



**Sundia v Akello & 3 others (Environment & Land Petition
03 of 2022) [2022] KEELC 2827 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND PETITION 03 OF 2022**

BN OLAO, J

JUNE 29, 2022

(FORMERLY BUSIA PETITION NO E001/2022)

**IN THE MATTER OF BREACH OF THE CONSTITUTION AND SPECIFICALLY ARTICLES
1(1) AND 1(3), 2(1), 3(1), 19(1) AND (2), 20, 21(1) AND (3), 22(1), 23(1), 25(C), 27(1), (2) AND
(4), 28, 40(1) (B) AND (2), 47(1), 48, 50(1), 159, 165(1) (A) AND (B) AND 165(6) AND (7)**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE LAND ACT

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

GABRIEL ONYACHI SUNDIA PETITIONER

AND

FRANCIS TOBIAS AKELLO 1ST RESPONDENT

LAND REGISTRAR 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

RULING

1. The subject matter of this Petitioner is land parcel No Samia (luanda/Muoma – 1369 (the suit land) which is situated within Busia County where there is a competent Environment and Land Court.



However, on 23rd February 2022, Omollo J the Presiding Judge in that Court recused herself from handling this case and that explains why it is being handled in this Court.

2. Gabriel Onyachi Sundia (the Petitioner) is the Administrator of the Estates of Lucas Sundia alias Lukas Sundia, Peter Oduma MUGA and Okoch Muga (the deceased) as per the annexed copies of Grant of Letters of Administration. I must at this juncture draw to the attention of Counsel to the Petitioner that some of the documents filed by him are not very legible. I will struggle with them for now but I hereby direct that more legible copies of those Grants be filed and served within 7 days of the delivery of this ruling.
3. The Petitioner seeks various remedies as against Francis Tobias Akello, Land Registrar Busia, Attorney General and the Inspector General of Police (the 1st to 4th Respondents respectively) with regard to the suit land the most prominent one being that he is the proprietor of the said land but his fundamental rights thereto were violated when it was merged with the land parcel No Samia/Luanda/Mudoma – 693 to create land parcel NO Samia/Luanda/Mudoma – 3572 and the 1st Respondent should therefore be permanently enjoined from interfering with his peaceful, quiet, possession and occupation thereof.
4. Simultaneously with the said Petition, the Petitioner has moved to this Court vide his Notice of Motion dated 13th February 2022 seeking the following orders: -
 1. Spent
 2. Spent
 3. That pending the hearing, determination and final disposal of the Petition, a conservatory order be and is hereby issued enjoining the 1st Respondent his agents, servants, and/or any persons acting under his instructions from interfering with his peaceful, quiet possession and use of the land parcel No Samia/Luanda/Mudoma – 1369.
 4. That the costs of this application be borne by the Respondents.

That application which is the subject of this ruling is premised on the grounds set out therein and is supported by the Petitioner's affidavit of even date.

5. The gravamen of the application is that the Petitioner is the Administrator of the Estates of the deceased having taken out Grants of Letters of Administration in respect of their Estates in 2010. That prior to their demise, the deceased who are his father and uncles jointly owned the suit land measuring 19.5 Hectares with each owning $\frac{1}{3}$ share on which they settled in 1932. That the 1st Respondent's land parcel No Samia/Luanda/Mudoma – 693 shares a boundary with the suit land and that a boundary dispute was the subject of previous Tribunal proceedings culminating in Busia PMCC Land Dispute Case No 106 of 2008 in which the Court ordered the amalgamation of the two parcels of land notwithstanding the fact that the Petitioner objected to participating in the Tribunal Case citing lack of locus standi as he was yet to obtain the necessary Grant of Letters of Administration. That his appeal against the decision of the Tribunal was dismissed and the 1st Respondent filed Busia ELC CASE No 44 of 2015 seeking his eviction from the suit land which orders were issued on 20th February 2019. That the Petitioner was born on the suit land where he and his family of over 200 people have put up homes and buried their dead and if the order of injunction is not granted, they will be rendered destitute and suffer irreparable damage. That their intended eviction is illegal and a nullity and this application merits granting the orders sought.
6. The application is opposed by the 1st Respondent who filed grounds of opposition dated 21st February 2022 stating that it is a back door appeal against the Judgment of Kaniaru J delivered on 20th February 2019 in Busia ELC Case No 44 of 2015 against which the Petitioner filed at the Court of Appeal Civil



