



Rapando v Ojwang (Sued as the leg rep of Oundo Mallo (Deceased) & 5 others (Environment & Land Case E020 of 2022) [2023] KEELC 20076 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20076 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E020 OF 2022
BN OLAO, J
SEPTEMBER 27, 2023**

BETWEEN

AMBROSE NDIACHA RAPANDO APPLICANT

AND

**ALFRED BARASA OJWANG (SUED AS THE LEG REP OF OUNDO MALLO
(DECEASED) 1ST RESPONDENT**

HON. OTUOMA PAUL NYONGESA 2ND RESPONDENT

OTUOMA RODGERS 3RD RESPONDENT

RAPHAEL MUSUNGU OJIAMBO 4TH RESPONDENT

DERRICK NAMAINDI OJIAMBO 5TH RESPONDENT

EDINA ADWORI OJIAMBO 6TH RESPONDENT

RULING

1. Ambrose Ndiacha Rapando (the applicant) moved to this Court vide his amended Originating Summons dated 17th November 2022 seeking the main order as against Alfred Barasa Ojwang (sued as the Legal Representative of the Estate of Oundo Malo – Deceased), Hon Otuoma Paul Nyongesa, Otuoma Rogers, Raphael Musungu Ojiambo, Derrick Namaindi Ojiambo and Edina Adwori Ojiambo (the 1st to 6th respondents), that he had acquired by way of adverse possession the portion of land measuring 10 acres known as Samia/Buburi/644 and now sub-divided into parcels No Samia/Buburi/1423, 1413, 1414, 1415, 1416, 1417 and 1418 (the suit land) having occupied the same for a period exceeding 12 years.
2. The applicant had previously filed an Originating Summons dated July 28, 2022 against the 1st respondent seeking similar orders with respect to the original land parcel No Samia/Buburi/644.



3. He had also filed a Notice of Motion dated September 14, 2022 seeking, inter alia, that an order of restriction or inhibition be placed on the said land pending the determination of this suit and in the alternative, an order of status quo. That application was however withdrawn on November 7, 2022 after the original land parcel No Samia/Buburi/644 had been sub-divided to create the suit land.
4. The applicant has now moved to this court vide his Notice of Motion dated June 12, 2023 in which he seeks against the respondents the following remedies:
 1. Spent
 2. Spent
 3. That a temporary injunction be issued against the respondents, their family members, servants, agents, employees and any other person claiming under/through them from entering, cultivating, planting, constructing, fencing, selling, disposing off or otherwise dealing with and interfering with the applicant's use and possession of 10 acres portion of the land parcels No Samia/Buburi/ 1412, 1413, 1414, 1415, 1416, 1417 and 1418 created from land parcel No Samia/Buburi/644 pending the hearing and determination of the main suit.
 4. That an order of inhibition be and is hereby issued to be registered on land parcels No Samia/Buburi. 1412, 1413, 1414, 1415, 1416, 1417 and 1418.
 5. That in the alternative to prayers 2, 3 and 4 the status quo be maintained.
 6. That costs of the application be provided for.
5. The application is premised on the grounds set out therein and supported by the affidavit of the applicant
6. The gravamen of the application is that the original land parcel No Samia/Buburi/644 was registered in the names of Oundo Malo now deceased and the father of the 1st respondent. That in June 1986, the deceased gifted him 10 acres in appreciation of the fact that the applicant was the one taking care of him when he was sickly. The deceased also allowed him to construct his home on a portion measuring 20 acres so as to be close to him since he had no wife and his only surviving son who is the 1st respondent was working away in Nyeri as a security officer and the applicant was the only person taking care of him. When the 1st respondent went home for the deceased's memorial, he asked the applicant to move out of the 20 acres and relocate to the 10 acres gifted to him by the deceased. So he relocated to 10 acres with his family in 1987 where he has put up his homestead and has planted trees and also cultivates crops.
7. In May 2018, he engaged the services of a private surveyor who confirmed that he occupies and resides on 4.25 Hectares out of the original land parcel No Samia/Buburi/644. That on April 20, 2014, he placed a caution on the land restricting any dealings thereon without his consent. He however discovered that the restriction was removed without his consent and the land had been sub-divided to create the suit land which was then registered in the names of the respondents' while this suit was pending.
8. That the 1st respondent commenced succession proceedings in respect to the Estate of his deceased father vide Busia CMC Succession Cause No 371 of 2010 and there was an understanding that he was entitled to 10 acres. However, when the Grant was confirmed, he was only allocated 1 acre notwithstanding the letters from his chief dated January 3, 2011 and January 26, 2011 confirming that he was entitled to 10 acres. The 1st respondent made sure that he did not participate in the succession proceedings yet he has been using the 10 acres since 1986.



