



**Malakwen & another v Rongoei (Environment & Land Case
E003 of 2022) [2022] KEELC 12665 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E003 OF 2022
EO OBAGA, J
SEPTEMBER 22, 2022**

BETWEEN

BENJAMIN KIPYEGO MALAKWEN 1ST APPLICANT

SIMON KIPSEREM 2ND APPLICANT

AND

SIMION SAWE RONGOEI RESPONDENT

RULING

1. This is a ruling in respect of a Notice of motion dated February 14, 2022 in which the plaintiffs/ applicants seek the following orders: -
 1. spent
 2. spent
 3. That this honourable court be pleased to issues orders of temporary injunction against the defendant herein, its agents, servants, employees from trespassing, encroaching claiming of 1.25 acres earlier sold by the defendant and now in actual possession by the 1st plaintiff for over 24 years whole of Uasin Gishu/Kormat Scheme/273 pending hearing and determination of the main suit.
 4. That costs be provided for.
2. The applicants contend that the 2nd applicant purchased the whole of LR no Uasin Gishu/ Kormat Scheme/273 (suit property) in the 1990's from the defendant/respondent. The 2nd applicant proceeded to obtain consent of the Land Control Board but the suit property was not transferred to him due to frustration by the respondent. The 2nd applicant then decided to sell the suit property to the 1st applicant vide a sale agreement dated January 13, 1997.



3. The 1st applicant took possession of the suit property in 1997 where he has been residing for over 24 years. In the year, 2020, the respondent started interfering with his quiet possession of the suit property. The 1st applicant then moved to the Lands office where he applied for registration of a caution against the title on May 25, 2021. In February, 2021, the 1st applicant wrote a warning letter to the respondent asking him not to interfere with the suit property.
4. On February 11, 2022, the respondent brought over 50 people in an attempt to force entry to the suit property but they were repulsed. It is on this basis that the applicants are seeking injunctive orders against the respondent.
5. The respondent opposed the applicant's application based on a replying affidavit sworn on April 19, 2022. The respondent contends that he is the registered owner of the suit property having been registered on November 29, 2012 and title issued to him on May 10, 2019. He states that he has never sold the suit property to the applicant's and is not the one who signed the agreement dated January 13, 1997.
6. The respondent further states that at the time he is purported to have signed the application for consent of the Land Control Board, he was away in Narok and did not attend the Land Control Board as alleged. He states that he purchased the suit property from Tuiyo Land Estates Company Limited in 1971 and has been cultivating it since then and that the Applicants have never been in occupation at any given time.
7. The respondent states that the 1st applicant lied on oath in the statutory declaration accompanying his application for caution that he is deceased which is not the case. The respondent takes issue with the 1st applicant's claim that he has resided on the suit property since his childhood yet he is much older than himself.
8. The parties were directed to put in written submissions. The respondent filed his submissions on July 8, 2022. Directions as to filing of written submissions were given on April 21, 2022. As at May 18, 2022, neither party had filed submissions. The parties were given 14 days to file their submissions from May 18, 2022. As at July 12, 2022 when ruling date was reserved, it is only the respondent who had filed his submissions.
9. I have considered the applicants' application, the opposition to the same by the respondent as well as the submissions of the respondent. The only issue for determination is whether the applicants have demonstrated that they have a *prima facie* case to warrant issuance of an injunction against the respondent.
10. The principles for grant of an injunction were well set out in the case of *Giella vs Cassman Brown & Co Limited* (1973) EA 358. Firstly, an applicant has to establish that he has a *prima facie* with probability of success. Secondly, an injunction will not be granted unless the applicant will suffer injury which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.
11. In the case of *Mrao Ltd vs First American Bank for Kenya & 2 Others* (2003) KLR 125, the Court of Appeal stated as follows:-

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



12. I have examined the documents presented before the court. In the statutory declaration which accompanied the application for caution by the 1st applicant, the 1st applicant states that the respondent is deceased. The agreement for sale dated January 13, 1997 shows that the 1st applicant purchased the suit property from Cicilia Chemosbei Tiony wife of the 2nd applicant. As the respondent claims that he is still alive, it is clear that the applicants have not demonstrated that any of their rights have been infringed to warrant grant of injunction.
13. The applicants claim that the respondent was registered as owner of the suit property on November 29, 1995. This is as per the search which they produced. On the other hand, the respondent has exhibited a copy of title deed which shows that the suit property was registered in his name on November 29, 2015 and title issued to him on May 10, 2019. It is therefore clear that the applicants have not demonstrated that they have a *prima facie* case against the respondent to warrant grant of an injunction.
14. The suit property is capable of being valued and even if it is found that the 1st applicant is entitled to it, he can be compensated or simply take possession as there is no evidence that the respondent is intent on disposing it off.
15. The area chief has written a letter confirming that it is the respondent who has been cultivating the suit property for the last 20 years. There was no rebuttal of this by the applicants. Even the court were to entertain any doubts, the balance of convenience would still tilt in favor of the respondent who *prima facie* is in possession.
16. Before I conclude I wish to state that if the averments in the statutory declaration accompanying the application for registration of a caution by the 1st applicant is true, then, the applicants' suit is a nullity. Again, it is beyond comprehension why he was entering into a sale agreement with the 2nd applicant yet the agreement states that the seller was wife to 2nd applicant. The 2nd applicant may as well have been dead as at the time of the sale of January 13, 1997. Be that as it may, the applicants' application is devoid of merit. The same is dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 22ND DAY OF SEPTEMBER, 2022.

E. O. OBAGA

JUDGE

In the virtual absence of;

Mr. Sambu for Defendant/Respondent.

Court Assistant –Albert

E. O. OBAGA

JUDGE

22ND SEPTEMBER, 2022

