



Osinya & 2 others v Odunga & 2 others (Environment & Land Case E003 of 2023) [2023] KEELC 21002 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21002 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E003 OF 2023**

BN OLAO, J

OCTOBER 26, 2023

BETWEEN

CHARLES OSINYA 1ST PLAINTIFF

ODUNGA MUNYASA MBOMERE 2ND PLAINTIFF

ROSEMARY AWINO ODUNGA 3RD PLAINTIFF

AND

OGANGA MBOMERE ODUNGA 1ST DEFENDANT

THOMAS WANDERA OYALO 2ND DEFENDANT

ONYANGO VINCENT OYALO 3RD DEFENDANT

RULING

1. What calls for my determination is the Notice of Motion dated 8th August 2023 by Charles Osinya Mbomere, Odunga Munyasa Mbomere and Rosemary Mbomere (the 1st, 2nd and 3rd Plaintiffs respectively) and which is premised under the provisions of Order 40 rule 1 of the [Civil Procedure Rules](#).
2. They seek against Oganga Mbomere, Thomas Wandera Oyalo and Vincent Onyango Oyalo (the 1st, 2nd and 3rd Defendants respectively), the following orders:
 - a. Spent
 - b. Spent
 - c. A temporary injunction be and is hereby issued restraining the Defendants, their agents, employees, servants or anyone claiming through them from selling, offering for sale, transferring, sub-dividing, partitioning or gifting the parcels of land presently registered



as Bukhayo/Mundika/10836 and Bukhayo/Mundika/10837 pending the hearing and determination of this suit.

- d. Costs be in the cause.
3. The application is predicated on the grounds set out therein and supported by the affidavits of the Plaintiffs all dated 8th August 2023.
4. The crux of the application is that the land parcels No Bukhayo/Mundika/10836 and 10837 (the suit land) are sub-division of the original land parcel No Bukhayo/mundika/807 which was the property of Mbomere Odunga. That the said Mbomere Odunga, who died in 1965, was the father to the 1st Plaintiff, 1st Defendant, Peter Oyalo Mbomere also deceased and who was the father to the 2nd and 3rd Plaintiffs and therefore nephews to the 1st Plaintiff. That the 3rd Plaintiff is a widow to Odunga Mbomere also a deceased brother to the 1st Plaintiff. That they all lived on the original land parcel No Bukhayo/Mundika/807 which measured 31.5 hectares and where the 1st Plaintiffs deceased brothers were all buried.
5. In 2021, the 1st Plaintiffs discovered that the 1st Defendant and Peter Oyalo Mbomere had, without his knowledge and with intention to defraud, partitioned the original land parcel and created the suit land. They then registered the land parcel No Bukhayo/Mundika/10836 in the name of the deceased Peter Oyala Mbomere and whose Estate is administered by the 2nd and 3rd Defendants. The 1st Defendant was registered as proprietor of the land parcel No Bukhayo/Mundika/10837. It is the Plaintiff's case that the original land parcel No Bukhayo/Mundika/807 and the resultant sub-divisions including the suit land was all family land held in trust.
6. That when the fraud was discovered, the matter was reported to the County Land Surveyor and Land Registrar. Upon hearing the dispute, the Land Registrar cancelled the sub-division of the original land parcel No Bukhayo/Mundika/807 to create the suit land and instead partitioned it to create five (5) new parcels for all the five (5) sons of Mbomere Odunga. That decision of the Land Registrar was however quashed by the Court in Busia ELC Judicial Review Case No E001 of 2021.
7. The Respondents have now issued threats to the Plaintiffs directing them to vacate the suit land on the ground that they are trespassers thereon with no interest in it yet it is family land on which they have lived all their life. If the Plaintiffs are evicted from the suit land and their crop destroyed, they will have nowhere else to go and that will occasion them loss and damage that cannot be compensated in damages. They therefore have showed a prima facie case.
8. Annexed to the 1st Plaintiff's affidavit are the following documents:
 1. Photocopy of the 1st Plaintiffs Identity Card No 01xxx05.
 2. Copy of the Title Deed to the land parcel No Bukhayo/Mundika/807 in the name of Oganga Bomele and Oyalo Bomele issued on 7th September 2007.
 3. Mutation form for the sub-division of the land parcel No Bukhayo/Mundika/807 to create the suit land each measuring 15.75 Hectares.
 4. Certificate of death of Peter Oyalo Mbomere.
 5. Certificate of compliance under the Physical Planning Act issued to Onganga Mbomere Odunga.
 6. Receipt for certificate of compliance.



