



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 302 OF 2017**

**BONIFACE OMULO OMOLO.....PLAINTIFF**

**VERSUS**

**THE REGISTERED TRUSTEES DALA HERA CHURCH.....DEFENDANT**

**RULING**

1. Boniface Omulo Omolo, the Plaintiff, seeks vide the motion dated 12<sup>th</sup> October 2017 for an order of temporary injunction restraining the Registered Trustees Dala Hera Church, *“the Defendant, by itself or through agents, employees, servants, members, worshippers, officials or persons claiming through it or them from fencing off the Plaintiff’s home, putting up a fence and a gate surrounding the Plaintiff’s home, barring the Plaintiff from accessing his home, selling, constructing or continuing with construction, or interfering with the Plaintiff’s interest in the land measuring 0.4 hectares from Land Reference no. Kisumu Municipality/13556 pending the hearing and determination of the main suit and or until further orders of the court.”* The application is based on the three (3) grounds on its face and supported by the affidavit sworn by the Plaintiff on the 12<sup>th</sup> October 2017.

2. The application is opposed by the Defendant through the replying affidavit sworn by Habakuk Onyango Abogno, a trustee of the Defendant on the 23<sup>rd</sup> November 2017.

3. The application came up for hearing on the 29<sup>th</sup> November 2017 when Counsel for the parties agreed to file and exchange submissions. The learned Counsel for the Plaintiff and Defendant subsequently filed their written submissions dated the 15<sup>th</sup> May 2018 and 14<sup>th</sup> May 2018 on the 15<sup>th</sup> May 2018 and 6<sup>th</sup> June 2018 respectively.

4. The following are the issues for the court’s determinations;

**a) Whether the Plaintiff has made a prima facie case with a probability of success for temporary injunctive order to issue at this interlocutory stage.**

**b) Who pays the costs.**

5. The Court has after carefully considering the grounds on the motion, the affidavit evidence by both sides, submissions by the Counsel, come to the following conclusions;

**a)** That from the Plaintiff’s deposition at paragraph 6 and the copy of the Kenya Gazette notice No. 3400 of 19<sup>th</sup> November 1976, there was setting apart of land for the extended areas of the Kisumu Municipality in Kanyakwar, South Kajulu, Manyatta among others and those affected were required to lodge their claims for compensation under **Section 8 of the Trust Land Act**, with the District Commissioner Kisumu from the 15<sup>th</sup> November 1976. That court gathers from the Plaintiff’s deposition that the land subject matter of this suit was affected by the setting aside notice. that the Plaintiff goes on and depones that *“the process was not perfected”* without elaboration. That as there is no evidence availed to suggest that the setting aside was ever withdrawn, and the land reinstated to the previous ownership, the court finds and holds that on the available evidence, the setting aside process was completed.

**b)** That from the deposition at paragraph 7 of the supporting affidavit and the copy of the Judgment in Kisumu C.M. Cr. Case No. 545 of 2003 that is attached, the Plaintiff was the 1<sup>st</sup> Accused in that trial in relation to a charge of forcible detainer onto land parcel Kisumu/Migosi/13556. That the last paragraph at page 41, and paragraph 3 of page 42 of the said Judgment shows that the Plaintiff had told court that he had *“bought the land in question in 1969 from one Johannes Odeny Adero and built a permanent five roomed house therein in 1985.”* That whereas the Plaintiff has described the land in dispute as 0.4 hectares of Kisumu Municipality/13556 in these proceedings, the court takes it to be the same land described as Kisumu/Migosi/13556 in Kisumu C.M. Cr. C. No. 545 of 2003 in view of the contents of paragraph 3 of the supporting affidavit. That position is strengthened by the Defendant’s replying affidavit, specifically paragraph 5. That the foregoing, especially the Plaintiff’s evidence in the Criminal case

that he had bought the land in 1969, and erected the house thereon in 1985 is at odds with the Plaintiff deposition at paragraph 4 of his supporting affidavit that he erected the house on his ***“parents land in the year 1966 or thereabouts.”***

c) That though the Plaintiff did not disclose the existence of Kisumu H. C. C No. 28 of 2003 (O.S) in the application and supporting affidavit to this court, the court dealing with his criminal trial for forcible detainer charge observed as follows about it at paragraph 3 of page 43;

***“...I have looked at the file HCCC number 28 of 2003 (O.S) and noted that indeed the applicant therein (accused 1) (and now Plaintiff herein) obtained a temporary orders of injunction against the Board of Trustees of the Church. The orders were set aside after interpartes hearing but the main suit is yet to be determined.”[emphasis mine]***

That the Defendant has not mentioned HCCC No. 28 of 2003 (OS), but at paragraph 21 of the replying affidavit has referred to ELC No. 785 of 2015 which the Plaintiff had instituted after being given notice to vacate which ***“has since been dismissed for ant of prosecution.”*** That if HCCC No. 28 of 2003 (O.S) is the one that was later given the reference ELC No. 785 of 2015, then the Plaintiff was not entirely truthful when he averred at paragraph 9 of the plaint and paragraph 3 of the verifying affidavit both dated the 12<sup>th</sup> October 2017, that there is no pending or previous suit between the parties or the property.

d) That further to (a) above, and the fact that the Defendant has availed a copy of the Grant to L. R. 13556 Kisumu Municipality issued on the 16<sup>th</sup> September 1999, that has not been contested and the obvious contradictions in what the Plaintiff told the court during the criminal trial and his deposition in these proceedings, the court finds the Plaintiff has failed to establish a prima facie case upon which temporary injunctive order could issue. That the Defendant’s deposition at paragraphs 12 and 13 of the replying affidavit concedes that a structure claimed by the Plaintiff is indeed on a portion of their land. That the Defendant’s further deposition at paragraphs 18 to 20 of the replying affidavit that it is the Defendant that is in possession of the suit land and that the Plaintiff only ***“invited some relatives and his servants to stay in the condemned structure”***, has not been disputed or rebutted through further affidavit. That whereas there is need to have the said structure/house retained as it is pending the hearing and determination of the suit, the Plaintiff’s motion nevertheless fails.

6. That from the foregoing, the Plaintiff’s motion dated the 12<sup>th</sup> October 2012 and filed on the 13<sup>th</sup> October 2017 is unmeritorious and is hereby dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JULY 2019

**In the presence of:**

Plaintiff Absent

Defendant Absent

Counsel Mr. Anyul for the Plaintiff

Mr. Orengo for Wasuna for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**