



**Onsongo v Onsongo & 2 others (Environment & Land Case  
E006 of 2023) [2023] KEELC 17991 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17991 (KLR)

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

**JM KAMAU, J**

**JUNE 15, 2023**

**BETWEEN**

**ROBERT NYAMWEYA ONSONGO ..... PLAINTIFF**

**AND**

**HUNDSON MASARA ONSONGO ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, NYAMIRA ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed an Application by way of Notice of Motion dated 09/05/2023 seeking the following prayers: -
  - 1) That the Application herein be certified as urgent and be heard ex-parte in the first instance.
  - 2) That pending the hearing and determination of this Application inter partes this Honorable Court be pleased to restrain the 1<sup>st</sup> Defendant/Respondents by themselves, agents, servants, employees, and/or others howsoever from cutting trees, doing construction, selling and/or transferring the said parcels of land, in whole other than the daily activity of plucking the tea leaves from the tea bushes in all that parcel of land known as land No. Central Kitutu/Mwogeto/210.
  - 3) That pending hearing and determination of this Application inter-partes this Honorable Court be pleased to order Agriculture Officer/Forest Officer, Nyamira to visit Land No. Central Kitutu/Mwogeto/210 measuring approximate area of 0.30HA now the subject of determination and do the assessment, cost and value of the trees and tea bushes that have been cut and/or damaged and submit the report to this Honorable Court for full determination of the subject before this Honorable Court.



- 4) That pending hearing and determination of the main suit this Honourable Court be pleased to issue a declaration order that the 1<sup>st</sup> Defendant/Respondent being the registered owner of all that parcel of land known as Land No. Central Kitutu/Mwogeto/210 measuring approximate area of 0.30HA now the subject of determination, holds the same in trust, equitable or otherwise of the Plaintiff/applicant and 1<sup>st</sup> Defendant/Respondent's mother Bosibori Oonsongo – Deceased and her children, any and sale and/or transfer of the aforementioned parcels of land, in whole, to a third party, cutting trees, destroying tea bushes, construction is an act of dispossessing the Plaintiff/applicant and 1<sup>st</sup> Defendant/Respondent's mother Bosibori Oonsongo – Deceased and ten (10) children their equitable and constructive rights over the said parcel of land.
  - 5) That the costs of this Application be provided for.
2. The same is for restraining orders and a further order directing the Agriculture Officer/Forest Officer, Nyamira to visit Land Reference No. Central Kitutu/ Mwogeto/210 for purposes of assessment, cost and value the trees and tea bushes cut and/or damaged by the 1<sup>st</sup> Defendant and submit a Report in court (I believe) to determine the value of the Damage. He also prays for an order that the court determines that the 1<sup>st</sup> Defendant holds Central Kitutu/Mwogeto/210 in trust for the Plaintiff. The Grounds buttressing the aforesaid prayers are that the Plaintiff is one of the beneficial owners of Central Kitutu/Mwogeto/210 since the Defendant is his brother their father being Oonsongo Masara who is now dead having been the registered owner of the same until 1996 when the same was transferred to the 1<sup>st</sup> Defendant/Respondent which transfer the Plaintiff claims was fraudulent. He depones that his mother is the late Bosibori Oonsongo while the 1<sup>st</sup> Respondent is the son of the late Teresa Oonsongo. The parcel of land was to be shared between the 2 homes but in 1996 even before their late father died on 08/05/1999, the 1<sup>st</sup> Defendant/Respondent had fraudulently transferred the same in his name without involving any of the other family members. The said land was to be utilized as “embonga”. There was no consent of the Land Control Board before the transfer was effected in 1996 when the late Oonsongo Masara was 92 years old and could not have engaged in the business of the transfer of the suit land alone yet only one person, the 1<sup>st</sup> Respondent was involved. The Plaintiff fears that since the 1st Respondent has been felling down trees on the suit land and picking the tea thereon alone, there may be nothing to benefit from if these activities are allowed to proceed undeterred. On 18/05/2023, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on the same day where he deponed that the Plaintiff lacks capacity to sue since the land which belonged to his deceased father was lawfully transferred to him and that since it is based on the ground of fraud, then the same is statute barred and should therefore be struck out with costs.
  3. From the outset Prayer Numbers 3 & 4,
    - 3)That pending hearing and determination of this Application inter-partes this Honorable Court be pleased to order Agriculture Officer/Forest Officer, Nyamira to visit Land No. Central Kitutu/ Mwogeto/210 measuring approximate area of 0.30HA now the subject of determination and do the assessment, cost and value of the trees and tea bushes that have been cut and/or damaged and submit the report to this Honorable Court for full determination of the subject before this Honorable Court.
    - 4)That pending hearing and determination of the main suit this Honourable Court be pleased to issue a declaration order that the 1st Defendant/Respondent being the registered owner of all that parcel of land known as Land No. Central Kitutu/Mwogeto/210 measuring approximate area of 0.30HA now the subject of determination, holds the same in trust, equitable or otherwise of the Plaintiff/ applicant and 1st Defendant/Respondent's mother Bosibori Oonsongo – Deceased and her children, any and sale and/or transfer of the aforementioned parcels of land, in whole, to a third party, cutting