7. Application for partition of the land parcel No Bukhayo/Mundika/807 by the 1st Defendant and Peter Oyalo Mbomere.
8. Receipt for stamp duty.
9. Copy of Title Deed for the land parcel No Bukhayo/Mundika/10836 in the name of Peter Oyalo Mbomere issued on 12th September 2013.
10. Copy of Grant of Letter of Administration issued to Thomas Wandera Oyalo on 30th June 2020 in respect to the Estate of Peter Oyalo Mbomere alias Oyalo Bomele in Busia CM Succession Cause No 582 Of 2019.
11. Copy of certificate of official search for the land parcel No Bukhayo/Mundika/10836.
12. Proceedings of the Land Registrar held on 12th January 2021 in respect of the boundary dispute between Thomas Wandera Oyalo and Anyango v Oyalo as complainants and Oganga Mbombe Odunga and Joseph Egesa over land parcels No Bukhayo/Mundika/10836, 5194, 14751 and 10837.
13. Judgment in Busia ELC Judicial Review Case No E001 Of 2021 between Thomas Wandera Oyalo and Onyango Vincent Oyalo as *Ex-parte* Applicants and County Land Registrar, Oganga Mgombe Odunga And Joseph Egesa as Interested Parties.
The 2nd and 3rd Plaintiff have also filed affidavits dated 8th August 2023 in support of the application.
9. In his affidavit, the 2nd Plaintiff confirmed that he is the administrator to the Estate of his late father Munyasa Mbomere Odunga who died on 14th September 1983 and was buried on the land parcel No Bukhayo/Mundika/807. That at the time of his death, his late father left a widow and six (6) children who live on the original land parcel No Bukhayo/Mundika/807 which is their only home.
10. He annexed to his affidavit the following documents:
 1. Copy of Limited Grant of Letters of Administration issued to him on 15th June 2023 in respect to the Estate of his father.
 2. Copy of certificate of death of his father.
11. The 3rd Plaintiff also filed her affidavit in support of the application. She deposed, inter alia, that she is the widow of Odunga Mbomere Odunga who died on 12th March 2003 leaving her with eight (8) children. That she has lived with the deceased and her children on the land parcel No Bukhayo/Mundika/807 from 1986 upto the time of his demise. That her late husband was buried on the said land without any protest from his brothers who were the registered proprietors thereof. The Respondents have now threatened to evict her claiming that she is a stranger.
12. She annexed to her affidavit the following documents:
 1. Limited Grant of Letters of Administration issued to her *vide* Busia CMC Succession Cause No E544 of 2022 in respect to the Estate of Odunga Mbomere Odunga.
 2. Certificate of death for Odunga Mbomere Odunga.
13. The 1st Defendant did not file any response to the application. And when the parties appeared before me on 19th September 2023, Mr Abok counsel for the 1st Defendant informed the Court that his client was not opposed to the application.



14. The 2nd and 3rd Defendants opposed the application by filing both replying affidavits and grounds of objection.
15. In the grounds of objection, they raised the following issues:
 1. That this suit is res-judicata having been determined in Busia ELC Judicial Review Application No E001 Of 2021.
 2. That the pleadings on trust are defective for failure to comply with the provisions of Order 6 Rule 8 of the Civil Procedure Rules.
 3. That the suit discloses no reasonable cause of action against the 2nd and 3rd Defendants.
 4. That the suit is premature and non-justiciable for being brought when the issue had not ripened.

In his replying affidavit dated 7th September 2023, the 2nd Defendant reiterated that he would raise a Preliminary Objection to the suit as being res-judicata. Further, that Peter Oyalo Mbomere whose Estate they represent has been absolved of any fraud and therefore the suit against them should be struck out. That the dispute was determined in Busia ELC Judicial Review Case No E001 Of 2021 and so it is res-judicata and this Court has no jurisdiction. The suit is therefore vexatious, scandalous and an abuse of the process of this Court and ought to be dismissed since it is based on abstract arguments and is premature.

