



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
ELC CASE NO.275 OF 2016

ANDREW ONYANGO.....PLAINTIFF

VERSUS

ANJELINA AWUOR ONYANGO.....1ST DEFENDANT

CHRISTOPHER OMONDI ONYANGO.....2ND DEFENDANT

DANIEL JEREMY ONYANGO.....3RD DEFENDANT

RULING

1. **Andrew Onyango**, the Plaintiff, filed the notice of motion dated 21st October 2016 against **Anjelina Awuor Onyango**, **Christopher Omondi Onyango** and **Daniel Jeremey Onyango**, the 1st to 3rd Defendant respectively, seeking to restrain them, by themselves or their agents, from “trespassing onto, entering into, disposing, alienating, fencing, building, tilling and in any other manner interfering with the Plaintiff’s parcel of land rightly known as **South Ugenya/Ambira/3856** pending the hearing and determination of this suit”. The application is based on the five grounds on its face and is supported by the affidavit of the Plaintiff sworn on the 21st October 2016.
2. The application is opposed by the Defendants through the replying affidavit of the 2nd Defendant sworn on the 25th November 2016.
3. The application came up for hearing on the 8th February 2017 when Mr. Nyanga and Mamwari, learned counsel for the Plaintiff and Defendants respectively made their oral rival submissions.
4. The following are the issues for determination by the court;
 - a. Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction order to issue at this interlocutory stage.
 - b. What order to issue.
 - c. Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both sides, the oral rival submission by both counsel and come to the following findings:

a. That land parcels **Ugenya/Ambira/3855** and **3856** were registered on the 28th April 2016 in the names of the 2nd Defendant and Plaintiff respectively following the subdivision of land parcel **Ugenya/Ambira/15**.

b. That the two parcels therefore share a common boundary.

c. That the 2nd Defendant has sold a portion of 0.05 hectares out of his land parcel **Ugenya/Ambira/3855** measuring 0.6 hectares to the 3rd Defendant. That the 3rd Defendant has fenced off the portion he has bought and it is that fencing that the Plaintiff claims has encroached onto his land **Ugenya/Ambira/3856** by $\frac{3}{4}$ of an acre. The 2nd Defendant has denied that the portion he sold to the 3rd Defendant has encroached onto the Plaintiff's land.

d. That the Plaintiff's and 2nd Defendant's affidavit evidence points to the existence of a dispute over the boundary position between their parcels of land. That under the provisions of **Section 18 (2)** of the Land Registration Act No.3 of 2012, the Plaintiff should have lodged a boundary dispute with the Land Registrar before coming to this court. That it is after the Land Registrar has determined the boundary position that the parties would be in a position to confirm whether either of them had encroached onto the other's land and the acreage of encroachment thereof.

e. That in view of the finding in (d) above, the court is of the considered view that the Plaintiff has failed to establish a prima facie case to warrant the issuance of temporary injunction. The Plaintiff has not shown the nature of loss or damage that he is likely to suffer that cannot be computed into monetary terms if the said temporary injunction order is not issued. The court is also of the view that the balance of convenience does not tilt to the Plaintiff's favour.

6. That flowing from the foregoing, the Plaintiff's notice of motion dated 21st October 2016 is without merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 17TH DAY OF MAY 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel M/S Omol;o for the Plaintiff

Mr. Mamwari for the Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017

17th May 2017

S.M. Kibunja Judge

Oyugi court assistant

Mr. Mamwari for the Defendant

M/S Omolo for Plaintiff

Court: Ruling dated and delivered in open court in presence of m/s Omolo and Mr. Manwari for the Plaintiff and Defendants respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017