



REPUBLIC OF KNEYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC CASE NO. 20 OF 2021

(FORMERLY MIGORI ELCC NO. 39 OF 2020)

JOHN ODAGO OMUNGUPLAINTIFF/APPLICANT

VERSUS

AMOS JAOKO OKONGO

NYATIENO OWINO AUGUSTINE (sued as the Legal

Representatives of the Estate of MARIA SABINA OWATO - *Now Deceased*)

FRED MOPHAT ONYANGO

KENNEDY OTIENO OWINO.....DEFENDANTS/RESPONDENTS

JOHNSON NYAKUNDI

KENNEDY OTIENO OWINO (SUED AS THE LEGAL

REPRESENTATIVE of the estate of CONSOLATA ALANDO –*Now Deceased*

DANIEL OLOO OWINO)

RULING

1. By a Notice of Motion dated 8th November 2021 and filed herein on 11th November 2021 (The application), one, John Odago Omungu (the applicant) through the firm of Oguttu Mboya, Ochwal and Partners Advocates is seeking the orders infra;

a. Moot

b. Moot

c. Moot.

d. Moot

e. The Honourable Court be pleased to grant an Order of Temporary Injunction restraining the Defendants/Respondents herein either by themselves, agents, servants, employees and/or anyone claiming under the Defendants/Respondents, from entering into, encroaching upon, selling and/or disposing of, charging, leasing, trespassing into, ploughing, Cultivating and/or otherwise interfering with, threatening to forcibly enter upon, developing, Fencing and/or in any other manner dealing with the suit property that is, LR NO's KANYAMWA/KOCHIENG/KOMUNGU/KAKAETA/1378,1379.1591.1592, 1080 and 1081 and/or any portions thereof, pending the hearing and determination of this suit.

f. The Honourable Court be pleased to grant an Inhibition directed to and/or against any dealings , transaction and/or disposing, relating and/or concerning transactions in respect of LR NO's KANYAMWA/KOCHIENG/KOMUNGU/KAKAETA/1378,1379.1591.1592, 1080 and 1081 to last pending the hearing and determination of the instant suit.

g. In the alternative and without prejudice to the foregoing, the Honourable court be pleased to order and/or direct the maintenance of Status Quo in respect of LR No's KANYAMWA/KOCHIENG/KOMUNGU/KAKAETA/1378, 1379.1592,1080 AND 1081 and more particularly, barring and/or prohibiting the Defendants/Respondents from carrying onto, Ploughing, cultivating and/or otherwise Interfering with, threatening to forcibly enter upon, fencing and/or in any other manner dealing with the suit property that is , LR NO's KANYAMWA/KOCHIENG/KOMUNGU/KAKAETA/1378,1379.1591.1592, 1080 and 1081 and or any portions thereof, pending the hearing and determination of this suit.

h. Costs of this Application be borne by the Defendants/Respondents.

i. Such further and/or other orders be made as the Court may deem fit and expedient.

2. The application is anchored on a thirty-one (31)-paragraphed supporting affidavit of even date sworn by the applicant and the annexed documents marked as "JOO 1 to JOO 8 (e), inter alia, a copy of certificate of official search with regard to Plot number 962, Komungu/Kakaeta Adjudication Section, a copy of objection proceedings, copies of green cards and bundles of photographs of the suit property. It is also based on grounds (a) to (t) set out on it's face.

3. In a nutshell, the applicant laments that on 17th July 2020, he lodged the instant suit by way of a plaint dated 23rd June 2020 claiming trust over the suit property. That in the month of early November 2021, the 2nd, 3rd and 5th respondents commenced construction of a permanent structure on the suit property and fencing off portions of the same hence precipitating the instant application.

4. By the 1st respondent's replying affidavit sworn on 20th December 2021, the Respondents through the firm of Omonde Kisera and Company Advocates, opposed the application, termed the same devoid of merits and sought it's dismissal with costs. The respondents asserted, inter alia, that the suit property are ancestral land of the respondents where they have lived and used from generations to generations. That the applicant's allegations are false and that the application should not be allowed as granting the prayers therein would amount to disposal of the main suit.

5. Annexed to the 1st respondent's supporting affidavit, is an authority of the 2nd to the 6th Respondents. Further, copies of certificate of official search and green cards in respect of the suit property and marked as "AJO-1a" to "AJO-1d," are in support of the affidavit.

6. On 22nd November 2021, this court ordered and directed that the application be argued by way of written submissions further to **Order 51 Rule 16 of the Civil Procedure Rules, 2010**; see also **Practice Direction number 33 of this Court's Practice Directions, 2014**.