9. On June 9, 2023, the 1st respondent trespassed onto his 10 acres and started fencing off 9 acres so he reported to the Police and was advised to come to court. It is his case that he is likely to suffer irreparable loss if the orders sought are not granted.
10. Annexed to the application are the following documents:
 1. Register from the land parcel No Samia/Buburi/644.
 2. Photographs of homes, livestock and trees.
 3. Surveyor's report.
 4. Certificate of search in respect of the land parcels No Samia/Buburi/1412, 1413, 1414, 1415, 1416, 1417 and 1418 in the names of the respondents.
 5. Confirmed Grant issued in Busia CM'S Court Succession Cause No 27 of 2022 in respect to the Estate of the deceased.
 6. Chief's letters dated December 17, 2010 and January 3, 2011.
11. The application is opposed and the respondents filed both Grounds of Opposition as well as a replying affidavit sworn by the 1st respondent on their behalf.
12. In the Grounds of opposition, they stated that the application is sub-judice since a similar application had been filed. It therefore offends the provisions of Section 6 of the *Civil Procedure Act*. Further, that the respondents are the registered proprietors of their respective parcels of land which they occupy and the application does not meet the threshold set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358.
13. In his replying affidavit dated July 3, 2022, the 1st respondent confirmed that he is the only surviving son of the deceased who was the proprietor of the land parcel No Samia/Buburi/644.
14. That following the demise of the deceased, he successfully filed a succession cause and the other respondents obtained title to their respective parcels of land which they occupy. It is therefore fallacious for the applicant to seek injunctive orders against them when he knows that he only owns and occupies 1 acre of the former land parcel No Samia/Buburi/644 which was awarded to him following the succession cause. That there is a similar application awaiting hearing and it is outrageous for the applicant to be given 10 acres as that is bound to disinherit about 50 other family members who legally occupy and use their respective portions. An injunction will render those families homeless and destitute. The applicant is an ungrateful beneficiary of the (one) 1 acre portion and "like the proverbial elephant" (sic), (the right term is actually proverbial camel), now wants to take the whole land and eject the real owners.
15. The 1st respondent added that there have been previous proceedings in which the applicant admitted that he has his own land which he inherited from his father. He is therefore greedy by seeking to benefit from the suit land. The applicant has not come to Court with clean hands nor met the threshold for the orders sought.
16. Annexed to his replying affidavit are the following documents:
 1. Order issued on October 12, 2022 by this court.
 2. Copy of title to the land parcel No Samia/Buburi/1426 in the names of the 1st respondent.
17. The court attempted to have the parties record some consent on the application but without success.



