



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.57 OF 2016**

**DONE ABRAHAMS NYAGWALLAH.....PLAINTIFF**

**VERSUS**

**BENARD OMOLLO KERE .....DEFENDANT**

**RULING**

1. **Done Abrahams Nyagwallah**, the Plaintiff, filed the notice of motion dated 15<sup>th</sup> March 2016 seeking for temporary order of injunction restraining **Benard Omollo Kere**, the Defendant, by himself or agents from trespassing, encroaching, selling, transferring, disposing, subdividing, occupying or working on the suit land parcel **Kisumu/Kanyakwar L.R.22905/54** pending the hearing and determination of this suit. The application is based on the three grounds on its face and supported by the Plaintiff's affidavit sworn on the 15<sup>th</sup> March 2016. The application is opposed by the Defendant through his replying affidavit sworn on the 16<sup>th</sup> June 2016.

2. The Defendant filed the chamber summons dated 16<sup>th</sup> June 2016 seeking to have the National Land Commission added to this suit. The application is based on the four grounds on the chamber summons and supported by the affidavit of the Defendant sworn on the 16<sup>th</sup> June 2016. The application is opposed by the Plaintiff through his replying affidavit sworn on the 13<sup>th</sup> July 2016.

3. The counsel for the parties appeared before the court on the 6<sup>th</sup> October 2016 and agreed to file and exchange written submissions on both applications. The counsel for the Defendant filed written submissions dated 26<sup>th</sup> October 2016 in respect of their chamber summons dated 16<sup>th</sup> June 2016. The Plaintiff's counsel filed their submission dated 24<sup>th</sup> November 2016 in response to the Defendant's submission. The plaintiff's counsel also filed another set of written submissions dated 24<sup>th</sup> November 2016 in respect of the plaintiff's notice of motion dated 15<sup>th</sup> March 2016. The counsel for the Defendant responded by filing their written submission dated 30<sup>th</sup> January 2017.

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

- a) Whether the Plaintiff has established a prima facie case with a probability of success for temporary injunction orders to issue at this interlocutory stage.
- b) Whether the Defendant has established a case for enjoining of the National Land Commission, and if so, in what capacity will the commission be enjoined.
- c) What orders to issue.

d) Who pays the costs.

5. The court has carefully considered the grounds on the two applications, affidavit evidence by both parties, the submissions by counsel and come to the following determinations;

a) That the Plaintiff is by virtue grant **No.I.R. 139066**, the registered leasehold proprietor of land reference **No.22905/54, Kisumu Municipality**, measuring 0.0207 hectares for a period of 99 years from 1<sup>st</sup> March 1997 as confirmed by the copy of the title document issued on 6<sup>th</sup> December 2011. That a copy of the said document has been attached to the supporting affidavit.

b) That the claim by the Defendant that the land the plaintiff's claim as his has not been demarcated and adjudicated and that it is part of **L.R. 8478 Kisumu** is not supported by evidence in view of the title document that have been issued to the Plaintiff which is yet to be impugned in accordance with **Section 26** of Land Registration Act No.3 of 2012.

c) That the Plaintiff has not prayed for mandatory injunction yet he knew that the Defendant had already entered onto the suit land and erected some housing structures. That a temporary injunction sought by the Plaintiff cannot be used to evict the Defendant and allow the demolition of the structures already erected. The best the Plaintiff can do is to prosecute the main suit through which he may get eviction orders if successful.

d) That the Defendant filed a defence with a counterclaim and had the opportunity to add the National Land Commission in the counterclaim if he believed that the Commission is a vital party in these proceedings. The chamber summons dated 16<sup>th</sup> June 2016 does not indicate in what capacity the Defendant wishes the Commission to be enjoined. That it is not too late for the Defendant to enjoin the National Land Commission through an amendment to the counterclaim.

6. That having come to the foregoing conclusions, the court find no merits in the Plaintiff's notice of motion dated 15<sup>th</sup> March 2016 and Defendant's chamber summons dated 16<sup>th</sup> June 2016 and the two applications are dismissed with costs in the cause. The court on its own motion grants the Defendant 14 days to file and serve an amended defence and counterclaim enjoining the National Land Commission.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF MAY 2017

In presence of;

Plaintiff            Absent

Defendant        Present

Counsel           None

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/5/2017**

10/5/2017

S.M. Kibunja judge

Oyugi court assistant

Defndant present

My advocate has not arrived and it is now 11:35 am.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/5/2017**

Order: The Ruling dated and delivered in open co9urt in presence of the Defendant only.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/5/2017**