



REPUBLIC OF KENYA



KENYA LAW
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**Oluoch v Tindi (Environment & Land Case 3 of 2022)
[2022] KEELC 2228 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 3 OF 2022
GMA ONGONDO, J
MAY 11, 2022**

BETWEEN

NASHON OCHIENG OLUOCH APPLICANT

AND

CHARLES ONYANGO TINDI RESPONDENT

RULING

1. By a Notice of Motion dated 23rd February 2022 and duly filed in court on 24th February 2022 under Articles 40, 48 and 50 of *the Constitution* of Kenya, 2010 and Orders 40 and 52 of *Civil Procedure Rules*, 2010, amongst other provisions of the law. (The application), the plaintiff, Nashon Ochieng Oluoch (The applicant) through learned counsel, L K Obwanda is seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That interim orders of injunction do issue restraining the defendant/respondent by himself, through his agents, assigns or anybody else deriving authority from the defendant/respondent from entering into disposing of, remaining in possession and/or in any other way dealing with the suit property being land parcel number KANYADA/KOTIENO/KATUMA'A'/3063, LR.KANYADA/KOTIENO/KATUMA'A'/3264, LR.KANYADA/KOTIENO/KATUMA'A'/3327, pending the hearing and determination of the main suit.
 - e. Costs.
2. The application is premised on the applicant's supporting affidavit of nineteen paragraphs together with the annexed documents marked as "NOO-1" to "NOO-4" which include; a sale agreements



- regarding the suit property, LR No. Kanyada/Kotieno/Katuma “A”/909(N00-1) and mutations showing LR Nos. Kanyada/Kotieno/Katuma/ “A”/ 3063, 3264, 3327 and 3328 being the subdivisions of the suit property (N00-2). The application is also founded upon grounds 1 to 12 set out on it’s face and I find it superfluous to reproduce the same.
3. In summary, it is the applicant’s lamentation that on 19th June 2001 and 4th September 2003, he bought 1.16 hectares of the suit property from the respondent, Charles Onyango Tindi. That he has been in possession of the said portion of land to date. That the respondent had refused to transfer the portion to him. That the respondent intends to sell the suit property to prospective buyers thus, provoking this application.
 4. By an eight (8) paragraphed replying affidavit sworn on 2nd March 2022, the respondent, Charles Onyango Tindi through M/S Nyauke and Company Advocates, opposed the application and sought dismissal of the same for want of cause of action. He deposed, inter alia, that the applicant is not telling the court the truth on the position of this matter as he is claiming adverse possession and rights pursuant to a sale agreement. That the applicant’s claim is untenable since the same is prohibited by the [Limitation of Actions Act](#). (Cap 22 Laws of Kenya)
 5. The respondent further deposed that adverse possession cannot stand as the applicant’s entry into the suit property was as a result of sale agreements. That the applicant’s claim be dismissed for want of proper cause of action.
 6. The application was canvassed by way of written submissions further to this court’s directions of 24th February 2022 pursuant to Order 51 Rule 16 of the [Civil Procedure Rules](#), 2010.
 7. By the submissions dated 4th March 2022 and filed in court on 10th March 2022, learned counsel for the applicant gave brief facts of the case and identified a single issue for determination namely whether the applicant has established a prima facie case and should be granted a temporary injunction sought in the application. Counsel relied on the celebrated case of *Giella-vs-Cassman Brown Company Limited* (1973) EA 358, [Mrao Limited –vrs- first American Bank of Kenya and 2 others](#) (2003) eKLR 125, among other authorities and implored upon the court to find that the applicant has established a prima facie case against the respondent and that the application be allowed with costs.
 8. In his submissions dated 2nd March 2022, learned counsel for the respondent termed the originating summons non suited and hinged on unknown law. Case of [Wilson Kazungu Katana and 101 others-vs-Salim Abdala Baks and another](#) (2015) eKLR and [Kasuve-vs-Mwaani Investments Limited and 4 others](#) (2004) eKLR 184, among others, are cited therein, in support of the application.
 9. I have duly considered the entire application, the replying affidavit and submissions. In that regard, has the applicant satisfied the threshold for the grant of the interim injunctive orders sought in the application?
 10. [The Constitution](#) and statutory provisions under which the application was mounted are borne in mind. Order 40 (*supra*) governs temporary injunctions and interlocutory orders.
 11. An interlocutory injunction application has to meet the threshold in *Giella* case (*supra*); see also [Nguruman Limited-vs-Jan Bonde Nielezen](#) (2014) eKLR. This court is conscious of the definition of the term “ a prima facie case” as stated in *Mrao* case (*supra*)
 12. It is established law that all the three conditions and stages inclusive of a prima facie as stated in paragraphs 11 and 12 above are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially; see *Kenya Commercial Finance Company Limited – versus- Afraba Educational Society* (2001) vol. 1 EA 86.



13. It is the assertion of the respondent that the applicant's claim mounted by way of an originating summons dated 23rd February 2022 is untenable. However, by the sale agreements, mutations showing sub-divisions of the suit property and developments thereon as per "N00-4" annexed to the supporting affidavit of the applicant, the character of the suit property is bound to be altered in the event the application is not allowed in terms of interim preservation orders.
14. Notably, this court is mandated to grant interim preservation orders under section 13 (7) (a) of the [Environment and Land Court Act, 2015](#) (2011). The same include interim injunctions and status quo orders.
15. It is trite that status quo order is meant to preserve the property in dispute pending the determination or termination of the suit; see [Ogada-vs-Mollin](#) (2009) KLR 620.
16. On that account, the applicant has demonstrated that the application has attained the threshold in Giella case (*supra*). He is entitled to status quo order in lieu of temporary injunctive relief over the suit property in the circumstances.
17. Wherefore, the application by way of notice of motion dated 23rd February 2022 and filed in court on 24th February 2022, is determined thus:
 - a. The applicant and respondent to maintain the obtaining status quo over the suit property and the respondent shall not sell, lease, charge, transfer, further sub-divide or further erect permanent structures thereon pending the hearing and determination of the present suit.
 - b. Costs of the application be in the cause.
18. It is so ordered.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 11TH DAY OF MAY 2022.

G. M .A ONG'ONDO

JUDGE

Present:

Ms. L.K Obwanda, learned counsel for the applicant.

Mr. V. Kisukwa holding brief for Nyauke learned counsel for the respondent

Okello, Court Assistant.

G. M .A ONG'ONDO

JUDGE

