



REPUBLIC OF KENYA



**KENYA LAW**  
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**Amuhaya & another v (Deceased & 3 others (Environment & Land  
Case 2 of 2022) [2022] KEELC 3454 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3454 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 2 OF 2022**

**DO OHUNGO, J**

**MAY 18, 2022**

**BETWEEN**

**ALEX GWAKHA AMUHAYA ..... 1<sup>ST</sup> PLAINTIFF**

**FLORENCE LYDIA (A.K.A LUDIA) MAGANGA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**VINCENT MUNIALO KAPTEKA (SUED AS THE ADMINISTRATOR OF THE  
ESTATE OF BENJAMIN KAPTEKA (DECEASED)) ..... 1<sup>ST</sup> DEFENDANT**

**AGNETA NALIAKA KABUTEKA (SUED AS ADMINISTRATOR OF THE  
ESTATE OF BENJAMIN KAPTEKA (DECEASED)) ..... 2<sup>ND</sup> DEFENDANT**

**JACOB WABOMBA ..... 3<sup>RD</sup> DEFENDANT**

**FRED WANGILA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By notice of motion dated February 7, 2022, the plaintiffs seek the following orders:

1. [Spent]
2. [Spent]
3. [Spent]
4. That pending the hearing and determination of the suit, an order of injunction be and is hereby issued restraining the Defendants whether by themselves, agents, servants, proxies or employees from entering, taking possession, trespassing or otherwise dealing in all that property occupied by the Plaintiffs comprising L.R. No. Kakamega/Kongoni/2225.



5. That pending the hearing and determination of the suit, an order of injunction be and is hereby issued restraining the defendants whether by themselves, agents, servants, proxies or employees from evicting, taking possession, trespassing or otherwise dealing on a portion of land measuring 2.5 Acres fenced, occupied and cultivated by the Plaintiffs and contained in L.R. No. Kakamega/Kongoni/2224.
  6. That the Officer Commanding Station Kongoni Police Station do ensure compliance with all orders issued herein.
  7. Costs be provided for.
2. The application is supported by an affidavit sworn by the 1<sup>st</sup> plaintiff who deposed that the plaintiffs are the registered owners of the parcel of land known as L.R. No. Kakamega/Kongoni/2225 measuring approximately 0.89 hectares or 2.2 acres (the ‘1<sup>st</sup> suit property’) which they purchased sometime in 2001 through their father from the then registered owner Benjamin Kapteka (deceased). That the 1<sup>st</sup> suit property was originally part of a parcel known as Kakamega/ Kongoni/121 measuring approximately 10.6 hectares which Benjamin Kapteka subdivided into Kakamega/Kongoni/2224 measuring approximately 9.7 hectares (‘the larger property’) and the 1<sup>st</sup> suit property. He further deposed that following the demise of Benjamin Kapteka in 2002, his widow Elimina Nanyama Kapteka sold to the plaintiffs 0.5 acres of the larger property for KShs 96,000 which was her apportioned inheritance from the estate of Benjamin Kapteka and that the sale was witnessed and endorsed by her children including the 1<sup>st</sup> defendant.
  3. The 1<sup>st</sup> plaintiff further deposed that through sale agreement dated 18<sup>th</sup> June 2006, the 3<sup>rd</sup> defendant who is a son to the late Benjamin Kapteka also sold 1 acre from the larger property being his apportioned inheritance to the plaintiffs and that later through agreement dated April 4, 2008, the 4<sup>th</sup> defendant who is also a son to the late Benjamin Kapteka also sold 1 acre of his apportioned inheritance from the larger property to the plaintiffs. That following the three purchases the plaintiffs acquired lawful interest in respect to 2.5 acres in the larger property in addition to the 1<sup>st</sup> suit property in respect of which they had a title deed in their names. That at the time of buying the 2.5 acres in the larger property, succession proceedings in respect of the estate of the late Benjamin Kapteka had begun but the grant was yet to be confirmed. That since the 1<sup>st</sup> suit property and the 2.5 acres in the larger property border each other, upon fully paying the purchase price the plaintiffs took possession of all the said plots, combined them, started farming on them and remained in open occupation for more than 15 years.
  4. The 1<sup>st</sup> plaintiff went on to depose that the plaintiffs learnt in March 2021 that succession proceedings in respect of the estate of the late Benjamin Kapteka had been concluded following protracted disputes and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants promised the plaintiffs that subdivision of the larger property would be concluded before the end of July 2021. That on or about 1<sup>st</sup> February 2022 a group of young men and women led by the defendants trespassed on the properties claiming to be grandchildren of Benjamin Kapteka (deceased) and removed the fence and threatened to evict the plaintiffs from the suit properties claiming that it is their ancestral land. That the plaintiffs are apprehensive that unless the orders sought are granted, the defendants will carry out the threatened illegal eviction and cause great loss, disruption, suffering and inconvenience to the plaintiffs.
  5. In response to the application, the 1<sup>st</sup> defendant swore and filed a replying affidavit in which he deposed that he is an administrator of the estate of the late Benjamin Kapteka and that he is not opposed to the application. That it is true that the plaintiffs are the proprietors of Kakamega/ Kongoni/2225 and



