



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KITALE**

**ELC NO. 51 OF 2021**

EZEKIEL OBANDA OLUNGA.....1<sup>ST</sup> PLAINTIFF/APPLICANT  
HEZEKIAH BUNDE OBANDA.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
MARGARET ADHIAMBOOLUNGA.....3<sup>RD</sup> PLAINTIFF/APPLICANT  
CAROLINE WASONGA.....4<sup>TH</sup> PLAINTIFF/APPLICANT  
PHILIP WASONGA.....5<sup>TH</sup> PLAINTIFF/APPLICANT  
FLORENCE ADOYO.....6<sup>TH</sup> PLAINTIFF/APPLICANT  
FLORIDA ADONGO.....7<sup>TH</sup> PLAINTIFF/APPLICANT  
JANET NJERI OBANDA.....8<sup>TH</sup> PLAINTIFF/APPLICANT

**VERSUS**

EMMANUEL NYONGESA OBANDA.....1<sup>ST</sup> DEFENDANT/RESPONDENT  
GABRIEL MUNENE.....2<sup>ND</sup> DEFENDANT/RESPONDENT  
FRANCIS MWAURA.....3<sup>RD</sup> DEFENDANT/RESPONDENT

**RULING**

**(On an Application for both a mandatory and temporary injunction)**

**Introduction**

1. In pre- and post-independence Kenya land is an emotive resource. The complaints by indigenous people about their displacement from their ancestral lands, the failure of the government to compensate the communities displaced from the parts commonly known as the White Highlands, the constant pastoral conflicts over grazing lands, the complexity of the intertwining weavings and intersections between land ownership and the economic and social gains it brings to people makes it even more emotive. Worse is when claims of land grabbing and fraud set in.

**The Application**

2. By a Notice of Motion dated 21/09/2021 the Applicants moved this Court under **Order 40 Rules 1 and 2** and **Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 3A, 1A and 1B of the Civil Procedure Act**. Through it, they sought the following orders:

(1) ...spent

(2) That a mandatory order of injunction do issue ordering the Defendants by themselves, their servants or agents to deliver forthwith vacant possession of Kingeleni Intra LR. No. 2073/26, 2073/27 and 2073/28 to the Plaintiffs and permanently restraining the Defendants by themselves, their servants or agents from entering upon, remaining on, cultivating or howsoever farming, using or dealing with the Plaintiffs' property known as Kingeleni Intra LR. No. 2073/26/

2073/27 and 2073/28.

**(3) The Honourable Court be pleased to make further orders deemed fitting within its inherent jurisdiction.**

**(4) The Defendants be condemned to pay costs occasioned to the Plaintiff by this action.**

3. The Application was based on a number of grounds and supported by an affidavit sworn by Ezekiel Obanda Olunga on **21/09/2021**. The contents of both the grounds of the Application and the Affidavit are basically the same. I will therefore summarize them as below.

4. The Applicants contended that they were beneficiaries entitled to ownership, possession, use and enjoyment of **Kingeleni Intra Nzoia Land Reference Nos. 2073/26, 2073/27 and 2073/28**; that both Ezekiel Obanda Olunga is the surviving Administrator of the estate of Henry Olunga Obanda; that the late Henry Olunga Obanda died intestate survived by the late Fridah Bwabi Olunga and the **1<sup>st</sup> to 8<sup>th</sup>** Plaintiffs and the **1<sup>st</sup>** Defendant as children and grandchildren of the deceased entitled to inherit and take benefit of the estate of Henry Olunga Obanda; that the Plaintiffs and the **1<sup>st</sup>** Defendant agreed in the mode of distribution of the estate of Henry Olunga Obanda as given in the summary in the Succession Cause, which they reproduced in the Supporting Affidavit, and it was received and acknowledged expressly or impliedly by each of the beneficiaries; that before and after **30/9/2019** the **1<sup>st</sup>** Defendant together with the **2<sup>nd</sup>** and **3<sup>rd</sup>** Defendants trespassed onto the Plaintiff's land.

5. It was the Applicants' argument that the Defendants wrongfully entered upon trespassed and encroached on the parcel of land known as **Kingeleni Intra LR No. 2073/26, 2073/27 and 2073/28** and unlawfully took possession and use and enjoyment of Florence Adoyo's Janet Njeri Obanda's, Margaret Adhiambo Olunga's, Caroline Wasonga's and Phillip Watonga's portions of **Kingeleni Intra Nzoia Land Reference No. 2073/26, 2073/27 and 2073/28** and leased it by the **1<sup>st</sup>** Defendant to the **2<sup>nd</sup>** and **3<sup>rd</sup>** Defendants without their consent; demarcation and survey of respective beneficiaries shares of **Kingeleni Intra LR No. 2073/26, 2073/27 and 2073/28** was already done pursuant to the orders of the succession court; they were in the process of getting titles some of whose copies they annexed in respect of Title **No I. R. 18055 L. R. No. 2073/26 and L.R. No. 2073/27 and Title No I. R. 17924 L.R. No. 2073/28** respectively; they annexed a copy of the Chief's letter confirming official demarcation of **Title No Bungoma/Ndalu/117** to Walter Osama Olunga for **21.6** acres and the **1<sup>st</sup>** Defendant **20** acres; they then contended that the Defendants had no legitimate or lawful claim to any right to or interest in ownership, possession, use of **Kingeleni Intra LR No. 2073/26, 2073/27 and 2073/28** or to subdivisions.

