



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.77 OF 2016

JACK OUKO OGONY.....PLAINTIFF

VERSUS

GERVASE ATIANG'.....DEFENDANT

RULING

1. **Jack Ouko Ogony**, the Plaintiff, vide the notice of motion dated 7th April 2016 seeks for “a permanent injunction” restraining the **Gervase Atiang**, the Defendant, by himself or agents from “blocking, restricting, restraining, or doing anything that may prevent the Applicant’s use of the only designated access road to his parcel of land herein designated as **Kisumu/Chuga/3857**”, pending the hearing and determination of this suit. The application is based on the thirteen grounds marked (a) to (m) on the notice of motion and is supported by the affidavit of the Plaintiff sworn on the 7th April 2016.

2. The application is opposed by the Defendant through his replying affidavit sworn on the 30th May 2016.

3. The court gave directions on the filing and exchange of submissions on the 19th September 2016 and placed the matter for mention on the 26th October 2016. That on that date, counsel for the Defendant disclosed that they had filed and served their written submissions dated 28th September 2016. The counsel for the Plaintiff was given 14 days to file and serve their submissions and another mention was fixed for 8th February 2017. That on the date, the counsel for the Plaintiff sought for two more weeks to file and serve their written submissions. That though the counsel for the Defendant did not oppose that application, the court declined to allow it and instead fixed the application for ruling today.

4. The following are the issues for the court’s determination;

- a. Whether the Plaintiff has established a prima facie case with a probability of success.
- b. Whether the prayer of permanent injunction sought can be issued at this interlocutory stage.
- c. What order to issue
- d. Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the written submissions by the Defendant and come to the following conclusions;

- a. That the Plaintiff became the registered proprietor of land parcel **Kisumu/Chuga/3857** on

the 27th August 2015. That though the Plaintiff claims that the Defendant is the registered proprietor of land parcel **Kisumu/Chunga/3967**, he did not avail any documentary evidence, from the Land Registrar's office to confirm it. That the Defendant has on his part availed a copy of the title deed and certificate of official search for land parcel **Kisumu/Chunga/3967** showing that the registered proprietor of the said land is **Mareza Achieng Ogango** since 17th December 2015.

b. That the Plaintiff commenced this suit vide his plaint dated 7th April 2016 and filed in court on the 14th April 2016. That it is therefore obvious that by the date the plaint and the notice of motion both dated 7th April 2016 were filed, the Defendant was not the registered proprietor of the land parcel **Kisumu/Chunga/3967** and the orders sought may not issue against him. It follows therefore that the Plaintiff has failed to establish a prima facie case with a probability of success against the Defendant for temporary injunction order to issue at this stage. That finding would in the considered view of the court be sufficient to settle the application.

c. That what the Plaintiff sought in prayer (4) is a permanent injunction and not a temporary injunction. That a permanent injunction would not issue at this stage as to do so would amount to granting the final order sought in prayer 10 (a) of the plaint before hearing the suit on merit.

d. That from the deposition by the Plaintiff, the road of access that he seeks to be opened has never existed on the ground. That it confirmed by the surveyor's report dated 20th November 2015 where he stated as follows; **"The access road did not exist on the ground. This was marked on the ground and shown to the applicant."** That fact leads the court to conclude that the access road did not exist on the ground by the time the Plaintiff acquired proprietorship of land parcel **Kisumu/Chunga/3857**, and he does not therefore stand to suffer any irreparable loss or damage even if no interim order of injunction is issued.

e. That the balance of convenience does not tilt to the Plaintiff's favour as the Defendant has shown that he was not the registered proprietor of the land parcel **Kisumu/Chunga/3967** by the time this suit and the application were filed in court.

6. That in view of the findings above, the Plaintiff's notice of motion dated 7th April 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 Mrs. Onyango for Anyumba for the Plaintiff

Mr. Yogo for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017

17th May 2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mrs. Onyango for Anyumba for Plaintiff

Mr. Yogo for the Defendant

Court: Ruling dated and delivered in open court in presence of Mrs. Onyango for Anyumba for the Plaintiff and Mr. Yogo for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017