16. That the Plaintiffs have not shown any evidence of eviction and infact they have their own land being parcel No Bukhayo/Mundika/10837 and do not reside on the parcel No Bukhayo/Mundika/10836. That the late Odunga Mbomere shared his land parcels No Bukhayo/Mundika/806, 807 and 808 between his four (4) wives namely Nalala Mbomere, Napunyi, Namakangala And Nalala Mbomere. To the first Nalala house, he gave parcel No Bukhayo/Mundika/806 which was registered in the name of the eldest son Bwile Mbomere. To the house of the 2nd Nalala, he gave parcel No Bukhayo/Mundika/808 which was registered in the name of Odongo Bomele father of 3rd Plaintiff in trust. Parcel No Bukhayo/Mundika/807 was given to the houses of Napunyi Bomele and Namakangala. Napunyi had three (3) sons being the 1st Defendant, the 1st Plaintiff and Odunga Mbomere Odunga the husband to the 3rd Plaintiff. Therefore, save for the 3rd Plaintiff, the other two Plaintiffs benefited from the 1st Respondent. The house of Namakangala was represented by Peter Oyalo.
17. This application has therefore been brought in bad faith and the Plaintiffs have sold their part of the inheritance and now want to unjustly benefit themselves. They have not come to Court with clean hands and their application should be dismissed with costs to the 2nd and 3rd Defendants.
18. On his part the 3rd Defendant also swore a replying affidavit also dated 7th September 2023. Its contents are simply a rehash of what is contained in the 2nd Defendant's replying affidavit of even date.
19. The 1st Plaintiff, with the authority of the 2nd and 3rd Plaintiffs, swore a supplementary affidavit dated 20th September 2023 in response to the replying affidavits of the Defendants. He reiterated that the 1st and 2nd Defendants have issued verbal threats to the Plaintiffs to vacate the land parcel No Bukhayo/Mundika/10836. That there is no known boundary between the land parcels No Bukhayo/Mundika/10836 and 10837. That the sons of Nalala Mbomere the 1st namely Odwako and Bwire are settled on the land parcel No Bukhayo/Mundia/806 and have no interest in this suit. That land parcel No Bukhayo/mundika/808 was the personal property of Odongo Mbomere and when he died, he left it to his family. None of the Plaintiffs have any claim over it. That his deceased father settled the family of Napunyi, Namakangala and the 2nd Nalala on the land parcel No Bukhayo/Mundika/807



which includes the Plaintiffs and the Defendants herein. However, Odongo Mbomere has his own land. That Nalala the 2nd was buried on the land parcel No Bukhayo/Mundika/807 and not Bukhayo/Mundika/808. He reiterated therefore that the land parcel No Bukhayo/Mundika/807 was meant to be shared among all the five (5) sons of Mbomere Odunga.

20. In her supplementary affidavit, the 2nd Plaintiff deposed, inter alia, that she and her sons Patrick Oduor Oganga and Brian Masiga Oganga who is the 1st Defendant's son are facing criminal charges in Busia CMC Criminal Case No E728 Of 2022 in which they are charged with the offence of damaging the 2nd Defendant's sand. That the said sand was deposited on a portion of the land which she is claiming in this suit for the sole intention of provoking her. She therefore needs protection from this Court. The charge sheet in Busia CMC Cr. Case No 728 of 2022 is annexed.
21. The application has been canvassed by way of written submissions. These have been filed both by Mr Omondi instructed by the firm of Omondi & Company Advocates for the Plaintiffs and by Mr Masiga instructed by the firm of Masiga Wainaina & Associates Advocates of the 2nd and 3rd Defendants. I have considered the application, the Preliminary Objection, the rival affidavits and the submissions by counsel.
22. Before I consider the merits or otherwise of the application, I must first consider the Preliminary Objection raised by the 2nd and 3rd Defendants because they touch on the jurisdiction of this Court to determine this suit. This is because, as was held in the often cited case of *owners of Motor Vessel 'Iillian S' v Caltex Oil (kenya) Ltd* 1989 KLR 1, "jurisdiction is everything" and where a Court finds that it is without jurisdiction, it must "down it's tools" as it "has no power to make one more step".
23. I shall therefore first consider the issues raised in the Preliminary Objection by the 2nd and 3rd Defendants dated 7th September 2023.

Res-judicata:

24. This is provided for in Section 7 of the *Civil Procedure Act* as follows:

"7 No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

In the case of *John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport & Infrastructure & Others*, Supreme Court Civil Petition No 17 of 2015 [2021 KESC 39 KLR], the Supreme Court said the following at paragraph 86 on when the principle of res-judicata can apply:

"We state the elements that must be proven before a Court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter, the following elements must be demonstrated:

- a. There is a former judgment or order which was final.
- b. The judgment or order was on merit.
- c. The judgment or order was rendered by a Court having jurisdiction over the subject matter and the parties; and



- d. There must be between the first and second action identical parties, subject matter and cause of action.”

