

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 7 OF 2015.

LEONARD OCHIENG OTIENO..... PLAINTIFF/APPLICANT

=VERSUS=

SAMUEL OTIENO OSEMBO..... DEFENDANT/RESPONDENT

R U L I N G.

1. **LEONARD OCHIENG OTIENO**, the Applicant, filed the Notice of motion under certificate of urgency dated 27th January, 2015 against Samuel Otieno Osembo, the Respondent, seeking for injunctive orders restraining the Respondent from collecting any rental payments from tenants on the suit property, Bukhayo/Mundika/5042. The Applicant has set out five grounds, marked (a) to (e) on the application. The application is supported by the Applicant's two affidavits sworn on 27th January, 2015 and 22nd April, 2015. The applicant has among other deponed that he got registered as the proprietor of the suit property on 6th October, 2014 and was issued with the title deed on 8th October, 2014, after emerging as the highest bidder during the public auction of the suit land on 6th August, 2014. That on the suit land are rental properties whose rent the Respondent, who was the previous registered owner of the suit land, continues to collect despite the Applicant asking him to stop.
2. The application is opposed by the Respondent through the grounds of opposition dated 11th February, 2015 setting out four grounds. The Respondent indicated in ground 3 that he is owner of Bukhayo/Mundika/5042, which neighbours the suit property and that the issue herein is a boundary dispute which should be referred to the County Surveyor.
3. The application came up for inter partes hearing on 17th June, 2015, and M/S. Chunge and Mr. Ashioya advocates for the Applicant and Respondent respectively, tendered their rival submissions. The court has considered the grounds on the application, grounds of opposition by the Respondent, submissions by counsel, the supporting and further supporting affidavit by the Applicant and find as follows;
 - a. That indeed the Applicant is the registered proprietor of the suit land Bukhayo/Mundika/5042 as confirmed by the copy of the title deed and certificate of official search annexed to the supporting affidavit sworn on the 27th January, 2015 and filed with this application. The provision of **section 26 of the Land Registration Act, 2012** requires this court to take the person named on the certificate issued by the Registrar, as proprietor of the land, to be the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. The title of the registered proprietor, like the Applicant herein, can only be challenged on the ground of fraud or misrepresentation to which the registered proprietor is a party to or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. There has been no challenge so far on the title of the Applicant in this matter.
 - b. That contrary to the Respondent's claim in ground 3 of his grounds of opposition dated 11th February, 2015 that land parcel Bukhayo/Mundika/5042 was his, the Applicant has annexed a copy of the title deed and certificate of official search that shows the land was registered in his names, Leonard Ochieng Otieno, on the 6th October, 2014. That should the Respondent had meant to refer to Land parcel Bukhayo/ Mundika/5041 instead of parcel 5042, the copy of certificate of official search annexed to the Applicants further supporting affidavit sworn on 22nd April, 2015 shows that the land was registered in the names of **JOSEPH TEMBA**

MUKWANA on 19th August, 1992. The Respondent has not sworn an affidavit to explain how land parcel Bukhayo/Mundika/5041 was his or to dispute the Applicant documentary evidence that it is registered in the names of another person other than the Respondent.

- c. That the court further finds that the Applicant, as the registered proprietor of the suit land, is entitled to the rights of a proprietor in accordance with **Section 25 of the Land Registration Act, 2012**. That as the owner of the suit land, the Applicant also owns all that which is appurtenant on it, including the developments thereon. The Applicant is therefore entitled to the rent arising from those occupying the developments on the suit land as to hold otherwise would lead him to suffer to irreparable loss. The Applicant has therefore established a prima facie case and his application has merit.

4. That the application dated 27th January, 2015 is therefore allowed in terms of prayers 4 and 5 with costs.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON.....8TH ...DAY OFJULY,.....2015.

IN THE PRESENCE OF;

PLAINTIFF/RESPONDENT.....ABSENT.....

DEFENDANT/APPLICANT.....ABSENT.....

COUNSEL.....MR. ONSONGO FOR ASHIOYA FOR PLAINTIFF/RESPONDENT.