



**Asunda v Ongoma & another (Environment & Land Case  
E022 of 2021) [2025] KEELC 3037 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3037 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E022 OF 2021**

**BN OLAO, J**

**APRIL 3, 2025**

**BETWEEN**

**FRANCIS OCHIENG ASUNDA ..... APPLICANT**

**AND**

**PETER LUNANI ONGOMA ..... 1<sup>ST</sup> RESPONDENT**

**ANNE BIBBY RADOLI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is in respect to the Notice of Motion dated 30<sup>th</sup> December 2024 by Francis Ochieng Asunda (the Applicant) and premised under the provisions of Order 40 Rule 1 and Order 53 Rule 3 of the [Civil Procedure Rules](#). He seeks the following orders against Peter Lunani Ongoma and Anne Bibby Radoli (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively):
  - a. Spent
  - b. Spent
  - c. That a temporary order of injunction be and is hereby issued restraining the Respondents whether by themselves, their agents, relatives, workers and/or servants from constructing, developing, alienating, cultivating or doing any activities on the land parcel No Marachi/Elukhari/1409 which has now been subsequently sub-divided pending the hearing and final determination of the main suit.
  - d. That the Officer Commanding Butula Police Station do assist in effecting this order.
  - e. That the costs of this application be provided for.

The Motion is anchored on the grounds set out therein and supported by the Applicant's affidavit of even date. The gist of the Motion is that the Applicant has been in possession of the land parcel No



Marachi/Elukhari/1409 (the suit land) for a period of over 12 years. The Respondents have however forcefully entered thereon and restricted the Applicant from accessing the same yet it is the Applicant's father one Okello Odieso (deceased) who, together with his family, have been using it despite the fact that the same was registered in the name of Laurent Ongoma also deceased. That the family of the said Laurent Ongoma through the Respondents, have continued with illegal registrations on the suit land which the Applicant has occupied for growing crops since 1980 to date a period of over 40 years. That all the registration on the suit land are fraudulent and the Applicant has been in open, peaceful and continuous occupation of a portion of the suit land without interruption from the Respondents.

2. The following documents are annexed to the Motion:

1. Copy of Adjudication Register for the suit land.
2. Register for the suit land.
3. Photographs.

The Motion is opposed and the Respondents have filed separate replying affidavits both dated 21<sup>st</sup> January 2025.

3. In his replying affidavit, the 1<sup>st</sup> Respondent has averred, inter alia, that the suit land formed the Estate of his late father Laurent Ongoma who died in 1980 having acquired it during the land adjudication process in 1966 and which has been used for grazing. That the Applicant has never trespassed thereon. That following succession proceedings, he was appointed as the sole Administrator to his father's Estate which he has since transmitted to the beneficiaries and has no interest therein neither has he been registered as the owner of the land and neither has the Applicant been in occupation of the same. The Applicant cannot claim adverse possession of the suit land whose title he disputes.

4. The following documents are annexed to the 1<sup>st</sup> Respondent's replying affidavit:

1. Copy of Land Adjudication Register.
2. Copy of Grant of Letters of Administration issued to the 1<sup>st</sup> Respondent and John Francis Muyodi in respect to the Estate of Laurent Ongoma.
3. Copy of certificate of Confirmation of Grant in respect to the Estate of Laurent Ongoma.
4. Copy of Certificate of Official search for the suit land showing the proprietors as Edmund Nyotta Muyodi and Anne Bibby Radoli each with ½ share.

On her part, the 2<sup>nd</sup> Respondent also vide her replying affidavit dated 21<sup>st</sup> January 2024 (that year must be an error) repeated the averments of the 1<sup>st</sup> Respondent. She too deponed, inter alia, that the suit land was part of the Estate of her deceased father Laurent Ongoma and was gifted to her by her deceased sister Pauline Ongoma following a Confirmed Grant issued in Busia High Court Succession Cause No 112 of 2010. She therefore became the registered owner of the suit land well before the filing of this suit and has surveyed it for purposes of sub-division. It has since been sub-divided to create parcels No Marachi/Elukhari/6052 and 6053. She is the registered proprietor of the parcel No Marachi/Elukhari/6053 which the Applicant has never occupied. The Applicant in fact resides on the land parcel No Marachi/Elukhari/1410 belonging to his father Okello Odieso. This application should therefore be dismissed as the suit land no longer exists.

5. The 2<sup>nd</sup> Respondent annexed the following documents to her replying affidavit:



1. Copy of Confirmed Grant issued in Busia High Court Succession Cause No 112 of 2010 in respect to the Estate of Laurent Ongoma.
2. Copy of Certificate of Official Search in respect of the suit land.
3. Application for consent and consent to sub-divide the suit land.
4. Receipt dated 7<sup>th</sup> May 2024 for Kshs.1,000 being partition fees.
5. Mutation Form.
6. Title deed for the land parcels No Marachi/Elukhari/6052 and 6053.
7. Certificates of Official Search for the land parcels No Marachi/Elukhari/6053 and 1410.

