



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.13 of 2017**

**NICHOLAS OKOTH MIRUKA**

**SAMWEL OTIENO MIRUKA**

**PETER ODOYO MIRUKA**

**MAURICE OTIENO MIRUKA**

**AND OTHER TWO SISTERS**

**(suing as the other surviving beneficiaries of**

**the late CHARLES S. AKECH (Deceased).....PLAINTIFFS**

**VERSUS**

**HENRY ODHIAMBO AKECH.....DEFENDANT**

**RULING**

1. **Henry Odhiambo Akech**, the Defendant, seeks vide the notice of motion dated 15<sup>th</sup> March 2017, to restrain **Nicholas Okech Miruka, Samuel Otieno Miruka, Peter Odoyo Miruka, Maurice Otieno Miruka and other two sisters**, hereinafter referred to as the Plaintiffs, by themselves or their agents from carrying out illegal excavation and or harvesting stones and murrum, ploughing, fencing off or in any other manner interfering with the Defendant's peaceful occupation and or utilization of land parcel **Kisumu/Buoye/3503** pending the hearing of this suit. The application is based on the nine (9) grounds marked (a) to (i) on its face and is supported by the affidavit sworn by the Defendant on the 15<sup>th</sup> March 2017.

2. The application is opposed by the plaintiffs through the replying affidavit sworn by Nicholas Okoth Miruka, Samwel Otieno Miruka and Peter Odoyo Miruka on the 22<sup>nd</sup> May 2017.

3. The application came up for hearing on the 30<sup>th</sup> May 2017 when Mr. Anyumba, learned counsel for the Defendant, and the 1<sup>st</sup> Plaintiff in person, made their submission on the notice of motion and preliminary objection dated 3<sup>rd</sup> February 2017.

4. The following are the issues for the determination of the court;

a) Whether the Defendant has established a case for issuance of temporary injunction in accordance with the principles set out in *Giela versus Cassman Brown* case.

b) Whether the Plaintiffs have capacity to file and prosecute this case as grandchildren of the late Charles S. Akech.

c) What orders to issue

d) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion dated 15<sup>th</sup> March 2017 and notice of preliminary objection dated 3<sup>rd</sup> February 2017, affidavit evidence, oral submissions by counsel for the Defendant and the 1<sup>st</sup> Plaintiff in person and come to the following determinations;

a) That the Plaintiffs have described themselves in the suit papers as “**other surviving beneficiaries of the late Charles S. Akech (deceased).**” They also describe themselves and the Defendant as “**biological grandsons**” of the late Charles S. Akech. The parties herein are therefore related.

b) That the Plaintiffs claim over land parcel **Kisumu/Buoye/3503** is based on the fact that it is ancestral land on which they, and other family members, live and that the Defendant has obtained ownership of the land without their consent and further in contravention of the law of succession.

c) That though the Defendant has raised five (5) grounds in his notice of preliminary objection, including the Plaintiffs lack of capacity to file the suit, the court is of the considered view that the suit should be allowed to go to hearing to allow the parties, who are all grandchildren to the late Charles S. Akech, ventilate their issues before the court and a determination on merit be made.

d) That the parties should be allowed to continue using the land in the same manner they have been doing before pending the hearing and determination of this suit.

e) That in view of the foregoing the notices of motion and the preliminary objection by the Defendant are dismissed with costs in the cause.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 8<sup>TH</sup> DAY OF NOVEMBER 2017

In presence of;

Plaintiffs                    1<sup>ST</sup> & 2<sup>ND</sup> PRESENT

Defendant                    ABSENT

Counsel                      Non attendance

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/11/2017**

8/11/2017

S.M. Kibunja Judge

Oyugi court assistant

1<sup>st</sup> & 2<sup>nd</sup> Plaintiff present

Court: Ruling dated and delivered in open court in presence of 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff only.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/11/2017**