



REPUBLIC OF KENYA



**KENYA LAW**  
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**Adiema & another v Shisikani (Environment & Land Case E013 of 2021)  
[2022] KEELC 4928 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4928 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE E013 OF 2021  
DO OHUNGO, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**SAMMY LIKUYI ADIEMA ..... 1<sup>ST</sup> PLAINTIFF**

**DOREEN ONGACHI APAMO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CHARLES SHAMWATI SHISIKANI ..... DEFENDANT**

**RULING**

1. By Notice of Motion dated 1<sup>st</sup> November 2021, the plaintiffs seek the following orders:
  1. [Spent]
  2. [Spent]
  3. That upon interpartes hearing this honorable court do issue an order of injunction restraining the Respondent, his family members, agents, servants, and/or employees or any other person claiming through him from trespassing, entering, invading, constructing and/or putting up any further structures on and/or in any other manner dealing with L.P.N South Kabras/Shamberere/3856 and 3855 pending the hearing and determination of the main suit herein.
  4. That the OCS Kakamega Police station to enforce the said orders.
  5. Costs of this application be provided for.
2. The application is supported by an affidavit sworn jointly by the plaintiffs/applicants. They deposed that the first plaintiff is the registered proprietor of the parcel of land known as South Kabras/Shamberere/3856, the second plaintiff is the registered proprietor of South Kabras/Shamberere/3855 and the defendant is the registered proprietor of South Kabras/Shamberere/3882. That all three parcels were a single parcel known as South Kabras/Shamberere/2650 until the Court of Appeal vide Kisumu



Civil Appeal No 3 of 2014 ordered that two (2) acres be hived and be transferred to the defendant. That pursuant to the judgment of the Court of Appeal, two acres were hived off South Kabras/Shamberere/2650 based on the position the defendant was occupying on the ground, transferred to him and the title deed delivered to him on 15<sup>th</sup> October 2021. That upon the title deed being delivered to him, the defendant hurriedly started assembling construction materials on the parcels of land known as South Kabras/Shamberere/3856 and South Kabras/Shamberere/3855 so as to claim that that was where he had been occupying and with a view to defeating justice. They also stated that the Deputy Registrar had to sign on behalf of the defendant so as to effect the subdivision and transfer because the defendant was avoiding to sign.

3. The defendant filed a replying affidavit in which he admitted the existence of the Court of Appeal case, its outcome, and the registration status of the parcels of land known as South Kabras/Shamberere/3856, South Kabras/Shamberere/3855 and South Kabras/Shamberere/3882. He added that South Kabras/Shamberere/3882 was clandestinely registered in his name by the plaintiffs without taking into account that the portion he had occupied since 1984 falls in the area that is now known as South Kabras/Shamberere/3856, South Kabras/Shamberere/3855 and part of South Kabras/Shamberere/3882. He added that the plaintiffs should explain how they got the Deputy Registrar to sign on his behalf, yet the Court of Appeal ordered the Deputy Registrar to sign on behalf of the 1<sup>st</sup> plaintiff should he refuse to sign and not vice versa.
4. The defendant further deposed that the title in respect of South Kabras/Shamberere/3882 was not handed over to him and that he saw it for the first time in the pleadings in this case. That the construction referred to by the applicants were commenced on my rightful share of the land as awarded to him by the Court of Appeal and that this suit is an attempt at appealing against the decision of the Court of Appeal. He further stated that besides the Court of Appeal and the case that led to it, the parties have also litigated in Kakamega ELC No. 6 of 2020, Kakamega ELC No. 181 of 2015 and Butali PMC ELC No. 15 of 2020 and that in all the cases filed after the judgment of the Court of Appeal, the courts have always declined to alter the judgment of the Court of Appeal and instead directed parties to implement the said judgment.
5. The application was canvassed through written submissions. The plaintiffs/applicants argued that their pleadings and affidavit disclose a prima facie case in that the defendant has trespassed into the respective parcels of land and that he was uncooperative as regards effecting the judgment of the Court of Appeal. They further argued that unless restrained, the defendant will continue with construction and other illegal activities on the suit parcels and that balance of convenience tilts in their favour in the circumstances. They urged the court to grant the orders sought.
6. In response, the defendant argued that the application is an abuse of the court's process and that the entire suit is res judicata in view of the decided cases mentioned in the replying affidavit. He submitted that allowing the application will amount to evicting him from his rightful share of the land contrary to the judgment of the Court of Appeal. He concluded by arguing that the applicants have failed to demonstrate a prima facie case with chances of success and added that the balance of convenience tilts in his favour.
7. I have considered the application, the affidavits, and the submissions. The principles that guide the court when considering an application for an interlocutory injunction are settled. They were enunciated in the case of *Giella -vs- Cassman Brown & Co. Ltd* [1973] E.A 358 and reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. Simply put, the applicants must establish a prima facie case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a



balance of convenience. All these conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. See also *Magondu v Koech & 3 others* (Civil Appeal 140 of 2019) [2022] KECA 642 (KLR) (13 May 2022) (Judgment).

8. There is no dispute that the first plaintiff is the registered proprietor of the parcel of land known as South Kabras/Shamberere/3856, the second plaintiff is the registered proprietor of South Kabras/Shamberere/3855 and the defendant is the registered proprietor of South Kabras/Shamberere/3882. All three parcels were created following a judgment of the Court of Appeal in Kisumu Civil Appeal No 3 of 2014. The defendant has contended in his replying affidavit that the subdivision and creation of the parcels was done behind his back and not in accordance with the judgment of the Court of Appeal. The applicants did not file any further affidavit or offer any specific submissions to dispute the respondent's contention.
9. The dispute between the parties ultimately boils down to interpretation and enforcement of the judgment of the Court of Appeal, a matter that should be done within Civil Appeal No 3 of 2014 or within the suit that led to the said appeal since the Court of Appeal entrusted enforcement of its judgment to the court appealed from. In those circumstances, I am not persuaded that the plaintiffs can found a prima facie case in this new suit. In short, the plaintiffs have failed to demonstrate a prima facie case. That being so, I need not enquire into the other limbs of the test in the Giella case (supra).
10. In the result, I find no merit in Notice of Motion dated 1<sup>st</sup> November 2021. I dismiss the application with costs to the defendant. The defendant made some argument about this entire suit being res judicata. I have avoided going into that in this ruling since the issue was neither raised from the onset nor addressed at length. Parties will have to properly place the issue before the court for determination.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Muthami for the plaintiffs

Ms Muleshe for the defendant

Court Assistant: E. Juma

