



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 153 OF 2014

CHRISANTUS OPONDO KASONGAPLAINTIFF

VERSUS

CHARLES OBILA OTURU..... 1ST DEFENDANT

CHARLES OSEMO..... 2ND DEFENDANT

RULING

1. The Plaintiff, **Chrisantus Opondo Kasonga**, through the notice of motion dated 4th June 2014 prays for temporary injunction restraining **Charles Obila Oturo** and **Charles Osemo**, the 1st and 2nd Defendants, from entering, remaining upon or carrying out a cultivation on land parcel **Kisumu/Koru/1087** pending the hearing and determination of this suit. The notice of motion is based on the five grounds on its face and supported by the affidavit of the plaintiff sworn on the 4th June 2014.
2. The 2nd Defendant filed his replying affidavit sworn on 27th June 2014 opposing the application.
3. The 1st Defendant filed his replying affidavit sworn on 11th April 2016 in opposition to the notice of motion.
4. The application came up for hearing on 29th February 2016 when counsel for Plaintiff and Defendants agreed to file written submissions. The Defendants counsel filed their submissions dated 13th April 2016 on the 25th April 2016. The matter then came up for mention on 24th May 2016 and today's date for ruling was fixed. The Plaintiff's counsel did not file written submissions.
5. The court has to determine the following issues.
 - a) Whether the Plaintiff has made a case for issuance of temporary injunction at this interlocutory stage.
 - b) Who pays the costs.
6. The court has considered the five grounds on the notice of motion, the affidavit evidence by all parties, the written submission by counsel for the Defendants and concluded as follows:
 - a) That **Kisumu/Koru/1087**, hereinafter referred to as the suit land, **Kisumu/Koru/1088** and **1089** are registered in the names of the Plaintiff, 1st and 2nd Defendant respectively.
 - b) That the three parcels are a subdivision of parcel **Kisumu/Koru/236** which belonged to the 1st Defendant and therefore share boundaries.

c) That through a survey exercise carried out on 26th May 2016 in respect of four parcels of land, including **Kisumu/Koru/1089** and **1087** belonging to the 2nd Defendant and Plaintiff respectively, it was found out that the Plaintiff's land parcel **1087** had encroached onto the 2nd Defendant's parcel **1089** by **0.4621** hectares. [see surveyor's report dated **28th May 2015 attached to the 1st Defendant's replying affidavit**]. This finding that followed an exercise carried out after the filing of the suit and notice of motion subject matter of this ruling creates doubt on the claim of the Plaintiff that there has been encroachment onto his land that is evidenced by the photographs he annexed to the supporting affidavit. This is especially so when the 2nd Defendant has disputed that the said photographs were taken on the land in question, and in the absence of the certificate by the photographer to confirm where the photographs were taken and processed as required under **Section 106B (4) of the Evidence Act** Chapter 80 of Laws of Kenya.

d) That the Plaintiff has failed to establish a prima facie case on which a temporary injunction against the Defendant could be issued at this interlocutory stage.

7. That the Plaintiff's notice of motion dated 4th June 2014 is therefore without merit and is dismissed with costs to the Defendants. The interim order of 5th June 2014 is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF JULY 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel M/S Khapoya for Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016

13/7/2016

S.M. Kibunja J.

Oyugi court assistant

M/S Khaponya for Defendant

Court: Ruling delivered in open court in presence of M/S Khaponya for Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016