



**REPUBLIC OF KENYA**

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

**ELC CASE NO.198 OF 2016**

**JOHN ONDUTO ATING'O.....PLAINTIFF**

**VERSUS**

**STEPHEN NDONGA.....1<sup>ST</sup> DEFENDANT**

**CHIEF OF SOUTH NYAKACH LOCATION.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. **John Onduto Ating'o**, the Plaintiff, seeks vide notice of motion dated 8<sup>th</sup> August 2016 for temporary injunction restraining the Defendants, their employees, servants, workers and or agents from interfering with his peaceful occupation on the parcel of land known as **Kisumu/Kamnua/Keyo Oguro/453** or carrying out any building, fencing, cutting down trees or any other activity whatsoever on the same parcel of land or any part thereof, alienating or interfering by any means howsoever until the hearing and final determination of this suit. The application is based on the nine grounds on the notice of motion and is supported by the affidavits of the Plaintiff sworn on the 27<sup>th</sup> July 2016 and 12<sup>th</sup> June 2017.

2. The application is opposed by **Stephen Ndonga**, the 1<sup>st</sup> Defendant, through his replying affidavit sworn on the 5<sup>th</sup> April 2017.

3. That on the 15<sup>th</sup> June 2017, the court gave directions on filing and serving of written submissions. The Plaintiff's counsel filed their submissions dated 15<sup>th</sup> November 2017 while counsel for the 1<sup>st</sup> Defendant filed theirs dated 16<sup>th</sup> November 2017.

4. The Chief, South Nyakach location is named as the 2<sup>nd</sup> Defendant but did not participate in the proceedings.

5. The following are the issues for the court's determinations;

a. Whether the Plaintiff has established a reasonable case with a probability of success for temporary injunction order to issue as prayed.

b. Who pays the costs.

6. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both sides, submissions by counsel for the parties and come to the following findings;

a. That though the Plaintiff's locus to file and prosecute this application is on the basis that land parcel **Kisumu/Kamnua/Keyo Oguro/453** belonged to his late father namely, **Peter Atungo Obando**, the certificate of official search availed by both sides indicates under entry No.2 that the registered proprietors are as follows; **Amolo Sigu, Shem Nyabwala, Justo Okora, Benyamen Miri and Kepha Okiko**. The certificate of official search is dated 21<sup>st</sup> January 2016 and there is no possibility of the said Peter Atingo Obando having been registered as proprietor of the said land as the Plaintiff depones at paragraph 2 of the supporting affidavit that he passed on the 5<sup>th</sup> May 1981 and exhibited his certificate of death No.142564.

b. That though the Plaintiff has availed a copy of a limited grant of letters of administration Ad litem issued on 3<sup>rd</sup> August 2016 in Kisumu C.M. Probate and Administration Cause No.57 of 2016, there is no documentary evidence to connect the suit land herein described as **Kisumu/Kamnua/Keyo Oguro/453** with the estate of the late Peter Atingo Obando.

c. That until and unless that time that evidence will be adduced to show on a balance of probabilities that the suit land or a portion thereof belonged to the late **Peter Atingo Obando**, then the capacity of the Plaintiff to sustain this suit against the Defendant will remain on shaky grounds.

d. That the court has taken note of entry number 4 on the register of the suit land which was made on the same date the five persons listed in (a) above, that is 5<sup>th</sup> July 1974, were registered as proprietors. The entry is on a restriction placed by the Chief land Registrar and reads as follows;

**“ RESTRICTION: EXCEPT UNDER AN ORDER OF CHIEF LAND REGISTRAR, NO DEALINGS WITH THE LAND OR ANY SHARE THEREIN SHALL BE REGISTERED WITHOUT THE WRITTEN CONSENT OF THE PROPRIETOR WHOSE NAMES ARE ANNEXED TO THE REGISTER”.**

e. That the Plaintiff has deponed that the five registered proprietors have since passed on. The Plaintiff has not obtained a grant in respect of the estate of any of the five named registered proprietors and the court finds that he has failed to establish a prima facie case with a probability of success.

f. That in view of the foregoing the court finds no merit in the notice of motion dated 8<sup>th</sup> August 2016 and the application is dismissed with costs to the 1<sup>st</sup> Defendant.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF FEBRUARY 2018**

In presence of;

Plaintiff Absent

Defendants 1<sup>st</sup> present

Counsel M/S Kagoya for the Plaintiff

M/S Odhong for Ayotsi for Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/2/2017**

21/2/2018

S.M. Kibunja judge

Joane Court assistant

1<sup>st</sup> Defendant present

M/S Kagoya for Plaintiff/Applicant

M/S Odhong for Ayotsi for Defendant/Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/2/2017**

Court: the ruling dated and delivered in open court in the presence of the 1<sup>st</sup> Defendant M/S Kagoya for Plaintiff and M/s Odhong for Ayotsi for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