6. They prayed for an order of injunction to give effect to the said declarations compelling the defendants to deliver vacant possession thereof to the Plaintiffs and permanently restraining them by themselves, their servants or agents from howsoever entering upon, remaining on, cultivating, farming, or howsoever using or developing the whole or any portion of **Kingeleni Intra LR No. 2073/26, 2073/27 and 2073/28**. They also relied on **Section 6 of Land Control Act** which forbids the leasing of or any dealing any agricultural land, of which they claimed the parcels of land in issue were, without first the consent of the relevant Land Control Board being obtained.

7. The Applicants served the Application twice, and filed an Affidavit of Service thereof, with the last one being sworn by one Geoffrey Masinde Sitati on **18/02/2022**, and filed on the same date. This Court was satisfied as to service hence directed that the Application proceeds to hearing. The Respondents neither replied to the Application nor entered appearance or filed any Notice of Appointment of Advocate.

#### **Directions**

8. Through directions made on **12/10/2021**, this Court ordered that the Application be determined by way of written submissions. Only the Applicants filed theirs on **17/11/2021**. As stated before, it appears the Respondents did not bother to oppose the Application.

#### **Applicants' Submissions**

9. While urging this Court to allow the Application, the Applicants submitted that they relied on the provisions of the **Civil procedure Act** and the subsidiary Rules made thereunder, the provisions of the **Land Control Act**, Chapter **302** of the Laws of Kenya and the opinions in **Bullen & Leake & Jacobs Precedents on Pleadings, 12<sup>th</sup> Edition** (*sic*), but the proper title of the book is in **Bullen & Leake & Jacob's Precedents of Pleadings, 12<sup>th</sup> Edition, Sweet and Maxwell, London, 1975**.

10. They submitted that it was telling that all the Respondents, despite being served, decided with one accord not to file any responses to the Application. They then relied on the comment by **Bullen & Leake & Jacob's Precedents of Pleadings** at an unspecified page which they indicated as "page...", which is to the effect that where a statement of claim is admitted in the defence because it is not traversed ceased to be in controversy between the parties and no evidence needs to be led thereon. The excerpt continues that pleadings bring parties to the point of affording each one of them the rules of natural justice of providing an opportunity for each to be heard. Thereafter, the Applicants submitted in summary, basically reproducing the facts of the Application.

#### **Issues, Analysis and Determination**

11. While I note that the Application is not opposed, I am alive to the fact that the law requires that the existence or non-existence of a fact ought to be proven by the person who so alleges. Thus, it is not automatic that the Application before the Court be allowed for reason of absence of opposition. Its merits have to be proved. Thus, I have carefully considered the Application, the Applicants' submissions, the law as well as the relevant cases cited. The issues that commend for determination therefore are:

**a) Whether the Application is merited;**

**b) What orders to issue and who to bear costs?**

12. I will analyze the issues one after the other as hereunder.

(a) ***Whether the Application is merited***

13. To begin with, in their submissions the Applicants relied on an excerpt from **Bullen & Leake & Jacob's Precedents of Pleadings** (supra) to implore the Court to make a finding that the Respondents, by not filing any documents in opposition to the instant Application, had impliedly admitted the facts. In a way the Applicants' view was that it was game over on the part of the Respondents or that the Respondents had given them their game by not responding to the Application. Of importance to note herein is that that which the Applicants brought before the Court are facts about trespass, leasing, occupation and use of a number of parcels of land said to be belonging to them as beneficial owners of the estate of the late Henry Olunga Obanda. The quotation was specifically on pleadings and not facts. The contention of the Applicants in the instant Application was on facts and not pleadings as envisaged by the excerpt that they relied on. Hence, in my view, the quotation is inapplicable to the instant Application.

14. The Applicants sought against the Respondents two types of injunction in our prayer. They were a mandatory and temporary injunction. The two have different requirements to be satisfied in order for them to be granted. Therefore, as I analyze whether or not the Application is merited I will have to make a finding on whether the principles required for each have been met.

15. I start by considering the merits or otherwise of the prayer for a temporary injunction. But before embarking on the determination of the issue, it is worth recalling and restating that injunctions are equitable remedies and their grant or denial is a matter of the discretion of the Court. The discretion ought to always exercised judiciously and not capriciously. The facts and the law have to be correlated properly by the judge and a reasoning on why the judge arrives at the final conclusion he does be given.

