



**Njenga v Chumba & another (Environment & Land Case
E037 of 2022) [2023] KEELC 17581 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E037 OF 2022**

DO OHUNGO, J

MAY 29, 2023

BETWEEN

ANNA KABOI NJENGA PLAINTIFF

AND

STEPHEN KIMTAI CHUMBA 1ST DEFENDANT

THE LAND REGISTRAR, KAKAMEGA COUNTY 2ND DEFENDANT

RULING

1. This ruling is in respect of two applications: the plaintiff's Notice of Motion dated 2nd August 2022 and the first defendant's Notice of Motion dated 5th October 2022.
2. By Notice of Motion dated 2nd August 2022 the applicant seek the following orders:
 1. [Spent]
 2. That this honourable court be pleased to issue a temporary injunction restraining the 1st defendant/respondent either by himself, his agents, servants, or personal representatives from entering, encroaching, trespassing, sub-dividing, using, acquiring or in any manner interfering with part or whole parcels of land known as Kakamega/Soy/2109 and Kakamega/Soy/2110 pending the hearing and determination of this application inter partes.
 3. That this honourable court be pleased to issue an order authorizing the officer commanding Likuyani Police Station to enforce the orders restraining the 1st defendant/respondent either by himself, his agents, servants or personal representatives from entering, encroaching, trespassing, sub-dividing, using, acquiring or in any other manner interfering with part or whole parcels of land known as Kakamega/Soy/2109 and Kakamega/Soy/2110.
 4. That this honourable court be pleased to issue stay orders of any nature restraining the 2nd defendant/respondent either by himself or his agents, servants from making any further



adverse entries in the records in the land registry that may interfere with part or whole parcels of land known as Kakamega/Soy/2109 and Kakamega/Soy/2110 pending the hearing and determination of the suit herein.

5. That the 1st defendant herein be cited for contempt of court and the court to order for his arrest for disobeying court orders in the judgment dated 20th November 2018 issued in Kakamega ELC Case No. 308 of 2015 *Stephen Kimtai Chumba v Daniel Barbara Barngetuny & Kiptesoi Clement Arap Too*.
 6. That the costs of this application be awarded to the plaintiff/ applicant.
3. When Notice of Motion dated 2nd August 2022 came up for inter parte hearing on 27th September 2022, I ordered parties to file submissions in respect of the application then scheduled the matter for mention on 21st November 2022 to fix date of ruling. I also granted interim orders in the following terms:

Pending the mention date, the first defendant is hereby restrained from subdividing, or in any manner disposing of the parcels of land listed at prayer number 2 of Notice of Motion dated 2nd August 2022.

4. It seems that the plaintiff extracted an incorrect order in respect of my orders of 27th September 2022, thereby triggering the first defendant to file Notice of Motion dated 5th October 2022, in which he sought stay and setting aside of the erroneous order. On 6th October 2022, I granted an order staying the erroneous order. With the resolution through this ruling, of the substantive Notice of Motion dated 2nd August 2022, the first defendant's Notice of Motion dated 5th October 2022 is overtaken by events and I therefore do not need to determine it.
5. Notice of Motion dated 2nd August 2022 (hereinafter 'the application') is supported by an affidavit sworn by the applicant who deposed that she is the registered proprietor of all those parcels of land known as Kakamega/Soy/2109 and Kakamega/Soy/2110 (suit properties) having purchased them from one Eunice Cherotich Chongin (deceased), Barbara Danisi Ng'etuny and Kiptesoi Clement Arap Too and has been in peaceful possession of the suit properties for more than thirty years. She further deposed that the said deceased and Barbara Danisi Ng'etuny filed a suit vide Civil Case No. 72 of 1998 over parcel of land number Kakamega/Soy/219 but the said suit was settled out of court and the said property was subdivided to form the suit properties herein and the title deeds issued to the applicant sometime in 2014.
6. The applicant further deposed that sometime in December 2015, the first respondent instituted a suit against the aforesaid Barbara and Kiptesoi vide Kakamega ELC Case No. 308 of 2015 and the court decided that the applicant was the registered proprietor of the suit properties having legitimately purchased them. That despite the said determination, the first respondent trespassed, subdivided, and even attempted to sell the suit property to third parties. That the first respondent misrepresented facts and used illegally obtained orders dated 10th January 2022 vide Kakamega High Court Succession Cause No. 222 of 1992 and Cause No. 243 of 2006 to cause the second defendant to cancel title entries over the suit properties prompting the applicant to report to Likuyani Police Station under OB No. 08 of 1st August 2022 which matter the police failed to adequately determine due to lack of a firm court order authorising them to do so. She added that owing to the aforesaid trespass, subdivision, and purported sale of the suit properties, she has suffered economic loss, distress, and loss of his quiet and peaceful enjoyment of the properties.



