



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 87 OF 2017

PHOEBE MUGA ASIYO

{Holder of power of Attorney donated

by JUNI AWITI ASIYO}.....PLAINTIFF/APPLICANT

VERSUS

JACOB NYAKWA OJWANG Alias

JOSEPH NYAKWA OJWANG....1ST DEFENDANT/RESPONDENT

GORDON NYAKWA.....2ND DEFENDANT/RESPONDENT

DAMARIS OGARE Alias

ROSELYNE KWAMBOKA.....3RD DEFENDANT/RESPONDENT

RULING

1. The Plaintiff seeks vide notice of motion dated 3rd March 2017 for temporary injunction restraining the “Defendant whether by herself, the Defendant’s agent, representative, servant and/or employee from trespassing on, wasting, constructing on, alienating or otherwise interfering and/or dealing in any way with the Plaintiff’s parcel of land known as Kisumu/Municipality L. R. 15037/10, L.R. 15037/14, 15037/13, 15037/12, 15037/11 and 15037/8”, pending the hearing and determination of this suit. There is also the prayer for O.C.S Maseno Police Station to effect and ensure compliance of any order issued by the Court and costs. The application is based on the five (5) grounds on its face and is supported by the affidavit sworn by Phoebe Asiyo, the Plaintiff, on the 3rd March 2017.

2. The application is opposed by Jacob Nyakwa Ojwang and Gordon Nyakwa, the 1st and 2nd Defendants respectively through their replying affidavits both sworn on the 21st April 2017.

3. The application came up for hearing on the 4th April 2017 when interim injunction order in terms of prayer 2 was granted and other directions given. That the hearing was rescheduled to the 2nd October 2017 when directions on filing and exchanging written submissions on the application were given. The Learned Counsel for the Plaintiff, 1st and 2nd Defendants then filed their written submissions dated 11th October 2017 and 27th February 2018 respectively.

4. The issues for determination are first, whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction to issue at this stage. Secondly, who pays the costs of the application.

5. The Court has carefully considered the grounds on the notice of motion, affidavit evidence by the Plaintiff, 1st and 2nd Defendants, written submissions by Counsel for the Plaintiff, 1st and 2nd Defendants and come to the following conclusions;

a) That the copies of the certificates of title in respect of Kisumu Municipality land reference number 15037/8, 9, 10, 11, 12, 13 and 14 annexed to the supporting affidavit are registered in the name of Juni Awiti Asiyo, represented in this suit by Phoebe Muga Asiyo the Plaintiff, under a power of attorney. That the 1st and 2nd Defendants have in their replying affidavits stated that they do not know the Plaintiff or the said parcels of land and in accordance with **Section 26 (1) of the Land Registration Act No. 3 of 2012**, the Court takes the said Plaintiff as the absolute and indefeasible owner of the said parcels, as the said registration has not been challenged in

this proceedings.

b) That the plaintiff alleges in the application that the Defendants have trespassed onto the suit lands on or about 25th February 2017 and embarked on excavating, fencing and storing building materials thereon among others. The 1st and 2nd Defendants have in their responses denied the Plaintiff's claim. They depone that "if there is any land that I am constructing on, it is rightfully mine and not among the alleged parcels...."

c) That the foregoing shows that the 1st and 2nd Defendants are not laying any claim of ownership or entitlement to the parcels of lands registered in the Plaintiff's name. The Court therefore finds that they would not be adversely affected or prejudiced if the injunction prayed sought by the Plaintiff is granted.

6. That in view of the findings above, the Court finds merit in the Plaintiff's notice of motion dated 3rd March 2017 and the same is granted in terms of prayer 3 with costs in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30TH DAY OF MAY 2018

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Oviero for Plaintiff

M/s Omieri for Kimanga for 1st and 2nd Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE