



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.174 OF 2016

EZRA ODONDI OPAR.....PLAINTIFF

VERSUS

GRACE AKINYI ODHIAMBO1ST DEFENDANT

MARGARET WAIGO.....2ND DEFENDANT

RULING

1. This ruling is on the two notices of motion dated 18th July 2016 and 13th November 2017. The two applications are by Ezra Odondi Opar, the Plaintiff, against Grace Akinyi Odhiambo and Margret Woigo, the Defendants. The notice of motion dated 18th July 2016 is for “permanent injunction restraining the Respondents of their own, agents, servants and/or employees from trespassing onto, developing, alienating, disposing off, or in any other way interfering with the Plaintiff’s quiet and peaceful use and occupation of the suit land herein designated as **Kisumu/Municipality/Block 10/328.**” The court granted temporally injunction pending the hearing and determination of the application on the 3rd October 2016. That order has been severally extended since then. The application dated 12th November 2017 is for punishing the Defendants for “**continuously and persisting in trespass with the Plaintiff/Applicant’s quiet and peaceful use of the suit land**”. The Plaintiff also seeks to have the Defendants denied audience until after they purge their contempt of the court order, and costs.

2. The notice of motion dated 18th July 2016 is based on six grounds on its face and is supported by the affidavit sworn by the Plaintiff on the 18th July 2016, in which he among others depones as follows;

a. That he bought the said land from Kiduruban Housing Cooperative Society and got it registered in his names on 3rd May 2016. He has annexed a copy of certificate of lease in his name confirming that deposition, and another copy in the name of Kiduruban Housing Cooperative Society Limited showing that they had got registered with the suit land on the 19th April 2016.

b. That when the plaintiff went to take possession, he was met by hostile agents of the Defendants who have frustrated his interest and right to peaceful use and occupation of the property.

3. The application is opposed by the Defendants through the replying affidavit sworn by Grace Akinyi Odhiambo on the 27th October 2016, who among others depones to the following;

a. That the Defendants bought land from one Alice Njoki Waira on the 28th November 2008. They annexed a copy of the sale agreement for plot Kisumu Municipality/Block 10/391 dated 28th

November 2008, and letter of offer for the same plot dated 28th September 2007 in favour of Alice Njoki Waira.

b. That through the transfer document dated 17th August 2009 (copy attached) one Erick Hongo transferred Kisumu Municipality/Block/10/328, the suit land, to the Defendants after which the Municipal Council of Kisumu issued the 1st Defendant with a letter of change of name dated 12th August 2009 (copy attached).

c. That the Defendants have been paying rates for the suit land as per the annexed receipts.

d. That the Defendants have been in occupation of the plot since 2008 and hence are not a strangers or trespassers to the plot.

4. The notice of motion dated 13th November 2017 is based on the five grounds on its face and is supported by the affidavit sworn by the Plaintiff on the 13th November 2017. The Plaintiff depones to the following among others;

a. That prayer 2 of his notice of motion dated 18th July 2016 was granted on the 3rd October 2016 restraining the Defendants from trespassing onto, developing, alienating, disposing off or in any other way interfering with his quiet and peaceful use of the suit land.

b. That through his notice of motion dated 2nd June 2017, the Defendants were found in contempt of court of the said order on 4th October 2017 and each fined Ksh.20,000/= . The Defendants were further cautioned to obey the court order.

c. That the Defendants have persisted in trespassing onto the suit property thereby frustrating the Plaintiff's peaceful and quiet enjoyment by continuing to carry on with the construction.

d. That the Defendants persistence in unlawful occupation of the suit property has made it increasingly difficult for the Plaintiff to enjoy the benefits of the court's order.

5. The application is opposed by the Defendants through the affidavit in response sworn by Grace Akinyi Odhiambo on the 20th November 2017, in which she depones to the following among others;

a. That the application is aimed at persecuting and intimidating the Defendants to submission.

b. That though the 1st Defendant was in possession of the suit property, she has since then kept away in compliance with the court's interim order.

c. That as the Defendants had developed the suit land, the 1st defendant has instructed a Rubi Court watchman to be checking on the plot from outside and alert her on any illegal, criminal and unauthorized activities on the plot.

d. That the Plaintiff has visited the suit land severally with the aim of burning down the property on the plot. That one such incident prompted her advocate to write to the Plaintiff's advocate the letter dated 1st November 2017 that is annexed and reports to the police under O.B. NO.33/06/10/2017 and 62/2/11/2017.

e. That the Defendants earlier disobedience, for which they were fined, was for failure to have understood the court order and they have expressed their remorse.

f. That all the plots failing under Block 10 (Rubi Court) are subject matter of Kisumu ELC No.804 of 2015 which is pending in court.

g. That the plaintiff has not availed any evidence of trespass, continued construction, and or any form of violation of the court order.

