



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.249 OF 2016**

**CHARLES ODHIAMBO .....PLAINTIFF**

**VERSUS**

**DAVID OTIENO AYIEKO..... DEFENDANT**

**RULING**

**1. Charles Odhiambo**, the Plaintiff, filed the notice of motion dated 16<sup>th</sup> September 2016 seeking for an order directing **David Otieno Ayieko**, the Defendant, “to demolish the fence and cut down trees planted on road reserve bordering land parcel numbers **Kisumu/Korndo/4610** and **3117**,” pending the hearing and determination of this suit. The Plaintiff also prays that the police do supervise the exercise and that the Defendant pays the costs of the application. The notice of motion is based on the four grounds marked (1) to (iv) and is supported by the affidavit of the

Plaintiff sworn on the 16<sup>th</sup> September 2016.

2. The application is opposed by David Otieno Ayieko through his document dated 21<sup>st</sup> October 2016 and another dated 24<sup>th</sup> April 2017.

3. The application came up for hearing on the 9<sup>th</sup> May 2017 when the Plaintiff and Defendant presented their oral submissions.

4. The following are the issues for the courts determination;

- a. Whether the Plaintiff has established a prima face case with a probability of success for temporary injunction to issue at this stage.
- b. What order(s) to issue.
- c. Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, grounds on the documents filed by the Defendant and come to the following determinations;

- a. That the Plaintiff is the registered proprietor of land parcel **Kisumu/Korando/4610**, as confirmed by the copy of the title deed issued on the 23<sup>rd</sup> April 2014 and certificate of official search dated 8<sup>th</sup> August 2016, both annexed to his supporting affidavit.

b. That land parcel **Kisumu/Korando/3117** is registered in the name of Tabitha Sisio Ayieko,, as confirmed by the certificate of official search dated 13<sup>th</sup> September 2016 annexed to the supporting affidavit. The Defendant has been sued as the occupant of that land as confirmed in paragraph 3 of the plaint.

c. That the Plaintiff's claim is that the Defendant has interfered with the access road to his land by construction a toilet, erecting a fence at the gate and planting trees. The Defendant response is that though he has the mutation form for **Kisumu/Korando/3150** subdividing it into parcels 4258, 4278, 4611, 4610, 4699, 3778, 4777, and 4776, there exists a dispute as to the ground position of the access road. That further parcels 4610 belonging to the Plaintiff, and the one above it being parcel 4699, are served by another access road.

d. That from the surveyor's letter dated 27<sup>th</sup> October 2015 addressed to the Plaintiff, it is clear that the Surveyor visited the land on 22<sup>nd</sup> October 2015 and found that the proprietor of Kisumu/Korando/3117 has planted trees on the road reserve and fenced off a part of the road reserve with barbed wire. That the surveyor's finding confirms the Plaintiff's claim that the access road to his land has been blocked.

e. That though the area map provided by the Plaintiff has been contested by the Defendant on good grounds as its source is not disclosed and cannot therefore be the official map from the Survey of Kenya, it nevertheless shows that the Plaintiff's land parcel 4610 is serviced by two access roads . That as the authenticity of the area map provided has been disputed, that fact will need to be confirmed by the County Land Registrar and Surveyor.

f. That even though the Defendant has not challenged the Plaintiff's case on the basis that he is not the registered proprietor of parcel Kisumu/Korando/3117, it is only fair and just that the registered proprietor be enjoined in this suit to enable all the issues relating to the access road be dealt with exhaustively and conclusively.

6. That for reasons set out above, the court finds that the Plaintiff notice of motion dated 16<sup>th</sup> September 2016 has merit and the same is allowed in the following terms;

a. That the court on its own motion directs that the Plaintiff do file and serve an amended plaint within 30 days enjoining the registered proprietor of Kisumu/Korando/3117 and any other registered owner of land involved in the blocking of the access road to enable the issues arising determined exhaustively and conclusively.

b. The County Land Registrar and Surveyor Kisumu County, do visit land parcels Kisumu/Korando/4610 and 3117 and do the following;

i. Establish whether there exists an official road of access touching on the two parcels.

ii. Whether either of the two parcels has encroached onto the road of access, and if so, re-establish the correct ground position of the access road's boundaries.

iii. Make a detailed report on the structures, fences, trees and other items that may be obstructing the road of access that need to be removed so as to open it, and by which party.

iv. That the report by the County Land Registrar and Surveyor be filed with the court within 90 days for further orders.

c. That the Plaintiff and the Defendant (s) be at liberty to attend the exercise to be conducted by the County Land Registrar and Surveyor either in person and or through their private Surveyors.

d. That the matter be fixed for mention after 90 days for further orders.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF September 2017**

In presence of;

Plaintiff Absent

Defendant Present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017

7/9/2017

S.M. Kibunja Judge

Oyugi/Joane Court Assistant

Defendant present

Order: Ruling delivered and dated in open court in presence of the defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017