



**REPUBLIC OF KENYA**

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

**ELC CASE NO.155 OF 2016**

**LILIANE SHIBALILA MUDENYO**

**JOAN JAYVONNE MDENYO**

**MELSA OBANDA OSORE**

**(Suing as Trustees of NASIO SELF HELP GROUP.....PLAINTIFFS**

**VERSUS**

**BENEDICT OPATA**

**WAMBANI WERE**

**(Suing on behalf of themselves and on behalf of the**

**Mumias Teachers Society) .....DEFENDANT  
S**

**RULING**

**1. Liliane Shibalila Mudenyio, Joan Jayvonne Mdenyo and Melsa Obanda Osore, suing as trustees of Nasio Self Group, the Plaintiff, filed the notice of motion dated 30<sup>th</sup> June 2016 seeking for temporary injunction to restrain Benedict Opala and Wambai Were, sued on their own behalf and on behalf of Mumias Teachers Society, the Defendants, from trespassing, constructing, working, laying claim or in any other way interfering with land parcel South Wanga/Lureko/2864 pending the hearing and determination of this suit. The application is based on the two grounds on the notice of motion which is also supported by the affidavit of Melsa Obanda Osore, sworn on the 29<sup>th</sup> June 2016. The application is opposed by the Defendants through the replying affidavit of the Honorary Secretary, sworn on the 11<sup>th</sup> July 2016.**

**2. The Defendants filed the notice of motion dated 28<sup>th</sup> July 2016 seeking to have the Plaintiff restrained from entering upon, trespassing, conduction of any educational activity thereon, or in any manner dealing or interfering with the Defendants proposed portions No.30, 33 and 34 known as Noah's Ark Academy on L.R. No.8056/317, Mumias Township pending the determination of this suit. The application is based on the four grounds on the notice of motion and is supported by the affidavit of Wambai Were Wambiri, the Honorary Secretary, sworn on the 28<sup>th</sup> July 2016. The application is opposed by the Plaintiff through the replying affidavit sworn by Liliane Shibalila Mudenyio on the 4<sup>th</sup> October 2016.**

**3. The counsel for the parties appeared in court on the 10<sup>th</sup> October 2016 and entered consent to have**

both applications dealt with together through written submissions. The counsel for the Plaintiffs filed their submissions dated 17<sup>th</sup> October 2016 in respect to their application dated 29<sup>th</sup> June 2016. They also filed undated written submissions of the Defendants notice of motion dated 28<sup>th</sup> July 2016. On their part, counsel for the Defendants filed written submissions dated 12<sup>th</sup> October 2016 in respect of their application dated 28<sup>th</sup> July 2016. They also filed written submission dated 28<sup>th</sup> October 2016 in respect to the Plaintiffs notice of motion dated 29<sup>th</sup> June 2016.

4. The issues for determination in both applications are as follows;

- a) Whether the respective parties have established a prima facie case with a probability of success for temporary injunction to issue at the interlocutory state.
- b) What orders to issue
- c) Who pays the costs in each of the application.

5. The court has after considering the grounds on the two applications, affidavit evidence by both parties and written submission by counsel come to the following determinations;

- a) That the Plaintiff is by dint of the title deed issued on 15<sup>th</sup> January 2007, whose entries are confirmed by the certificate of official search issued on 26<sup>th</sup> January 2015, the registered proprietor of land parcel **Wanga/Lureko/2864** and under **Section 26 (1)** of the Land Registration Act No.3 of 2012, the court is obligated to take their title as indefeasible and absolute. Their title can however be impugned on grounds of fraud or misrepresentation involving the Plaintiff or upon evidence that the title has been acquired illegally, unprocedurally or through a corrupt scheme.
- b) That the ground on which the Plaintiffs land is situated is claimed by the Defendants as the same position their **Plots No.30, 33 and 34** of land parcel **L.R.8056/317**, which is registered in the Defendants name, are situated.
- c) That the Plaintiffs came to court after the Defendants had commenced the development of permanent buildings on the land in dispute. That the Defendants have confirmed the permanent nature of their development which if allowed to proceed will permanently alter the physical condition of the land in dispute and its use.
- d) That due to the competing claims of both parties over the same land, it is only fair that the developments that had been commenced by the Defendants be stopped pending the hearing and determination of this suit.

6. That flowing from the foregoing, the court issues the following orders:

- a) That the notices of motion dated 29<sup>th</sup> June 2016 and 28<sup>th</sup> July 2016 are hereby allowed, limited to restraining both the Plaintiffs and Defendants from carrying any new constructions or continuing with any construction on the contested parts of the land parcel **South Wanga/Lureko/2864** or plots **No.30, 33 and 34** of land parcel **L.R.8056/317**, pending the hearing and determination of this suit.
- b) That costs of the two application be in the cause.
- c) That this being a matter emanating from the territorial jurisdiction of Kakamega Environment and Land Court, the same is hereby transferred to that court for hearing and determination.
- d) That the suit be mentioned at the Environment and Land Court Kakamega for directions on the 29<sup>th</sup> March 2017.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF MARCH 2017

In presence of;

Plaintiffs        Absent

Defendants        Absent

Counsel         Mr. Namatsi for the Plaintiffs

                      Mr. Ndobu for the Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/3/2017**

15/3/2017

S.M. Kibunja Judge

Court assistant Oyugi

Parties absent

Mr. Namatsi for the Plaintiff

Mr. Ndobu for the Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/3/2017**

Court: Ruling dated and delivered in open court in presence of Mr. Namatsi and Ndobu for the Plaintiff and Defendants respectively.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/3/2017**