



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MIGORI**

**ELC CASE NO. E 020 OF 2021 (O.S)**

**JOSEPH K. WAKIAGA**

**(Suing on own behalf and as the legal rep. of the estate of**

**APOLLO ABRAHAM WAKIAGA (Deceased).....1<sup>ST</sup> .PLAINTIFF/APPLICANT**

**TIMOTHY N. WAKIAGA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**JAMES M. WAKIAGA.....3<sup>RD</sup> PLAINTIFF/ APPLICANT**

**VERSUS**

**DANIEL OTIENO OJWELU.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**COUNTY LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/ RESPONDENT**

**RULING**

**INTRODUCTION**

1. By Notice of Motion dated 17<sup>th</sup> August, 2021 the Applicants/Plaintiffs sought for the following orders: -

a) Spent.

b) This Honourable Court be pleased to grant Temporary Conservatory/ Preservatory Order of Injunction restraining the Defendants especially the 1<sup>st</sup> Defendant by himself, servants, agents or otherwise howsoever from interfering with the Plaintiffs/ Applicants' quiet possession of portion of the suit title measuring 3acres and comprised of Original Title Number SUNA WEST/ WASWETA II/ 115 which has since been illegally subdivided without Succession into 6639,6640,7477 and 7478 pending hearing and determination of this Application.

c) This Honourable Court be pleased to grant Temporary Conservatory/ Preservatory Order of Injunction restraining the Defendants especially the 1<sup>st</sup> Defendant by himself, servants, agents or otherwise howsoever from interfering with the Plaintiffs/ Applicants' quiet possession of portion of the suit title measuring 3acres and comprised of Original Title Number SUNA WEST/ WASWETA II/ 115 which has since been illegally subdivided without Succession into 6639,6640,7477 and 7478 pending hearing and determination of this Suit.

d) Costs of this Application be provided for.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn by JOSEPH K. WAKIAGA on 17.08.2021 on his own behalf and on behalf of the co-plaintiffs. The applicants herein aver that their late father APOLLO ABRAHAM WAKIAGA bought a portion of land L.R. SUNA WEST/ WASWETA II/115 measuring 3acres from the late COSMAS OJWELU, the 1<sup>st</sup> Defendant's father. He thereafter took immediate vacant possession of the said portion and they have been in open, peaceful and uninterrupted possession, occupation and use of the same since 1981 to date. They have been growing blue gum trees, forests and other crops on the said portion.

3. The Applicants contend that sometimes in 2017, the 1<sup>st</sup> Defendant, without instituting succession, went ahead to illegally cause the said portion of the suit land to be transferred/ registered into his name and further embarked on illegal subdivision of the suit property into L.R NO. SUNA WEST/ WASWETA II/6639,6640, 7477 and 7478 in an attempt to dispossess, evict and disinherit them.

4. It is therefore their position that the said transfers of the Original Title into the 1<sup>st</sup> Defendant's name and the subsequent subdivision into the 4 portions are an illegality.

5. Further, it is their claim that the 1<sup>st</sup> Defendant has destroyed the crops grown on the suit land and other properties belonging to the plaintiffs with a view to illegally evict them from the said suit property.

6. That as a result of the actions of the 1<sup>st</sup> Defendant, they are bound to suffer irreparable loss hence the need for the court to intervene and preserve the substratum of the suit.

7. The application was unopposed. Despite being served with the Application herein the Defendants/ Respondents neither filed a response nor submissions in response to the allegations leveled against them.

8. The Applicants filed submissions which I have read and considered and I have taken the same into account in arriving at my decision.

#### **ISSUES FOR DETERMINATION**

9. 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 following issues arising for determination therefrom;

a) Whether the Applicants have met the requirements for the grant of a temporary order of injunction sought.

b) Whether a temporary conservatory order of injunction sought can issue.

#### **ANALYSIS AND DISPOSITION**

##### **A) Whether the Applicants have met the requirements for the grant of a temporary order of injunction sought.**

10. 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."**

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

12. 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** and reiterated in the case of in **Mrao Ltd vs First American Bank of Kenya and 2 Others, [2003] KLR 125** 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 **East Africa Industries Limited vs Trufoods Ltd [1972] EA 420**)

13. 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. In **Mrao Ltd vs First American Bank of Kenya Ltd & 2 (Supra)** the Court of Appeal elaborated the meaning of 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.”*

14. From the foregoing, it is clear that the Applicants have been in possession and use of the portion of the suit property in dispute herein; the photographs samples annexed to the Application shows the activities and the various crops and trees on the suit property. It is their position that they have been using the said portion since 1981 when the same was bought.

