



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KISUMU**  
**ELC CASE NO. 834 OF 2015**  
**(FORMERLY HCC NO.231 OF 2002 (OS))**

**ISAAC EDWIN NICHOLAS OKERO.....PLAINTIFF**

**VERSUS**

**MAURICE OKETCH ABALA.....1<sup>ST</sup> DEFENDANT**

**FRANCIS ONYANGO OMWEGA AYIECHA.....2<sup>ND</sup> DEFENDANT**

**PARMOD B. KOHLI (Sued as the administratix of the  
estate of the late PARDEEP K.KOHLI).....3<sup>RD</sup> DEFENDANT**

**VIJAY KOHILI.....4<sup>TH</sup> DEFENDANT**

**RAVINDER SINGH WALIA.....5<sup>TH</sup> DEFENDANT**

**RAJINDER SINGH WALIA.....6<sup>TH</sup> DEFENDANT**

**FREDERICK OTIENO OUTA.....7<sup>TH</sup> DEFENDANT**

**LUCY ATIENO OKOTH.....8<sup>TH</sup> DEFENDANT**

**FREDERICK ENOS NYAMOLO OGADA.....9<sup>TH</sup> DEFENDANT**

**RULING**

1. Isaac Edwin Nicholas Okero, the Plaintiff filed the notice of motion dated 24<sup>th</sup> August 2015 seeking for five prayers . Prayer (1) is for an order to issue for the three named surveyors to come to court and be cross- examined on reports dated 10<sup>th</sup> December 2002 and 13<sup>th</sup> August 2015. Prayer (2) was for enjoining of the registered proprietors of **Kisumu/Nyalenda B/1599, 1600, 1601, 1603 and 1833** as Defendants. That prayer was granted by the Deputy Registrar in the ruling of 16<sup>th</sup> September 2015. Thereafter the Plaintiff filed the amended originating summons issued on 25<sup>th</sup> September 2015 enjoining Ravinderpal Singh Walia, Rajinder Singh Walia, Frdrick Otieno Outa, Lucy Atieno Okoth and Fredrick Enos Nyamolo Ogada as the 5<sup>th</sup> to 9<sup>th</sup> Defendants respectively. In the same ruling of 16<sup>th</sup> September

2015 by the Deputy Registrar, the firm of N.E. Mogusu & Associates were allowed to file notice of change of advocate thereby granting prayer 2 of their notice of motion dated 31<sup>st</sup> July 2015. The notice of motion dated 24<sup>th</sup> August 2015 is based on five grounds on its face and is supported by the affidavit of the Plaintiff sworn on the same date.

2. The application is opposed by Francis Onyango Owega Ayiecha and Lucy Atieno Okoth, the 2<sup>nd</sup> and 8<sup>th</sup> Defendants respectively, through their replying affidavits both sworn on the 12<sup>th</sup> August 2016.

3. The application is however supported by the 1<sup>st</sup> Defendant, Maurice Aketch Abala, through his replying affidavit sworn on the 2<sup>nd</sup> December 2015. It is also supported by Rajinder Singh Walia, the 6<sup>th</sup> Defendant, through the replying affidavit sworn on behalf of the 5<sup>th</sup> and 7<sup>th</sup> Defendant and on his own behalf on the 2<sup>nd</sup> December 2015.

4. The application came up for hearing on the 8<sup>th</sup> November 2016. Mr. Mwaisbwa, learned counsel for the Plaintiff, prayed for the application to be allowed. Mr. Amondi and Lore, the learned counsel for the 1<sup>st</sup> Defendant and 5<sup>th</sup> to 7<sup>th</sup> Defendants respectively, supported the notice of motion. Mr. Nyamweya, learned counsel for the 2<sup>nd</sup> Defendant submitted that there is no suit pending in view of the consent orders of 17<sup>th</sup> June 2009 and that what the Plaintiff should be seeking is to implement the consent order. Mr. Amondi, learned counsel for the 1<sup>st</sup> Defendant, submitted that the originating summons has not been decided upon in view of the subsequent inclusion of five additional Defendants. The learned counsel sought for directions on how to proceed with the hearing of the suit. The court directed that the parties do maintain the status quo obtaining then awaiting the ruling.

