



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
LAND CASE NO.41 OF 2014

FREDRICK OUMA OWINO.....APPLICANT

VERSUS

ABISALOM ANYANY.....1ST RESPONDENT

RICHARD GUYA MEMBO.....2ND RESPONDENT

DAVID ODHIAMBO.....3RD RESPONDENT

DAVID ONYANGO ARAO.....4TH RESPONDENT

RULING

1. **Fredrick Ouma Owino**, the Applicant in the notice of motion dated 27th February 2014, seeks for temporary injunction orders restraining **County Government of Kisumu, Absalom Ayany, Richard Guya Membo, David Odhiambo and David Onyango Arao**, herein after referred to as 1st to 5th Respondents respectively, from dealing or interfering with land parcel **Kisumu/Kanyakwar/18108**, the suit land, pending the hearing and determination of the suit. The Notice of motion is based on the twelve grounds on its face and supported by the affidavit of **Fredrick Ouma Otieno** sworn on the 27th February 2014. The applicant depones that he was allocated the suit land by 1st Respondent vide letter of allotment dated 28th September 2007. That in 2011 the 2nd Respondent, who was an employee of the 1st Respondent, served him with demand notice for rates that were exaggerated which he later undertook to correct. Thereafter the 2nd to 5th Respondent occupied the suit land and put up buildings from which they currently draw rent. That the 1st Respondent has approved further building plans for the 2nd to 5th Respondent on the suit land. That he filed this suit on learning that the 2nd Respondent has left the employment of the 1st Respondent.

2. The 2nd to 5th Respondents have opposed the notice of motion through the grounds of opposition dated 17th March 2014 and replying affidavit of Absalom Ayany sworn on 7th April 2014. The said Absalom depones that the suit land belongs to **Millicent Atieno Omollo and Beatrice Akinyi Omollo** and annexed a copy of their title document issued on 21st September 2010. That the Applicant has not exhibited any title to the suit land. That the Respondents also filed a notice to raise preliminary objection dated 17th March 2014 raising three grounds.

3. The counsel from the Applicant filed their submissions dated 28th June 2016 while the counsel for the

2nd to 5th Respondents had filed theirs dated 10th May 2016.

4. The issues for determination are as follows;

- a) Whether the notice of motion is based on an existing suit or is incompetent and what order to issue.
- b) Whether the applicant has established a case for issuance of temporary injunction at the interlocutory stage.
- c) Who pays the costs for the notice of motion and preliminary objection.

5. The court has carefully considered the grounds on the notice of motion, the grounds of opposition, grounds on the notice of preliminary objection, the affidavit evidence by both sides, the written rival submissions and come to the following determination;

- a. That the submissions filed by both counsel addresses the notice to raise preliminary objection dated 17th March, 2014 by the counsel for the 2nd to 5th Respondents. That the directions on filing written submission on the preliminary objection were given on 18th March 2014 and timelines given. That the time was extended last on 25th June 2014 and there has not been any other directions given since then.
- b. That when this matter came for mention on 25th February 2016, which is almost two years later, the counsel holding brief for the Applicant's counsel sought for a hearing date of the notice of motion dated 27th February 2014. That a hearing date of 11th May 2016 was fixed. That on that date counsel for the 2nd to 5th Respondents indicated that they had filed their submission which however had not been placed on the court file. That another mention date was fixed on 29th June 2016 when both counsel were represented and today ruling date was fixed.
- c. That even though no submission have been filed on the notice of motion dated 27th February 2014, this ruling will be for both that notice of motion and the notice to raise the preliminary objection dated 17th March 2014.
- d. That the notice of motion dated 27th February 2014 was filed contemporaneously with the plaint of even date which was later amended on 4th March 2014 before the pleadings had closed. That the notice of motion is therefore based on an existing suit contrary to the Respondents contention and the preliminary objection fails on that score.
- e. That the Plaintiff has laid the basis of his claim of entitlement to the suit land. That the persons the Respondents have put forward as the registered proprietors of the suit land are not parties to this suit, and it is the finding of the court that the matter be allowed to proceed to be processed with a viewing of maturing to hearing and be decided on merit, **subject to either of the parties moving the court to enjoin the persons currently registered as proprietors of the suit land.**

6. That in view of the foregoing, the court orders as follows;

- a. That the preliminary objection raised by counsel for 2nd to 5th Respondents vide notice dated 17th March 2014 has no merit and is rejected with costs.
- b. That the Applicant's notice of motion dated 27th February 2014 has no merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 5TH DAY OF OCTOBER 2016

In presence of;

Applicant Absent

Respondent Absent

Counsel Mr Onsongo for 2nd to 4th Defendants/Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/10/2016

5/10/2016

S.M. Kibunja J.

Oyugi court Assistant

Parties absent

Mr Onsongo for 2nd to 4th Defendants

Court: Ruling dated and delivered in open court in presence of Mr Onsongo for 2nd to 4th Defendants/Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/10/2016