Appeal No 96 of 2019 which was struck out with costs on 19th March 2021 having been filed out of time. An application for leave to appeal out of time was also dismissed on 11th February 2022. That this dispute has been in Court since 2009 and the 1st Respondent has been bombarded with suits and Petitions over the suit land being: -

1. ELC Case No 77 of 2019 Phylis Makokha Sundia .v. Francis Tobias Akello.
2. Constitutional Petition No 2 of 2019 George Christopher Oundo .v. Francis Tobias Akello.
3. Judicial Review No 24 of 2009 Gabriel Onyachi Sundia .v. Francis Tobias Akello.
4. ELC Case No 20 of 2013 Gabriel Onyachi Sundia .v. Francis Tobias Akello.
7. That in all the above cases, the Tribunal's ruling was considered and the Petitioner has had a fair hearing before different Judges and he has not even paid the balance of the taxed costs in ELC Case No 44 of 2015 amounting to Kshs. 38,671/= as well as the costs of various applications and this litigation must come to an end.
8. The 2nd, 3rd and 4th Respondents did not file any responses to the application.
9. When the application was placed before Omollo J on 23rd February 2022, the Judge directed that it be canvassed by way of written submissions. These have been filed both by Mr Otieno instructed by the firm of Otieno & Company Associates for the Petitioner and by Mr Juma instructed by the firm of J. V. Juma & Company Advocates for the 1st Respondent.
10. I have considered the application, the supporting affidavit and grounds of opposition as well as the submissions by Counsel.
11. What the Petitioner seeks is an order of temporary injunction restraining the 1st Respondent by himself, his agents, servants or any persons acting under him from interfering with his peaceful, quiet possession and use of the suit land pending the hearing and determination of this suit.
12. The conditions for the grant of such an order are now well settled. In the case of *Giella .v. Cassman Brown & Company Ltd* 1973 E.A 358, the Court laid down the following conditions which a party must satisfy before that remedy can be granted. These are: -
 1. The Applicant must show a prima facie case with a probability of success.
 2. Such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
 3. If in doubt, the Court will decide the application on the balance of convenience.

A prima facie case was defined in the case of *Mrao .v. First American Bank of Kenya Ltd & Others* 2003 KLR 125 as follows: -

"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

In *Nguruman Ltd .v. Jan Bonde Nielsen & Others* C.A Civil Appeal No 77 of 2012, the Court stated as follows with regard to proof of a prima facie case: -

The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of



proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

Finally, as was held in the case of *Films Rover International & Others .v. Cannon Films Sales Otd* 1986 3 ALL ER 772, a Court considering an application such as this one must take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

13. Guided by the law and the above precedents, it is the Petitioner's case that the deceased were the first registered proprietors of the suit land where they settled with their families since 1932. That the families of the deceased now numbering over 200 people including the elderly and school going children will be rendered destitute and suffer irreparable damage if the eviction orders issued in Bungoma ELC Case No. 44 of 2015 are executed. And although there is a suggestion that the title to the suit land and the 1st Respondent's title to land parcel No Samia/Luanda/mudoma/693 have since been amalgamated, no evidence has so far been placed before this Court to prove that. What I have seen however is the Green Card for the suit land showing the deceased as the first registered proprietors of the suit land since 23rd May 1975 with each holding ¹/₃ share therein.

14. In paragraph 20 of the supporting affidavit, the Petitioner has averred as follows: -

20: “That I have lived on the said parcel of land together with my clan all my life as I was born thereat, we have also buried our dead on the said parcel of land for as long for (sic) as I can remember, erected our homes including permanent structures on the said parcel of land number 1369 and my clan consists of over 200 people including the elderly and school going children who will all be rendered destitute and suffer irreparable damage if the orders sought in this application are not granted.”

