



**Onyango v Lessonet (Environment & Land Case E2 of 2020)
[2022] KEELC 2224 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E2 OF 2020**

LA OMOLLO, J

MAY 12, 2022

BETWEEN

JOHN ORIRI ONYANGO APPLICANT

AND

ALBERT KIPKOSGEI LESSONET RESPONDENT

RULING

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 8th December, 2021. The said application is expressed to be brought under Article 159(2)(d) of *the Constitution* of Kenya 2010, Order 8 Rule 3 and 5, Order 40 rules 1, 2 and 3, Order 51 rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B & 3A and 63(e) of the *Civil Procedure Act*.
2. The application is filed under Certificate of Urgency and seeks the following orders:
 - a. Spent
 - b. That the Honorable court be pleased to grant leave to the Plaintiff/Applicant to amend his Originating Summons dated 23rd October 2020 as per the annexed draft amended Originating Summons.
 - c. Spent
 - d. That pending the hearing and determination of this suit, this honorable court be pleased to issue an order of temporary injunction restraining the 1st Defendant and the intended 2nd Defendant whether by themselves, their agents, servants, employees and or any person acting under their authority from entering onto, remaining on, trespassing, disposing or in any way dealing with the suit parcel Nakuru/Municipality Block 12/236.
 - e. That this Honorable Court be pleased to make all such further orders and/or directions as it may deem fit.



- f. That costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn by the Plaintiff/Applicant on 8th December, 2021.
4. Despite service, the Defendant/Respondent did not file a response to the application.

Factual Background

5. The Plaintiff/Applicant filed the Originating Summons dated 23rd October, 2020 where he is seeking the following orders:
 - a. That this Honorable court be pleased to issue an order of Declaration that the Plaintiff has been in occupation of the land parcel No. Nakuru/Municipality Block 12/236 measuring 0.1350 Hectares lawfully, peacefully and uninterrupted for 27 years.
 - b. That this Honorable court be pleased to issue an order of Declaration that the Plaintiff is entitled to the whole parcel of land comprised of Nakuru/Municipality Block 12/236 registered in the name of the Defendant herein by virtue of the Plaintiff being in adverse possession of the same land in open, quiet and peaceful occupation for a period of 27 years.
 - c. That this Honorable court be pleased to order the cancellation and/or revocation of the title of the land parcel Nakuru/Municipality Block 12/236 registered in the name of the Defendant.
 - d. That this Honorable court be pleased to order the rectification of register in respect to land parcel Nakuru/Municipality Block 12/236 to reflect the name of the Plaintiff and title to issue thereafter.
 - e. That the costs of this summons be in the cause.
6. This background is necessary for purposes of appreciating the orders sought in the current application.

The Plaintiff/applicant's Contention.

7. The Plaintiff/Applicant contends that he filed this suit sometime in the year 2020 and an order of injunction pending hearing and determination of the suit was issued on 13th November, 2020.
8. It is his contention that the Defendant/Respondent has never entered appearance.
9. The Plaintiff/Applicant further contends that at the time of filing of this suit he had every reason to believe that the Defendant/Respondent was the registered owner of the suit parcel Nakuru/Municipality Block 12/236 according to the title in his possession.
10. The Plaintiff/Applicant also contends that upon further investigation he has found out from the records at the Land Registry that registered owner of the parcel of land is Bekapi Enterprises Ltd.
11. It is his contention that he is advised by his advocates on record that given the developments and information that has come up, it is only prudent that the registered owner be enjoined to the suit so that his claim of adverse possession be settled.
12. He contends that he now wishes to enjoin Bekapi Enterprises Ltd in this suit so that he can lay out his claim for adverse possession over the property.



13. The Plaintiff/Applicant contends that there is a need to amend the Originating Summons so as to include Bekapi Enterprises Limited to aid in determining the matter and that no prejudice will be occasioned on the Defendants if this application is allowed.
14. The Plaintiff/Applicant ends his deposition by stating that it is in the interest of justice that he is allowed to amend the Originating Summons before it is set down for hearing so as to reflect the true position and claims.

Issues For Determination

15. The Plaintiff/Applicant in his submissions identified the following issues for determination:
 - a. Whether the Applicant is entitled to leave to amend his originating Summons.
 - b. Whether the principles for granting temporary injunction have been met by the Plaintiff/Applicant
 - c. Who should bear the cost of the application?
16. I agree to the issues for determination are as set out by the Plaintiff/Applicant and will proceed to determine them in the subsequent paragraph.

Determination and Analysis

A. Whether the Applicant is entitled to leave to amend his originating Summons.

17. The law on amendment is Order 8 Rules 3 and 5(1) of the [Civil Procedure Rules](#). It is as follows:

“(3)(1)

Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

“3(5)

An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

General power to amend

“5(1)

For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”

18. The court of appeal in [St Patrick's Hill School Ltd vs Bank of Africa Kenya Ltd](#) [2018] eKLR, cited with approval the decision in [Ochieng & Others vs First National Bank of Chicago](#) Civil Appeal No. 147 of 1991 (unreported). It set out the principles governing the amendment of pleadings as follows:



- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case.
 - b. The amendments should be timeously applied for.
 - c. Power to amend can be exercised by the court at any stage of the proceedings.
 - d. That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.
 - e. The Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
19. In *Harrison C. Kariuki vs Blueshield Insurance Company Ltd* [2006] eKLR the court cited the Court of Appeal decision in *Central Kenya Ltd vs Trust Bank Ltd* [2000] EALR 365 and held that: -

“The amendment of pleadings(is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of his action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided, (i) there (has) been no undue delay, (ii) no new or inconsistent cause of action (is) introduced, (iii) no vested interest or accrued legal right (is) affected, and (iv) the amendment (can) be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment (does) not result in prejudice or injustice to the other party that (cannot) not be properly compensated for in costs..... Neither the length of... proposed amendments nor mere delay (are) sufficient grounds for declining leave to amend. The overriding considerations (are), whether the amendments (are) necessary for the determination of the suit and whether the delay (is) likely to prejudice the opposing party beyond compensation in costs”.