7. By eight (8) paged submissions dated 14th January 2022 and duly filed in court on 20th January 2022, learned counsel for the applicants gave the background of the case and framed four issues for determination including whether the applicant has a prima facie case against the respondents and whether a temporary injunction can issue in the circumstances. Counsel discussed the issues in favour of the applicant and urged the court to grant the prayers in the application as the threshold thereof has been satisfied by the applicant.

8. To fortify the submissions, the applicant's counsel cited the case of **Mrao Ltd-vs-First American Bank of Kenya Limited and 2 others (2003) eKLR** on the meaning of a prima facie case, among others. Counsel further cited the case of **Nguruman Limited-vs-Jan Bonde Nielsen and 2 others (2014) eKLR** concerning the burden and standard of proof of proof of a prima facie case and irreparable injury.

9. On 20th December 2021, learned counsel for the respondents filed submissions of even date stating, inter alia, that the numerous orders sought in the application are injunctive in nature and very drastic in their implications. That the applicant seems to seek implementation of adjudication which was determined by the Minister on appeal. That therefore, the present suit is statute barred by dint of the Limitations of Actions Act, factually faulty and defect in form and procedure.

10. To reinforce the submissions, counsel referred to the celebrated decision in **Giella-vs-Cassman Brown Co. Ltd (1973) EA 358**. Counsel submitted that the application has not satisfied the conditions in **Giella case** (Ibid) thus, implored upon the court the court to dismiss the same.

11. I have carefully read and considered the entire application, the replying affidavit and the parties' respective submissions inclusive of the issues framed and the authorities cited therein. In that regard, the condensed issue for determination is whether the application has attained the threshold in the celebrated case of **Giella-vs Cassman Brown (supra)**.

12. **Order 40 of the Civil Procedure Rules, 2010** governs temporary injunction and temporary orders. Clearly, the conditions under Rule 2 of the said Order are meant to curb abuse of temporary orders as noted in **DPP-vs-Justus Mwendwa Kathenge and others 2016 eKLR**.

13. The triple requirements to be satisfied in an application for any order of injunction are well settled; see **Giella case (supra)**.

14. As regards a prima facie case, I subscribe to the decision in the case of **Mrao-vs- First American Bank of Kenya Ltd and 2 others 2003 KLR 125** where the court fashioned a definition of a prima facie case in civil cases, inter alia;

'.....A prima facie case is more than an arguable case....'

15. Regarding irreparable injury and balance of convenience, I bear in mind the application and the replying affidavit in their entirety. I am also guided by the authoritative pronouncements including **Giella and Nguruman cases** (supra) accordingly.

16. It is established that the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially; see **Kenya Commercial Finance Co. Ltd-vs-Afraha Education Society** applied in **Nguruman case** (supra).

17. It is important to note that all the issues raised in the pleadings are to be considered at the hearing of the main suit which should be determined on merits; see **Articles 25 (c) and 50 (1) of the Constitution of Kenya, 2010** and the Court of Appeal decision in the case of **Philip Chemwolo and another-vs-Augustine Kubende (1986) eKLR**,

18. In light of the orders sought in the application, it must be noted that in the case of **Hutchings Biemer-vs-Barclays Bank of Kenya Limited and 2 others (2006) eKLR**, the Court of Appeal observed;

*“.....In our view, injunctive orders are meant to preserve property and maintain the status quo. This is the light in which we read the holdings in the case of *Madhupaper International Limited-vs-Kerr (1985) KLR 840.....*”* (Emphasis added)

19. This court is mandated under **Section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)** to grant interim preservation orders. The orders sought in the application inclusive of status quo orders, are envisioned thereunder.

20. Moreover, this court has the powers to grant an order of status quo over the suit property. That the same is meant to preserve the suit property until the suit is determined or terminated as I subscribe to the decision in **Ogada-vs-Mollin (2009) KLR 620**.

21. In the premises, an order the maintenance of the prevailing status quo over the suit property is merited rather than temporary injunctive relief in the manner sought in the application.

22. Thus, the application dated 8th November 2021 and lodged in court on 11th November 2021, is partially allowed in terms of prayer number 7 sought therein and as state in paragraph 1 (g) hereinabove. In particular, the respondents/defendants shall not further erect permanent structures on the suit property, sell, charge, lease, sub divide, transfer and or dispose of the suit property pending the hearing and determination of this suit.

23. Costs of the application be in the cause.

24. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT HOMA BAY THIS 15TH DAY OF FEBRUARY 2022.

PRESENT:

A) MR. B. MULISA, LEARNED COUNSEL FOR THE APPLICANT/PLAINTIFF.

B) OKELLO, COURT ASSISTANT.

G.M.A ONG'ONDO

JUDGE