15. The Applicants contend that the actions of the 1<sup>st</sup> Defendant of destroying the crops and the properties on the suit property, transferring the original title to his name and subsequently subdividing the same in to 4 portions; SUNA WEST/ WASWETA II/ 6639,6640,7477 and 7478 are all aimed at dispossessing, displacing and evicting them from the portion of the suit property which they have been occupying and using. It is also the Applicants allegation that the said actions were done by the 1<sup>st</sup> Defendant without the legal capacity required and which allegations have not been challenged and thus stand uncontroverted.

16. In view of the circumstances; I find that the Applicants herein have satisfactorily proved that they have a prima facie case against the Respondents.

17. 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.”*

18. It is important to consider whether the Applicants have proven that they will suffer irreparable harm, I find this in the affirmative. As stated above, irreparable harm/injury is that which cannot be quantified in monetary terms. It is the Applicants assertion that they have been occupying and using the said portion of the suit property since 1981; they have planted blue gum trees, forests and other crops as evidenced from the annexed photographs and which are now at the verge of being destroyed and wasted by the 1<sup>st</sup> Defendant. No explanation whatsoever has been tendered by the 1<sup>st</sup> Defendant on the said allegations. Thus, should 1<sup>st</sup> Defendant alienate and/or evict the Applicants/ Plaintiffs from the suit property which is now registered in his name, then the loss and inconvenience the Applicants stand to suffer cannot be quantified nor be compensated by an award of damages.

19. 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.

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

20. The final element that must be established is on the balance of convenience. Here the court must be satisfied that the inconvenience likely to be caused to the Applicants by declining the injunction is greater than that which is likely to be caused to the Respondent. This likely inconvenience is balanced and compared between both parties; the court balances the inconveniences of the 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)

21. Having held that the Applicants have demonstrated that they have a prima facie case with a likelihood of success and further that they will suffer irreparable harm that cannot be compensated by an award of damages should the Injunction not be granted, I accordingly find that the balance of convenience tilts in favour of the Applicants in granting the temporary injunction.

22. **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.”*

23. Guided by the above case laws and the legal provisions in the subject, it is evident that the property in dispute herein is in danger of being wasted, damaged or even alienated by the 1<sup>st</sup> Defendant, I therefore find that there is need to preserve the suit property and maintain the status quo by restraining the 1<sup>st</sup> Defendant by himself, agents or servants pending the hearing and determination of the claims of the various parties according to the law.

#### **B) Whether a temporary conservatory order of injunction as sought can issue**

24. The Applicants also sought temporary Conservatory Orders against the Defendants/ Respondents to preserve the suit property and to restrain the Respondents from interfering with the Applicants’ quiet and peaceful possession, use and occupation of the portion of the suit property.

25. The Supreme Court determined the nature and concept of Conservatory Orders in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Other (2014) eKLR** where it was held that:

***“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”***

26. The suit property in dispute in the present case does not bear any public law connotation, issues of public interest or constitutional values do not arise at all. It is a private property with the dispute herein being between the Applicants and the Respondents. As such therefore, I do find that Conservatory Orders as sought by the Applicant cannot be granted in the circumstances.

### **CONCLUSION**

27. In conclusion, I accordingly find that the Application dated 17<sup>th</sup> August, 2021 is merited and I proceed to order and direct that the 1<sup>st</sup> Defendant/ Respondent by himself, servants, agents or otherwise howsoever, be and are hereby restrained from interfering with the Plaintiffs/ Applicants possession, occupation and use of the portion of the suit property Original Title Number SUNA WEST/ WASWETA II/ 115 now subdivided into 6639,6640,7477 and 7478 measuring 3 acres pending the hearing and determination of the suit herein. Parties are hereby directed to comply with Order 11 within 14days from the date of this ruling. It is so Ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 19TH DAY OF JANUARY, 2022**

**MOHAMMED N. KULLOW**

### **JUDGE**

**Ruling delivered in the presence of:-**

Non appearance for the Applicants

Non appearance for the 1<sup>st</sup> Respondent

Non appearance for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

Tom Maurice - Court Assistant