



**Tombo v Chunga & 4 others (Environment & Land Case
E006 of 2023) [2023] KEELC 18364 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18364 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E006 OF 2023**

**AY KOROSS, J
JUNE 20, 2023**

BETWEEN

MESHACK OUMA TOMBO PLAINTIFF

AND

PHILLIP BONYO CHUNGA 1ST DEFENDANT

WILLIAM ODHOCH CHUNGA 2ND DEFENDANT

GEORGE ODHIAMBO CHUNGA 3RD DEFENDANT

CAREN AWINO OTIENO 4TH DEFENDANT

PHILIP MANGO CHUNGA 5TH DEFENDANT

RULING

1. Within the provisions of Article 40 of the [Constitution](#), Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Order 40 Rules 1, 2, 3 and 4 and Order 51 of the [Civil Procedure Rules](#), the plaintiff filed a notice of motion dated March 2, 2023 in which he sought several reliefs: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of the originating summons dated February 14, 2023, a temporary injunction do issue restraining the defendants herein by themselves, through their agents, heirs or any person whatsoever acting under them, from in any manner interfering with the portion of North Sakwa/Maranda/40 which the plaintiff and his family are occupying.



- e. That costs of the application be provided for.
2. The motion was supported by the grounds set therein and on the supporting affidavit of the plaintiff Meshack Ouma Tombo deposed on March 2, 2023.
 3. In brief, he allegedly bought a portion of North Sakwa/Maranda/40 ('suit property') measuring 10 acres ('defined portion') from the defendants' father in 1982 and had occupied and developed it since then. The defendants who are the current registered owners had started excising the suit property and disposing off portions to 3rd parties.
 4. The motion was not opposed and neither did the defendants file their written submissions.
 5. The plaintiff's counsel, M/s Odoyo, filed her written submissions dated April 17, 2023. Counsel submitted the settled principles for temporary injunction were inter alia; the applicant must establish a prima facie case with probability of success, irreparable loss which could not be compensated by an award of damages and balance of probability. Counsel submitted the plaintiff had met all these ingredients.
 6. On the 1st principle of prima facie case, counsel submitted the plaintiff had been in possession of the defined portion for close to 40 years after purchasing it for valuable consideration and had even established a home on it. The plaintiff's occupation had been peaceful and without interruption and the only hindrance to a transfer was that the defendants' father had died. Counsel submitted the plaintiff's case had high chances of success.
 7. On the 2nd and 3rd principles of irreparable harm and balance of convenience, counsel submitted the plaintiff would suffer irreparable loss that could not be compensated by an award of damages as he held a sentimental value to it and would lose his home. Further, the balance of convenience tilted in the plaintiff's favour.
 8. Having carefully considered the motion, affidavit and submissions, the only issue falling for determination is whether the plaintiff's motion has merit.
 9. A temporary injunction is anchored on Section 63 (c) and (e) of the *Civil Procedure Act* and Order 40 Rule 1 of the *Civil Procedure Rules*. Temporary injunctions prevent the ends of justice from being defeated, prevents property from being wasted by a party, damaged, alienated or wrongly sold. In other words, it is meant to maintain the substratum of the 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. This court is also guided by the principles that were laid out in the classical case of *Giella v Cassman Brown & another* [1973] EA 358 (See also *Nguruman Limited v Jan Blonde Nielsen & 2 others* [2014] eKLR) which settled the principles as follows;

'Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.'
 12. Having addressed the law. I will now turn to the facts of this case.



13. On the 1st principle, the plaintiff had to demonstrate that he had established a prima facie case with probability of success. In other words, it is the condition which, on analysis of the facts presented by a party before the court, the court is persuaded the opposite party has committed acts which he had not satisfactorily convinced the court as to why he acted in a certain manner failure to which, the court will arrive at a finding that the adverse party intends to or has infringed on the rights of such an applicant. In this case the plaintiff.
14. From the documents adduced before this court more so the suit property's title document and greencard, the defendants are allegedly the registered owners of the suit property. The plaintiff has also tendered an alleged agreement for sale dated 00/06/1982 between himself and the defendants' father and a bundle of photographs which allegedly depict structures and a grave on the suit property.
15. The plaintiff's claim is founded on adverse possession and the plaintiff has allegedly been in occupation and possession of the suit property for a period of over 12 years. On this condition, I find that the plaintiff has established a prima facie case with probability of success.
16. 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 has alleged occupancy of the suit property for over 12 years, peacefully and without interruption.
17. Taking into consideration the claim is grounded on adverse possession, the plaintiff has allegedly buried his kin therein and there is grave danger that the defendants may interfere with the plaintiff's alleged interests over the suit property by disposing it off, 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 defendants are allowed to interfere with the suit property.
18. On the 3rd condition, the plaintiff is allegedly in occupation of the suit property. The plaintiff tendered photographs to this court which allegedly depicted 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 defendants 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.'
19. I find the plaintiff has met the threshold for the grant of the equitable remedy of injunction which is pertinent in maintaining the status quo pending the determination of the issues raised in the originating summons.
20. Ultimately, it is my eventual finding the motion is merited. I allow the motion. 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 only one year restraining the defendants either by themselves, their agents, employees, relatives and/ or any other person deriving authority from them from, entering, constructing on, alienating, cultivating, or in any manner interfering with the plaintiff's quiet possession, ownership and occupation of the defined portion in land parcel no. North Sakwa/Maranda/40.
 - b. The originating summons shall be personally served upon the defendants within 21 days hereof and a return of service shall be filed.
 - c. Costs shall abide the outcome of the main suit.



d. Suit shall be mentioned before the Deputy Registrar for pretrial directions on 9/08/2023.

DELIVERED AND DATED AT SIAYA THIS 20TH OF JUNE 2023.

HON. A. Y. KOROSS

JUDGE

20/6/2023

Ruling delivered in the Presence of:

N/A for the plaintiff

N/A for the defendants

