



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.251 OF 2015

LAZARO ODUOR OTIENO.....APPLICANT

VERSUS

JASCA AWUOR ONYANGO1ST RESPONDENT

GENSON OWINO OWISO.....2ND RESPONDENT

GEORGE OKOTH OWISO.....3RD RESPONDENT

RULING

1. **Lazaro Oduor Onyango**, the Applicant, seeks for judgment to be entered on admission in his notice of motion dated 25th February 2016. The Applicant has set four grounds marked (a) to (d) on the application which is supported by the affidavit of the Applicant sworn on 25th February 2016, in which he among others depones that paragraphs 4 to 9 of the replying affidavit to the originating summons dated 23rd September 2015 sworn by **Genson Owino Omiso**, the 2nd Respondent, amounts to admission and judgment should be entered. The notice of motion names **Jesca Awuor Onyango**, **Genson Owino Owiso** and **George Obwongo Owiso** as the 1st to 3rd Respondents. That none of the three Respondents has filed any reply to the notice of motion dated 25th February 2016.

2. **Jesca Awuor Onyango**, the 1st Respondent filed the notice of motion dated 31st March 2016 seeking for the Applicant to be restrained from trespassing, renovating, fencing, demolishing, destroying, disposing off, handling and in any way interfering with **Plot No. 1 Ugunja Market** pending the hearing and determination of this suit. She also prays that the rent payable by all tenants on the said plot be deposited in court by the 5th day of each month till the final determination of the suit and that status quo be maintained. The application is based on eight grounds on its face and supported by the affidavits of **Jesca Awuor Onyango**, (1st Respondent), sworn on the 31st March 2016 and 15th June 2016.

3. The notice of motion is opposed by the Applicant through the replying affidavit sworn on 18th April 2016.

4. That court issued directions on service of the two application and filing of the replying papers on the 27th September 2016 and further directed that the two applications be heard on 14th November 2016. That in attendance were counsel for the Applicant, 1st Respondent and 3rd Respondent in person.

5. That on the 14th November 2016, the 2nd Defendant attended the court in person. The applicant was also present as was his counsel. The counsel for the 1st Respondent was represented when the matter was

called for hearing and confirmed for 10.45 am. That when the matter was called at 10.45 a.m, only the Applicant, 2nd Respondent and counsel for the Applicant were in court. The court heard the submissions by the counsel for the Applicant and the 2nd Respondent in person on the two applications.

6. The issues for determination are as follows;

- a) Whether the 2nd Respondent's replying affidavit to the originating summons amounts to admission of the Applicant's claim.
- b) Whether judgment should be entered on admission as prayed.
- c) Whether the 1st Respondent has established a prima facie case with probability of success for the injunction orders to issue at the interlocutory stage.
- d) What orders to issue
- e) Who pays the costs in each of the applications

7. The court has considered the grounds on the two applications, affidavit evidence filed, submissions offered, the pleadings filed and come to the following findings;

- a) That the originating summons dated 23rd September 2015, through which this suit was commenced, indicates that it was brought under **Order 37 rule 1 (A) (B), 7 (1), (2) (3) of the Civil Procedure Rules and Section 38 of the Civil Procedure Act. That Rules 1 (a) and (b) deals with who may take out originating summons, while Rule 7 (1) to (3) provides for applications under Section 38 of Limitation of Actions Act.**
- b) That the Applicant claim is based on both agreement for sale of land and adverse possession. The sale is alleged to have been between the late **Francisca Akoth Otieno** as purchaser and 2nd, 3rd Respondents and **William Okoth Omiso** as Vendors. That even though the 2nd Respondent appear to admit that the said sale transaction took place in his replying affidavit sworn on 1st December 2015, it is obvious the land was in the names of their deceased father, **Nicholas Owiso Oyule** . That question of whether the Vendors had capacity to enter into the sale agreement while the grant had not been issued and confirmed arises. The court has noted that the administration of the estate was later bestowed on the 1st Respondent vide Kisumu H.C. Suc. Cause No.736 of 2013. The 1st Respondent has opposed the originating summons. That the originating summons is not between the Purchaser and Vendors and has not cited **Order 37 Rule 3 of the Civil Procedure Rules.**
- c) That a claim based on agreement for sale of land should be preferably pursued through a plaint and not an originating summons.
- d) That **Order 37 rule 7 of the Civil Procedure Rules** requires the Applicant to annex a certified copy of the extract of the title to the supporting affidavit but none has been annexed by the Applicant.
- e) That for reasons set out above, the notice of motion dated 25th February 2016, though unopposed cannot be granted as the suit on which it is based is unsustainable for failure to comply with **Order 37 Rule 7 (2) of the Civil Procedure Rules.**
- f) That the notice of motion dated 31st March 2016 was not prosecuted as the 1st Respondent and her counsel did not attend the court during its hearing. That the Applicant has opposed it through their replying affidavit and the submission offered during the hearing. The court is of the considered view that in view of the finding in (e) above, the suit should be struck out with costs.

This will enable the parties seek legal advice from their counsel on how to pursue their interests without any delay.

8. That flowing from the foregoing court orders as follows;

a) The notices of motion dated 25th February 2016 and 31st March 2016 are dismissed with each party bearing their own costs.

b) The suit commenced through the originating summons dated 23rd September 2015 is struck out with costs for failure to comply with **Order 37 Rule 7 (2) of Civil Procedure Rules**.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 08TH DAY OF MARCH 2017

In presence of;

Applicant	Absent
Respondents	2 nd present
Counsel	Mr. Ingosi for Applicant

Mr. Oganda for Madialo for 3rd Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/ 3/2017

8/3/2017

S.M. Kibunja Judge

Oyugi court assistant

2nd Respondent present

Mr. Ongosi for the applicant

Mr Oganda for Madialo for 3rd Respondent

Court; ruling delivered in open court in presence of the 2nd Respondent, Mr. Ingosi for Applicant and Mr. Oganda for Madialo for 3rd Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/ 3/2017