



Orwongo v Moving Atlantic Limited (Environment & Land Case E073 of 2022) [2023] KEELC 20901 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E073 OF 2022
LC KOMINGOI, J
OCTOBER 19, 2023**

BETWEEN

SIMON NYAMBOGORIA ORWONGO PLAINTIFF

AND

MOVING ATLANTIC LIMITED DEFENDANT

RULING

1. This is the Notice of Motion dated 27th September 2022 brought under;
(Under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order, 40, Rule 1,2 & 3 of the [Civil Procedure Rules](#) and enabling powers and provisions of the Law)
2. It seeks orders;
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this suit this Honorable Court be pleased to grant an injunction restraining the Defendant whether by themselves, their agents and/ or servants from gaining entry into, taking possession of, trespassing, remaining upon, demolishing any structures on the suit land, construction on, or otherwise interfering with the Plaintiff's quiet enjoyment and use of Kajiado/Kaputiei North/47209.
 4. That the Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
 5. That the costs of this Application be provided for.
3. The grounds are on the face of the Application and are set out in paragraphs 1 to 12.



4. The Application is supported by the Affidavits of Simon Nyambogoria Orwongo, the Plaintiff/Applicant herein sworn on the 27th September 2022.
5. In response to the Notice of Motion, the Defendant filed a preliminary objection dated 21st November 2022. It appears the defendant did not put in a Replying Affidavit to the Notice of Motion.
6. On the 15th February 2023, the court directed that the Preliminary Objection and the Notice of Motion be heard together. It also directed parties to put in written submissions.
7. The Notice of Preliminary Objection is dated 21st November 2022.

The grounds are;

1. This suit offends Article 162(2) (b) of *the Constitution* of Kenya and Section 150 of the *Land Act* 2012 as the cause of action does not relate to the environment and the use and occupation of and title to land.
2. The suit is therefore fatally and incurably defective and is bad in Law.
3. The suit is an abuse of the process of the court and should therefore be struck out with costs.
8. I have considered the Notice of Motion and the affidavits in support. I have also considered the Preliminary Objection, the written submissions and the authorities cited. The issues for determination are;
 - i. Whether the Preliminary Objection is merited.
 - ii. Whether the Plaintiff's/Applicant's application meets the threshold for grant of temporary injunction.
 - iii. Who should bear costs of this Application?
9. In their submissions counsel have substantiated their clients' respective positions stated in their respective affidavits.
10. It is the Defendant's/Respondent's contention that this court lacks jurisdiction to hear and determine this matter.

Article 162 (2) (b) of *the Constitution* provides that;

“System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to Constitution of Kenya,2010-
 - a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land.”



Section 150 of the [Land Act](#) provides that;

“The environment and Land Court established in the [Environment and Land Court Act](#) is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

Section 13 of the [ELC Act](#) provides that;

“Jurisdiction of the Court

1. The court shall have original and appellate jurisdiction to hear and determine all the disputes in accordance with Article 162(2)b of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of [the Constitution](#), the court shall have power to hear and determine disputes-
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land, and
 - e. any other dispute relating to environment and land.
3. Nothing in this Act shall preclude the Court from hearing and determining application for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Article 42,69 and 70 of [the Constitution](#).
4. In addition to the matters referred to in subsection (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
5. Deleted by Act NO.12 of 2012
6. Deleted by Act No. 12 of 2021.
7. In exercise of its jurisdiction under this Act, the Curt shall have power to make any order and grant any relief as the court deems fit and just, including-
 - a. interim or permanent preservation orders including injunctions; prerogative orders;
 - b. award of damages;
 - c. compensation;
 - d. specific performance;



- e. restitution; or
- f. declaration; or
- g. costs.”

11. From the foregoing provisions it is clear that this court has jurisdiction to hear and determine this matter. I therefore find the preliminary objection to be without merit and the same is dismissed. The costs do abide the outcome of the main suit.

12. As regards the Notice of Motion dated 27th September 2022, the principles were laid down in the precedent setting case of *Giella Vs. Cassman Brown & Co. Ltd* (1973) EA 358.

In the case of *Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125 the Court of Appeal stated what amount to prima facie case.

13. It is not in dispute that the Plaintiff/Applicant is the registered proprietor of the suit property. It is also not in dispute that the plaintiff and the defendant entered into a contract for sale of the suit property and Kshs.7,000,000/= was deposited towards the purchase of the suit property.

14. It is also not in dispute that the balance of the purchase price was not paid within the completion period.

It is clear that the Defendant/Respondent defaulted.

15. In paragraph 7 of the supporting affidavit, the Plaintiff/Applicant states;

“The defendant has on various occasions by itself, or its agents trespassed and attempted to forcibly take vacant possession of the suit property by illegally and forcibly evicting the Plaintiff and/or the Plaintiff’s employees.”

The said averments have not been rebutted by the Defendant/respondent.

In the case of *Njenga Vs. Njenga* (1991) KLR 401 Bosire J (as he then was) held that;

“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles”.

I am persuaded by the Plaintiff/Applicant that he deserves the orders sought.

16. I also find that he has demonstrated that he will suffer irreparable having these orders are not granted.

17. There is a likelihood that the Defendant/Respondent may invade the suit property if it is not stopped.

18. The balance of convenience tilts in favour of the plaintiff/applicant who is the registered proprietor of the suit property.

19. In conclusion I find merit in this application and I grant the orders sought namely;

a. That a temporary injunction is hereby issued restraining the Defendant/Respondent whether by itself, its agents and or servants from gaining entry into taking possession, trespassing remaining upon demolishing any structures on the suit property, construction on or in any way by interfering with the plaintiff’s quiet enjoyment and use of land known as Kajiado/Kaputiei North/47209 pending hearing and determination of this suit.

b. That the costs of this application do abide the outcome of the main suit.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH DAY OF OCTOBER, 2023.

L. KOMINGOI

JUDGE

In the presence of;

Mr. Kerongo for the Plaintiff/Applicant.

Mr. Mwangi Mburu for the Defendant/Respondent.