None of the Respondents filed any replying affidavits to rebut the averments contained in the Petitioner's supporting affidavit. All that the 1st Respondent did was to file grounds of opposition. That means that all the averments contained in the Petitioner's supporting affidavit remain un – rebutted. In *Daniel Kibet Mutai & Others .v. Attorney General* C.A Civil Appeal No 95 of 2016 Eldoret [2019 eKLR], the Court addressed itself as follows on the probative value of an affidavit vis – a - vis grounds of opposition: -

The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross – examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit is factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?” Emphasis added.

Based on the above, this Court must therefore accept as factual, the Petitioner's assertion that he and his family of over 200 people have been in occupation of the suit land and continue to do so since 1932. In the circumstances, if they are evicted therefrom, they will no doubt suffer irreparable injury that



cannot be adequately compensated by an award of damages. In *Nguruman Ltd .v. Jan Bonde Nielsen* (supra), the Court added thus: -

The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be adequate remedy.”

I have no doubt that if the Petitioner and his family are evicted from the suit land which is the only home they have known, and the graves of their loved ones desecrated, that will clearly be injury that cannot adequately be compensated by an award of damages.

15. It is also not in dispute that the Petitioner and his family are currently the ones in possession of the suit land. In *George Orago .v. George Lewa Jagalo & Others* C.A Civil Appeal No 62 of 2009 [2010 eKLR], the Court of Appeal while considering the grant of an injunction to a party in possession of the land in dispute said: -

The Appellant was in possession. Prima facie, he is the owner of the land. The denial of injunction has the effect of dispossessing the appellant of his land. The purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.”

In the case of *Silas Mugo Njoka & Others .v. Charles Nyaga Nthia & Others* 2017 eKLR, I took the following view with regard to a party in possession of land: -

Secondly, being in possession of the suit land, a denial of a temporary injunction coupled with the imminent threat of eviction would mean that the plaintiffs may be dispossessed of the same and in my view, such loss would be disproportionate to any amount of damages.

Besides, no prejudice will be occasioned to the defendants who, in any case, are not in occupation of the suit land. In the circumstances, the greater cause of justice will be served by granting, rather than denying, the plaintiffs the orders of temporary injunction pending trial.”

In determining whether or not the Petitioner has established a prima facie case with a likelihood of success, I am of course conscious of the fact that at this stage, I have not been called upon to decide with any finality, the respective rights of the parties with respect to the suit land. That will be a matter to be determined at the trial. In the case of *Mbuthia .v. Jimba Credit Corporation Ltd* 1988 KLR 1, it was held that: -

In an application for interlocutory injunction, the Court is not required to make final findings of contested facts and law and the Court should only weigh the relative strength of the parties’ cases.”

As I have already stated above, the Petitioner’s averments have not been rebutted by any replying affidavit. And although the 1st Respondent made reference to several cases in his grounds of objection and which he says have involved the suit land, none of those cases was availed for the Court’s inspection. Taking into account all the Petitioner’s averments, uncontroverted as they are, I am persuaded that he has established a prima facie case and also that he and his family will suffer irreparable loss if the order of temporary injunction pending trial is not issued. The first two limbs set out in the *Giella .v. Cassman Brown* case (supra) have therefore been satisfied.



16. Even if I was in any doubt, which I am not, and had to determine the application on the balance of convenience, the same would tilt in favour of the Petitioner who is already in occupation and possession of the suit land.
17. The up – shot of all the above is that the Notice of Motion dated 13th February 2022 is hereby allowed in the following terms: -
 - (a) Pending the hearing and final disposal of this Petition, an order of injunction is issued injuncting the 1st Respondent his agents, servants or any persons acting under his instructions from interfering with the Petitioner’s peaceful possession and use of the land parcel No Samia/ Luanda – Mudoma/1369.
 - (b) Costs of the application shall be in the Petition.
 - (c) The Petitioner shall ensure that this Petition is heard and determined within the next twelve (12) months from the date of this ruling otherwise the injunction shall lapse unless the Court extends it for sufficient reasons.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL THIS 29TH DAY OF JUNE 2022.

BOAZ N. OLAO.

J U D G E

29TH JUNE 2022.