The Motion has been canvassed by way of written submissions. These have been filed both by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Applicant and by Mr Omondi instructed by the firm of Omondi & Company Advocates for the Respondents.

6. I have considered the Motion, the rival affidavits and annexures, as well as the submissions by counsel.
7. This being an application for temporary injunction pending trial, the Applicant is required to demonstrate that he has satisfied the principles set out in the case of *Giella -v- Cassman Brown & Co. LTD* 1973 E.A 358. These are:
  1. Demonstrate that he has a prima facie case with a probability of success at the trial.
  2. Show that unless the order of temporary injunction is granted, he might suffer irreparable injury which cannot adequately be compensated by an award of costs.
  3. If in doubt, the Court will determine the application on the balance of convenience.

A prima facie case, as was defined in the case of *Mrao -v- First American Bank Of Kenya Ltd & Others* C.a. Civil Appeal No 39 of 2002 [2003 eKLR]:

“... 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.”

The Court of Appeal went on to adopt the above definition and added as follows in the case of *Nguruman Ltd -v- Jan Bonde Nielsen & Others* C.A. Civil Appeal No 77 of 2012 [2014 eKLR]:

“We adopt that definition save to add the following by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from that invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging 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 is otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed." Emphasis mine.

Further, as was held in the case of *Films Rover International Ltd -v- Cannon Film Sales LTD* 1963 3 ALL ER 772, a Court considering such an application should take the course that appears to carry the lower risk of injustice should it turn out to have been "wrong".

8. Finally, as was held in the case of *Nyutu & Others -v- GATHERU & Others* 1990 KLR 554:

"Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised."

I shall be guided by the above precedents and others in determining this Motion.

9. On the issue of prima facie case, it is clear that the suit land was first registered in the names of the Respondents' deceased father Laurent Ongoma on 8<sup>th</sup> November 1966 as per the Register. However, from the documents produced by the Respondents to wit, the copies of titles to the land parcels No Marachi/Elukhari/6052 and 6053, the suit land no longer exists and has since been subdivided to give rise to the above parcels of land. Yet the Applicant's main claim, as per his Originating Summons dated 4<sup>th</sup> November 2021, is that he has acquired title to the suit land by way of adverse possession. While this Court should not at this stage examine the Applicant's case closely (*Nguruman -v- Jan Bonde Nielsen supra*), it cannot be correct to allege that a party claiming land which no longer exists can be said to have established a prima facie case. I agree with the submissions by the Respondent's counsel at paragraph 4(a) that:

"The suit land Marachi/Elukhari/1409 no longer exists. Any order of Court issued in respect thereto will be in vain."

It is also clear from the pleadings herein that even as the Applicant seeks an order that he has acquired the suit land by way of adverse possession, he has in paragraph 3 of his supporting affidavit annexed to this Motion pleaded as follows:

- 3: "That L.R. No Marachi/Elukhari/1409 was illegally and unlawfully registered in the names of Laurent Ongoma (deceased) in the year 1966. Annexed hereto and marked FO-1 is a true copy of the Mutation registered at the Lands Registry."

A party claiming land by way of adverse possession must admit the title of the registered owner. It cannot lie in the mouth of the Applicant to seek to be registered as the proprietor of the suit land yet at the same time claim that the title which he seeks to be registered in his name was in fact acquired illegally and through a fraudulent process. It is akin to asking this Court to perpetuate an illegality which is not the business of a Court of law.

10. It is clear from the above that the Applicant has not demonstrated that he has a prima facie case to warrant the grant of the order of temporary injunction pending trial. And having failed to surmount the hurdle of establishing a prima facie case, the Applicant's Motion collapses and this Court need not go further to consider the other two grounds. As was held in the case of *Nguruman LTD -V- Jan Bonde Nielsen supra*:

"If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."



Even if this Court were to consider whether the Applicant has shown that he will suffer irreparable loss or injury which cannot adequately be compensated by an award of damages, the pictures of the suit land annexed to the Motion show largely a bare parcel of land with a temporary structure and persons trying to fence it. I do not see from those photographs anything to show that the suit land has been “extensively developed” as deponed in paragraph 7 of the Applicant’s supporting affidavit.

11. Ultimately therefore, and having considered the Applicant’s Notice of Motion dated 30<sup>th</sup> December 2024, I make the following disposal orders:
  1. The Motion is dismissed.
  2. Costs to the Respondents.

**BOAZ N. OLAO**

**JUDGE**

**3<sup>RD</sup> APRIL 2025**

**RULING DATED, SIGNED AND DELIVERED ON THIS 3<sup>RD</sup> DAY OF APRIL 2025 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**3<sup>RD</sup> APRIL 2025**