6. The court had given direction on filing and exchanging written submissions on the notice of motion dated 18th July 2016 on the 22nd February 2017. The application was subsequently mentioned on the 30th May 2017, when another mention for 22nd November 2017 was fixed. That when the notice of motion dated 13th November 2017 was certified urgent on the 13th November 2017, it was fixed for hearing on the 22nd November 2017. That on that date, Mr. Ouma and Abande, learned counsel for the Plaintiff and Defendants respectively, made their oral submissions on the application dated 13th November 2017. Thereafter, the two applications, dated 18th July 2016 and 13th November 2017, were fixed for ruling today.

7. That at the closure of the oral submissions from counsel on the 22nd November 2017, the court sought to know from the Plaintiff and the 1st Defendant the details of the acts of disobedience allegedly committed by the Defendants from 4th October 2017. The Plaintiff indicated that since that date, the 1st Defendant had elected an iron sheet fence and structure in which she houses a guard who keeps him away from the suit property. He further stated that the 1st Defendant had fitted some windows on the illegally constructed house. On her part, the 1st Defendant denied the Plaintiff's claim and stated that the windows, fence and structure were done before 4th October 2017. That the Plaintiff had sent goons who demolished the structure, after which she collected the materials for safety and are on the suit property. That she has not kept a guard on the suit property but has some who keep watch from outside. The court then made a visit that afternoon to the suit property in the company of both the Plaintiff and 1st Defendant plus their respective advocates. That both the Plaintiff and 1st Defendant were given opportunity to address and the court the following were noted;

a. That on the suit land is a single storeyed permanent massionette under construction which the 1st Defendant confirmed has been put up by the Defendants since 2016.

b. That the suit land is fenced with ironsheets along most of the Perimeter, running parallel to the building under construction, except in the front.

c. That there were visible marks of a structure and fencing materials having been removed from the front portion. The 1st Defendant indicated that those materials were the one stored inside the building.

d. That the Plaintiff conceded that the building and fencing materials on the suit land do not belong to him.

e. That the building, materials and fence on the suit land belong to the Defendants.

8. The following are the issues for court's determinations;

a. Whether the Plaintiff has made a prima facie case for restraining orders to issue against the Defendants at this stage.

b. Whether the Plaintiff has shown to the standard required that the Defendants have continued with construction on the suit property after the 4th October 2017.

c. What orders to issue.

9. The court has carefully considered the grounds on the two applications, affidavit evidence filed, written and oral submissions tendered by counsel and come to the following findings;

- a. That though the Plaintiff has a certificate of lease over the suit property in his name, which was issued on the 3rd May 2016, the Defendants, specifically the 1st Defendant, had been in possession of the said plot even before then.
- b. That the Plaintiff appear not to have visited the suit land to confirm whether it was indeed vacant before he acquired it. That when he went to take possession, he was not allowed to by the Defendants and hence this suit.
- c. That the Defendants appear not to be mere trespassers onto the suit land, as they have presented transfer and change of name documents in their favour dating back to years before the Plaintiff acquired the plot in his name.
- d. That as the ownership of the suit land is contested between the Plaintiff and the Defendants, and that the Defendants are in possession by virtue of owning the building under construction and all the materials and fence standing on the suit land, it is only fair that both parties maintain the existing status quo as of the 22nd November 2017, when the court visited the suit land, pending the hearing and determination of the suit.
- e. That having considered the evidence and submission of both sides, and on the court's own observations during the visit to the locus, the court finds that the Plaintiff has failed to prove his claim that the Defendants have continued with any constructions activities at the suit land since 4th October 2017.

10. That flowing from the foregoing, the court orders as follows;

- a. That the notice of motion dated 18th July 2016 be and is hereby compromised with an order that both parties do maintain the status quo existing as of 22nd November 2017 when the court visited the locus pending the hearing and determination of this suit. That for avoidance of doubt, the Defendants, as the owners of the building under construction, the building materials on site and the fence, do continue to be in possession of the suit land, but remain restrained from any further unauthorized construction activities or residing on the said plot during the said period.
- b. That the notice of motion dated 18th November 2017 is without merit and is dismissed with costs.
- c. That the costs in relation to the notice of motion dated 18th July 2016 be in the cause.
- d. That the interim order of 3rd October 2016 is hereby vacated.

Order accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF DECEMBER 2017

In presence of;

Plaintiff Absent

Defendants 1st Present

Counsel Mr. Abande for Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/12/2017

18/12/2017

S.M. Kibunja Judge

Oyugi court Assistant

1st Defendant present

Mr. Abande for the Defendant

The Plaintiff and his advocate are absent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/12/2017

Order: The ruling dated and delivered in open court in presence of the 1st Defendant and her counsel.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/12/2017