



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 44 OF 2015.

FRANCIS TOBIAS AKELLO.....PLAINTIFF/APPLICANT

(Suing as administrator of MATAYI AKELO OLOO)

VERSUS

GABRIEL ONYANCHI SUNDIA.....DEFENDANT/RESPONDENT

R U L I N G

1. **FRANCIS TOBIAS AKELLO** hereinafter referred to as the Applicant, suing as the administrator of the estate of **MATAYI AKELO OLOO**, filed the Notice of Motion dated 8th May, 2015 seeking for temporary injunction against Gabriel Onyanchi Sundia, hereinafter referred to as Respondent, over parcel Samia/Luanda-Mudoma/3752. The application is supported by the affidavit headed '*Affidavit Statement of the Plaintiff.*' sworn by the Applicant on 8th May, 2015.
2. The Respondent opposed the application and filed the grounds of opposition dated 22nd May, 2015.
3. The application came up for hearing on 28th May, 2015 and Mr. Juma and Mr. Jumba Advocates, for the Applicant and Respondent respectively, presented their rival submissions.
4. The court has considered the contents of the Applicant's affidavit, Respondent's grounds of opposition and rival submissions by counsel and find as follows;
 - a. That the notice of motion was filed simultaneously with the plaint dated 8th May, 2015.
 - b. That the copy of the title for parcel Samia/Luanda Mudoma/3752 annexed to the Applicant's affidavit shows that the suit land was a combination of plot numbers 1369, 2203, 2204, 2205 and 2290 and was registered in the Applicant's name on 5th December, 2014 and title deed issued on 13th April, 2015.
 - c. That the Applicant had filed Busia Succession Cause No. 120 of 2014 and was appointed the administrator of the estate of Matayi Akelo Oloo on 15th July, 2014.
 - d. That the Applicant's contention that the suit land comprises the estate of Matayi Akelo Oloo cannot be confirmed without the court being presented with the requisite documents like copy of the register of the parcels combined to make the suit land and the certificate of confirmation of grant.
 - e. That the fact the affidavit supporting the notice of motion is headed '*Affidavit statement of the Plaintiff*' does not suffice to make the court conclude that the application is without a supporting affidavit. It would have been however desirable that the affidavit was properly headed

as it was drawn and filed through a counsel and not a party. The misleading heading of the affidavit is a technicality and this court is required under Article 159 (2) (d) of the constitution to administer justice without undue regard to procedural technicalities.

f. That further to the finding in (a) above, the Applicant's claim that the suit land is party of the estate of the late Matayi Akelo Oloo has not been disputed. The court will take it that the Applicant got registered with the suit land on transmission. That between the Respondent and the Applicant, the court finds the Applicant has a better right to the suit land and it is only fair the Respondent's use of the land be restricted to the use and developments already undertaken by the time this suit was filed. That for the foregoing reasons, the court finds that the Applicant has satisfied the grounds set out in *Giella versus Cassman Brown* case by establishing a prima facie case. It is also more convenient to restrict the Respondent's use of the land to that already existing pending the hearing and determination of this suit.

5. That having found as above, the court allows the application dated 8th May, 2015 in the following terms;

- a. That temporary injunction is hereby issued restraining the Defendant, his agents and servants and all those claiming from him from any further developments on land parcel Samia/Luanda/3752 until this suit is heard and determined.
- b. The costs of this application will be in the cause.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON30THDAY OF.....JUNE,,2015.

IN THE PRESENCE OF;

PLAINTIFF/APPLICANT.....ABSENT

DEFENDANT/RESPONDENT.....ABSENT

COUNSEL. MR. JUMA AND MR. JUMBA FOR APPLICANT AND RESPONDENT RESPECTIVELY.

JUDGE