



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.386 OF 2015

MICHAEL AGUDI OKER.....1ST PLAINTIFF

GABRIEL OLALE AGUDA.....2ND PLAINTIFF

VERSUS

GEORGE OTEINO JUMA1ST DEFENDANT

JOSHUA OUMA OMOLLO2ND DEFENDANT

RULING

1. Michael Agudi Oker and Gabriel Olale Aguda, the Plaintiffs, prays through the notice of motion dated 12th April 2016 for the following:

- That **Joshua Ouma Omollo**, the 2nd Defendant do comply with the orders of 24th March 2010 by removing the fence and building materials on the disputed land within seven days or such other period as the court may consider just pending the hearing and determination of the suit.
- That alternatively, a temporary injunction be issued restraining the 2nd Defendant by himself or agents from interfering with and or disposing of the suit land and doing further construction pending the hearing of the suit.
- Costs.

The notice of motion is based on the five grounds on its face and supported by the affidavit sworn by Gabriel Olale aguda, the 2nd Plaintiff, on the 12th April 2016.

2. The notice of motion is opposed by the 2nd Defendant through his replying affidavit sworn on the 16th August 2016.

3. The counsel for the Plaintiffs and 2nd Defendant appeared in court on the 11th October 2016 and consented to have the notice of motion dealt with through written submissions. The counsel for the 2nd Defendant filed their submission dated 27th January 2017 on the 30th January 2017, while counsel for the Plaintiffs filed theirs dated 7th February 2017 on the 8th February 2017.

4. following are the issues for the court's determination;

- a) Whether the Plaintiffs have made a reasonable case with a probability of success for temporary

injunction to issue against the 2nd Defendant at this interlocutory stage.

b) What orders to issue.

c) Who pays the costs.

5. The court has after considering the grounds on the notice of motion, affidavit evidence and submissions filed come to the following conclusions;

a) That the Plaintiffs moved the court under notice of motion dated 12th March 2010 seeking for among others that a restriction order be issued against land parcel **Kisumu/Border/29**, which is the suit land. The 2nd Defendant had by then not been enjoined in these proceedings. That counsel for the Plaintiffs appeared before the court *ex parte* on the 24th March 2010 in respect of the motion dated 12th March 2010 and the court made the following order;

“ Application dated 12th March 2010 may not be heard *ex parte*. Same may be heard after the current vacation. In the meantime the status quo pertaining to the suit property existing before the 3rd January 2010 be restored and maintained until hearing of the application dated 12th March 2010. Ordered accordingly.”

b) The 2nd Defendant was enjoined in the proceedings as a 2nd Defendant through the amended originating summons dated 2nd July 2010 and entered appearance through the memorandum of appearance dated 6th September 2010 filed through M/S Otieno Yogo & Company Advocates.

c) That the court has perused the record and noted that though several other applications have been filed and that there has been several other court appearances by parties and or their counsel since the order of 24th March 2010 was made, the notice of motion dated 12th March 2010 do not appear to have been heard *inter partes* to date. That further, there is nothing on the record to confirm whether the notice of motion dated 12th March 2010 has ever been amended to include the 2nd Defendant or whether the 2nd Defendant has ever been served with the order dated 24th March 2010.

d) That the foregoing notwithstanding, this suit was commenced through the originating summons dated 18th August 2009 and filed in court on the 23rd October 2009. That by then the person registered with the suit land was **Albert Okech Ombanyi**, having been so registered on 7th June 2006 as per the annexed copy of certificate of official search dated 17th October 2007. That Joshua Odoyo Okech, the 1st Defendant, entered appearance *vide* memo dated 18th December 2009 filed through M/s Ouma Njoga & Company Advocates. That the 1st Defendant got registered as proprietor of the suit land on the 24th February 2010 and that he transferred the title to the 2nd Defendant on the 11th March 2010. That the two transactions took place when this suit was pending before the court. That interlocutory judgment against the 1st Defendant had been entered on the 29th January 2010 and it was not until 3rd June 2010 that it was set aside by consent. That it follows that the transfer of the title of the suit land to the name of the 2nd Defendant is questionable and it is only fair that the legal status of the suit land be safeguarded as the suit is heard and determined.

e) That while it may be true that the 2nd Defendant may have been an innocent purchaser, the removal of the caution that had been filed against the title by the Plaintiffs on the 6th December 2007, registration of the 1st Defendant as proprietor and transfer to the 2nd Defendant while this suit was pending in court gives credence to the Plaintiffs fears that the 2nd Defendant may carry out developments on the suit land that may prejudice their interests.

f) That even though the 2nd Defendant has title to the suit land, the same is being challenged through these proceedings and it is only just that the legal and physical status of the suit land be maintained pending the hearing and determination of this suit.

6. That flowing from the foregoing the court finds the plaintiffs notice of motion dated 12th April 2016 has merit and is allowed in the following terms:

a) That pending the hearing and determination of this suit, the 2nd Defendant be and is hereby restrained by himself or agents from interfering with, disposing of or doing any further construction on land parcel Kisumu/Border/29.

b) That the 2nd Defendant do pay the plaintiffs costs of the application.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 31ST DAY OF MAY 2017

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr. Achua for Ogola for Plaintiff

Mr. Abande for 1st Defendant

Mr. Ojuro for the 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2017

S.M. Kibunja Judge

Oyugi Court Assistant

Mr. Ojuro for the 2nd Defendant

Mr Achua for Ogola for Plaintiff

Mr. Abande for the 1st Defendant

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

Mr. Achua for Ogola for Plaintiff, Mr. Abande for 1st Defendant and Mr. Ojuro for 2nd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2017