I have looked at the judgment in the Judicial Review Application No E001 of 2021. It involved the 2nd and 3rd Defendants as Applicants, the 1st Defendant as a 3rd Interested Party and one Joseph Egesa and County Land Registrar as 1st and 2nd Interested Parties. It did not involve the Plaintiffs. Most importantly, the issue in that Judicial Review Application was that the Applicants therein and who are the 2nd and 3rd Defendants in this suit were seeking the orders of mandamus and prohibition to quash the decision of the Land Registrar Busia who had purported to revoke the title deeds for the land parcels No Bukhayo/Mundika/10836 and 10837 (the suit land herein) and to restore them in the names of the Applicants. The Court, Omollo J up-held the application having found that the Land Registrar Busia acted ultra vires in cancelling those titles. The issue in that Judicial Review Application was basically whether or not the Land Registrar Busia acted within his jurisdiction. The issue for determination in this suit, as is clear from paragraphs 14 and 15 of the plaint dated 8th April 2023 and filed on 9th August 2023, is that the 1st Defendant and the deceased Peter Oyalo Mbomere represented by the 2nd and 3rd Defendants held the land parcel No Bukhayo/Mundika/807 in trust for the Plaintiffs as it was ancestral/family land and that the Plaintiffs are entitled to equal shares in the same. It is clear therefore that whereas the Judicial Review Application involved the suit land, it was not a merit decision on the issue of trust and fraud which are the issues in this case.

25. The plea of res-judicata has not been properly invoked as a valid Preliminary Objection and I hereby dismiss it.

Order 6 Rule 8 Civil Procedure Rules Not Complied With:

26. The 2nd and 3rd Defendants have also based their Preliminary Objection on the ground that the pleadings on trust are defective for failure to comply with the provisions of Order 6 Rule 8 of the [Civil Procedure Rules](#).
27. The Defendants must have had in mind the provisions of Order 2 Rule 10(1) and (2) of the [Civil Procedure Rules](#) which state:

- “(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
 - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”
- (2) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.”



28. I have looked at the pleadings herein in view of the above provisions. In paragraph 10 of the plaint, the Plaintiffs have pleaded particulars of the fraud alleged against the 1st Defendant and Peter Oyalo Mbomere. In paragraphs 14 and 15, it is pleaded that the land parcel No Bukhayo/Mundika/807 was family land registered in the names of the 1st Defendant and Peter Oyalo Mbomere to hold in trust for the entire family of Mbomere Odunga. The plaint cannot be described as elegant in as far as those pleadings are concerned. However, it is not in doubt that their claims to the suit land is based on the fact of the suit land being family/ancestral land. The 2nd and 3rd Defendants no doubt appreciate that claim because in paragraph 22 of their joint statement of defence, they have denied the existence of that trust. On his part, the 1st Defendant has pleaded in paragraph 5 of his defence that the Plaintiffs are not trespassers presence, occupation and their use of the suit land is lawful. Clearly therefore, the 2nd and 3rd Defendants know the case which they have to meet and they have responded to it in their defences. In any event, even though the Plaintiffs pleading could have been more elegant, I do not consider that lapse to be fatal to their case. It is curable under Article 159(2) (d) of the Constitution as well as Section 19(1) of the Environment and Land Court Act.
29. That ground also fails.

Suit Discloses No Cause Of Action, Is Premature And Non-justiciable

30. It is of course common knowledge that Order 2 Rule 15 of the Civil Procedure Rules empowers this Court to strike out a pleading which discloses no reasonable cause of action or defence known in law. However, the power to do so is to be exercised sparingly and with caution. As was held in D.T. Dobia & Company (kenya) Ltd v Muchina 1982 KLR 1.

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it ...”

From a plain reading of the Plaintiffs’ plaint and the respective defences herein, I am not in the least persuaded that the Plaintiffs plaint discloses no reasonable cause of action.

