



**Okuba v Odongo (Environment & Land Case 131 of 2018)  
[2022] KEELC 14451 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 14451 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 131 OF 2018  
MN KULLOW, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**DAVID ONYANGO OKUBA ..... PLAINTIFF**

**AND**

**ARTHUR MARK OKEYO ODONGO ..... DEFENDANT**

**RULING**

**Introduction**

1. By notice of motion dated July 15, 2020 the plaintiff/ applicant sought for the following orders: -
  - a. Spent.
  - b. That a temporary order of injunction do issue against the defendant/ respondent restraining either himself, servants and/or agents (Robert Ouma Okuba, Lucas Ochieng Angila and Kennedy Orwa) from blocking the road passage to the main road and from the main road to the river Olando by lands in a manner adverse to the applicant/ plaintiff pending the hearing and determination of this application inter-partes.
  - c. That pending the hearing and determination of this suit, the defendant/ respondent his servants and agents be restrained from illegal act on and around parcel number Kamagambo/ Kanyamamba/255 & 607.
  - d. Costs of this application be borne by the respondent/ defendant.
  - e. Any other remedy available as the court deems fit to grant.
2. The application is based on 3 grounds thereof and on the supporting affidavit sworn by the plaintiff July 15, 2020. The applicant avers that the defendants and his agents/servants without any color of right and by use of force; blocked the public road passing from his home to the main road and to river



- Olando. As a result of the said blockage, it has been impossible to access the main road or to get water from river Olando.
3. Further, it is the applicant's contention that the said blockage has denied and made it impossible for him to transport his mature cane to Sony Sugar Mills at Awendo.
  4. He maintained that the defendant's action of blocking the main road has greatly inconvenienced him, his family and animals and are likely to continue suffering irreparable loss and damage if the orders sought are not granted. He thus sought a temporary order of injunction to restrain the defendant and his agents/ servants from barring him, his family and animals from accessing the main road and river Olando.
  5. The application was opposed. The defendant/ respondent filed his replying affidavit dated September 22, 2020 in response to the instant application. He averred that he is the lawful owner of the land in dispute LR No Kamagambo/Kanyamamba/ 255; having purchased the same on February 1, 1971 and adjudication process was later conducted between April and May the same year.
  6. It is his contention that at the time of the adjudication process, there was no road for public passage or one leading to river Olando that was ever created on the said land and thus dismissed the applicant's claim that he had blocked the public road passage as mere allegations devoid of any evidentiary and legal basis.
  7. He maintained that there has never been any public passage or pathway on the suit parcel either leading to the main road or river Olando and urged the court to dismiss the application.
  8. The application was canvassed by way of written submissions; both parties filed their respective submissions together with authorities which I have read and taken into consideration in arriving at my ruling as hereunder;
  9. It is my considered view that the sole issue arising for determination therefrom is;
    - a. Whether the application dated July 15, 2020 is merited and the applicant is entitled to the reliefs sought.
  10. The applicant's claim is that the defendant through his agents and/or servants, without any color of right have used force to block him from accessing the public main road and river Olando from his home. He urged the court to restrain the defendant from barring his access to the main road and to river Olando.
  11. The respondent on the other hand stated that he is the lawful and registered owner of the suit property and maintained that there has never been any road for public passage that has ever been created on the suit property. He thus dismissed the applicant's claims as mere allegations devoid of any evidentiary and legal basis.
  12. Even though no party attached a copy of the map of the suit property in support of their rival claims; the common ground is that the applicant herein is unable to access the main road from his home or to access water for his use and animals from river Olando and to transport his mature cane to Sony Sugar Mills in Awendo.
  13. Section 140(4) of the *Land Act* provides the factors to be considered by the court in determining whether or not to grant an access order as follows: -
    - a. The nature and quality of the access, if any, to the landlocked land when the applicant first occupied the land;



- b. The circumstances in which the land became landlocked;
  - c. The nature and conduct of the negotiations, if any, between the owners of the landlocked land and any adjoining or other land with respect to any attempt by the owner of the landlocked land to obtain an easement from one or more owners of the adjoining or other land;
  - d. The hardship that may be caused to the applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person the making of the order;
  - e. The purposes for which access is or may be required; and
  - (f) Any other matter that appears to the court to be relevant.
14. The law on granting of interlocutory injunctions is set out under order 40 rule 2 (1) which provides as follows: -
- “2(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right..”
15. The necessary principles to be proved for the grant of interlocutory injunction is now well settled. The 3 pillars on which rests the foundation of any order of injunction include; an applicant must establish a *prima facie* case, he must demonstrate that he will suffer irreparable damage/ injury if the temporary injunction is not granted and finally, the applicant must show that the balance of convenience lies in his favor. See *Giella vs Cassman Brown* [1973] EA 358.
16. A *prima facie* case with a probability of success does not necessarily mean a case which must eventually succeed. The applicant need not establish title, it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. See [Nguruman Limited vs Jan Bonde Nielsen & 2 Others](#) [2014] eKLR.
17. From the application, it is evident that the applicant had been using the public passage in question to access both the main road and river Olando. It is however his claim that without any color of right, the respondent has blocked the public road passage from his home to the main road and to river Olando. Although there was no proof to the contrary by the respondent, he maintained that there has never been any road for public passage on the suit property and dismissed the applicant’s claims.
18. On the strength of the explanation preferred by the applicant, it is clear that the applicant had been using the public road passage for some time before the respondent decided to block it. To this end, given the totality of the facts, I am satisfied that the applicant has made up a *prima facie* case with a probability of success.
19. The second test is that of an Irreparable damage/ injury. In [Halsbury’s Laws of England](#) [Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] it is stated that: -
- “ .... By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the



exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages....”

20. Therefore, on the second limb of irreparable loss and damage being occasioned to the applicant; I am of the considered view that no amount of damages can compensate the applicant for his inability to access both the main road from his home and to river Olando thus limiting his access to water both his use and for his animals.
21. Consequently, having considered the purpose for which the access is required and the hardship caused to the applicant by the said road blockage; I find that the balance of convenience tilts in favour of the applicant who has been using the public road passage to access both the main road and river Olando, to warrant the issuance of orders sought in the instant application.

### **Conclusion**

22. In conclusion, I accordingly find that the application dated July 15, 2020 is merited and I proceed to allow the same on the following terms: -
  - i. The respondent is hereby directed to re-open the public road passage and/or access.
  - ii. An order of temporary injunction be and is hereby issued restraining the defendant/ respondent either by himself, his servants, agents and/or employees from blocking the road passage to and from the main road and river Olando in a manner adverse to the applicant/ plaintiff herein pending the hearing and determination of the suit.
  - iii. The defendant/ respondent, either by himself, his servants, agents and/or employees is further restrained from conducting any illegal act on and around parcel number Kamagambo/ Kanyamamba/255 & 607 pending the hearing and determination of the suit.
  - iv. Costs of the application be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 27<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

Nonappearance for the applicants

Nonappearance for the respondent

Tom Maurice - Court Assistant

