



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.60 OF 2017
[FORMERLY HIGH COURT CIVIL CASE NO.135 OF 2012]
PRO.SHELLEMIAH OKOTH KEYA.....PLAINTIFF

VERSUS

JOANS HONGO.....1ST DEFENDANT

BONFACE OWITI.....2ND DEFENDANT

RULING

1. Through the notice of motion dated 16th December 2016, Joanes Hongo and Bonface Owiti, the Defendants, prays for an order of temporary injunction restraining Professor Shellemiah Okoth Keya, the Plaintiff, by himself or agents “from fencing, continuing with fencing, blocking access, alienating, demolishing homes, harassing, terrorizing the Applicants’ family and interfering with the Applicants’ interest in their ancestral land, measuring approximately 6 acres and more specifically the Applicants’ homesteads, pending the hearing and finalization of the main suit.” The Defendants also prays for costs. The notice of motion is based on the four grounds on its face marked (i) to iv) and is supported by the affidavit sworn by 1st Defendant on the 16th December 2016.

2. The notice of motion is opposed by the Plaintiff through the grounds of opposition dated 12th January 2017 and replying affidavit sworn by the Plaintiff on the 10th February 2017.

3. The temporary injunction order pending the interpartes hearing was granted on the 20th December 2016 and severally extended.

That on 21st February 2017 the court gave directions on filing of written submissions. The counsel for the Plaintiff filed theirs dated 11th March 2017, on the 13th March 2017, while that for the Defendants filed theirs dated 27th March 2017 on the same date.

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

a. Whether the Defendants have made a prima facie with probability of success for temporary injunction to issue at this stage.

b. Who pays the costs.

5. The court has after carefully considering the grounds on the notice of motion, grounds of opposition,

affidavit evidence, submissions by both counsel concluded as follows;

- a. That land parcel **No.15329 Kisumu Municipality**, measuring 2.999 hectares was allocated to the Plaintiff vide Grant No.I.R – 126283 on the 1st December 1990.
- b. That the same land was allocated to one Phillip Ochieng Otieno on the 1st June 1997 under Grant No. I.R.91141.
- c. That even though the said Phillip Ochieng Otieno is not a party to this proceedings, the existence of the documents of ownership in his name of the same land the Plaintiff claims cannot be ignored as the registration in his favour came about seven (7) years after the Plaintiff's registration.
- d. That the Plaintiff has exhibited to the replying affidavit a surveyors report showing that the houses (structures) in question are outside the suit land. That taking that the said houses are the homesteads that the Defendants sought to be protected through an order of injunction, and as the Defendants have not challenged or controverted the surveyor's findings, the court finds that the Defendants have failed to establish the existence of any threat to their homesteads or access thereto that would require an order of injunction to be issued.
- e. That as between the Plaintiff and the Defendants, the former has exhibited the document of ownership of the suit land and unless his ownership is successfully challenged in accordance with **Article 40** of the Constitution and **Section 26** of the Land Registration Act No.3 of 2012, the court is obligated to take him as the absolute and indefeasible owner of the suit land.

6. That having found as above, the court finds no merit in the defendants' notice of motion dated 16th December 2016 and the same is dismissed with costs. The interim order is hereby vacated.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 24TH DAY OF OCTOBER 2017

In presence of;

Plaintiff Absent

Defendants 1ST present

Counsel Mr. Osongo for the Plaintiff

Mr. Anyul for the Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

2/10/2017

24/10/2017

S. M. Kibunja Judge

Oyugi court assistant

Plaintiff absent

1st Defendant present

Mr. Anyul for the Applicant

Mr. Onsongo for the Respondent

Court: The ruling dated and delivered in open court in the presence of Mr. Anyul and Onsongo for the Plaintiff/Respondent and Defendants/Applicants respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

2/10/2017