



**Owit & another v Pambo & 4 others; Real People Kenya Limited (Intended Interested Party)
(Environment & Land Case 19 of 2021) [2022] KEELC 2759 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 19 OF 2021**

**AY KOROSS, J
JULY 14, 2022**

BETWEEN

FLORENCE ATIENO OWIT 1ST PLAINTIFF

MILDRED APIYO AIRO 2ND PLAINTIFF

AND

PEREZ ONAM PAMBO 1ST DEFENDANT

GEORGE ODHIAMBO PAMBO 2ND DEFENDANT

STEVEN AWITI PAMBO 3RD DEFENDANT

AND

VITALIS OMONDI ODHIAMBO 1ST INTENDED DEFENDANT

ERICK ODIWUOR OPOT 2ND INTENDED DEFENDANT

AND

REAL PEOPLE KENYA LIMITED INTENDED INTERESTED PARTY

RULING

Introduction

1. By an Originating Summons dated 03/03/2021, the plaintiffs sought to be declared as adverse possessors of land parcel number South Sakwa/Barkowino/4352 [the suit property] which had subsequently been subdivided. Through the firm of Odongo Awino & Co. Advocates, the 1st to 3rd defendants entered appearance. The firm of Ooro & Co. advocates are currently on record for the 2nd and 3rd defendants while the 5th intended defendant is represented by the firm of Lawi Ogutu & Co.



Advocates. The 2nd and 3rd defendants filed a replying affidavit dated 22/02/2022 denying the plaintiffs' claim.

The plaintiffs' case

2. Pursuant to the provisions of Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, the plaintiffs filed a motion dated 28/03/2022 against the defendants seeking several reliefs. Some are spent and those that are pending determination are follows;
 - a. An injunction do issue restraining the defendants whether by themselves, their agents, servants or anybody acting on their behalf or claiming against them from trespassing, encroaching, demolishing, erecting, disposing, charging or in any way wasting the property known as South Sakwa/Barkowino/8761 and South Sakwa/Barkowino/8762;
 - b. The plaintiffs be granted leave to amend the originating summons dated 03/03/2021 to add the 4th and 5th intended defendants as defendants and the intended interested party as an interested party; and
 - c. That costs of the motion be provided for.
3. The motion is supported by grounds set out in the motion and on the supporting affidavit of Florence Atieno Owit dated 28/03/2022.
4. The plaintiffs contended that on 14/06/1980, their late husband purchased a portion of South Sakwa/Barkowino/503 from the registered owner Pambo Onyina and they took possession and constructed rental units upon it.
5. South Sakwa/Barkowino/503 was subdivided into South Sakwa/Barkowino/4352, 4353 and 4354 with their purchased portion lying in South Sakwa/Barkowino/4352 but the transfer to their husband was never effected. Around the year 2006, the 1st, 2nd and 3rd defendants partitioned the suit property into South Sakwa/Barkowino/8761 and South Sakwa/Barkowino/8762 and subsequently transferred them to the intended 4th and 5th defendants.
6. Sometimes in 2020, the intended 5th defendant unlawfully trespassed onto the suit property, established a cowshed and destroyed houses that were under construction. On 12/02/2022, the intended 4th defendant unlawfully trespassed and demolished a rental house belonging to the plaintiffs.

The defendants' case

7. None of the defendants filed a response. However, when this matter came before court on 11/05/2022, counsel for the 2nd and 3rd defendants stated that he was not opposed to the motion. The intended defendants and interested party though served, did not attend court.

The plaintiffs' submissions

8. The plaintiffs filed written submissions dated 11/04/2022. They identified two issues for determination; (i) whether injunctive orders should issue and, (ii) whether they should be granted leave to amend their pleadings.
9. On the 1st issue, they submitted that the legal framework for injunctive orders is Order 40 Rule 1 of the *Civil Procedure Rules* and they had met the criteria set out in the locus classicus case of *Giella v Cassman Brown Ltd* [1973] EA 358. On the 1st criteria of prima facie case, they contended that they entered the suit property on 14/06/1980 vide a written agreement and had since then constructed upon it. They also placed reliance on the case of *Mrao Ltd v First Americam Bank of Kenya Ltd* ¶ 2



Others Civil Appellate No. 39 of 2002. On the 2nd criteria of irreparable harm, they contended that the 1st to 3rd defendants had interfered with the suit property. On the 3rd criteria, they contended that the balance of convenience tilted in their favour and they relied on the authority of *Kipchirchir Kogo versus Frank Kimeli Tenai* [2018] eKLR and *Charles Njagi Miriti v Leonard Mutembei Girishon & 3 others* [2021] eKLR.

10. On the 2nd issue, the plaintiffs' contended that Orders 1 Rule 10 (2) and 8 Rule 3(1) of the Civil Procedure Rules were the legal framework that donated courts with jurisdiction to allow amendment of pleadings and that the grant of leave would permit the courts to efficiently determine the issues in dispute. They relied on the authority of *Central Kenya Limited v Trust Bank Limited* [2000] EALR 365 where the Court of Appeal set out the criteria for amendment of pleadings. They averred that the defendants would not be prejudiced if leave to amend was granted and relied on the case of *Sher Karuturi Limited v V/D Berg Roses Kenya Limited* [2010] eKLR.

The defendants' submissions

11. The defendants did not file any written submissions. Though the motion is unopposed, the court has to determine it as a matter of course.

