



REPUBLIC OF KENYA



KENYA LAW
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**Eudoge v Egesa (Environment & Land Case E045 of 2021)
[2022] KEELC 2271 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E045 OF 2021**

**AA OMOLLO, J
JUNE 30, 2022**

BETWEEN

SAVIOUR EMOCHE EUDOGE APPLICANT

AND

OPAMA OCHWADA EGESA RESPONDENT

RULING

1. The Applicants brought the present application sections 1, 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#), Order 40 Rule 1 (a), (b) 2 (1) (2), 3(1) (3), Order 51 Rule 1, 4, 6, 10(1) (2) of the [Civil Procedure Rules](#) on the 14th of October, 2021 for Orders That:
 - a) Spent;
 - b) This Honourable Court do issue an order of temporary injunction against the Defendant/ Respondent, his servants, his workers, his agents, 3rd parties or any other person claiming through him from transferring , alienating, fencing off, or in any manner whatsoever interfering with the Plaintiff's/Applicant's L.R No. South Teso Angorom/14174 pending hearing and determination of this application;
 - c) This Honourable Court do issue an order of temporary injunction against the Defendant/ Respondent, his servants, his workers, his agents, 3rd parties or any other person claiming through him from transferring , alienating, fencing off, or in any manner whatsoever interfering with the Plaintiff's/Applicant's L.R No. South Teso Angorom/14174 pending hearing and determination of this suit;
 - d) That the OCS Adungosi Police Station assist in effecting this order;
 - e) Spent;
 - f) The cost of this application be provided for.



2. The Application was supported by the affidavit of Saviour Emoche Eudoge dated 12th October, 2021 and premised on the following grounds;
 - a) That, the Respondent is in the process of alienating through transfer the suit property herein;
 - b) That the alienation and transfer of the suit land would render this suit nugatory and a mere academic exercise should the same succeed;
 - c) That the Applicant has been in peaceful, quiet, continuous and uninterrupted possession and occupation of the suit land for over 20 years;
 - d) That the Applicant has no other known place of abode;
 - e) That it is in the interest of justice that the Application be allowed.
3. The Respondent opposed the application on the 3rd of November, 2021 on the following Grounds;
 - a) That the Defendant already obtained an eviction order and a permanent injunction against the Plaintiff vide Busia CMC ELC No. 18 of 2016 over L.R No. South Teso/angoromo/14174 and that the present suit is a ploy to delay the execution of the said judgement;
 - b) That the Plaintiff is a relative of the Defendant hence the claim for adverse possession cannot be sustained;
 - c) That the Applicant has not met the legal threshold of section 26 of the [Land Registration Act](#) for grant of an interim order of injunction, pending hearing and determination of the suit as the Applicant is not the registered proprietor of the suit parcel;
 - d) That a person in occupation of land as a squatter cannot resist the claims of a registered proprietor as held by the Court of Appeal in [Michael Gitbinji Kimocho vs. Nicholas Muratha Mugo](#) 1997 eKLR hence the Applicant has no legal right to injunct the Respondent who is registered proprietor of the suit parcel from occupying and using his parcel of land;
 - e) That no evidence has been annexed in support of the Application which evidence will form the basis for grant of the orders sought;
 - f) That the applicant has therefore not established a prima facie case with chances of success;
 - g) That the Application is therefore scandalous, vexatious and otherwise an abuse of the court process meant to delay the execution of the eviction orders issued in Busia CM ELC No. 18 of 2016 hence the same should be dismissed with costs.
4. The Respondent also filed a replying affidavit on the 3rd of November, 2021 where he deposed that he was the registered proprietor of Land Reference No. South Teso/Angoromo/14174 having lawfully acquired it from its initial registered proprietor. That he obtained orders in Busia CMC ELC No. 18 of 2016 for the eviction of the family of Chrispinus Ekisa who is the Applicant's father which order was issued on the 6th of May, 2021. He deposed further that the present suit resulted from the service of the eviction order and its intention is to delay the execution of the decree obtained in the Busia CMC ELC No. 18 of 2016.
5. During the hearing of the application on the 13th of November, 2021, parties agreed to canvass the application by way of written submissions. The Applicant filed his submissions on the 6th of December, 2021 and further submissions on the 26th of January, 2022. He contended that he has been in peaceful, uninterrupted, continuous and open occupation of the suit property for over 20 years and any alienation done on the same will render his suit nugatory. That he would be denied the right to be



