



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 26 OF 2020

JAMES ONYANGO OTIENO.....1ST PLAINTIFF/APPLICANT

MARGARET ADHIAMBO ADHIRI.....2ND PLAINTIFF/APPLICANT

RAPHAEL OTIENO ONYANGO.....3RD PLAINTIFF/ APPLICANT

JOSHUA OOKO ONYANGO.....4TH PLAINTIFF/ APPLICANT

JANES OTIENO OKIRO.....5TH PLAINTIFF/ APPLICANT

MAURICE OTIENO ADHIRI.....6TH PLAINTIFF/ APPLICANT

VERSUS

ELIDA OWUOR ODHIRI

(Alias ELIDA OWUOR

ADHIRI Alias ELIDA OWUOR

ODERA ONDIALA.....1ST DEFENDANT/ RESPONDENT

ANDREW ODERA.....2ND DEFENDANT/ RESPONDENT

BENEDICT BUNDE ODERA.....3RD DEFENDANT/ RESPONDENT

ANTHONY OTIENO ODERA (Alias

ANTHONY OTIENO OTIENO.....4TH DEFENDANT/ RESPONDENT

FREDRICK OKOTH ODERA.....5TH DEFENDANT/ RESPONDENT

AND

GEORGE ACHIENG AONGO.....1ST INTERESTED PARTY

RUSALINA ARIWI ODERA ALIAS

NYODUWO.....2ND INTERESTED PARTY

JOHN TOBIAS AKELLO.....3RD INTERESTED PARTY

JOHN OKELLO OMBOK.....4TH INTERESTED PARTY

RULING

INTRODUCTION

1. By Notice of Motion dated 13th October, 2021 the Applicants/Plaintiffs sought for the following orders: -

a) Spent.

b) THAT pending the hearing and determination of this Application, this court be pleased to issue an Order of temporary injunction restraining the 4th Defendant by himself, his servants, his agents, his employees and/or persons acting with his express and/or implied authority from entering, re-entering, cultivating, planting crops on or in any way interfering with land parcel **No. KANYAMKAGO/ KAJULU/1274**.

c) THAT pending the hearing and determination of this Suit, this court be pleased to issue an Order of temporary injunction restraining the 4th Defendant by himself, his servants, his agents, his employees and/or persons acting with his express and/or implied authority from entering, re-entering, cultivating, planting crops on or in any way interfering with land parcel **No. KANYAMKAGO/ KAJULU/1274**.

d) THAT the Costs of this Application be provided for.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn by JOHN TOBIAS AKELLO on 13.10.2021 and a Further Affidavit dated 06.12.2021. The applicant herein avers that he has a beneficial interest in a portion of the land parcel **No. KANYAMKAGO/ KAJULU/1274** measuring approximately 1acre; the same having been acquired by his deceased father. That the deceased took immediate vacant possession where he remained in occupation until his death. Subsequently, his dependants continued/maintained possession and occupying the said portion of the suit property.

3. It is the Applicant's contention that sometimes in August, 2021, the 4th Defendant unlawfully and forcefully entered his portion of the suit property and started cultivating the said portion without his consent or authority.

4. He further contends that the 4th Defendant; who has no right over the said portion of land, is using threats and intimidation tactics while he continues to use and occupy the said portion even though he has no lawful claim over the same.

5. Further, it is his claim that he as a good claim over the portion of the suit property in dispute with a high chance of success and if the Application is not granted the entire suit may be rendered nugatory.

6. That as a result of the actions of the 4th Defendant, the Applicant avers that he is likely to suffer irreparable loss, damage and expense hence the need for the court to intervene and stop the unlawful activities and occupation/possession by the 4th Defendant.

7. In his Further Affidavit the Applicant also avers that the 1st Plaintiff has not challenged his rights & interests over the suit property and therefore that is proof that he has a valid claim over a portion of the suit property which is an overriding interest capable of registration.

8. He also maintained that he had demonstrated the extent of damage that he was likely to suffer as a result of the activities of the 4th Defendant which he contends shall permanently diminish the value and status of the suit land.

9. He thus urged the court to find that the balance of convenience tilts in his favor as the 1st Defendant had expressed her intention to relinquish her title leaving the 4th Defendant a total stranger to the suit property.

