



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.342 OF 2015

JAMES OGUTU

OBIERO.....PLAINTIFF

VERSUS

JARED AMBROSE ODHIAMBO.....

DEFENDANT

RULING

1. **James Ogutu Obiero**, the Applicant, through notice of motion dated 10th December 2015, prays for temporary injunction against **Jared Abrose Odhiambo**, the Respondent, restraining him from, interfering with his peaceful possession and enjoyment of land parcel **Uholo/Sigomre/2149** pending the hearing and determination of this suit. The Applicant set out five grounds on the notice of motion which is also supported by his affidavit sworn on 10th December 2015.
2. The Respondent opposed the notice of motion through the replying affidavit sworn on 22nd February 2016.
3. The Applicant replied to the Respondent's replying affidavit through the supplementary affidavit sworn on 15th April 2016.
4. The counsel for the parties filed written submissions on the notice of motion.

The Applicant's counsel's written submission dated 4th May 2016 was filed on 5th May 2016 while that of the Respondent's counsel dated 13th May 2016 was filed on the same date.

5. The issues for determination by the court are as follows:
 - a) Whether the Applicant has established a prima facie case with a possibility of success.
 - b) Whether the temporary injunction orders should issue
 - c) Who pays the costs.
6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the rival written submissions and concluded as follows:
 - a) That from the copy of the title deed for parcel **Uholo/Sigomre/2149** it is clear that parcel was a subdivision from parcel **498**.
 - b) That further the copy of the register provided by the Respondent for parcel **Uholo/Sigomre/498** it is apparent that the land was first registered on 21st February 1972 in the names of **Tera Rabongo** who is said to have died on 3rd November 2000 as confirmed in the certificate of death

No.0276125 marked **JAO-1** attached to the replying affidavit.

- c) That though the applicant does not disclose how he acquired the title to land parcel **Uholo/Sigomre/2149**, the Respondent's explanation, which is unrebutted, is that the Applicant unprocedurally first had both their names entered into the register of the parcel **498** and thereafter had it subdivided into **2149 and 2150**. That he subsequently, had himself registered with the former on 27th November 2012.
- d) That the Respondent's explanation that the unprocedural subdivision of **Uholo/Sigomre/498** into parcel 2149 and 2150 was later cancelled by the Land Registrar has not been rebutted by the Applicant and this leaves the court with doubt as to the legality of the Applicant's title to **Uholo/Sigomre/2149**.
- e) That while it is the law that a legally registered owner of a suit land who is also in possession should be protected by the court from those infringing on his/her right to property as set out under **Sections 24 and 25** of the Land Registration Act No.3 of 2012, until and unless such title is impugned in accordance with **Sections 26 of the said Act**, the title to the suit land claimed by the Applicant herein is under serious challenge by the Respondent.
- f) That the Applicant has in response to the Respondent's disclosure that title for **parcel 2149** was cancelled alleged fraud on the part of the Respondent. That the court will only be in a position to pronounce itself on the legality or otherwise of the Applicant's title to **Uholo/Sigomre/2149** after hearing the parties and their witnesses as the affidavit evidence so far presented is conflicted.
- g) That the Applicant had based his case, at this interlocutory stage, on the fact he was the registered proprietor of land parcel **Uholo/Sigomre 2149**, whose existence now appear doubtful in view of the copy of the register for **parcel 498** provided by the Respondent in his replying affidavit.
7. That the Applicant has on the material facts so far availed failed to establish a prima facie case with a possibility of success. He has also not shown that he will likely suffer irreparable loss if injunction orders are not issued. The balance of convenience dictates against issuance of restraining orders as it is more convenient to wait for the outcome of the main suit after hearing evidence on merit.
8. That having found as above, the notice of motion dated 10th December 2015 is without merit and is dismissed with costs. The interim orders of 15th December 2015 are hereby vacated.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 29TH DAY OF JUNE 2016

In presence of;

Applicant Absent

Respondent Present

Counsel Mr. Baganda for Kowino for Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/6/2016

29/6/2016

S.M. Kibunja J.

Oyugi court assistant

Mr Oriero for Applicant

Mr Raganda for Kowino for Respondent

Court: The ruling delivered and dated in open court in presence of defendant/respondent, M. Oriero for plaintiff and M. Baganda for Kowino for Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/6/2016