7. The first defendant/respondent opposed the application through a replying affidavit which he swore on 15th February 2023. He deposed that the alleged registration of the suit properties in the applicant's name were legally cancelled since the applicant had illegally obtained the title deed to the suit properties by intermeddling in the estate of the first respondent's late father one William Chonging Chumba. That the applicant was not a party to the order and judgment in Kakamega ELC Case No. 308 of 2015 and as such has not satisfied the threshold for citing a party for contempt of court. That the said Eunice Cherotich, Daniel Barabara and Kiptesoi Arap Too were not owners of the suit property thus were incapable of transferring the same to the applicant and that contrary to the applicant's allegations, she has not been in the suit property for the alleged thirty years nor at all.
8. In response to paragraph 5 of the applicant's supporting affidavit, the respondent stated that the applicant and the said Daniel Barabara were not parties in Kakamega Civil Case No Kakamega HCC. 72 of 1998 and that the alleged court settlement was made with strangers to the suit which decision was never determined by a court awarding the suit properties to the applicant and as such cannot be enforced. In conclusion, the first respondent deposed that the applicant has never occupied the suit properties and that the applicant fraudulently and or illegally acquired the suit properties and as such has no good title to them thus the orders sought by the applicant are untenable.
9. Counsel for the second defendant told the court that the second defendant would remain neutral in the application and would neither file a response nor submissions.
10. I have considered the application, the affidavits, and submissions on record. From the onset, the order sought at prayer 5 of the application concerns alleged contempt of an order said to have been made on 20th November 2018 in ELC Case No. 308 of 2015. This court cannot deal with allegations of contempt arising in another case other than the case before the court. If the applicant is persuaded that she can make a case for citing any person for contempt in respect of the order made on 20th November 2018 in ELC Case No. 308 of 2015, such an application ought to have been made in ELC Case No. 308 of 2015. I find no merit in prayer 5 of the application.
11. The applicant seeks an interlocutory injunction through prayer 4 of the application. The principles that apply to such an application are that the applicant must establish a prima facie case with a probability of success. Even if she succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. See *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR.
12. The applicant's case is that the second defendant cancelled her titles in respect of the suit properties. She is in essence conceding that she is not the registered proprietor of the suit properties. She further contends that she lost registration of the suit properties through "illegally obtained orders dated 10th January 2022 through High Court Succession Cause No. 222 of 1992." Indeed, the first defendant has availed a certified copy of the register which demonstrates that the entries pursuant to which the applicant became the registered proprietor were cancelled and reversed by the Land Registrar on 11th January 2022 and the first defendant registered as proprietor on 11th January 2022 pursuant to an order made in Succession Cause No. 222 of 1992. If there is any issue to raise about validity of the order made by the succession court, such an issue should be raised before the succession court.



13. In view of the foregoing, I am not persuaded that the applicant has any prima facie case with a probability of success. That being so, irreparable injury and balance of convenience need no consideration.

14. Notice of Motion dated 2nd August 2022 is without merit. I dismiss it with costs to the first defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Minishi for the plaintiff

Mr Shivega for the first defendant

No appearance for the second defendant

Court Assistant: E. Juma

