



REPUBLIC OF KENYA



**Osodo v Ochanda & another (Environment & Land Case E007 of 2021)
[2022] KEELC 14455 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E007 OF 2021**

AY KOROSS, J

OCTOBER 27, 2022

BETWEEN

GEORGE AGGREY OSODO PLAINTIFF

AND

WYCLIFFE OCHANDA 1ST DEFENDANT

KENNEDY OTIENO OCHANDA 2ND DEFENDANT

RULING

1. Pursuant to the provisions of sections 1A, 1B, 3A, 63 (c) and (e) of the *Civil Procedure Act*, order 40 rule 2 (1) & (2) and order 51 rule 1 of the *Civil Procedure Rules*, the plaintiff filed a notice of motion dated June 8, 2022 against the defendants in which he sought the following reliefs:
 - a. Spent
 - b. Spent
 - c. That the honourable court be pleased to grant an order of injunction restraining the defendants, their servants, agents and assignees or any other person acting on their behalf from evicting the plaintiff, demolishing structures, interfering or disposing land parcel Number East Alego/Karapul Ramba/5355 being a subdivision of East Alego/Karapul Ramba/767 until the hearing and final determination of the suit.
 - d. That costs of the motion be borne by the defendants.
2. The motion is supported by grounds set out on its face and on the supporting affidavit of the plaintiff George Aggrey Osodo dated June 8, 2022.
3. The plaintiff contended that he had been living on land parcel number East Alego/Karapul Ramba/5355 ('suit property') being a subdivision of East Alego/Karapul Ramba/767 ('767') since July



2, 1981 when he bought the suit property from the defendants' father, one Cleopas Ochanda Okumu ('Okumu'). Okumu however died without transferring the suit property to him. The suit property was subsequently transferred to the defendants' mother Jane Achieng Akumu ('Jane') who similarly died without transferring title to him.

4. It was the plaintiff's claim that he had been in quiet, peaceful and open possession and use of the suit property for over 12 years and had constructed some houses on it. He claimed that the defendants' title to the suit property had been extinguished by operation of law.

Plaintiff's case

5. In opposition, the defendants' filed a replying affidavit dated July 13, 2022. They averred that Okumu was the registered proprietor of 767 which had been subdivided into Siaya/Karapul Ramba/2945, Siaya/Karapul Ramba/2946 and Siaya/Karapul Ramba/2947. However, Siaya/Karapul Ramba/5355 was not a subdivision of 767 as alleged by the plaintiff and there was no evidence to prove otherwise.
6. They averred that Okumu was illiterate and usually executed documents using a thumb print. Therefore, he could not have executed the sale agreement or land control board consent. They also averred that the sale agreement was dated July 2, 1981 yet the register for the 767 was opened in 1987 and the question raised was whether the subject agreement was executed over a non-existent piece of land.
7. The defendants contended that the plaintiff did not live on the suit property but resided in North East Gem location. They further stated that if the plaintiff entered the suit property by way of an agreement of sale, then the same was with the consent of their father which was averse to the principles of adverse possession.

Parties written submissions

8. As directed by the court, the parties disposed of the motion by way of written submissions. Mr Sala counsel for the plaintiff filed his written submissions dated June 22, 2022.
9. He submitted that the applicable principles of law in deciding whether to grant an order of temporary injunction were settled in *Giella v Cassman Brown & another [1973] EA 358*. In this decision, the settled principles were, inter alia, an applicant must; establish a prima facie case with probability of success, show that he stands to suffer irreparable harm which could not be adequately compensated by an award for damages and, if the court was still in doubt, it could decide it on a balance of convenience.
10. On the first principle, counsel submitted that the plaintiff had been in peaceful, open and actual occupation of the suit property for over 12 years. On the definition of a prima facie case, he relied on the case of *Mrao Limited v First American Bank of Kenya & 2 Others (2003) eKLR*.
11. On the second principle, counsel submitted that an award of damages would not be adequate as the plaintiff had lived on the suit property since 1981 and had even buried his loved ones therein; he held a sentimental value over it. Counsel relied on the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 others [2016] eKLR* where the court stated that in order to show irreparable harm, a party had to demonstrate that it was a harm that could not be quantified in monetary terms or could not be cured.
12. On the third principle, it was counsel's contention that the plaintiff had been on the suit property since 1981 where he had established a home and engaged in farming. On the other hand, the defendants neither had access nor possession of the suit property. Therefore, the balance of convenience tilted in the plaintiff's favour. He cited the cases of *Lilian Mercy Mutua T/A Lilian M Gems v Elizabeth*



Wangechi Olonginda & 3 Others Civil Case Number 36 of 2013 [2013] eKLR and Alice Awino Okello v Trust Bank Limited & another LLR No 625 (CCK).

