



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 18 OF 2017

IN THE MATTER OF LAND REGISTRATION ACT, CAP 28 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP 22) LAWS OF KENYA

BETWEEN

ELISHA OCHUKA OCHUKA.....APPLICANT

VERSUS

LAWRENCE OMARI ORUOCH.....1ST RESPONDENT

JOHN ANTHONY ONYANGO.....2ND RESPONDENT

RULING

1. Elisha Ochuka Ochuka, the Plaintiff, filed the notice of motion dated 12th September 2017 seeking for temporary injunction restraining the defendant from trespassing, cultivating or in any way dealing or interfering with the Plaintiff's peaceful use of Kisumu/Lower Kadianga/679 pending the hearing and determination of this suit. The application is based on the four (4) grounds marked (a) to (e) on its face and is supported by the affidavits sworn by the Plaintiff on the 12th September 2017 and 11th December 2017.

2. The application is opposed by Lawrence Omari Oruoch and John Antony Onyango, the 1st and 2nd Defendants respectively, through the affidavit sworn by the former on the 2nd November 2017.

3. That when the application came up for hearing on the 6th December 2017, the court gave directions on filing and exchanging written submissions. That subsequently the counsel for the Plaintiff and Defendants filed their written submissions dated 3rd March 2018 and the 16th May 2017 respectively.

4. The issue for determination by the Court are as follows;

a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction order to issue.

b) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, submissions by counsel and come to the following determinations;

a) That the Plaintiff's case is that he entered into three written sale agreements with the 1st Defendant in 1995, 1997 and 2003 over plot numbers 2641, 262 and 2624. That the annexed copies of the agreements on the face of it confirms the existence of the said contracts even though the 1st Defendant has disputed their existence.

b) That it is also the Plaintiff's case that he has since 2017 discovered that the plots described in (a) above were actually registered as Kisumu/Wangaya/6988 and was later subdivided into 6987 and 6988 and the later registered with 2nd Defendant. That the Defendant's case is that Kisumu/Wangaya/6987 and 6988, which are in their names, are subdivision from Kisumu/Wangaya/2631

which the 1st Defendant inherited through transmission from the estate of his late uncle namely Nyandiwa Kitengo.

c) That whatever the correct description of the land is, it is clear from paragraph 23 of the 1st Defendant's replying affidavit sworn on the 26th July 2017, that he concedes that the Plaintiff had taken possession of "parcel No. 2631 and planted sugarcane on approximately 1 acre". That though the pleadings filed by the Plaintiff are not explicit on the date he allegedly took possession, it is only fair and just that he continues in possession of the said land pending the hearing and determination of this suit to avoid further wanton destruction of crops.

6. That flowing from the foregoing, the court finds merit in the Plaintiff's notice of motion dated the 12th September 2017. That accordingly the interim order of injunction granted on the 17th May 2018 is hereby confirmed pending the hearing and determination of this suit. That the costs be in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2018

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Mr. Odeny for the Plaintiffs/Applicant and Mr. Olel for the Respondents/Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE