



**Sewe v Ogutu (Environment & Land Case E022 of 2022)
[2023] KEELC 16809 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E022 OF 2022**

AY KOROSS, J

APRIL 13, 2023

BETWEEN

ERICK OCHIENG SEWE PLAINTIFF

AND

MICHAEL OWINO OGUTU DEFENDANT

RULING

1. Pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Orders 40 and 51 Rule 1 of the *Civil Procedure Rules* and allegedly Sections 152E and 152F of the *Land Laws (Amended) Act 2016*, the plaintiff filed a notice of motion dated January 12, 2023 against the defendant and sought the following reliefs:
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That pending the hearing and determination of the originating summons, the defendant be restrained, either by himself, his agents, family members, relatives or any other person acting under his instructions from evicting and threatening to evict whatsoever or denying the plaintiff and his family members access to land parcel North Ugenya/Sega/350, trespassing, entering or otherwise interfering with the plaintiff's quiet occupation and possession of the same;
 - v. That pending the hearing and determination of the originating summons, the defendant be restrained whether by himself, his agents, family members, relatives and any other person acting under his instructions howsoever from transferring, alienating, disposing, selling,



encumbering, assigning or in any other like manner dealing with the property known as North Ugenya/Sega/350;

- vi. That the Commanding Officer Siaya Police Station do supervise compliance with this honourable court's order; and
 - vii. That the costs of this application be provided for in the cause.
2. The application is premised on the grounds enumerated on the face of the motion and on the annexed affidavit of the plaintiff deposited on January 12, 2023.
 3. The plaintiff contended that upon service of the pleadings, the defendant had resorted to cutting down trees and vegetation and had since threatened to exhume bodies buried on North Ugenya/Sega/350 (hereinafter referred to as 'the suit property') with a view of evicting the plaintiff and his family.
 4. The plaintiff posited he would suffer substantial loss and damage if orders sought were not granted and the suit rendered nugatory. His family had been living on the suit property continuously, peacefully and uninterrupted since 1982; his parents having built on it in 1960s. His parents and siblings had been buried on it.
 5. Despite service, the defendant did not participate in these proceedings. The motion was hence unopposed. However, being guided by statutes and established legal principles, this court is called upon to determine the motion on its own merits.

Parties submissions

6. Mr Obiero, counsel for the plaintiff, filed written submissions dated January 20, 2023 and submitted that the plaintiff had met the legal principles of temporary injunction as settled in the well cited case of *Giella v Cassman Brown & another* [1973] EA 358.
7. Counsel submitted the plaintiff had a prima facie case and if an injunction was not granted, the plaintiff and his family would suffer prejudice which could not be cured by an award of damages. Further, the defendant would not be prejudiced.

Analysis and determination

8. Having carefully considered the plaintiff's motion, grounds thereunder, supporting affidavit and written submissions, this court is of the view that the single issue falling for determination is whether the motion was merited. However, before I proceed, I noticed the plaintiff cited a strange statute known as [Land Laws \(Amended\) Act 2016](#).
9. The legal framework for interlocutory injunctions is governed by Section 63 (c) and (e) of the [Civil Procedure Act](#) and Order 40 Rule 1 of the [Civil Procedure Rules](#). The purpose of interlocutory injunctions is to preserve the subject matter of a suit.
10. The case of [Mrao Limited v First American Bank of Kenya Limited & 2 others](#) Civil Appeal Number 39 of 2002 reminds this court that its authority in an application for interlocutory injunction is discretionary and such discretion must be exercised judiciously. And as is the position, judicial discretion has to be exercised on the basis of law and evidence.
11. For one to succeed, one has to meet not one but all the principles of temporary injunctions in a sequential manner. The principles are separate and distinct and inter alia they are, establishing a prima facie case with a probability of success, proof one would suffer irreparable injury which could not be



adequately compensated by an award of damages and if in doubt, the court will decide the matter on a balance of convenience. See *Giella v Cassman Brown* (Supra).

12. On the 1st principle the plaintiff had to demonstrate that he had established a prima facie case with probability of success. From the documents adduced before this court, the defendant is the registered proprietor of the suit property. The plaintiff's claim is founded on adverse possession. He tendered photographs before this court which showed structures and crops. Whether the structures and crops are on the suit will have to await the outcome of the main suit.
13. The plaintiff averred that he and his family had been in occupation and possession of the suit property for a period of over 12 years. In my considered view, the alleged occupation for over a period of 12 years demonstrated the plaintiff had an interest over the suit property. On this condition, I find that the plaintiff had established a *prima facie* case with probability of success.
14. On the 2nd principle, the plaintiff had to demonstrate he would suffer irreparable harm that could otherwise not be compensated by an award of damages. The plaintiff alleged occupancy of the suit property for over 12 years, peacefully and without interruption. This was not rebutted by the defendant.
15. Taking into consideration the claim is grounded on adverse possession, there is grave danger that the defendant may interfere with the plaintiff's alleged interests over the suit property and the plaintiff holds a sentimental value over the suit property because his family are allegedly buried on it. I am satisfied and find that in the event the plaintiff succeeds in his claim, he may suffer irreparable harm that cannot be compensated by an award of damages in the event the defendant is allowed to interfere with the suit property.
16. On the 3rd condition, the plaintiff is allegedly in occupation of the suit property. The plaintiff tendered photographs to this court which allegedly depict his occupancy and possession of the suit property. It is my finding that the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendant if an injunction was not granted but the plaintiff ultimately succeeds. Ombwayo J in *Pius Kipchirchir Kogo v Franklin Kimeli Tenai* [2018] eKLR expressed himself thus;

‘Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them is greater than that which may be caused to the Defendants. If the inconvenience is equal, it is the Plaintiff who suffers.’
17. The plaintiff has met the threshold for the grant of the equitable remedy of temporary injunction which is pertinent in maintaining the status quo pending determination of the issues raised in the originating summons. Having established he had met the threshold of temporary injunction, it therefore follows that the plaintiff is deserving of the relief of inhibition which is anchored in Section 68(1) of the *Land Registration Act*.
18. Ultimately, it is my eventual finding the motion is merited. Costs shall abide the outcome of the main suit. I hereby issue the following disposal orders;
 - a) There be an order of temporary injunction which shall remain in force for a period of one year only restraining the defendant either by himself, his agents, employees, relatives and/or any other person deriving authority from him from, entering, constructing on, alienating, cultivating, or in any manner interfering with the plaintiff's quiet possession, ownership and occupation of land parcel no North Ugenya/Sega 350.
 - b) An order of inhibition be and is hereby issued, restricting the registration of any disposition in the register of the land parcel no North Ugenya/Sega 350 until this suit is heard and determined.



- c) Costs shall abide the outcome of the main suit.
- d) The originating summons shall be personally served upon the defendant within 21 days hereof and a return of service shall be filed.
- e) Suit shall be mentioned before the Deputy Registrar for pretrial directions on 24/5/2023.
- f) Mention notice to be served.
- g) Once pretrial directions have been issued, this suit shall be heard together with ELC Case No. E023 of 2022 (O.S.) between Charles Otieno Owino and Geofry Murabula Ogonda & Another.

DELIVERED AND DATED AT SIAYA THIS 13TH DAY OF APRIL 2023.

HON. A. Y. KOROSS

JUDGE

13/04/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

M/s Omondi h/b for Mr. Obiero for the plaintiff

N/A for the defendant

Court assistant: Ishmael Orwa

