



**Simon v Adel (Environment & Land Case E006 of 2023)
[2023] KEELC 20251 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20251 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E006 OF 2023
GMA ONGONDO, J
SEPTEMBER 27, 2023**

BETWEEN

MICHAEL OCHOO SIMON PLAINTIFF

AND

SALMON KWANYA ADEL DEFENDANT

RULING

1. This ruling is in respect of an application by way of a Notice of Motion dated May 22, 2023 brought under, inter alia, Articles 40, 48 and 50 of the Constitution of Kenya, 2010 and Order 40 of the Civil Procedure Rules, 2010 by the plaintiff/applicant, Michael Ochoo Simon through the firm of Quinter Adoyo and Company Advocates seeking the orders as follows;
 - a. Spent
 - b. Spent
 - c. That upon hearing the instant application inter partes, interim orders do issue barring the respondent either by himself or through his agents or persons deriving authority from him, from evicting the Applicant from K/Kalanya/Kanyango/3129, (The suit land herein), until such a time until such a time as the main suit is heard and determined.
 - d. That costs of this application be in the cause.
2. The application is premised upon grounds 1 to 5 set out on the face of the same and the applicant's supporting affidavit of ten paragraphs sworn on even date. In summary, the applicant laments that the respondent mounted Homa Bay CMC EL Case No. 60 of 2019 which was determined in favour of the respondent. That being aggrieved by the said decision, the applicant preferred an appeal namely Homa Bay ELC Appeal No. E005 of 2021 which was allowed and no further appeal has since been preferred



- against the determination. That the respondent has issued an eviction notice of seven days against the applicant over the suit land contrary to the provisions of the law hence, precipitating the application.
3. The respondent, Salmon Kwanya Adel through the firm of Aluoch Odera & Nyauke Advocates opposed the application by way of his replying affidavit of twelve paragraphs sworn on May 29, 2023. He deposed in part, that the application is misguided as a notice to vacate does not in any way amount to an order of eviction. That since there is no suit filed by the respondent before this court of a similar nature, the matter is not Res judicata as alleged by the applicant. That in Homa Bay ELC Appeal No. E005 of 2021, the Honourable court did pronounce itself only on jurisdiction of the court thus, the decision did not confer ownership of the suit land upon the applicant.
 4. Simultaneous with the replying affidavit, the respondent filed grounds of opposition of even date thus;
 - a. The application lacks merit and is bad in law.
 - b. The application is a non-starter, mischievous and meant to defeat the cause of justice.
 - c. The application has not been made in good faith.
 5. The application was heard by written submissions pursuant to this court's directions of June 5, 2023.
 6. By the submissions dated June 19, 2023, counsel for the applicant provided a brief history of the case capturing the suit land and submitted on prayers 3 and 4 in the application. Counsel delineated two issues for determination namely whether the said prayers are deserved. In analyzing the issues, counsel submitted that the applicant has established a prima facie case against the respondent, that status quo be maintained and he be allowed to stay on the suit land pending the determination of the main suit. To buttress the submissions, counsel referred to authoritative pronouncements including *Giella-vs-Cassman Brown Ltd (1973) EA 358*, *Mrao Ltd-vs-First American Bank of Kenya Ltd and 2 others (2003) eKLR* and *Nicholas Njeru-vs-A-G and 8 others (2013) eKLR*.
 7. In the submissions dated June 12, 2023, counsel for the respondent referred to the injunctive relief sought in the application, the response to the application and Rent Restriction Tribunal case number No. E0038 of 2023 at Kisumu filed by the respondent against the applicant which is pending determination. Counsel relied on Order 40 (supra) alongside the case of *JM-vs-SMK and 4 others (2022) eKLR* on the requirements for an injunction and submitted that this court is devoid of jurisdiction over this matter. That the respondent has affirmed that he has no intention of evicting the applicant unless it is so ordered by the court. Therefore, counsel urged this court to dismiss the application with costs for lack of merit.
 8. It is noteworthy that in the plaint dated May 22, 2023 herein, the applicant who is the plaintiff alleged, inter alia, that on May 11, 2023, the respondent/defendant issued an illegal eviction notice of seven days against him in respect of the suit land. That the decision of the appellate court in Homa Bay ELC Appeal No. E005 of 2021 has been ignored thereby. That the applicant's life and property are under threat. So, he has sought;
 - a. An order directing the eviction notice dated May 11, 2023 is illegal and the same should be quashed.
 - b. An order of declaration that any suit bought by the defendant with regards to the suit land is res judicata, and the same should not be entertained in court.
 - c. An order directing that the defendants should not in any way interfere with the suit land as there is a judgment that was pronounced by this Honourable Court.



- d. Costs and interest of this suit.
9. In his statement of defence dated May 31, 2023, the respondent/defendant denied the applicant/plaintiff's claim and raised a preliminary objection to this suit on ground that the same is sub-judice. That therefore, the suit be dismissed with costs.
10. In the obtaining circumstances, is there merit in the interim orders sought in the application?
11. Order 40 (supra) under which the application is originated, governs temporary injunction and temporary orders. This court is guided by the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent as laid down in Giella case (supra).
12. It must be noted that this court has the mandate to grant interim and permanent preservation orders as provided for under section 13 (7) (a) of the *Environment and Land Court Act, 2015* (2011). Undoubtedly, the principal order sought in this application, is envisaged thereunder.
13. The applicant asserted that he lives on the suit land. That he is bound to be evicted from the same further to a notice of eviction (MOS-02) as captured in paragraph 9 of his supporting affidavit and annexed to the application, That the said notice does not comply with section 152 E of the *Land Act, 2016* (2012).
14. Further, in paragraphs 4 to 8 of the plaint, the applicant referred to previous pleadings and determinations thereof. That there is no appeal preferred from Homa Bay ELC Appeal No. E005 of 2021 as discerned in grounds 3 and 4 of the application and paragraph 6 of his supporting affidavit.
15. The Respondent termed the application irrelevant because he has filed a proper case in a proper court with competent jurisdiction further to the determination in Homa Bay ELC Appeal No. E005 of 2021. That thus, this application is nonstarter, bad in law and should be dismissed.
16. Clearly, issues of sub judice and jurisdiction are raised in paragraphs 8 and 10 of the statement of defence. These issues are threshold questions which call for a definitive, determinative and prompt pronouncement as held in the case of *Kakuta Maimai Hamisi-vs Peris Pesi Tobiko and 2 others* (2013) eKLR.
17. Moreover, Articles 48, 50(1) and 25(c) of the Constitution of Kenya, 2010 provide for access to justice and unlimited right to fair hearing applicable to the said issues.
18. Besides, I bear in mind the effect of the notice of eviction (MOS 2) in this application. Thus, interim preservation orders are merited at this stage of this case.
19. In view of sections 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, sections 3, 13 (7) (a) and 19 of the *Environment and Land Court Act, 2015* (2011), the applicant deserves an order of status quo order as envisioned in the application; see also *Ogada-vs Mollin* (2009) KLR 620.
20. In the foregone, the present application is determined as follows;
- a. The parties shall maintain the status quo over the suit land and in particular, the notice of eviction (MOS-02) shall not be effected pending the hearing and determination of issues of law namely sub judice and jurisdiction of this court raised in the statement of defence.
- b. Costs of this application to abide the cause.
21. It so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 27TH DAY OF SEPTEMBER 2023



G.M.A ONG'ONDO

JUDGE

Present:

- a. Ms Okello learned counsel for the applicant
- b. Mr. S. Nyauke learned counsel for the respondent
- c. Luanga, court assistant

