



**Ochier & another v Okoth & another (Environment & Land Case E024 of 2022) [2023] KEELC 18879 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18879 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E024 OF 2022**

**E ASATI, J  
JULY 19, 2023**

**BETWEEN**

**TOM ODHIAMBO OCHIER ..... 1<sup>ST</sup> PLAINTIFF**

**MOSES OTIENO OCHIER ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LEONARD NYAMBOK OKOTH ..... 1<sup>ST</sup> DEFENDANT**

**ROSE ACHIENG NYAMUOK ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs/Applicants, vide the Notice of Motion application dated February 16, 2023 stated to be brought pursuant to the provisions of Sections 13 and 19 of the *Environment and Land Court Act*, sought for an order of temporary injunction to stop the Respondents by themselves, their servants and/or agents from selling, disposing off, alienating or in any manner dealing with the suit land No Kisumu/Ojola/1522 or any portion thereof pending hearing and determination of the suit. The application was supported by the Supporting Affidavit of Tom Odhiambo Ochier, the 1<sup>st</sup> Applicant.
2. The Applicants' case was that they are the sons and heirs of one Robert Ochier Ongonga, deceased, who bought the suit land from Elijah Anam Onyango and Onyango Isaiah Nyambok vide land sale agreement signed on December 6, 2001. That both sellers and the purchaser. died before the land was transferred to the purchaser. That the 1<sup>st</sup> Respondent succeeded the Estates of the seller and transmitted the suit land into his name. That the 1<sup>st</sup> Respondent subsequently fraudulently sold the suit plot and/or a portion thereof to the 2<sup>nd</sup> Respondent.

That the Applicants' father had taken possession of the suit land soon after purchase and used the same since then without interference from the 1<sup>st</sup> Respondent or any of his relatives. That the sale of the land to the 2<sup>nd</sup> Defendant is therefore tainted with illegality.



That the Respondents are likely to deal with the suit land in a manner detrimental to the Applicants' interests hence it is in the interest of justice that the orders sought be granted so as to preserve the suit land.

3. The application was opposed vide the Respondents' grounds of opposition dated March 2, 2023 namely, that the application is incompetent, frivolous and vexatious and ought to be dismissed with costs, that the applicants have failed to meet the criteria for grant of the orders sought, the application is an abuse of the court process and a tactic intended to frustrate the Defendants.
4. The application was canvassed by way of written submissions. The Applicants filed written submissions dated April 13, 2023 through the firm of Odhiambo SI & Company Advocates. It was submitted on their behalf that the application has met the principles for grant of orders of injunction as indicated in the case of *Giella v Cassman Brown*. That it is not denied that the Applicants' father bought the suit land and occupied, used and possessed it for a period of over 12 years hence a claim of adverse possession bars the 1<sup>st</sup> Defendant from selling and transferring the land. That the Applicants cannot be compensated adequately by an award of damages because of the sentimental value on the suit property. Counsel prayed that the application be allowed.
5. The Respondents filed written submissions dated May 12, 2023 through the firm of Omondi Abande & Company Advocates. It was submitted for the Respondents that there is no evidence before court to demonstrate who the current registered proprietor of the suit land is. That the burden of proof under Sections 107 and 108 of the [Evidence Act](#) Cap 80 Laws of Kenya is with the Applicants.

That the sale agreement annexed to the application is voidable under the provisions of Section 6 of the [Land Control Act](#) for lack of consent of the Land Control Board. That there is no evidence to support the allegations that the applicants' father had taken possession of the land. That the applicants claim is caught up by the limitation period under Section 7 of the [Limitation of Actions Act](#). That an award of damages can be adequate compensation for the applicants. That the application falls short of the principles in *Giella -vs- Cassman Brown* case.

6. I have carefully considered the application. The basis of the applicants' claim is first a land sale agreement between their father and relatives of the Respondents who are now all deceased. The applicants are claiming on behalf of the estate of their father. There is no evidence placed before the court to show that the Applicants obtained Letter of Administration so as to acquire capacity to sue on behalf of the estate of their father. A copy of the alleged land sale agreement annexed to the application and marked "T001" is not in the language of the court and there is no translation for it. There is no evidence of occupation or possession of the suit land by the applicants' deceased father or by themselves.

It was the Applicants' case that the temporary structure on the suit land was constructed by one Denis on a portion he (Denis) was given by the Applicant's father. Denis is not a party to the suit. There is no evidence that the Denis authorized the Applicants to sue on his behalf.

7. I find that the Applicants have not made out a *prima facie* case with a probability of succeeding. A *prima facie* case was defined by the Court of Appeal in [Mrao Ltd v First American Bank Kenya Ltd & 2 Others](#) [2003] eKLR as follows:

“ a *prima facie* case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



I further find that the grounds for issuance of temporary injunction as set out in Order 40 Rule 1 and the Case of Giella v Cassman Brown Co Ltd [1973]358 have not been demonstrated.

8. The upshot is that there is no merit in the application. The application is dismissed. Costs to the Respondents.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 19TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

**Maureen- Court Assistant.**

**No appearance for the Plaintiffs/Applicants.**

**No appearance for the Defendants/Respondents.**