13. Counsel contended that as defined in Transcend Media Group Limited v Independent Electoral and Boundaries Commission [2015] eKLR, the motion was not frivolous, vexatious or embarrassing.
14. The defendants who act in person filed written submissions dated July 13, 2022. In a similar fashion as the plaintiff, they relied on the cases of Giella v Cassman Brown Company Limited & Another (Supra) and Mrao Limited v First American Bank of Kenya & 2 Others (Supra)
15. On the first principle, they contended that the motion had no footing because they were neither the owners of the suit property nor personal representatives of the estate of Jane who was allegedly the registered owner of the suit property. They contended that the plaintiff had not established a prima facie case and they placed reliance on the case of Nguruman Limited v Jan Bonde Nielsen & 2 others.
16. On the second principle, the defendants held that the plaintiff had failed to prove irreparable damage which could not be compensated by an award of damages.
17. On the third principle, it was their submission that the balance of convenience did not tilt in the plaintiff's favour.

Analysis and determination

18. I have carefully considered the motion, its grounds, affidavits and respective parties' submissions and the issues falling for determination are; (i) whether the motion is merited and (ii) who shall bear costs. I will proceed to analyse the legal and jurisprudential frameworks on these issues sequentially.
19. Before considering the merits of the motion, I wish to address my mind on the preliminary objection and evidence that were tendered in the defendants' written submissions. Submissions are arguments and not evidence and this court declines to consider the preliminary objection and new evidence that were introduced in the defendants' submissions.
20. Order 40 rule 2 (1) and (2) of the Civil Procedure Rules sets out the legal framework on injunctions. This provision of law provides as follows:
 - (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.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
21. As rightfully submitted by the plaintiff and defendants, the case of Giella v Cassman Brown Company Limited & Another (Supra) has long settled the principles that have guided courts on the conditions one has to meet before it can exercise its discretion on whether an injunction could be granted. In this case, the court stated thus;

' First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience'.

22. In my considered view, the three principles have to be met and at the outset, the plaintiff had to establish that he had a prima facie case.
23. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (Supra) the Court of Appeal defined a prima facie case to mean a genuine and arguable case based on the material presented before the court.
24. In establishing whether the plaintiff had 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.
25. The question that begs to be answered is has the plaintiff established a prima facie case? My answer is in the negative. I say so because the plaintiff did not tender documentary evidence before this court to shed light on the existence of the suit property and in whose name, it was registered in. From the pleadings, the plaintiff claimed that the suit property was a subdivision of 767. The greencard of 767 evidences otherwise; it was subdivided into Siaya/Karapul Ramba/2945, Siaya/Karapul Ramba/2946 and Siaya/Karapul Ramba/2947; the suit property was not part of it. I need not say more on the other principles and on this, I rely on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (Supra), where the Court of Appeal expressed itself thus;

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

26. Ultimately, it is my finding that the plaintiff's motion dated June 8, 2022 is not merited and because it is trite law that costs follow the event, I award costs to the defendants. Ultimately, I make the following disposal orders:-
 - a. The notice of motion dated June 8, 2022 is hereby dismissed with costs to the defendants.
 - b. Parties to comply with order 11 of the Civil Procedure Rules within 21 days from today.
 - c. Matter to be mentioned for pretrial directions before the deputy registrar on January 25, 2023.

DELIVERED AND DATED AT SIAYA THIS 27TH DAY OF OCTOBER 2022.

HON AY KOROSS

JUDGE

27/10/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform;

In the Presence of

Mr Sala for the Plaintiff

Kennedy Otieno Ochanda -1st defendant

Wycliffe Ochanda - 2nd defendant

Court assistant: Ishmael Orwa