10. The application was opposed. The 4th Defendant filed a Replying Affidavit sworn and dated on 04.11.2021. He averred that the suit property in dispute parcel **No. KANYAMKAGO/ KAJULU/1274** measuring approx. 2.86Ha (7.45 acres) is registered in the name of ELIDA OWUOR ODHIRI, the 1st Defendant herein who is also his mother.

11. It is his contention that the 1st Plaintiff sold to his mother a portion of the suit property measuring $\frac{1}{4}$ an acre sometimes in the year 2004 and he immediately took possession and occupation, he constructed his home and planted trees which are evidenced from the Applicant's annexure marked "JTA2" which shows a picture of his home and trees.

12. He further claimed that his occupation and use of the said portion of land was with the consent of his mother who is the registered proprietor and on the contrary, he did not need to seek any consent from the Applicant.

13. He also averred that sometimes in the month of June, 2020; destroyed his trees that he had planted on the suit land, the same was reported to Uriri Police Station, where an order of arrest was issued and to the Forest Officer who assessed the damage at Kshs. 18,950/=. He thus denied that the Applicant would suffer any loss, irreparable or at all. He further denied making any threats or causing violence as alleged by the Applicant.

14. On 18.10.2021, this court issued directions on the disposal of the Application herein by way of written submissions. On a perusal of the court record, I have noted with concern that the Applicant has not filed his submissions as directed. The 4th Defendant on the other hand has filed his submissions dated 12.11.2021 which I have read and considered and I have taken the same into account in arriving at my decision.

ISSUES FOR DETERMINATION

15. I have taken into account the entire application and the Affidavit in support together with the annexures thereto and the Applicants' submissions. Consequently, it is my considered view that the solitary issue arising for determination therefrom is;

a) Whether the Applicant has met the requirements for the grant of a temporary order of injunction sought.

ANALYSIS AND DISPOSITION

A) Whether the Applicant has met the requirements for the grant of a temporary order of injunction sought.

16. The law relating to injunctions has been provided under Order 40 (1) (2) of the Civil Procedure Rule which provides as follows:

1. "Where in any suit it is proved by affidavit or otherwise: -

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

(b),

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

17. Section 13 (7) (a) of the Environment and Land Court Act, 2015 also mandates this court to grant interim preservation orders; to wit, an interim injunction as sought in the present Application.

18. The principles that govern the grant of injunctions are now well settled. An applicant seeking orders of injunction should satisfy the conditions set out in the celebrated case of **Giella vs Cassman Brown and Co. Ltd [1973] EA. 358 at 360** as follows: -

a). *where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt;*

b). *He will suffer irreparable harm/injury which cannot be adequately compensated by damages;*

c). *Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.*

(See also **Mrao Ltd vs First American Bank of Kenya and 2 Others, [2003] KLR 125, American Cyanamid vs Ethicon Limited [1975] AC 396**)

19. I will now proceed to discuss each of the 3 grounds as explained above. The first ground that an Applicant must establish is that he has a Prima Facie case which raises arguable and triable issues with a probability of success. The Court of Appeal in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 (Supra)** spelt out what amounts to a prima facie case and stated as follows:

"a prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It 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."

20. From the foregoing, the 4th Defendant/Respondent avers that he has been in occupation of the portion of the suit property measuring 1/acre for a period of about 17years; he has constructed his home on the said parcel and further carries out other farming activities and planted trees thereon which are mature for harvesting, photographs of the same have been annexed. The Applicant on the other hand has stated that the suit land was purchased by his father from the 1st Plaintiff and they immediately took possession.

21. The Respondent in his Replying Affidavit stated the photographs used by the Applicant as annexures in his Supporting Affidavit are photographs of his home which are evidence of his occupation of the said parcel of land, a fact which was not challenged by the Applicant in his Further Affidavit. It is therefore clear that the 4th Defendant/Respondent is in occupation of the said portion of the suit property. It is his position that has been occupying and using the said portion since 2004 when the same was purchased by his mother; the 1st Defendant from the 1st Plaintiff.

