



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.370 OF 2015

NAFTALI ADUGO NYATINDO.....PLAINTIFF

VERSUS

JOEL OYUKO OKENO.....1ST DEFENDANT

SHADRACH BONDENI.....2ND DEFENDANT

IBRAHIM OKOMO BARASA.....3RD DEFENDANT

WELLINGTON WAJUANGA OKEMBI.....4TH DEFENDANT

RULING

1. Naftali A. Nyatindo, the Plaintiff, vide notice of motion dated 26th May 2014, seeks for injunction order restraining **Joel Oyoko Okeno, Shadrack N. Bonderi, Wellington Wajwanga Okemi**, hereinafter referred to as 1ST, 2nd and 4th Defendants respectively, by themselves or those claiming under them from “cultivating, selling, disposing off, subdividing, transferring, taking possession or interfering in any manner with parcel of land number **Muhuro- Bay/942, 943 944, 945**” pending the hearing and determination of this suit. The application is based on the two grounds on its face that the Defendants are building new houses while this case is still pending, and that the defendants are using force to develop the suit property even after being stopped by an earlier court order. The application is supported by the affidavits sworn by the Plaintiff on the 26th May 2014 and 7th April 2016 deponing to the following among others;

- a) That his late father entered into a sale agreement with the Defendants who are yet to fully pay the purchase price.
- b) That the court restrained the Defendants from developing the suit properties pending the hearing and determination of the suit but the Defendants are going on with the developments without paying the purchase price.

2. The notice of motion is opposed by the 1st Defendant through the replying affidavits sworn on the 17th march 2015 and 24th August 2015 summarized as follows;

- a) That it is the Plaintiff who sold him the land under agreement dated 15th October 2004 and has witnessed him develop it.
- b) That the land was then under adjudication and the Plaintiff did not obtain a written consent to

file this suit from the adjudication officer.

c) That the agreement was for a plot measuring 60 feet by 110 feet and there was no condition that he build any rooms for the Plaintiff.

d) That the Plaintiff's suit stand dismissed on the strength of the order of 8th March 2012.

e) That the sale agreement for **Muhuru Bay/945** was for a purchase price of Ksh.172,000/= but later the Plaintiff did a demand notice of 28th October 2004 demanding Kshs.118,600/=, as additional payment, which he disputed.

f) That the Plaintiff thereafter executed the Land Control Board application for consent on 7th December 2008, which action the 1st Defendant took to mean the Plaintiff had abandoned the claim for Ksh.118,600/=.

3. The application is also opposed by the 2nd Defendant vide his replying affidavit sworn on 30th April 2015 in which he deposed as follows:

a) That he is the registered proprietor of **Kadem/Muhuru Bay/943** and cannot be enjoined from using it as he has already developed it.

b) That all disputes over ownership of the land were settled and there is no appeal pending.

c) That the Plaintiff has failed to prosecute his case since filing it in 2006.

4. That on the 31st May 2017, the court gave directions on filing of written submissions and fixed the matter for mention on the 22nd November 2017. That on that date the 2nd Defendant and counsel for the plaintiff were present. The court fixed the application for ruling after being notified that the counsel for the Plaintiff and 1st and 2nd Defendants had filed and exchanged their submissions. That the counsel for the Plaintiff's submissions are dated 12th June 2017 and filed on the 13th June 2017. That for counsel for the 1st and 2nd Defendants is dated the 14th September 2017 and filed on the 27th September 2017.

5. The issues for the court's determination are as follows;

a) Whether the Plaintiff has made a reasonable case with a probability of success for the restraining orders issue at this stage against the Defendants, or anyone of them.

b) Who pays the costs.

6. The court has carefully considered the two grounds on the notice of motion, the affidavit evidence and written submissions by the Plaintiff, 1st and 2nd Defendants, the court record and comes to the following findings;

a) That the Plaintiff commenced this proceeding through the plaint dated 27th February 2006 and filed in court on the same date.

That the Plaintiff claim is for a declaration that parcels Nos.942 to 945 at Kilongo Market, Muhuru Bay belong to him, and costs. That the plaintiff names Joel Oyoko Okeno, Shadrack N. Bendori, Hibrahim Okomo Baraza and Wellington Wajwanga Okemi as the 1st to 4th Defendants respectively. That the court's ruling of 9th November 2016 on the 3rd Defendant notice of motion dated 27th October 2015, the suit against the 3rd Defendant was marked abated on confirming that he passed on the 17th February 2007 and no application to substitute him had been taken.

b) That temporary order of injunction in terms of prayer 2 was granted on the 4th March 2015 excluding the aspect of cultivation, to be in force until 18th May 2015 when it was extended to the 21st October 2015. That the interim order was again extended to the 25th November 2015 but there is no indication of any extension thereafter. That the court takes the interim order to have lapsed on or about the 25th November 2015.

c) That from the Plaintiff averment at paragraph 4 of the plaint and the documents of title availed by the Defendants, two of the suit properties being parcel 942 and 943 are registered in the names of the 2nd and 4th Defendants respectively since the adjudication exercise. That parcels 944 and 945 are in the names of the father of the Plaintiff, and Plaintiff respectively. That further, the Defendants have been in possession of their respective parcels even by the time this suit was filed. That accordingly this court does not find any reasonable cause to stop the Defendants from continuing in occupation and possession of the said parcels on condition that they maintain their legal status pending the hearing and determination of the suit. That additionally, the Defendants should stop any new construction or further construction of a permanent nature, that is likely to alter or change the physical form of the suit land, until after the suit is heard and determined. That should the Plaintiff have evidence of any of the Defendants having disobeyed any of the court orders, then he should consider moving the court to cite them for contempt.

7. That flowing from the foregoing the court finds merit on the Plaintiff's notice of motion dated 26th May 2014, and filed in court on the 22nd August 2014, and is allowed in the following terms;

a) That pending the hearing and determination of this suit, an order of temporary injunction be and is hereby issued restraining the 1st, 2nd and 4th Defendants, whether by themselves, their agents, servants, employees or anybody deriving their rights from them or acting on their behalf from selling, disposing off, subdividing, transferring, charging or in any way changing or altering the existing legal status of land parcel **Kadem/Muhuru Bay/942 to 945**.

b) That the costs of the application be in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2018

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr Anumba for Okero for Plaintiff

Mr. Oganda for Ogutu Mboya for 1st and 2nd Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/2/2018

28/2/2018

S.M.Kibunja Judge

Joane Court Assistant

Parties absent

Mr. Anyumba for Okero for Plaintiff

Mr. Ogonda for Ogutu Mboya for 1st and 2nd Defendant

Court: ruling dated and delivered in open court in presence Mr. Anyumba for Okero for the Plaintiff and Mr. Ogonda for Ogutu Mboya for the Defendant 1st and 2nd.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/2/2018