20. In *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR; the court of appeal restated the law relating to amendment of pleadings as expressed in *Bullen and Leake & Jacob's Precedents of Pleadings* – 12th Edition and captured in the Court of Appeal decision in *Joseph Ochieng & 2 others Vs First National Bank of Chicago* (*supra*) thus:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including Appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the Defendant would be deprived of his right to rely on Limitation Acts.”



21. I have taken into consideration the reasons advanced by the Plaintiff/Applicant for seeking leave to amend the Plaintiff.
22. I also note that this matter has not proceeded to hearing and have no doubt that no prejudice will be occasioned to the Defendant/Respondent. The Defendant/Respondent shall have opportunity to amend their pleadings should they deem it necessary.
23. For the above reasons and having regard to the above cited authorities on amendment of pleadings, I find that the amendment is necessary and grant leave to the Plaintiff Applicant to amend the originating summons.
24. I note also note that leave to amend the originating summons was granted on 20th December, 2021. To that extent, that limb of the application was comprised and it was not necessary for this court to address the same as elaborately as it has. I will deem the preceding paragraphs as merely restating the earlier position.
25. What remained to be determined, therefore is the prayer for temporary injunction pending the hearing and determination of the suit.

B. Whether the plaintiff has met the criteria for grant of orders of temporary injunction.

26. The Defendants were served with this application. The first Defendant was personally served while the 2nd Defendant was served by way of substituted service pursuant to a court order dated 17th January, 2022. Both affidavits of service are on record.
27. The Plaintiff/Applicant is seeking orders of temporary injunction against both Defendants/Applicants. Prayer (d) on the face of the application is reproduced as hereunder;

That pending the hearing and determination of this suit, this honorable court be pleased to issue an order of temporary injunction restraining the 1st Defendant and the intended 2nd Defendant whether by themselves, their agents, servants, employees and or any person acting under their authority from entering onto, remaining on, trespassing, disposing or in any way dealing with the suit parcel Nakuru/Municipality Block 12/236.

28. The Plaintiff/Applicant, in his submissions sets out the criteria for grant of orders of temporary injunction and has cited the decision in *Giella vs Cassman brown* (1973) EA 3.
29. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella vs Cassman Brown* (*supra*). This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially”



30. Consequently, the Applicant ought to, first, establish a prima facie case. In support of this first requirement, the Applicant has relied on the decisions in *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR. The Court of Appeal explained what comprises of a prima facie case as follows:

“...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

31. The Applicant deposed that he has been in occupation of the suit parcel since 1995, developed it until sometime in October 2021 when the Defendants trespassed, destroyed part of the property, fenced it off while claiming ownership.

32. The Defendant has not responded to these allegations despite service. From the material placed before me, I find that there exists a legal right has apparently been infringed by the Defendants.

33. This apparent infringement requires an explanation from the Respondents. In my opinion, therefore, the Applicant has met the first requirement for grant of orders of temporary injunction.

34. Secondly, the applicant has to demonstrate that irreparable injury will be occasioned to him if the order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“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.

35. The Applicant submits that they have been in occupation since 1995, is residing in the suit property together with his children, has developed it and that the Defendant continues to destroy his property and continually interferes in his use of it. The Plaintiff fears that if orders of temporary injunction are not granted, he will not be able to continue with his farming activities and that suit property needs to be preserved.

36. The Applicant has sufficiently demonstrated that irreparable loss will be occasioned to him if orders of temporary injunction pending the hearing and determination of the suit are not granted.

37. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.



In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”

38. In the case of *Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the question of balance of convenience expressed itself thus: -

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies”

39. In the decision of *Amir Suleiman vs Amboseli Resort Limited* [2004] eKLR the learned judge offered further elaboration on what is meant by “balance of convenience” and stated:

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

40. From the affidavit filed, I note that the Applicant is in occupation. I find that the balance of convenience tilts in favour of the Applicant. I am convinced that there is a lower risk in not granting orders of temporary injunction than in granting them, as I wait to hear the suit on its merits.
41. In view of the foregoing, I find that the Applicant has met the requirements for grant of an order of temporary injunction.

Who should bear the cost of the application?

42. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

43. The upshot of the foregoing is that the application is allowed in the following terms:
- a. The Plaintiff/Applicant is granted leave to amend his originating summons.
 - b. The amended Originating summons be filed and served within 7 days from the date of this ruling.
 - c. The Defendants are granted corresponding leave to amend file and serve their Responses/ amended responses within 14 days from the date of receipt of the amended Originating Summons.
 - d. That pending the hearing and determination of this suit, an order of temporary injunction is hereby issued restraining the 1st and 2nd Defendant by themselves, their agents, servants,



employees and or any person acting under their authority from entering onto, remaining on, trespassing, disposing or in any way dealing with the suit parcel Nakuru/Municipality Block 12/236.

- e. The costs of the application shall abide the outcome of the suit.

44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF MAY 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Cherono for the Plaintiff/Applicant.

No appearance for the 1st Defendant/Respondent.

No appearance for the 2nd Defendant/Respondent.

Court Assistant; Ms. Jeniffer Chepkorir.