Analysis and determination

12. Having considered the plaintiffs' motion, supporting affidavit and written submissions, the court will adopt the two issues identified in the plaintiffs' submissions.
 - I. Whether injunctive orders should issue
13. The case of *Giella vs Cassman* (Supra) has long settled the principles that have guided courts in determining whether or not an applicant has met the threshold to warrant the grant of a temporary injunction. Have the plaintiffs met the threshold? In answering this question, this court shall sequentially juxtapose the principles of *Giella vs Cassman* (Supra) against the facts of this case.
14. On the 1st limb, has the plaintiff established a prima facie case with probability of success at the intended trial? In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case to mean a genuine and arguable case based on the material presented before the court.
15. In establishing whether the plaintiffs have established a prima facie case, this court is alive that it has to restrain itself from making pre-emptive assertions which may have a bearing on the pending suit where the parties are constitutionally entitled to have a fair hearing (See the Supreme Court of Kenya decision in *Deynes Muriithi & 4 others v Law Society of Kenya & another* [2016] eKLR).
16. Though the plaintiffs have availed a purported agreement of sale, it is unfortunate they have not taken their time to have an expert interpret it from Dholuo dialect to English language. Such an interpretation would ordinarily be accompanied by a certificate of interpretation. Nevertheless, the plaintiffs have proffered photographs to this court which demonstrate that their structures which were allegedly on the suit property were destroyed. The 1st plaintiff had placed a restriction over land parcel number South Sakwa/Barkowino/8762 claiming beneficiary interest. I am satisfied that the plaintiffs have met the 1st limb.
17. While briefly addressing the two other residual limbs, this court shall bear in mind the Court of Appeal decision in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR which stated



with approval the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 where Lord Diplock specified thus;

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

18. On the 2nd limb, the plaintiffs have to demonstrate that irreparable injury will occur to them if the injunction is not granted and there is no other remedy open to them by which they will protect themselves from the consequences of the apprehended injury. The plaintiffs contended that they have invested on the suit properties and they proffered photographs of their structures which were allegedly on the suit property which were allegedly demolished by the defendants or those claiming under them. I am satisfied that there is high likelihood that the structures in the suit property will waste away thus occasioning irreparable harm to the plaintiffs. They succeed on the 2nd limb.

19. In the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) eKLR Ombwayo J, defined the concept of balance of convenience as thus;

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor 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”.

20. The plaintiffs have contended that they allegedly had been in possession of the suit property. This assertion was never controverted. I am satisfied that they will be highly prejudiced if injunctive orders are not granted. They succeed on the 3rd limb.

21. I must hasten to add that the prayer does not apply to the intended defendants and interested party for the simple reason that is premature against them.

II. Whether they should be granted leave to amend their pleadings

22. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that courts may in the interest of effectually and completely adjudicating the dispute between parties, may at any stage of the proceedings join a party. Order 8 Rule 3 of the Civil Procedure Rules gives courts jurisdiction to grant leave to a party to amend their pleadings subject to certain conditions.

23. Commenting on a provision akin to our Order 1 Rule 10 (2), the learned authors of Sarkar’s (India) Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), which was cited by the decision of *IMK v MWM & another* [2015] eKLR stated thus;

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

24. In the instant suit, the plaintiff sought to join additional defendants to the proceedings on grounds that they [additional defendants] had purchased subdivided portions of the suit property pendente lite. Save for a mention in their submissions that the 5th defendant charged Sakwa/Barkowino/8762 to the intended interested party, there is no averment in the motion or supporting affidavit that the intended interested party ever charged this property. The “green card” of this property does not reflect that any charge took place. It is my humble opinion that submissions can never take the place of evidence and at this point of the proceedings, I am not satisfied that the intended interested party charged this particular property.



25. Adding the defendants is necessary for the determination of the real issues in controversy and none of the parties have demonstrated that they will be prejudiced by such an amendment.
26. It is my ultimate finding that the motion is partially merited and because it is trite law that costs follow the event, costs shall be in the cause and I issue the following disposal orders;
- a. The plaintiffs are hereby granted leave to join Vitalis Omondi Odhiambo and Erick Odiwuor Opot as the 4th and 5th defendants.
 - b. The plaintiffs are granted leave to amend their originating summons.
 - c. The amended originating summons shall be filed and served within 21 days from the date hereof and the plaintiffs to file a return of service.
 - d. The defendants are hereby granted leave to file their respective replying affidavits or amended replying affidavits as the case maybe within 21 days of service by the plaintiffs.
 - e. The plaintiffs shall be at liberty to file a supplementary affidavit within 14 days of service by the defendants.
 - f. A temporary injunction is issued restraining the 1st , 2nd and 3rd defendants, their agents, servants or anyone else acting under them from trespassing, encroaching, demolishing, erecting structures, disposing, transferring, charging or in any way dealing with land parcels numbers South Sakwa/Barkowino/8761 and South Sakwa/Barkowino/8762.
 - g. The suit shall to be mentioned for pretrial directions before the Deputy Registrar on 5/10/2022.
 - h. Costs shall be in the cause.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF JULY 2022.

HON. A. Y. KOROSS

JUDGE

14/7/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Tawo for the plaintiffs

Mr. Ooro E for the 2nd and 3rd defendants

Court assistant: Ishmael Orwa

