



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.260 OF 2014**

**JEREMIAH OGOLA RAJWAYI .....PLAINTIFF**

**VERSUS**

**ECUBETH FLORENCE ODERA ONGUDU .....DEFENDANT**

**RULING**

1. **Eucabeth F.O. Odera**, the Defendant, filed the notice of motion dated 27<sup>th</sup> January 2016 seeking to have **Jeremiah O. Rajwayi**, the Plaintiff, restrained from trespassing, encroaching, destroying, breaking, demolishing, handling or in any way interfering with the perimeter wall surrounding land parcels **Kisumu/Konya/5475, 5476 and 5499** pending the hearing and determination of this suit. The Defendant also seeks for the report of the site visit of 16<sup>th</sup> March 2015 be made known to the parties and costs. The application is based on the ten (10) grounds marked (a) to (j) on the notice of motion and supported by the affidavits sworn by the Defendant on the 27<sup>th</sup> January 2016 and 14<sup>th</sup> March 2016.
2. The application is opposed by **Jeremiah O. Rajwayi**, the Plaintiff, through his replying affidavit sworn on the 1<sup>st</sup> march, 2016.
3. The notice of motion came up for hearing on the 19<sup>th</sup> april 2016 when M/S Kymazima and Mr. Emukule, learned counsel for the Defendant and Plaintiff respectively, agreed to file written submissions. The Defendant's counsel filed their submissions dated 9<sup>th</sup> May 2016 on the 10<sup>th</sup> May 2016, while the Plaintiff's counsel filed theirs dated 23<sup>rd</sup> May 2016 on the 24<sup>th</sup> May 2016. The Plaintiff's counsel filed another written submissions dated 7<sup>th</sup> June 2016 on the same date responding to that filed by the Defendant's counsel.
4. The issues for determination by the court are as follows:
  - a) Whether the Defendant has established a prima facie case with a probability of success for issuance of temporary injunction at the interlocutory stage.
  - b) Whether the surveyor report prepared pursuant to the consent order of 23<sup>rd</sup> February 2015 should be released to the parties.
  - c) Who pays the costs of the application.
5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence provided by both parties, written submissions by counsel, the pleadings filed and come to the following conclusions;

a) That this suit was commenced by the Plaintiff against the Defendant vide the plaint dated 3<sup>rd</sup> September 2014. That the Plaintiff averred that he is the registered proprietor of land parcel **Kisumu/Konya/5499** and annexed a copy of the title deed for the said land issued on 22<sup>nd</sup> April 2009 in his name. That the Plaintiff avers that the Defendant encroached onto the said land in July 2014 and pray for mandatory and permanent injunction, general damages and costs.

b) That filed contemporaneously with the plaint was the notice of motion under certificate of urgency seeking for restraining orders against the Defendant. That the interim orders in terms of prayers 1 and 2 were issued on 23<sup>rd</sup> September 2014, extended on 7<sup>th</sup> October 2014, 18<sup>th</sup> November 2014, 9<sup>th</sup> December 2014, 23<sup>rd</sup> February 2015, 24<sup>th</sup> March 2014 and 15<sup>th</sup> June 2015.

c) That the Defendant filed her replying affidavit sworn on the 10<sup>th</sup> November 2014, but has not to date filed a statement of defence to the Plaintiff's claim. That the Defendant deponed in her replying affidavit that she own land parcel **Kisumu/Konya/5476** jointly with her late husband and that the plot is adjacent to that of the Plaintiff. That the Defendant further deponed that she owns parcel **Kisumu/Konya/5475** which she bought from one **Grace Akinyi Odhiambo** and annexed a copy of the title deed for that parcel issued on 6<sup>th</sup> August 2007 in the name of **Grace Akinyi Odhiambo**.

d) That following the consent order of 23<sup>rd</sup> February 2015 for the County Surveyor to establish the boundaries of land parcels **Kisumu/Konya/5499, 5475 and 5476**, a report dated 23<sup>rd</sup> March 2015 signed by one **Vincent Oluoch** for County Surveyor Kisumu, was filed with the court on 1<sup>st</sup> April 2015.

That the surveyor found that Plaintiff's plot **Kisumu/Konya/5499** was 0.34 hectares on the ground while its registered acreage was 0.71 hectares. That the surveyor also found that the two plots claimed by the Defendant, being **Kisumu/Konya/5475 and 5476**, were 0.46 hectares on the ground while the total registered area was 0.70 hectares. That the report further shows that the ground area in contest was 0.40 hectares and the surveyor recommendation is that it be shared equally between plots **5499** on one part and plots **5475 and 5476** (combined) on the other part.

e) That it is not clear why the parties in this suit have not moved the court to get copies of the said surveyor's report for their information and consideration. That the court orders that the Deputy Registrar do avail a copy of the surveyor's report to the counsel for the parties to enable the parties give instructions to their advocates as to whether the recommendations were acceptable and or the way forward.

f) That the Defendant having not filed a statement of defence, and more importantly, not having a subsisting claim against the Plaintiff that is awaiting trial in this suit, has no basis of seeking for temporary injunction against the Plaintiff as she would be incapable of complying with any of the principles set out in **Giella –V- Cassman Brown & Co. Ltd [1973]E.A 358**.

6. That in view of the foregoing the court finds that the defendant has only partially succeeded in the notice of motion dated 27<sup>th</sup> January 2016 and orders as follows:

a) That prayer 5 is granted and the Deputy Registrar is hereby directed to immediately forward to the parties' counsel a copy of the surveyor's report dated 23<sup>rd</sup> march 2015 and filed in court on the 1<sup>st</sup> April 2015.

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 16<sup>th</sup> DAY OF NOVEMBER 2016

In presence of;

Plaintiff            Absent

Defendant         Absent

Counsel            Mr Kuifei Otieno for Plaintiff

                          Mr Onyango for Madialo for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**16/11/2016**

16/11/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr Onyango for Madialo for Defendant.

Mr Kuifei Otieno for Plaintiff

Court: Ruling dated and delivered in open court in presence of Mr. Kuifei Otieno for Plaintiff and Mr. Onyango for Madialo for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**16/11/2016**