22. Further, it is the Applicant's contention that the 1st Defendant in her Replying Affidavit made admissions on the ownership of the land and expressed her interest to relinquish/ surrender the title of the suit property to the 1st Plaintiff. It is therefore her claim that since the 1st Plaintiff has not challenged his rights and interest over the said portion, then he has valid claim. In my opinion, such averments do not demonstrate a prima facie claim against the 4th Defendant to warrant his restraint from entering, re-entering, cultivating & planting crops on the suit property. In any event, such matters of admission and claims of ownership are issues that can only be fully determined at main trial with production of evidence and not at an interlocutory stage like the present Application.

23. In view of the circumstances; I find that the Applicant herein has failed to satisfactorily prove to this court that he has a prima facie case against the 4th Defendant/Respondent.

24. The second limb is that an Applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by damages, if an Order of Injunction is not issued. In **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** in defining what amounts to an irreparable injury the court stated as follows;

“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.”

25. It is important to consider whether the Applicant has demonstrated that he will suffer irreparable harm. An irreparable loss is that which cannot be quantified in monetary terms. The Applicant contends that the actions and activities of the 4th Defendant/ Respondent on the portion of the suit property No. KANYAMKAGO/ KAJULU/ 1274 in dispute shall permanently diminish the value and status of the land. It is noteworthy that the Applicant has not demonstrated his occupation and use of the said portion of land as alleged; the photographs annexed to his Supporting Affidavit are photos showing the 4th Defendant/ Respondent's occupation and activities on the said portion of the suit parcel. There is no proof whatsoever of the irreparable loss and inconvenience that will be suffered by the Applicant if the orders sought are not granted. Further, I need to point out that ownership of the portion of land and the purchase between the deceased and the 1st Plaintiff are matters that go to the root of the case and can only be fully determined at the full trial of the case.

26. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is actual, substantial and demonstrable injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or is in such a nature that monetary compensation, of whatever amount, will never be adequate remedy. Consequently, I find that the Applicant has not demonstrated the irreparable loss that he is likely to suffer that cannot be compensated by an award of damages to the required threshold.

See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)**

27. The final element that must be established is on the balance of convenience. The court needs to be satisfied that the inconvenience likely to be caused to the Applicant by declining the injunction is greater than that which is likely to be caused to the Respondent. The court balances the inconveniences of both parties and possible injuries to them and their properties.

(See **Charter House Investment Limited vs Simon K. Sang and 3 Others [2010] eKLR** (Eldoret Court of Appeal))

28. From the foregoing; it is clear that the 4th Defendant/ Respondent is in occupation of the portion of the suit property in dispute; he has constructed his home thereon and has been carrying out other farming activities; planting crops and trees. The Applicant on the other hand has not demonstrated a prima facie case against the 4th Defendant/Respondent or the irreparable loss that he is likely to suffer unless the orders sought are granted. Therefore, the inconvenience likely to be caused to the 4th Respondent by the grant of the orders sought to restrain him is greater than that which is likely to be caused to the Applicant in the circumstances. I accordingly find that the balance of convenience tilts in favour of the 4th Defendant/ Respondent herein in not granting the temporary injunction.

29. **Lord Diplock** noted in **American Cyanamide Co. vs Ethicon Limited [1975] AC 396; [1975] 2 W. L. R. 316**

“The whole point of temporary injunction is to keep matters in status quo until the main issue in the case can properly be heard.”

CONCLUSION

30. In conclusion, I accordingly find that the Application dated 13th October, 2021 is **not merited** and I proceed to dismiss the same with costs to the 4th Defendant/ Respondent. Further, I order and direct that pending the trial and determination of the suit herein, all parties are hereby ordered to maintain the status quo pertaining their occupation. No party should develop the suit property No. KANYAMKAGO/ KAJULU/ 1274, by putting up permanent structures, selling, transferring, charging or alienating the suit property in any manner whatsoever. Parties are hereby directed to comply with Order 11 within 14 days from the date of this ruling and to fix the suit for hearing on a priority basis. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 24TH DAY OF JANUARY, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:-

Mr. Kisia for the Applicant

Mr. Awino for the Respondent

Tom Maurice - Court Assistant