18. The application was subsequently canvassed by way of written submissions. These were filed both by Mr Were instructed by the firm of Fwaya Masakhwe Were & Advocates for the applicant and by Mr Okutta instructed by the firm of OumaOkutta & Associates Advocates for the respondents.
19. I have considered the application, the rival affidavits annexures and submissions by counsel.
20. The starting point should be whether in fact this application is sub-judice and offends the provisions of section 6 of the [Civil Procedure Act](#) which reads:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
21. The term sub-judice is defined in [Black’s Law Dictionary](#) 10th Edition as:
- “Under a Judge.
Before the court or Judge for determination.”
22. It is of course true that the applicant had filed a previous similar application dated September 14, 2022 seeking similar orders against the 1st respondent. By then, the land in dispute was the original land parcel No Samia/Buburi/644 prior to its sub-division to create the suit land and the 1st respondent was the only respondent. However, although this Court had directed that the said application be canvassed by way of written submissions, on November 7, 2022 when that application came up to confirm filing of the said submissions, Mr Were informed the court that in fact the land parcel No Samia/Buburi/644 had been sub-divided in the intervening period to create the land parcels No Samia/Buburi/1412, 1413, 1414, 1415, 1416, 1417 and 1418 which are now the subject of this suit. Mr Were therefore applied to withdraw the application dated September 14, 2022 and to amend the Originating Summons. Both applications were allowed by this court. That led to the withdrawal of the Notice of Motion dated September 14, 2022 and the filing of the Notice of Motion dated June 12, 2023 after the Originating Summons was amended.
23. It follows therefore that there is no similar application pending before this court. The plea of sub-judice is unfounded and is dismissed.
24. The parameters for the grant of an order of temporary injunction are now well captured in several precedents. In the case of *Giella v Cassman Brown & Co Ltd (supra)*, it was held that a party seeking such an order must prove the following:
1. Demonstrate a prima facie case with a probability of success.
 2. Show that unless the order is granted, he might suffer irreparable loss which might not adequately be compensated by an award of damages.
 3. If the court is in doubt, it will determine the application on a balance of convenience.
25. In the case of *Films Rover International v Cannon Film Sale Ltd* [1986] 3 All ER 772, the court held that in considering such an application, a court must take the course which appears to carry the lower risk of injustice should it turn out to have been “wrong”.



26. A prima facie case was defined in the case of *Mrao v First American Bank of Kenya Ltd & others* [2003] KLR 125 as:

“... a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

27. In the case of *Nguruman Ltd v Jan Bonde Nielsen & others* C.A. Civil Appeal No 77 Of 2012 [2014] eKLR, the Court of Appeal adopted the definition set out in the case of *Mrao v First American Bank of Kenya* (*supra*). It then went on to add:

“We adopt that definition save to add the following condition by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise, put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.” Emphasis mine.

28. Guided by the above precedents, it is the applicant’s case that he was gifted the suit land measuring 10 acres and created from the original land parcel No Samia/Buburi/644 by the deceased in June 1986. That he has been in open, peaceful, notorious and continuous occupation of the said land to the exclusion of others. He has therefore acquired it by way of adverse possession. However, on June 9, 2023, the 1st respondent and his wife trespassed onto the 10 acres and attempted to fence off 9 acres and therefore dispossess him of the suit land. And although he had placed a restriction on the original land parcel No Samia Buburi/644, the same was removed without his consent and the 1st respondent registered it in his names before sub-dividing it to create the suit land which was then transferred to the 2nd to 6th respondents.

29. The respondent’s case as is contained in the replying affidavit of the 1st respondent also sworn on behalf of the other respondents is that infact the applicant only occupies 1 acre and that an order of injunction will render them and their families, numbering about 50, homeless and destitute.

30. In support of his case, the applicant annexed photographs of several houses, livestock, trees and a man tending some crop as evidence that he has been in occupation and possession of the suit land. The veracity of those photographs was not disputed and they support the applicant’s claim of occupation and possession of the land which he claims. In paragraphs 6 and 9 of his replying affidavit, the 1st respondent has deposed thus:



6:

“That the application is made in bad faith since the right the applicant has applied to be given 10 acres of which was my father’s land is outrageous and bound to disinherit about 50 other family members who legally occupy and use their respective portions.”

9:

“That issuing an order of injunction will render myself and my co-respondents homeless and destitute on our land.” Emphasis mine.