trees, destroying tea bushes, construction is an act of dispossessing the Plaintiff/applicant and 1st Defendant/Respondent's mother Bosibori Onsongo – Deceased and ten (10) children their equitable and constructive rights over the said parcel of land cannot be granted nor considered at this stage.

4. The Plaintiff has expressed his fears over the continued use and the likelihood of the transfer of the suit land LR. No. Central Kitutu/Mwogeto/210 by the 1<sup>st</sup> Defendant.

5. In *Abel Salim & Others v Okong'o & Others* [1976] KLR 42 at p 48 it was, inter alia, held: -

“In granting or refusing to grant an interlocutory injunction, a court exercises its discretion. I am of the view that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them. These are stated in *Giella v Cassman Brown and Co Ltd* [1973] EA 358 at 360.”

6. As established by the locus classicus authority of *Giella v Cassman Brown* (1973) E.A 358, the Plaintiff must establish the following conditions precedent:

1. A prima facie case with a probability of success;
2. Demonstrate that he shall suffer irreparable harm that cannot adequately be compensated by an award of damages;
3. Where there is doubt, the Court will decide the Application on a balance of convenience.

7. In *Suleiman v Amboseli Resort Ltd* [2004] eKLR 589 at page 607 Ojwang J (as he then was) observed that:

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

8. Going by the Case of Suleiman above, I believe that the course that appears to carry the lower risk of injustice should it turn out to have been “wrong” is to have the temporary injunction granted in order to preserve the subject matter of the suit. This is because issues of fraud and misrepresentation on the transfer of the suit property have been raised and the court must be investigate whether this is the case or not. It would therefore do no harm to have the subject matter preserved as the court finds the truth of the indictment. This is informed by the fact that should the orders sought not be granted the suit land may pass hands in multiplicity and it would be so difficult to get it back.

9. I am satisfied upon a careful consideration of the facts that the suit would be of no use if an injunction is not granted. The Application partially succeeds and I hereby grant prayer Number 2 of the said Application. The Application is therefore granted in the following terms: -

“Pending the hearing and determination of this suit this Honorable Court hereby restrains the 1st Defendant/Respondent by himself, agents, servants, employees, and/or others howsoever from cutting trees, doing construction, selling and/or transferring all that parcel of land known as land No. Central Kitutu/ Mwogeto/210 in whole or otherwise but allows the daily activity of plucking the tea leaves from the tea bushes in by both parties.”

Costs will abide the outcome of the suit.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15<sup>TH</sup> DAY OF JUNE 2023.**

**MUGO KAMAU**

**JUDGE**



**In the Presence of**

Court Assistant: Sibota

Applicant: Mr. Onyancha

Respondent: Mr. Omwoyo holding brief for Mr. Soire for 1<sup>st</sup> Defendant