- that the plaintiffs have lawfully acquired interest in the 2.5 acres of land in the larger property. That he personally witnessed and endorsed all the sale transactions that took place in relation to the 2.5 acres of land in the larger property between the plaintiffs, the 3<sup>rd</sup> and 4<sup>th</sup> defendants and his step-mother Elimina Nanyama Kapteka. That he expected the 3<sup>rd</sup> and 4<sup>th</sup> defendants to honour their agreements with the plaintiffs and that as administrators of the estate of the late Benjamin Kapteka, he and the 2<sup>nd</sup> defendant had the intention of subdividing the larger property and excising for the plaintiffs their 2.5 acres.
6. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed grounds of opposition in which they contended that the applicants have not established a prima facie case, that the application is an abuse of court process as the applicants have approached the court of equity with unclean hands and that the application is fatally defective, incompetent, bad in law and incapable of yielding the orders sought.
  7. The parties relied on the material on record and urged the court to render a ruling.
  8. I have considered the application, the affidavits and the material on record. The only issue for determination is whether the orders sought should issue.
  9. The principles that guide the court when considering an interlocutory injunction were enunciated in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] E.A 358 and reiterated in [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR. Simply put, the applicants must establish a prima facie case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate remedy then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.
  10. While deciphering whether an applicant has a prima facie case the court must look beyond mere arguments. Over and above raising issues, the applicants must avail evidence demonstrating an infringement of a right, and the probability of success of their case upon trial. See [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] eKLR.
  11. There is no dispute that the applicants are the registered proprietors of the parcel of land known Kakamega/Kongoni/2225, as is indeed demonstrated by the copy of title deed dated October 18, 2002. The plaintiffs' claim that they purchased 2.5 acres of Kakamega/Kongoni/2224 have not been denied on oath by the 2<sup>nd</sup> to 4<sup>th</sup> defendants. If anything, the 1<sup>st</sup> defendant who is one of the administrators of the estate of the late Benjamin Kapteka is not opposing the application and has confirmed both the sale and the intention to subdivide Kakamega/Kongoni/2224 to excise for the plaintiffs the 2.5 acres. Equally, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have not offered any evidence to deny the trespass and threats which the plaintiffs have complained of. I am persuaded that the applicants have a prima facie case with a probability of success. Damages will not be an adequate remedy to them.
  12. In view of the foregoing, I make the following orders:
    - a. Pending the hearing and determination of this suit, an injunction is hereby issued restraining the defendants whether by themselves, agents, servants, proxies or employees from entering, taking possession, trespassing or otherwise dealing in all that property occupied by the plaintiffs comprising L.R. No. Kakamega/Kongoni/2225.
    - b. Pending the hearing and determination of this suit, an injunction is hereby issued restraining the defendants whether by themselves, agents, servants, proxies or employees from evicting,



taking possession, trespassing or otherwise dealing on a portion of land measuring 2.5 acres fenced, occupied and cultivated by the plaintiffs and contained in L.R. No. Kakamega/Kongoni/2224.

c. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF MAY 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the plaintiffs

No appearance for 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants

No appearance for the 3<sup>rd</sup> defendant

Court Assistant: E. Juma