31. At this point, I must caution myself that I need not hold a mini trial nor “examine the merits of the case closely” – *Nguruman Ltd v Jan Bonde Nielsen* (*supra*). However, prima facie, the applicant appears to be the party in occupation of the suit land. If the respondents have their families numbering 50 on the suit land, nothing would have been easier than at least availing similar photographs as those exhibited by the applicant. Of course whether or not the applicant will eventually prove his case based on adverse possession will be a matter for trial. However, at this stage, it is clear to me that whereas the suit land is registered in the names of the respondents, the applicant is the party in occupation and possession of a portion of the same. And as was held in *Mwangi & another v Mwangi* [1986] KLR 328, the rights of a person in possession and occupation of land are equitable rights which are binding on the land. The purpose of a temporary order of injunction in such a case is to preserve the land in dispute until the suit is heard and determined to find out if those rights claimed in adverse possession have indeed crystallized and as I have already stated above, that will be a matter for trial. There is evidence that the original land parcel No Samia/Buburi/644 was sub-divided to create the suit land during the pendency of these proceedings. If the order of temporary injunction is denied, the fear that further sub-divisions and transfers may continue on the land to his detriment is real.
32. The applicant has not only surmounted the hurdle of establishing a prima facie case but he has also demonstrated irreparable injury having been in occupation and possession of the suit land since 1986. At this stage, I am persuaded that the applicant, rather than the respondents, is the party in occupation and possession of the suit land. He has shown that “he has a fair and bona fide question to raise as to the existence of the right which he alleges.”
33. Even if I was to determine this application on the balance of convenience, it would lean in favour of granting the order of temporary injunction pending trial. That is the course that appears to me to carry the lower risk of injustice in the circumstances.
34. The order of temporary injunction is well merited in the circumstances.
35. The applicant also sought that an order of inhibition be registered on the suit land. Such an order is provided for in section 68(1) of the *Land Registration Act* which provides that:
- 68(1)
- “The court may make an order (hereafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”
36. An order of inhibition like an order of temporary injunction, is designed to preserve the property in dispute until the case is heard and determined. Therefore, a court issuing such an order must be satisfied



that the applicant has demonstrated good grounds to warrant the issuance of such an order – *Dorcas Muthoni & 2 others v Michael Ireri Ngari* [2016] eKLR. In the circumstances of this case, and as I have already found above, a previous order of restriction placed on the land parcel No Samia/Buburi/644 was removed without the applicant’s consent leading to its sub-division and creation of the suit land. An order of inhibition will not prejudice the respondents and will be in the interest of justice given their previous antecedents.

37. That order is also merited and I allow it.
38. The up-shot of all the above is that having considered the Notice of Motion dated June 12, 2023, I allow it in the following terms:
 1. An order of temporary injunction is hereby issued restraining the respondents by themselves, their family members, agents, servants, employees or any other persons claiming through them from entering, cultivating, planting, constructing on, fencing, selling, disposing off or otherwise dealing with and interfering with the applicant’s use and possession of the 10 acres comprised in the land parcels No Samia/Buburi/1412, 1413, 1414, 1415, 1416, 1417 and 1418 pending the hearing and determination of this suit.
 2. An order of inhibition is also issued inhibiting the registration of any dealings on the land parcel No Samia/Buburi/1412, 1413, 1414, 1415, 1416, 1417 and 1418 pending the hearing and determination of this suit.
 3. The plaintiff must ensure that this suit is heard and determined within the next 12 months from today otherwise the order of temporary injunction shall lapse unless otherwise extended by this court.
 4. The parties shall therefore appear before the Deputy Registrar for pre-trial on October 3, 2023 and thereafter take a hearing date for the main suit.
 5. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED ON THIS 27TH DAY OF SEPTEMBER 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 25TH JULY 2023.

BOAZ N. OLAO

JUDGE

