



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC CASE NUMBER E004 OF 2021 (O.S)

JOHN ODHIAMBO ADALA.....PLAINTIFF

VERSUS

MICHAEL OMAVA.....1ST DEFENDANT

WILLIAM ONYANGO.....2ND DEFENDANT

JACKSON OKETCH OGWAYO.....3RD DEFENDANT

LAND REGISTRAR SIAYA.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The plaintiff's case

1. Pursuant to the provisions of **Section 1A, 1B, 3 and 63 (e)** of the **Civil Procedure Act** and **Order 40 Rules 1, 2, 3, 4 and 10** of the **Civil Procedure Rules**, the plaintiff filed a motion dated 10/11/2022 seeking several prayers. Prayers 1, 2, 3 and 4 are spent and the main prayers pending determination are as follows;

a) That pending the hearing and determination of this suit there be an order of inhibition inhibiting the defendants, their agents, servants and/or any other person acting on their instructions from trespassing or proceeding with further cultivation on SIAYA/UMALA 138 and SIAYA/UMALA/139 [suit properties].

b) That the court do issue an order for rectification and cancellation of entries number 1 and 2 on the suit properties' register.

2. The Motion is based on the grounds set out on the face of the motion and on the supporting affidavit of the plaintiff dated 10/11/2021.

3. The plaintiff contended that he had lived on the suit properties for a period of over 12 years and had made substantive developments thereupon and that his occupation and possession had been open, continuous and uninterrupted. He contended that the trial court had found that the plaintiff was an adverse possessor of the suit properties and had erred in dismissing the suit.

The defendant's case

4. With the authority of the 2nd and 3rd defendant, the 1st defendant filed a replying affidavit dated 20/01/2022 in which he denied the averments in the plaintiff's supporting affidavit and asserted that the suit properties were 1st registrations and that the plaintiff was a relative.

5. He contended that the plaintiff's brother one Samuel Omondi held a separate parcel of land in trust for the plaintiff and the plaintiff's claim lay with his brother and not the 1st to 3rd defendants. He asserted that the plaintiff was neither born nor brought up in the suit properties and that his (plaintiff's) parents were not buried there.

6. He contended that the plaintiff had been a perpetual litigator whose claims had either been dismissed by the courts or withdrawn. He contended that this matter had been the subject of litigation in **Ukwala Misc. Land Case No.3 of 2019, Ukwala ELC No.30 of 2018 and Kisumu ELCA No.56 of 2019**. He urged the court to disallow the motion.

The plaintiff's submissions

7. The plaintiff filed written submissions dated 12/01/2022. He stated that the only issue falling for determination was whether he had met the threshold for the grant of a temporary injunction.

8. He submitted that the principles of granting orders of temporary injunction were enunciated in the cases of **Giella v Cassman Brown [1973] EA 358** and **Nguruman Limited v Jan Bondenielson & 2 others CA Number 77 of 2012 [2014] eKLR**.

9. Placing reliance on the case **Mrao Limited v First American Bank of Kenya Limited [2003] eKLR**, the plaintiff contended that he was in occupation of the suit properties and that he had established a prima facie case with probabilities of success. Relying on the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** he contended that he would suffer irreparable loss if the orders sought were not granted. He contended that he had lived on the suit properties since 1959 and that the balance of inconvenience tilted in his favour.

The defendants' submissions

10. The 1st to 3rd Defendants filed their written submissions dated 20/01/2022. They identified four issues for determination; (i) Whether the plaintiff owned the suit properties (ii) Whether the suit was *res judicata* (iii) Whether the plaintiff had met the threshold for grant of injunction and, (iv) Whether the 1st to 3rd Defendants had any remedies.

11. They submitted that the plaintiff had not demonstrated ownership or possession of the suit properties and that the plaintiff was guilty of material non-disclosure for failing to disclose that there had been several suits amongst the parties. They asserted that the plaintiff had not met the threshold of **Giella v Cassman Brown (Supra)** and urged the court to dismiss the motion.

Analysis and determination

12. Before considering the merits or otherwise of the motion, there is an important issue pleaded by the plaintiff in paragraphs 6 and 7 of his affidavit in support of his motion in which he has alluded that there were proceedings between the parties on a claim of adverse possession which was dismissed by the trial court for want of jurisdiction. He has similarly asserted this in the affidavit in support of his originating summons.

13. From the attachments annexed to the defendants' replying affidavit it is evident that **Ukwala Misc. LC No.3 of 2018** was between the plaintiff and the 3rd defendant and involved the suit properties that are the subject of these proceedings. The status of these proceedings have not been disclosed to the satisfaction of this court. **Ukwala ELC No.30 of 2018 [formerly Kisumu ELC 43 of 2017]** was between the plaintiff and the 1st to 3rd defendants and by a judgement dated 4/12/2019, the plaintiff's suit in this case was dismissed on merit by the court. The plaintiff has appealed against this decision in **Kisumu ELCA No.56 of 2019**. The status of this appeal has not been disclosed to this court. The various suits relate to the suit properties that are the subject of this suit and more or less relate to the same parties.

14. From these pleadings, it is apparent that there is high likelihood that the various suits are either pending determination, been determined or been dismissed which may have the general effect of rendering this suit *res subjudice* or *res judicata*. As neither of the parties have availed the entire proceedings of these other suits, the appropriate order that behooves this court at this stage is to order that the proceedings in this suit be stayed. Ultimately, I issue the following disposal orders;

a) I hereby order that this suit shall forthwith be stayed pending further directions from this court.

b) Mention for further directions on 16/05/2022.

15. It is so ordered.

Ruling delivered virtually and in open court.

DATED, SIGNED AND DELIVERED THIS 4TH DAY OF APRIL 2022

IN THE PRESENCE OF:

MR. OGONDA FOR THE 1ST, 2ND & 3RD DEFENDANT.

N/A FOR 4TH & 5TH DEFENDANT.

N/A FOR THE PLAINTIFF

COURT ASSISTANT: ISHMAEL ORWA

HON. A. Y. KOROSS

JUDGE

4/4/2022