heard as enshrined in Article 159 (2)(d) of the Constitution of Kenya, 2010. While relying on the case of Sheria Nauria vs. Stephen Ekirapa, sections 24 and 26 of the Land Registration Act and Article 60 of the Constitution, the Applicant urged this Court to find that the Defendant's acts are unconstitutional and that the evidence he has adduced is uncontroverted reliable and credible entitling him to the orders sought for in the suit.

6. The Respondent filed his submissions on the 22nd of December, 2021 and rehashed his grounds of opposition and replying affidavit. He submitted that the crux of the present application was whether or not the application had fulfilled the principles laid down in the case of Giella vs. Cassman Brown and buttressed with the definition of a *prima facie* case as set out in the case of Mrao v. First American Bank of Kenya & Two others (2003) eKLR 125. That the Applicant has failed to establish that he has a *prima facie* case with the chances of success as the issue taking cognizance that the issue of occupation and use of the suit land were already dealt with in Busia CMC ELC No. 18 of 2016 and consequently eviction and injunctive orders issued. While relying on the case of Busia ELC No. 22 of 2020 Raphael Onyango & 20 others vs. Agatha Nabwire Okello & 9 others, he urged this Court to find that the present application is a ploy employed by the Defendant in the Busia CMC ELC No. 18 of 2016 to obtain orders to frustrate the execution of the decree already in place. That the Applicant has not provided any proof that the Respondent intends to transfer the suit land to warrant the grant of orders sought. He concluded that the Applicant being a trespasser cannot obtain an injunction restraining a registered proprietor from accessing and utilizing his own parcel of land and urged this Court to dismiss the application with costs.
7. For an injunction to be granted, the Applicant needed to demonstrate that: they have a *prima facie* case; if the injunction is not granted, they shall suffer irreparable loss and that they have the balance of convenience in their favour. The Applicant has pleaded that they have been in possession of Land Reference No. South Teso/Angoromo/14174 without interruption for a period of over twenty (20) years, had his grandparents, uncles and brother all buried thereon and he has no other place of abode. Although the Respondent does not dispute the occupation the Applicant of the suit land, he raised two issues that are key to the question whether or not the Applicant has demonstrated a *prima facie* case and in whose favour the balance of convenience tilts.
8. First, the Respondent deposed that the Applicant is the son of Chrispinus Ekisa. He annexed a letter from the area chief for the location where both parties reside which letter confirmed that the Applicant is the son of Chrispinus Ekisa. The Applicant did not file any response to contradict this allegation. Secondly, the Respondent annexed a copy of decree/order obtained by the Respondent in BSA CMC ELC Case No. 18 of 2016 against Chrispinus Ekisa. The decree permanently enjoined the said Chrispinus Ekisa and or his agents, workers, employees or servants from interfering with the Respondent's parcel No. S.Teso/Angoromo/14174.
9. On the basis that the Applicant has not denied the relationship between him and Chrispinus Ekisa (father-son), it means that the orders as issued against Chrispinus Ekisa indirectly affects the interest/ rights of the Applicant. It would therefore be irregular to file a new suit to stay a decree instead of using the procedural method of staying a decree. The application thus borders on abuse of the court process for piecemeal litigation. For this reason, I am not satisfied that a *prima facie* case has been established. The balance of convenience tilts in favour of the Respondent who already has a court order that has not been varied.
10. Consequently, I find the application dated 12/10/2021 does not meet the threshold for granting orders of temporary injunction. The same is dismissed with costs to the Respondent.

DATED, SIGNED & DELIVERED AT BUSIA THIS 30TH DAY OF JUNE, 2022.



A. OMOLLO
JUDGE

