



**Too v Njunge (Environment & Land Case 16 of 2022)  
[2023] KEELC 19990 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19990 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 16 OF 2022  
DO OHUNGO, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**DAVID KIPROTICH ARAP TOO ..... PLAINTIFF**

**AND**

**RICHARD KARUGU NJUNGE ..... DEFENDANT**

**RULING**

1. The plaintiff filed this suit on 12<sup>th</sup> September 2022 at the Environment and Land Court, Eldoret. Together with the plaint, he filed Notice of Motion dated 12<sup>th</sup> September 2022, seeking an injunction to restrain the defendant, his agents, and servants from interfering with, trespassing on, encroaching onto, disposing of or in any way dealing with the parcel of land known as Kakamega/Sergoit/44 (suit property) pending hearing and determination of the suit.
2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he is the registered proprietor of the suit property, in occupation thereof and that the defendant had trespassed into the property.
3. The suit was transferred to this court on 14<sup>th</sup> September 2022 and the plaintiff then fixed the application for inter parte hearing on 21<sup>st</sup> November 2022. Come 21<sup>st</sup> November 2022, the record bore no response from the defendant and there was no appearance by him. Based on evidence of service that the plaintiff had availed, the court considered the application and granted an injunction restraining the defendant, his agents, servants, or anyone claiming on his behalf from interfering with, trespassing on or disposing of the parcel of land known as Kakamega/Sergoit/44 pending hearing and determination of the suit. Costs were ordered to be in the cause.
4. The defendant then filed Notice of Motion dated 22<sup>nd</sup> November 2022 seeking setting aside of the orders made on 21<sup>st</sup> November 2022. The application is equally supported by an affidavit sworn by the defendant. He stated that although he was served on 14<sup>th</sup> November 2022, Notice of Motion dated 12<sup>th</sup>



- September 2022 bore an Eldoret case number and that he travelled to Eldoret ELC on 21<sup>st</sup> November 2022 ready to file his replying affidavit and to proceed with the hearing of the application only to be informed that the case had been transferred to Kakamega. That he immediately boarded a matatu and headed to Kakamega but on arrival at the court at 1.52pm, he was informed that the matter had been dealt with and orders issued.
5. Even before Notice of Motion dated 22<sup>nd</sup> November 2022 could be heard, the plaintiff filed Notice of Motion dated 13<sup>th</sup> December 2022, seeking to have the defendant committed civil jail for a period not exceeding six months for allegedly disobeying the orders made on 21<sup>st</sup> November 2022. The application is also supported by an affidavit sworn by the plaintiff. He stated that despite being served with the orders made on 21<sup>st</sup> November 2022, the defendant disregarded them by continuing to trespass on the suit property.
  6. This ruling is in respect of all three pending applications: Notices of Motion dated 12<sup>th</sup> September 2022, 22<sup>nd</sup> November 2022, and 13<sup>th</sup> December 2022. The plaintiff swore and filed a replying affidavit in respect of Notice of Motion dated 22<sup>nd</sup> November 2022 and written submissions. The defendant relied entirely on his affidavit which he filed in support of Notice of Motion dated 22<sup>nd</sup> November 2022.
  7. I have considered the applications, the affidavits, and the submissions. I will deal first with Notice of Motion dated 22<sup>nd</sup> November 2022 which seeks setting aside of the orders made on 21<sup>st</sup> November 2022. The principles that govern such an application are that where service has not been effected then setting aside should be granted as of right. In situations where service was effected, the court has unfettered discretion in determining whether to set aside, the main mission being to do justice as between the parties. See *Mbogoh & Another v. Shah* [1968] EA 93 and [\*James Kanyiita Nderitu & another v Marios Philotas Ghikas & another\* \[2016\] eKLR](#).
  8. It is not in dispute that the defendant was served with Notice of Motion dated 12<sup>th</sup> September 2022. It is also not in dispute that the application had an Eldoret case number, and it is therefore understandable that the defendant travelled to the Eldoret court on 21<sup>st</sup> November 2022 as opposed to Kakamega. A perusal of the record shows that the order transferring the suit to Kakamega was made in the absence of the parties. I have not seen anything on record to show that the court notified the defendant of the transfer. I am persuaded that the defendant has demonstrated sufficient grounds to warrant exercise of discretion in his favour and setting aside of the orders made on 21<sup>st</sup> November 2022.
  9. I now turn to Notice of Motion dated 13<sup>th</sup> December 2022, through which the plaintiff is seeking to have the defendant committed civil jail for allegedly disobeying the orders made on 21<sup>st</sup> November 2022.
  10. The law relating to contempt of court is that every person against whom an order is made by a court of competent jurisdiction has a duty to obey it unless and until it is discharged. An allegation of contempt of court is a serious matter since if proven, the liberty and or property of the contemnor are at grave risk. Consequently, the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See [\*Mutitika vs. Babarini Farm Limited\* \[1985\] KLR 229](#). Further, to succeed in such an application, the applicant must demonstrate wilful disobedience. See [\*Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others\* \[2018\] eKLR](#).
  11. I have perused the plaintiff's affidavit in support of Notice of Motion dated 13<sup>th</sup> December 2022. He deposed therein that "the defendant was duly served" with the order. He neither stated who served the defendant nor annexed a copy of an acknowledged order. Considering the applicable higher standard



of proof and the need to demonstrate wilful disobedience, I am not persuaded that a case has been made to warrant a finding that the defendant is in contempt of court. In any case, I have set aside the orders made on 21<sup>st</sup> November 2022 owing to the explanation offered by the defendant for his failure to attend court.

12. Lastly, I now consider Notice of Motion dated 12<sup>th</sup> September 2022, through which the plaintiff seeks an interlocutory injunction.
13. The principles applicable to an application for interlocutory injunction are that the applicant must establish a prima facie case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. See *Giella –vs- Cassman Brown & Co Ltd* [1973] EA 358 and [Nguruman Limited v Jan Bonde Nielsen & 2 Others](#) [2014] eKLR.
14. At the core of the plaintiff's case is his claim that he is the registered proprietor of the suit property. In support of that contention, he annexed a copy of a title deed that was issued to him on 9<sup>th</sup> November 2016. On the other hand, the defendant contends that Beverly Marleen Wambui who is his mother and who has donated to him a power of attorney in respect of the suit property, is the registered proprietor. He annexed a copy of the register in respect of the suit property, certified by the Land Registrar on 22<sup>nd</sup> November 2022. A perusal of the register shows that the current registered proprietor is Beverly Marleen Wamburi, having been registered as such on 29<sup>th</sup> July 2022. While the same register shows that the plaintiff was registered as proprietor on 9<sup>th</sup> November 2016, the entry that supported his registration was cancelled on 14<sup>th</sup> March 2022.
15. Suffice it to state that there has been a lot of back and forth on ownership of the suit property. That said, as at the date that he presented Notice of Motion dated 12<sup>th</sup> September 2022, there was no evidence that the plaintiff was the registered proprietor. On that account, I find that the plaintiff failed to establish a prima facie case. It follows therefore that Notice of Motion dated 12<sup>th</sup> September 2022 is without merit and is for dismissal.
16. In view of the foregoing, I make the following orders:
  - a. The orders made on 21<sup>st</sup> November 2022 granting an injunction to the plaintiff are set aside.
  - b. Notice of Motion dated 13<sup>th</sup> December 2022 is dismissed.
  - c. Notice of Motion dated 12<sup>th</sup> September 2022 is dismissed.
  - d. Costs of all the applications shall be in the cause.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Kimeli for the plaintiff

The defendant present in person

Court Assistant: E. Juma