31. That limb of the Preliminary Objection is similarly rejected.
32. The result is that the Preliminary Objection dated 7th September 2023 is devoid of merit. It is accordingly dismissed.
33. I shall now consider the merits or otherwise of the Notice of Motion dated 8th August 2023 which seeks the substantive order that the Defendants, their agents, employees, servants or anyone claiming through them be enjoined from selling, offering for sale, transferring, sub-dividing or gifting the suit land pending the hearing and determination of this suit.
34. The well trodden path in an application of this nature, as set out in the case of Giella v Cassman Brown & Company Ltd 1973 E.A. 358, is that the Plaintiffs are required to establish the following to justify the order of temporary injunction:
1. Show a prima facie case with a probability of success.
 2. Demonstrate that unless the order is granted, they will suffer irreparable loss or injury which would not adequately be compensated by an award of damages.



3. If the Court is in doubt, it will decide the application on a balance of convenience.

Further, as was held by Justice Hoffman in the English case of *Films Rover International Ltd v Cannon Film Sale Ltd* 1963 3 ALL E.R. 772, the Court considering such an application should take the cause that appears to carry the lower risk of injustice should it turn out to have been wrong.

35. Guided by the above precedents, it is common ground that the parties herein are family and the original land parcel No Bukhayo/Mundika/807 was, prior to its sub-division to create the suit land, part of the several parcels of land owned by the family patriarch Odunga Mbomere. It is also not in dispute that the Plaintiffs are part of the said family and are in occupation of portions thereof. A prima facie case, as was stated in *Mrao Ltd v First American Bank Of Kenya Ltd & Others* C.A. Civil Appeal No 39 Of 2002 [2003 eKLR],

“... is a case in 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.”

36. The Court of Appeal adopted that definition and went on to add as follows in the case of *Nguruman Ltd v Jan Bonde Nielsen & Others* C.A Civil Appeal No 77 OF 2012 [2014 eKLR]:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and 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.

As I have already stated above, the Plaintiffs are part of the family of the late Odunga Mbomere the original owner of the land parcel No Bukhayo/Mundika/807 which was later sub-divided to create the suit land. The Plaintiffs have averred that they have buried some of their family members on the suit land and are in occupation. It is also instructive to note that the 1st Defendant who, together with Peter Oyalo Mbomere were registered as proprietors of the land parcel No Bukhayo/Mundika/807 which registration is said by the Plaintiffs to have done fraudulently, has not opposed this application. That, in my view, is sufficient to establish a prima facie case.

37. On the issue of irreparable loss or injury which cannot be compensated by an award of damages, it is also not rebutted that the Plaintiffs occupy the suit land or portions of it and have buried their kin thereon. On the issue of eviction from the suit land, the 1st and 3rd Plaintiffs by their supplementary affidavits have deponed that the 2nd and 3rd Defendants have issued verbal threats to evict them. The 2nd and 3rd Defendants have averred in their replying affidavits that this suit is premature and that no eviction notices have been issued. However, this Court should not wait until those notices are



issued and effected. That may be too late. As was held in the case of *Nguruman Ltd v Jan Bonde Nielsen* (*supra*), it is enough for the Plaintiffs to show that they have “a right which has been or is threatened with violation.” Prima facie, the Plaintiffs have satisfied me that they have such a right and it is threatened with violation. Whether or not they will prove it at the trial is a matter to be determined by evidence during the plenary hearing.

38. It is also clear to me that the role of the Court at this stage is to ensure that the subject matter of this suit is preserved pending trial. The route that commends itself to me at this stage therefore is that the grant of a temporary order of injunction carries the lower risk of injustice.
39. If I was in doubt, which I am not, I would determine the application in favour of the Plaintiffs.
40. Ultimately therefore and having considered all the matters herein, I allow the Notice of Motion dated 8th August 2023 in the following terms:
 1. An order of temporary injunction is issued restraining the Defendants whether by themselves or through their agents, servants, employees or anyone acting or claiming through them from trespassing into, cultivating, taking possession or occupation of, excising, alienating, evicting or in any way interfering with the Plaintiffs’ use and occupation of their designated portion of land comprised in the lands No Bukhayo/Mundika/10836 and 10837 pending the hearing and determination of this suit.
 2. The Plaintiffs shall ensure that this suit is heard and determined within twelve (12) months of this ruling or the injunction shall lapse unless otherwise extended by this Court.
 3. The parties shall ensure that they file all their outstanding documents and conduct pre-trial before the Deputy Registrar on 6th November 2023 who shall then give the parties a date for hearing.
 4. As the parties are family, each shall meet their own costs of this application.

RULING DATED, SIGNED AND DELIVERED ON THIS 26TH DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