5. The court has considered the grounds on the notice of motion, the affidavit evidence in support and in opposition, the court record, submissions by counsel and came to the following findings;

a. That this suit was commenced through the originating summons dated 16<sup>th</sup> July 2002 by Isaac Edwin Nicholas Okero, described as the Plaintiff. The originating summons names Maurice Aketch Abala, Francis Onyango Omwega Ayiecha Pramond B. Kohli (sued as administratrix of the estate of the late Pardeep K. Kohli) and Vijay Kohli as the 1<sup>st</sup> to 4<sup>th</sup> Defendants.

b. That the originating summons dated 16<sup>th</sup> July 2002 has three issues for determination as follows;

“ 1. What are the dimensions of the public access road created to serve Title Nos. **Kisumu/Nyalenda “B”/1599, 1600, 1601, and 1602** at the time the titles were created by subdivisions in 1995.

2. What structures are erected on the public access road, serving title Nos. **Kisumu/Nyalenda “B”/1599, 1600, 1601, and 1602**, by whom should they be removed, and at whose costs.

3. Who should meet the costs of this suit?”

c. That pursuant to the chamber summons dated 2<sup>nd</sup> August 2002 the court made a consent order on the 20<sup>th</sup> August 2002 granting the application for the land Registrar and surveyor to visit the suit lands and file reports. The reports dated 9<sup>th</sup> and 10<sup>th</sup> December 2002 were subsequently filed and the court directed the parties on 17<sup>th</sup> December 2002, to obtain copies and marked the matter stood over generally.

d. That thereafter dates for hearing of the suit were fixed and on the 17<sup>th</sup> June 2009, a consent order was entered as follows;

**“ By consent, the Land registrar’s report of 10<sup>th</sup> December 2002 together with the surveyors report of 9<sup>th</sup> December 2002 are adopted and to be implemented. Mention on 23<sup>rd</sup> September 2009 to monitor progress.”**

e. That the consent set out in (d) above renders credence to submission by Mr. Nyamweya, counsel for the 2<sup>nd</sup> Defendant, that the said consent order settled the suit commenced through the originating summons and what is may be outstanding is its implementation. The court agrees with that position and as the said consent order has not been varied and or set aside, it settled the issues that were for determination under the originating summons dated 16<sup>th</sup> July 2002.

f. That notwithstanding the position confirmed in the findings in (e) above, the Plaintiff filed the notice of motion dated 24<sup>th</sup> August 2015 seeking to have five new parties enjoined as Defendants. That prayer was granted by the Deputy registrar on 16<sup>th</sup> September 2015 and an amended originating summons issued on 25<sup>th</sup> September 2015 was filed. The court wishes to express its reservation on the purpose to be served by enjoining the five Defendants at the implementation stage of the orders of 17<sup>th</sup> June 2009 when those parties had not participated in the exercise that led to the reports dated 9<sup>th</sup> and 10<sup>th</sup> December 2002.

g. The prayer by the Plaintiff to have the Land Registrar and Surveyors named in the notice of motion cross-examined on the reports filed by their offices has no merit for the reason that the suit has been decided through the consent order of 17<sup>th</sup> June 2009, and no further taking of evidence is possible at this stage without first reopening the proceedings. That the Land Registrar and Surveyor should be allowed to implement their reports that were adopted by the court on the 17<sup>th</sup> June 2009 and any party that may not be satisfied may thereafter move the appropriate court as by law provided.

h. That by the time the suit commenced through the originating summons dated 16<sup>th</sup> July 2002 was settled through the adoption order dated 17<sup>th</sup> June 2009, no direction to convert the originating summons into a plaint in terms of **Order 37 Rule 19 of Civil Procedure Rules** had been taken. It follows therefore that no such direction can be given at this stage without setting aside the consent order of 17<sup>th</sup> June 2009 to reopen the pleadings.

i. That for the reasons set out above, the court do not find any merit on notice of motion dated 24<sup>th</sup> August 2015.

6. That the notice of motion dated 24<sup>th</sup> August 2015 is without merit and is hereby dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 18<sup>th</sup> DAY OF JANUARY 2017

In presence of;

Plaintiff            absent

Defendants        2<sup>nd</sup> Defendant present

Counsel        Mr. Mwaisbwa for the plaintiff, Mr. Nyamweya for the 2<sup>nd</sup> Defendant and Mr. Achira for Amondi for 1<sup>st</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

18/1/2017

S.M. Kibunja – Judge

Mwaisbwa for Plaintiff

Mr. Achira for Amondi for 1<sup>st</sup> Defendant

Mr. Nyamweya for 2<sup>nd</sup> Defendant

Court: Ruling dated and delivered in open court in presence of the 2<sup>nd</sup> Defendant and his counsel Mr. Nyamweya, Mr. Mwaisbwa for the Plaintiff and Mr. Achirafor Amondi for 1<sup>st</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

18/1/2017