



Musumba & another v Ojiambo & 4 others (Environment & Land Case 125 of 2016) [2023] KEELC 21675 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 125 OF 2016
BN OLAO, J
NOVEMBER 22, 2023**

BETWEEN

CAMULUS OSENO MUSUMBA 1ST PLAINTIFF

JUSTUS OMBIJI ONYANGO 2ND PLAINTIFF

AND

PARTRICK BARASA OJIAMBO 1ST DEFENDANT

STEPHEN OJIAMBO 2ND DEFENDANT

FRANCIS OJIAMBO 3RD DEFENDANT

DOUGLAS JUMA 4TH DEFENDANT

MOSES OJIAMBO 5TH DEFENDANT

RULING

1. Camulus Oseno Musumba and Justus Ombiji Onyango (the 1st and 2nd Plaintiffs respectively) impleaded Patrick Barasa Ojiambo, Stephen Ojiambo, Francis Ojiambo, Douglas Juma and Moses Ojiambo (the 1st to 5th Defendants respectively) seeking the main remedy that they have acquired by adverse possession the land parcel No Samia/Wakhungu-odiado/67 (the suit land) by way of adverse possession.
2. The defendants resisted the claim through the replying affidavit of Patrick Barasa Ojiambo arguing, *inter alia* that the Plaintiffs entered the suit land forcefully and have never been in quiet and peaceful occupation thereof.
3. The plenary hearing has commenced and the Plaintiffs closed their case on May 11, 2023 and thereafter the Defendant's case commenced but was adjourned to October 9, 2023 due to time constraints.



4. Meanwhile, by a notice of motion dated October 6, 2023 and filed on October 9, 2023, the defendants citing the provisions of sections 1A, 1B, 3 & 3A of the Civil Procedure Act as well as order 40 rule 1 of the Civil Procedure Rules sought the following remedies:
 1. Spent.
 2. Spent.
3. That pending the hearing and determination of the suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants by themselves, their agents, assignees or anyone else claiming through them from burying the remains of the late Patrick Oduori Wandera a brother to the Defendants on the suit land.
4. That costs be awarded to the Plaintiffs.
5. The application is based on the grounds set out therein and is supported by the affidavit of the 1st defendant.
6. The gist of the application is that the Defendants are still the registered proprietors of the suit land which the Plaintiffs are seeking by way of adverse possession. That if the order of temporary injunction is not granted, the Defendants will suffer irreparable damage.
7. The application is opposed and the 1st Plaintiff filed a replying affidavit dated October 13, 2023 to the effect that the suit land is family land where they have lived un-interrupted since their father died in 1986 the same have been registered in the name of the Defendants' father Ojiambo Namude to hold in trust for their father who was in Uganda at that time. That on January 24, 2008, the Plaintiffs obtained an order to evict the Defendants from the suit land. Further, that vide the decision of the Funyula Land Disputes Tribunal, the Defendants claim to the suit land was dismissed but they have registered themselves as owners of the suit land. That having vacated the suit land in 2008, the defendants never challenged the eviction order and are not deserving of the orders sought.
8. Annexed to the replying affidavit are the following documents:
 1. Copy of the register to the suit land.
 2. Eviction order against the 1st defendant issued in Busia PMCC No 15 of 2003.
 3. Decree issued in Busia PMCC No 290 of 2003.
 4. Proceedings in Funyula Land Disputes Tribunal Case.
9. The application has been canvassed by way of written submissions. These have been filed both by Ms Achala instructed by the firm of Abalo & Company Advocates for the Defendants and by Mr Namatsi instructed by the firm of Namatsi & Company Advocates for the Plaintiffs.
10. I have considered the application, the rival affidavits and annexures and the submissions by counsel.
11. This being an application for a temporary injunction pending trial, it has to be determined in accordance with the principles set out in the case of *Giella v Cassman Brown & Company Ltd* 1973 E.A. 358. These are:
 1. The applicant must establish a *prima facie* case.
 2. The applicant must demonstrate that he stands to suffer irreparable loss which would not be adequately compensated by an award of damages.



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

A prima facie case, as was held in the case of *Mrao Ltd v First American Bank of Kenya* 2003 KLR 125,

“... is a case 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.”

It is clear from the copy of register of the suit land that the same is registered in the names of the Defendants. That is *prima facie* evidence that they are the absolute and indefeasible owners of the suit land as provided under section 26(1) of the *Land Registration Act*. However, that proprietorship is always subject to the overriding interests set out in Section 28 of the same Act.

12. There is however evidence from the orders issued in Busia PMCC no 15 of 2003 that the 1st defendant and his agents and servants have previously vide orders issued in 2008 been evicted from the suit land. It is not clear if that eviction order was ever reversed on appeal. If the defendants have continued to remain on the suit land notwithstanding the eviction order, then that is a violation of the law which disentitles them to the equitable remedy of temporary injunction. I do not see what prima facie case the Defendants have established in the circumstances because the eviction orders, if they are still in place, suggests, prima facie, that they no longer enjoy by protection provided by section 26 of the *Land Registration Act*. Even as I say so, I must caution myself, that at this stage and as was stated in *Nguruman Ltd v Jan Bonde Nielsen & others* C.A. Civil Appeal No 77 of 2012 [2014 eKLR], I must not examine the merits of the parties respective cases closely. That will be a matter for trial.
13. In my view, the fact that the 1st Defendant and those acting through him have previously been evicted from the suit land does not establish a prima facie case in their favour.
14. On the issue of irreparable damage that cannot be compensated by an award of costs, the defendants have not demonstrated what irreparable damage they stand to suffer. Should the Court, at the end of the trial find in favour of the Plaintiffs, necessary orders with regard to the interment of the body of the deceased Patrick Oduori Wandera on the suit land will be made.
15. If there was any doubt, which I do not entertain on the basis of the evidence now before me, I would determine the application on the balance of convenience which is in favour of the Plaintiffs.
16. The up-shot of all the above is that having considered the Notice of Motion dated October 6, 2023, I make the following disposal orders:
 1. The notice of motion dated October 6, 2023 is hereby dismissed.
 2. For avoidance of doubt, the interim orders issued on October 9, 2023 are hereby vacated.
 3. Costs shall be in the cause.
 4. Since this matter is part heard the said application having been held in the cause of the trial which was about to end, the matter be mentioned on November 27, 2023 before the Deputy Registrar for purposes of taking an early hearing date.

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2023



**RULING DATED, SIGNED AND DELIVERED ON THIS 22ND DAY OF NOVEMBER 2023 BY
WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2023

