



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.76 OF 2012**  
**[FORMERLY HIGH COURT CIVIL SUIT NO.76 OF 2012]**

**GEORGE TITUS ADEM.....PLAINTIFF**

**VERSUS**

**ELIAS OBURA NDEGE.....1<sup>ST</sup> DEFENDANT**

**THE TOWN CLERK MUNICIPAL CONCIL OF KISUMU.....2<sup>ND</sup> DEFENDANT**

**MARY AKINYI ODHIAMBO.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By notice of motion dated 29<sup>th</sup> September 2012, George Titus Adem, the Plaintiff, seeks for temporary injunction restraining Elias Obura Ndege and the Town Clerk Municipal Council of Kisumu, from trespassing, encroaching, forceful entry, fencing, selling, disposing, alienating, charging, stepping on, advertising, dealing and/or interfering whatsoever with the Plaintiff's land parcel **Unsurveyed Residential Site 474 Migosi site and service Scheme, Kisumu Municipality** pending the hearing and determination of this suit. The application is based on the four grounds on the notice of motion and is supported by the affidavit of the Plaintiff sworn on the 29<sup>th</sup> September 2012.

2. The application is opposed by **Elias Obura Ndege**, the 1<sup>st</sup> Defendant, through his replying affidavit sworn on the 17<sup>th</sup> December 2012 and by the Town Clerk Municipal Council of Kisumu, 2<sup>nd</sup> Defendant, through the replying affidavit sworn by Christopher O. Rusana on the 7<sup>th</sup> December 2012.

3. The counsel for the 2<sup>nd</sup> Defendant filed their written submission dated 9<sup>th</sup> October, 2013. The counsel for the 1<sup>st</sup> Defendant then filed their submissions dated 20<sup>th</sup> March 2014 while counsel for the Plaintiff filed theirs dated 20<sup>th</sup> September 2016.

4. The issues for determination by the court are as follows;

a) Whether the Plaintiff has established a prima facie case with a probability of success for injunction orders to issue as prayed.

b) Who pays the costs.

5. The court has considered the grounds on the notice of motion, the affidavit evidence by the three parties, written submissions by counsel for the parties participating in the hearing of the application and

come to the following findings;

a) That the basis of the plaintiff's claim over the plot described as **Unsurveyed Residential Site 474 Migosi Site and Service Scheme, Kisumu Municipality** is based on the following documents and attached to the supporting affidavit:

(i) Letter of allotment dated 18<sup>th</sup> June 1996 from the Commissioner of Lands for Unsurveyed Residential plot No.125 – Migosi S.S.S. Kisumu.

(ii) Letter for a meeting of 20<sup>th</sup> June 1986 from director, Housing Development Department, Municipal Council of Kisumu.

(iii) Receipts from Municipal Council of Kisumu dated 11<sup>th</sup> October 1998, 7<sup>th</sup> September 1983 for Sh.100/= and 1000/= respectively.

(iv) Acceptance note dated 6<sup>th</sup> September 1983.

(v) Letter of offer for Plot 474 dated June 1983.

(vi) Agreement between Municipal Council of Kisumu and George T. Adem over plot No.474 dated 17<sup>th</sup> February 1986.

(vii) Letters dated 1<sup>st</sup> August 1984, and 23<sup>rd</sup> May 1996.

(viii) Receipt dated 22<sup>nd</sup> May 1996 for Ksh.19,348/30.

(ix) Demand notices dated 16<sup>th</sup> August 1990 and 11<sup>th</sup> December 1989.

(x) Receipt dated 24<sup>th</sup> February 1986 for Kshs.10,000/=.

(xi) Construction card dated 9<sup>th</sup> June 1986.

b) That other than the letter of allotment dated 18<sup>th</sup> June 1996 and the letter dated 23<sup>rd</sup> May 1996 which refers to Plot No.125, all the other documents in (a) above refers to plot No.474.

c) That the plaintiff's pleadings, both in the plaint dated 29<sup>th</sup> September 2012 and the notice of motion of even date, has not made any reference to unsurveyed Residential plot **No.125 Migosi S.S.S.Kisumu**, which is the subject matter of the letter of allotment dated 18<sup>th</sup> June 1996 from Commissioner of Lands. That the plaintiff's counsel submissions has however indicated that plot number 125 was formerly **plot No.474** which seems to agree with the position taken by the Defendants in their replying affidavits and submissions.

d) That the 2<sup>nd</sup> Defendant has taken the position that the plot allocated to the Plaintiff was reposed, advertised and allocated to 1<sup>st</sup> Defendant who has commenced development. Though the Plaintiff faults the procedure used, the court notes that the Plaintiff has not availed evidence of having accepted the offer of the plot and made the payments as required under the letter of offer dated 18<sup>th</sup> June 1996 from the Commissioner of Land. The payments and acceptance was required under clause 2 to be made in 30 days after which the offer would be considered to have lapsed.

e) That in view of absence of letter of acceptance and evidence of payment of the amounts of money in the letter of allotment dated 18<sup>th</sup> June 1996, and the fact the Plaintiff is not the one in possession of the said plot, the court finds that the Plaintiff has failed to establish a prima facie case with a probability of success. That in case the Plaintiff was to be successful in the main case, the

value of the plot is capable of being established and there is no evidence that he would suffer irreparable loss if injunction orders are not issued at this stage. That on a balance of convenience the party in possession, and who had commenced construction on the plot before this suit was filed in 2012 is the 1<sup>st</sup> Respondent, and considering the time that has lapsed since then, no temporary injunction orders should issue against him.

6. That flowing from the foregoing the court finds no merit in the notice of motion dated 29<sup>th</sup> September 2012 and is dismissed with costs.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MARCH 2017

In presence of;

Plaintiff                      Absent

Defendants                     Absent

Counsel                      M/S Masese for the Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/3/2017**

22/3/2017

S.M. Kibunja Judge

Oyugi court Assistant

M/S Masese for plaintiff/Applicant

Court: Ruling dated and delivered in open court in presence of

M/s Masese for the Plaintiff/Applicant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/3/2017**