



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC MISC APPLICATION NO.2 OF 2016

DANCUN OTIENO OKWIRIPLAINITFF/APPLICANT
(SUING AS NEXT FRIEND OF ALEX ONYANGO OKWIRI)

VERSUS

KENYA INDUSTRIAL ESTATES LIMITED.....1ST DEFENDANT/ RESPONDENT

SYLVESTER OUMA OKOTH.....2ND DEFENDANT/ RESPONDENT

RULING

1. **Dancun Otiemo Okwiri**, the Applicant, suing as next friend of Alex **Onyango Okwiri**, vide notice of motion dated 12th February 2016 seeks for the same order in prayers 2 and 3 that pending the “hearing and determination of this application, the Honourable court be pleased to issue an order of temporary injunction against the 1st Defendant’s agents, **Rhemats Auctioneers**, either against themselves, their servants, workers and/ or agents barring them from selling, disposing, alienating, and in any other manner interfering with the Plaintiff’s parcel of land known as L.R. No. **East Alego/Karapul Ramba/4812**”. The application is based on the eight (8) grounds on its face and supported by the affidavit sworn by **Dancun Otiemo Okwiri** on the 12th February 2016 and further affidavit sworn on the 15th November 2016.

2. The application is opposed by Kenya Industrial Estate, the 1st Respondent, through the replying affidavit sworn by **Faith A. Onyango**, a legal officer, on the 16th September 2016.

3. The application is also opposed by Sylvester Ouma Okoth, the 2nd Respondent, through the grounds of apposition dated 28th July 2016.

4. The counsel for the Applicant appeared in court *ex parte* on 15th February 2016 and prayer 2 was granted pending service and *inter partes* hearing. The court then gave directions on filing of written submission on the 21st September 2016. The counsel for the 1st Respondent filed their written submission dated 20th February 2017 on the same date.

5. The following are the issues for the determination by the court::

a. Whether there is any pending prayer capable of being considered by this court after the *ex parte* order.

b. Whether the Applicant has established a *prima facie* case with a probability of success for

temporary injunction to be issued at this stage.

c. What order to issue.

d. Who pays the costs.

6. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions by counsel for the 1st Respondent and come to the following determinations;

a. That these proceedings were commenced through the Notice of motion brought under **Article 40(1)** of the constitution 2010, **Order 40 Rule 1, 4(1)** and **Order 50 Rule 1** of the Civil Procedure Rules. That as indicated above, it seeks for temporary injunction pending the hearing and determination of this application in both prayers 2 and 3. That prayer 1 was for certifying the application urgent and was granted *ex parte* also on 15th February 2016. That the only pending prayer is the fourth one that deals with costs.

b. That both prayers 2 and 3 are the same and were granted *ex parte* on the 15th February 2016 before being vacated on the 22nd February 2017. The only issue remaining to be determined in this ruling is that of costs after the court pronounced itself by granting prayer 2 *ex parte* on the 15th February 2016.

c. That **Order 40 Rule 4(1)** of Civil Procedure Rules allows the court in certain defined instances to hear the application *ex parte* as the court did on 15th February 2016. That **Order 40 Rule 1** of Civil Procedure Rules provides for the issuing of temporary injunctions pending the disposal of the suit or until further orders. That in these proceedings, there is no suit pending or further orders expected to be issued after this ruling and the temporary injunction cannot therefore issue.

d. That the Applicant disclosed at ground 7 that there exist another case being **Siaya C.M. Environment and Land Case No.14 of 2014** between the same parties and subject matter. That the 1st Respondent has confirmed the existence of that lower court case in paragraphs 12 to 17 of the replying affidavit and deponed that the Applicant had lodged a similar application in that court that was dismissed on the 22nd July 2015. That it follows that the application before this court is *res judicata* and hence offends **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That the

Applicant should have approached this court preferably through an appeal if he was not satisfied with the lower court dismissal order.

7. That for reasons shown above the Applicant's notice of motion dated 12th February 2016 is without merit and is dismissed with costs. The interim order of injunction issued on 15th February 2016 is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiff Absent

Defendants 2nd present

Counsel Mr. Baganda for Oduor for the Plaintiff

Mr. Owiti for 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2017

S.M. Kibunja judge

Court Assistant Oyugi

2nd Defendant/Respondent present

Mr. Baganda for J.D. Oduor for the Applicant/Plaintiff

Mr. Owiti for the 1st Respondent.

Court: Ruling dated and delivered in open court in presence of the 2nd Defendant, Mr. Baganda for Oduor for Plaintiff and Mr. Owiti for the 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017