



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**HCC. NO.192 OF 2011**

**MICHAEL ODERA OTOM (Suing as the administrator**

**of the estate of THOMAS OTOM**

**OGULLO.....PLAINTIFF**

**VERSUS**

**COMMISSIONER FOR LANDS .....1ST  
DEFENDANT**

**THE ATTORNEY GENERAL .....2ND  
DEFENDANT**

**KISUMU TEACHERS SACCO LTD (KITE) ..... 3RD  
DEFENDANT**

**RULING**

**1. Kisumu Teachers Sacco Company Limited**, the 3rd Defendant filed the notice of motion dated 23rd October 2015 seeking for injunctive order restraining **Michael Odera Otom**, the Plaintiff, who is suing as administrator of the estate of **Thomas Otom Ogullo**, from *"entering, remaining on, carrying construction, development of any type/kind, erecting any structures, or carrying out any activities within the boundary of all that parcel of land known as grant No.83689, L.R. No.16344, Land Survey number 228781"* and costs. The application is based on the ten grounds labelled (a) to (j) on the face of the notice of motion and supported by the affidavit sworn by **Joseph Omolo Oganga**, the 3rd Defendant's manager, on the 23rd October 2015.

2. The application is opposed by **Michael Odera Otom**, the Plaintiff, through the replying affidavit he swore on 13th November 2015.

3. The notice of motion came up for hearing on 10th March 2016. The counsel for the 1st and 2nd Defendant indicated that the application did not touch on his clients and therefore would not be participating in its hearing. The counsel for the 3rd Defendant and the Plaintiff agreed to file written submissions on the notice of motion. The counsel for the 3rd Defendant filed their submission dated 11th March 2016 on the 14th March 2016. Plaintiff's counsel filed theirs dated 23rd March 2016 on the same date.

4. The issues for determination is first whether the 3rd Defendant has established a case for issuance of temporary injunction at this interlocutory stage. Secondly, who pays the costs.

5. The court has considered the grounds on the notice of motion, affidavit evidence by both sides, written rival submissions by counsel from both sides and come to the following determinations.

- a) That the Plaintiff commenced their claim against the 3rd Defendant and two others through their initial plaint dated 4th October 2011. The 3rd Defendant filed their defence dated 7th December 2011.
- b) That the Plaintiff among others, challenges the 3rd Defendant's title to the suit land which he claims was ancestral land while the 3rd Defendant's defence is that their title was indefeasible.
- c) That **Section 26(1) of the Land Registration Act No.3 of 2012** obligates this court as follows;

*"The certificate of title issued by the Registrar upon registration ..... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except*

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme".**

A similar provision was contained in **Section 23 (1) of the Registration of Titles Act, Chapter 281 of Laws of Kenya, now repealed.**

c) That the challenge on the 3rd Defendant's title to the suit land by the Plaintiff will only be known whether it is successful after the hearing of the main suit and not at this interlocutory stage.

d) That flowing from (c) above, this court takes the 3rd Defendant as the absolute and indefeasible owner of the suit land and the 3rd Defendant therefore has every reason to be concerned when developments likely to change their proprietary interests on the suit land are undertaken without their blessings.

e) That the 3rd Defendant has shown that the Plaintiff and his agents have commenced construction of a permanent structure on the suit land. That the Plaintiff has more or less conceded to that fact at paragraph 25 of the replying affidavit where he deposed;

*" 25. That I know of my own knowledge that the averments that George Agengo who is my cousin to me erecting the said building is within the law and the said construction was even approved by the national construction authority and was even issued with a letter of compliance and the same was even copied to the county government of Kisumu (Attached herein and marked M0022 is the certificate of compliance and letter dated 01/09/2015"*

That the commencement of the said construction was not with the consent of the registered proprietor of the suit land and nor was this court's authority obtained.

f) That the 3rd Defendant, having established that they are the registered proprietors of the suit land, and that the construction on the suit land has been commenced while this suit challenging their title is still pending and without their concurrence, have established a good case for issuance of temporary injunction against the Plaintiff pending the hearing and determination of this case.

6. That from the foregoing, the notice of motion dated 23rd October 2015 by the 3rd Defendant against the Plaintiff has merit and is allowed in the following terms:

a) That pending the hearing and determination of this suit, temporary order of injunction is hereby issued restraining the Plaintiff by himself, his agents, servants, employees and or any other person(s) claiming under his authority from carrying out any new structural development and or continuing with any structural construction that may have commenced, on Land parcel **L.R. 16344, Grant No.83689, Survey Plan Number 228781**, pending the hearing and determination of this case.

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

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF JULY 2016**

IN PRESENCE OF;

PLAINTIFF                      Absent

3RD DEFENDANT              Absent

COUNSEL                      Mr Arikho for Mwamu for Plaintiff

Mr Mavuli for Onsongo for 3rd Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

6th July 2016

S.M. Kibunja J.

Oyugi court Assistant

Mr. Mavuli for Onsongo for 3rd Defendant/Respondent

Mr. Ariko for Mwamu for Plaintiff/Applicant

Court: Ruling Delivered in open court in presence presence of Mr Arikho for Mwamu for Plaintiff and Mr. Mavuli for Onsongo for 3rd Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**6/7/2016**