



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT KISUMU

ELC CASE NO.70 OF 2015

GILBERT OPIYO ORENGO.....APPLICANT

VERSUS

JAMES ODONGO SUNGA.....1ST RESPONDENT

CHARLES ODHIAMBO.....2ND RESPONDENT

RULING

1. **Gilbert Opiyo Orengo**, the Applicant, by notice of motion dated 9th March 2015 against **James Odongo Sunga** and **Charles Odhiambo**, hereinafter referred to as 1st and 2nd Respondent, prays for temporary injunction restraining the Respondents from destroying fence and trees, demolition of structures, electing developments, depositing materials, blocking the entrance or interfering with Plaintiff's interest on land parcel **Kisumu/Korando/4610** pending the hearing and determination of this suit and costs. The Applicant listed three grounds on the notice of motion which is also supported by the affidavit sworn by **Gilbert Apiyo Orengo** on 9th March 2015.
2. The application is opposed by the 1st Respondent through his replying affidavit sworn on 28th April 2015. The 2nd Respondent also opposed the application through the grounds of opposition dated 15th April 2015.
3. The counsel for the parties appeared before the Deputy Registrar on 15th July 2015 and agreed to file written submission in respect of the notice of motion. The counsel for the Applicant filed their written submissions dated 25th August 2015 while 1st Respondent counsel filed theirs dated 18th December 2015. The matter was then mentioned on 25th February 2016 when counsel for the 2nd Respondent indicated that they would not be filing any submissions but would rely on the grounds of opposition and statement of defence.
4. The issue for determination is whether the Applicant has established a prima facie case for issuance of temporary injunction order against the Respondents at this interlocutory stage.
5. The court has considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, written submissions and come to the following findings;
 - a) That land parcel **Kisumu/Korando/4610**, which is hereinafter referred to as the suit property, is subdivision of parcel **4256** which itself is a subdivision from parcel **3150** from which the Plaintiff claims to have bought a portion from both the 1st Defendant and his late father. That though the Plaintiff did not get the portion he claims to have bought registered into his names, the available

evidence from both himself and 1st Defendant confirms, that he at some time took possession and elected some permanent houses on a portion of the suit property.

b) That by the time this suit was filed on 12th March 2015, there existed **Kisumu ELC NO.14 of 2013** filed by the 1st Respondent against the Applicant seeking his eviction from **Kisumu/Korando/4610**, through the plaint dated 24th January 2013. The Applicant had filed a statement of defence containing a counter claim for a portion of land measuring **27 steps by 17 steps**, dated 22nd March 2013. That suit is reportedly pending before this court and there is no explanation why the Applicant did not seek to enjoin the 2nd Respondent into that suit and file the current application in that suit instead of commencing a fresh suit while the subject matter and parties are substantially and directly the same.

c) That in view of the Applicant's claim in both this case, the counter claim in **Kisumu ELC NO.14 of 2013** and the fact that he is in possession of a portion of suit property where he has elected some permanent structures, it is only fair that he continues having access to that portion of land as this case is heard and determined. There is no prejudice to be suffered by the Respondents as they were aware that the Applicant was in possession when they entered into the transaction that led the 2nd Respondent to be registered as proprietor of the suit property on the 23rd April 2014. The Applicant has therefore established a prima facie case for issuance of temporary injunction in accordance with the principles set out in **Giella -V- Cassman Brown Company Ltd** [1973} E A 358.

6. That the Applicant's application dated 9th March 2015 has merit and is hereby allowed as follows;

a) That the Respondents be and are hereby restrained from trespassing, blocking the entrance of, and or in any other way interfering howsoever with the Applicant's use of the portion of land parcel **Kisumu/Korando/4610** measuring **27 by 17 steps** under his possession pending the hearing and determination of this case.

b) That the costs of this application be in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 27TH DAY OF APRIL 2016

In presence of;

Applicant ABSENT

Respondent s ABSENT

Counsel Mr Anyul for Applicant, Mr Osongo for Obuso for 2nd Respondent and Mr Ariko for Nyanga for 1st Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2016

S.M. Kibunja J

Oyugi Court Assistant

Mr. Anyul for Applicant Mr Osongo for Obuso for 2nd Respondent and Mr Ariko for Nyanga for 1st Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2016

Court: Ruling delivered in open court in presence of Mr Anyul for the Applicant, Mr Osongo for Obuso for 2nd Respondent and Mr Ariko for Nyanga for Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/4/2016