



Menya (Suing as the Agent of Jashon Albert Menya) v Guya (Sued as the Administrator of the Estate of the Late Omilo Guya) (Environment & Land Case E010 of 2023) [2023] KEELC 21244 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E010 OF 2023
AY KOROSS, J
OCTOBER 19, 2023**

BETWEEN

STEPHEN EVANS MENYA (SUING AS THE AGENT OF JASHON ALBERT MENYA) PLAINTIFF

AND

CHARLES OMILO GUYA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE OMILO GUYA) DEFENDANT

RULING

1. For determination before me is the plaintiff's notice of motion filed under certificate of urgency dated 2/06/2023 which was moved pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rules 1 and 2 of the *Civil Procedure Rules*. The plaintiff sought the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That pending hearing and determination of the main suit, an order of temporary injunction do issue restraining the defendant by himself, employees, servants, representatives and agents or any person acting under his authority from transferring, cultivating, disposing or evicting the plaintiff and his family from land parcel no. Central Alego/Nyalgunja/1881.
 - d. That costs of the application be provided for.
2. The motion was premised on the grounds appearing on the face of it together with the supporting affidavit of Stephen Evans Menya who contended he was the plaintiff's attorney. The affidavit was sworn on 2/06/2023.



3. He stated the plaintiff bought land parcel no. Central Alego/Nyalgunga/1881 ('suit property') from a 3rd party one Wilfrida Mlanya Juma in the 1980's but Omilo Guya ('deceased') died before he could transfer the suit property to the plaintiff and the deceased's family had been reluctant to effect the transfer.
4. The defendant who was the son of Omilo Guya cleared trees that were planted on the suit property on 10/11/2022 and on 31/05/2023, he entered the suit property with the aim of evicting the plaintiff and proceeded to till the suit property and claimed possession. The deceased's title over the suit property was extinguished since the plaintiff had been in quiet and uninterrupted possession by adverse possession.
5. The plaintiff's counsel, M/s. Omondi filed written submissions dated 17/04/2023. Counsel submitted the jurisdiction of this court to grant temporary injunctive orders was derived from Order 40 Rules (1) and (2) of the *Civil Procedure Rules*.
6. Counsel submitted the principles for temporary injunction were settled in *Giella v Cassman Brown & another* [1973] EA 358 as; the applicant must establish a *prima facie* case, demonstrate irreparable injury and that the balance of convenience tilted in an applicant's favour. Counsel submitted the plaintiff had met all these ingredients.
7. On the 1st principle of *prima facie* case, counsel submitted the plaintiff had been in occupation of the suit property for over 40 years and his claim was founded on adverse possession and the defendant had threatened to evict him. Counsel placed reliance on the case of *Mrao Ltd vs. First American Bank of Kenya Ltd* (2003) eKLR where the Court of Appeal gave a determination on a *prima facie* case as thus: -

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
8. On the 2nd and 3rd principles of irreparable harm and balance of convenience, counsel submitted the plaintiff would suffer irreparable loss which could not be compensated by an award of damages and the balance of convenience tilted in the plaintiff's favour.
9. Counsel submitted the defendant as the legal administrator of the deceased had caused damages by felling trees on the suit property, invaded it, was on the verge of evicting the plaintiff and chances were high the defendant would dispose of the suit property. Counsel placed reliance on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where the court expressed itself: -

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
10. Counsel further submitted that since the defendant had administrative rights over the estate of the deceased, he could dispose off the suit property to the detriment of the plaintiff and he had in fact damaged the suit property. To buttress her position, counsel cited the case of *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR which stated: -

“The circumstances for consideration before granting a temporary injunction under order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is



in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts.”

11. Albeit being served, the defendant did not oppose the application or file written submissions. Notwithstanding the application was unopposed, this court has to subject it to merit evaluation.
12. Having carefully considered the motion, affidavit, submissions and well cited provisions of law and precedents which shall be relied upon by this court, the single issue that arises for determination is whether the plaintiff has met the threshold to warrant the grant of temporary injunctive orders.
13. The law on granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the [Civil Procedure Rules](#) and a reading of this provision of law demonstrates the purpose of injunctive relief is to maintain the substratum of the suit by ensuring the suit property is protected from danger of being wasted, damaged, alienated, wrongfully sold in execution of a decree or disposed of. See also [Robert Mugo Wa Karanja v Ecobank \(Kenya\) Limited](#) (Supra).
14. The path of temporary injunction is well trodden and this court need not reinvent the wheel. This court shall be asking itself, has the plaintiff established a *prima facie* case? What of irreparable damage and balance of convenience? The Court of Appeal decision of [Nguruman Limited vs. Jan Blonde Nielsen & 2 others](#) [2014] eKLR) concluded as follows: -

“in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

15. That is the law and I will now turn to the facts of this case. On the question of *prima facie* case. No doubt the deceased is the registered owner of the suit property. I have looked at the greencard of the suit property, and it has remarks ‘no dealings until succession is finalised in court’.
16. At this point, this court is uncertain on the capacity of Charles Omilo Guya who has been sued as the representative of the estate of the deceased. This is one of the issues parties may need to address the court on during the hearing of the main suit.
17. The ‘agent’ of the plaintiff averred the defendant had invaded the suit property and caused destruction to it by cutting trees and annexed a charge sheet and in paragraph 9 of his affidavit, he stated the defendant had commenced clearing and tilling the suit property and claimed possession but at the same time stated the defendant was on the verge of evicting him.
18. Who is in current occupation? is it the plaintiff or Charles Omilo Guya? If at all the defendant had taken possession, there is nothing capable of being restrained since the injunction has been overtaken by events. Due to uncertainty of the current occupier of the suit property, I am reluctant to grant temporary injunctive orders. I am also not convinced the plaintiff has established a *prima facie* case. In the case of [Habiba Ali Mursal & 4 others v Mariam Noor abdi](#) [2018] eKLR, the Court held as follows:

“The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one’s right. It is never meant to prevent what has already occurred. It will therefore be futile to grant injunctive orders.”



19. On irreparable harm, apart from stating the defendant had invaded the suit property and considering this court is uncertain who the current occupier is, it was not averred the defendant intended to dispose of the suit property and further the plaintiff annexed an assessment report from Kenya Forest Service ('KFS') which showed damage caused to the suit property was valued at kshs. 160,000/-. I am not satisfied the plaintiff may have suffered irreparable harm that may not be compensated by an award of damages. I need not say more.
16. In view of the foregoing reasons, I find the plaintiff's notice of motion dated 2/06/2023 is without merit and it is hereby dismissed. Costs shall be in the cause. Matter to be mentioned before the deputy registrar for pretrial directions on 29/11/2023. Mention notice to be served upon the defendant.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

19/10/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Miss Omondi for the plaintiff

N/A for the defendant

Court assistant: Ishmael Orwa