16. The factors to consider in a case where a temporary injunction is sought were given in the seminal case of ***Giella -vs- Cassman Brown [1973] EA 358***. The case established three limbs to be satisfied. These are:

(a) **Whether the applicant has established a prima facie case**

(b) **Whether the he or she would suffer rreparable loss that may not be compensated by damages and**

(c) **That if the court is in doubt, it may rule on a balance of convenience.**

17. The Applicants have proved beyond peradventure that they were the beneficiaries of the estate of the late Henry Olunga Obanda, of whom the 1<sup>st</sup> Defendant too was. They also showed that the estate consisted of the parcels of land known as **Kingeleni Intra LR No. 2073/26, 2073/27 and 2073/28**. They also proved that the estate was the subject of **Kitale Succession Cause No. 122 of 2011** which has been distributed in the manner deponed in the Affidavit sworn by Ezekiel Obanda Olunga on **21/09/2021**. However, they failed to show that the 1<sup>st</sup> Defendant leased to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the parcels of land in issue which belonged to them as beneficiaries and also that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took possession of the said parcels of land. All that the Applicants demonstrated was that the 1<sup>st</sup> Defendant had leased the portion of land that fell unto him by way of beneficial ownership of the estate of the late Henry Olunga Obanda. They did so by annexing at paragraph 10 of the Supporting Affidavit a copy of a lease agreement dated **30/09/2019**, marked as annexure **EOO 3**, entered between the 1<sup>st</sup> Defendant and one **Ibrahim Kiratu Kigoto** who is not enjoined in this suit as a party. The said lease did not specify if it was for one year or more so as to inform the Court or anyone else that it was still in existence. In any event the Application was brought after two years of the purported lease. It is not clear as to whether the lease subsisted or it ended after the one year it related to. It did not purport to show a nexus between it and the other parcels of land in dispute. Again, there was no lease agreement shown to be in existence between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Furthermore, apart from unsubstantiated depositions that the parcels of land being part of **Kingeleni Intra LR No. 2073/26, 2073/27 and 2073/28** falling under the beneficial ownership of the 1<sup>st</sup> Applicant and Florence Adoyo, Janet Njeri Obanda, Margaret Adhiambo Olunga, Caroline Wasonga and Phillip Watonga being leased out, there was no document, even from an independent source such as the area Chief to support the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took occupation of the portions of land referred to or indeed any other portions forming part of **Kingeleni Intra LR No. 2073/26, 2073/27 and 2073/28**. As such I find that no *prima facie* case has been established to warrant issuance of a temporary injunction.

18. Additionally, the Applicants denied granting consent to the 1<sup>st</sup> Respondent to lease their respective parcels of land, and demonstrated that there was no consent obtained from the Land Control Board before granting the leases, as required by **Section 6 of the Land Control Act, Chapter 302** of the Laws of Kenya in regard to agricultural land, of which the parcels of land were. There being no evidence that the parcels of land had been leased, it was doubtful whether there was any need of consent being sought from the Land Control Board even though there was a demonstration that the parcels of land were agricultural.

19. The analysis of the totality of the facts as proven by the Applicants is that they have neither shown a *prima facie* with a probability of success nor shown that they will suffer irreparable loss that may not be compensated by way of damages should the orders sought not be granted.

20. In regard to understanding what amounts to irreparable loss, in ***Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR*** <http://kenyalaw.org/caselaw/cases/view/156488/> the Court defined it 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.”***

21. I have carefully considered the facts relied on by the Applicants and compared them with the law on irreparable loss. I am of the view that, as the issues are before me, no actions, if any, of the Respondents have been shown that will occasion the Applicants irreparable loss if a temporary injunction is not granted. Thus, this limb of the prayer is unmerited.

22. For the reasons above, first, I will not consider whether or not the balance of convenience tilts in favour of the Applicants or the Respondents. Second, turning to the limb on the prayer for a mandatory injunction for the Respondents to deliver vacant possession of the parcels of land in issue, this Court considers the point that the grant of a mandatory injunction at the interlocutory state of any case is a very rare step the Court takes. The Court has power to grant such a prayer under special circumstances. However, given that it has not been demonstrated that the 1<sup>st</sup> Respondent leased to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the parcels of land in issue and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents actually took possession thereof, it would be unnecessary and an academic exercise to consider this limb at this stage.

**(b) What orders to issue and who to bear costs**

23. The upshot is that the Application dated **21/09/2021** is not merited. Since it was not opposed, it is hereby dismissed with no order as to costs.

24. For ease of management of this case, the Applicants are directed to ensure that compliance with **Order 11** of the **Civil Procedure Rules** together with the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts, *Gazette Notice No. 5178* are complied with within the next **thirty (30)** days. This matter shall be mentioned on **06/06/2022** at **8.30 am** to confirm compliance.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21ST DAY OF APRIL, 2022.**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**