



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC JUDICIAL REVIEW CASE NO.9 OF 2016**  
**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**  
**ORDER OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE SENIOR RESIDENT MAGISTRATE, WINAM LAW COURT**

**THE IN-CHARGE ADMINISTRATION POLICE (WINAM DIVISION)**

**MAURICE ADAWO ONDURU.....RESPONDENTS**

**JUDITH AKINYI OMONDI.....EXPARTE APPLICANT**

**JUDGMENT**

1. Through the notice of motion dated 12<sup>th</sup> October 2016, **Judith Akinyi Omondi**, the Exparte Applicant, seeks for an order of certiorari to remove into this court and quash the exparte order issued by the **Senior Resident Magistrate's Winam**, the 1<sup>st</sup> Respondent, on the 15<sup>th</sup> September 2016 in Winam SRM Misc. Civil Application No.32 of 2016. She also prays for an order of prohibition barring **Administration Police In charge Winam** and **Maurice Adawo Onduru**, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively, from acting on or implementing the exparte order made and issued by the 1<sup>st</sup> Respondent on the 15<sup>th</sup> September 2016. The exparte Applicant also prays for costs. The application is based on the statutory statement and verifying affidavit filed with it.

2. The application is opposed by the 3<sup>rd</sup> Respondent through his replying affidavit sworn on the 3<sup>rd</sup> March 2017.

3. The application came up for hearing on the 20<sup>th</sup> September 2017 when Mr. Nyasimi and Onyang'o, learned counsel for the Exparte applicant and 3<sup>rd</sup> Respondent respectively, made their oral submissions.

4. The issues for determinations by the court are as follows;

a) Whether the exparte Applicant has established a case for quashing of the 1<sup>st</sup> Respondent's order.

b) Whether the Exparte Applicant has made a reasonable case for prohibition order to issue against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

c) Who pays the costs.

5. The court has carefully considered the grounds on the statutory notice, affidavit evidence, submissions by counsel and concluded as follows;

a) That even though the 3<sup>rd</sup> Respondent may be the legally registered proprietor of the suit land, the way he initiated Winam S.R.M. Miscellaneous Application No.32 of 2016 did not give or afford any opportunity to those who were on the land, either as trespassers or otherwise, to be heard.

b) That the order issued by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent to provide security for the 3<sup>rd</sup> Respondent to level the land shows that the 3<sup>rd</sup> Respondent knew of the existence of a person or persons who are likely to object to the exercise. The 3<sup>rd</sup> Respondent had therefore the obligation to enjoin such persons in the court process that he had filed so that they could be afforded the opportunity to be heard before any adverse orders could be issued against them.

c) That the failure by the 3<sup>rd</sup> Respondent to enjoin the people likely to be affected by the order to be issued, like the Exparte Applicant, and obtaining orders that if executed would displace them denied such persons the right to a fair hearing as required under **Article 50 of the Constitution 2010**.

d) That by the 1<sup>st</sup> Respondent issuing the order that it did without ensuring that all those who were likely to be affected, like to Exparte Applicant, denied such persons the opportunity to be heard and be accorded fair administrative action as required under **Article 47 and 50 of the Constitution 2010** before they could be condemned.

6. That in view of the foregoing the court finds merit in the notice of motion dated 12<sup>th</sup> October 2016 and the same is allowed in terms of payers (a) and (b) with costs to be paid by the 3<sup>rd</sup> Respondent.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF DECEMBER 2017**

In presence of;

Exparte Applicant        Absent

Respondents               Absent

Counsel:    Mr. Nyasimi for Exparte Applicant

M/S Bagwasi for Onyango for 3<sup>RD</sup> Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**6/12/2017**

**6/12/2017**

**S.M. Kibunja Judge**

**Oyugi court assistant**

**Parties absent**

**M/S Bagwasi for Onayngo for 3<sup>rd</sup> Respondent**

**Mr.Nyasimi for Exparte Applicant**

**Court: The Judgment dated and delivered in open court in presence of Mr. Nyasimi for the Exparte Applicant and M/S Bagwasi for Onyango for 3<sup>rd</sup> Respondent.**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**6/12/2017**