



**Isatsiro v Mary & 2 others (Environment & Land Case E003 of 2022)
[2022] KEELC 14732 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE E003 OF 2022**

E ASATI, J

NOVEMBER 10, 2022

BETWEEN

DAVID AMAYI ISATSIRO APPLICANT

AND

JANET AKETCH MARY 1ST RESPONDENT

ANDREW IMBEGO 2ND RESPONDENT

EPHRAHIM LIVAMBULA 3RD RESPONDENT

RULING

1. This ruling relates to the notice of motion application dated August 26, 2022 (the Application) brought by the plaintiff under certificate of urgency. The Application seeks for orders that;
 - a. The application be certified as urgent.
 - b. The court be pleased to issue an order of temporary injunction restraining the Respondents by themselves, their agents, employees and or their servants from trespassing on, developing, building, constructing and/or whatever dealing or interfering with the plaintiff quiet possession of the land Kakamega/Shiru/669 pending the hearing and determination of the application.
 - c. That the OCS or the In-charge police administration do ensure supervision of the orders and that peace prevail.
 - d. That the respondents/defendants be condemned to the costs of this Application.
2. The grounds upon which the application was brought as shown on the face of the notice of motion are that;



- i. The respondents have unlawfully and without any colour of right occupied the applicant/plaintiff's land Kakamega/Shiru/669 and started to construct illegal structures thereon.
 - ii. That the plaintiff owns the suit property and will suffer untold suffering, loss and damage as he was planning to erect his residential houses on the property when he discovered the trespass.
 - iii. That the respondents' acts are unlawful, unfounded, illegal and are acts of aggression.
 - iv. That it is also necessary and in the interest of justice that an injunction order is granted as the plaintiff stands to suffer irreparable loss and damage if the orders sought are not granted.
 - v. That the plaintiff has a prima facie case with high chances of success warranting the orders sought and further that the balance of convenience is in issuing the orders that halt further acts of waste on the suit land.
 - vi. That this honourable court has inherent powers to grant the orders sought.
3. The Application is supported by the averments contained in the supporting affidavit sworn by the applicant on May 26, 2022.
 4. The application is opposed vide the contents of the replying affidavit sworn by the 1st respondent on September 16, 2022 and the annexures thereto, the replying affidavit sworn by the 2nd respondent on October 5, 2022 and the annexures thereto and the replying affidavit of the 3rd respondent sworn on October 6, 2022 and the annexures thereto.
 5. The applicant's case is that he is the bona fide owner of land No. Kakamega/Shiru/669 (the suit land herein) which he inherited from his father. That he visited the suit land in the month of April 2021 only to be surprised to find structures erected on the land. That the respondents are illegally on the suit land as he (applicant) does not co-own the suit land with them. That the respondents have refused to heed his pleas to them to stop the developments on the suit land. He therefore seeks the court's intervention.
 6. The 1st respondent's case is that her brother one Tadayo Omenya bought a portion of the suit land on November 7, 1988 from the plaintiff's father and took possession thereof in the same year and has been in occupation to date. That in the year 1990 the plaintiff's father (the seller) who was the registered owner sought and obtained consent of the Land Control Board for the sub-division of the suit land so as to carve out the sold portion but thereafter declined to register the consent at the Land Registry. That a dispute which arose over the suit land in the year 2014 was resolved. That the transfer of the suit land by the seller to the plaintiff in the year 2020 was fraudulent. That the instant application is an abuse of the court's process and should be dismissed.
 7. The 2nd respondent's case is that he bought a portion measuring half an acre of the suit land from one Peter Isatsiro, the original registered owner at a consideration of Ksh 10,600/= That he took possession of the sold portion of the land in the year 1988 and has had the same to date. That he shall suffer irreparable loss if the orders sought are granted. That the applicant has come to court with unclean hands and is guilty of material non-disclosure. That the application is frivolous, incompetent and a waste of court's time and the same should be dismissed with costs.
 8. The case of the 3rd respondent is that his father one Shadrack Amalemba Mademba bought a portion of the suit land which he (3rd respondent) is occupying. That a dispute that was brought up over the suit land by the Plaintiff's father was resolved in the year 2014. That the transfer of the entire of suit land in favour of the plaintiff was unlawful.



9. When the Application came up for hearing on 28/9/2022, directions were given by consent that the application be canvassed by way of written submissions. Consequently, written submissions dated October 3, 2022 were filed on behalf of the plaintiff by the firm of P.K Makau & Co Advocates. The respondents filed joint written submissions dated October 7, 2022 through the firm of A.B.L Musiega & Co. Advocates.
10. I have read the Application, the replying affidavits and the submissions filed. The issues for determination are;
- a. Whether or not there is a valid application before the court for the court's consideration and determination
 - b. Whether an order of temporary injunction would issue on the basis of the facts presented.
 - c. Who pays the costs of the application.
11. On whether or not there is a valid application before the court for its determination, perusal of the application shows that the prayer for injunction is prayer 2. The same as drawn seeks for an interim injunction pending hearing and determination of the application. There is no prayer for temporary injunction pending hearing and determination of the suit. As it were, prayer 2 of the application is spent having been the subject of the ex parte proceedings in the first instance. Prayer 3 and 4 are a prayer for security during implementation of the orders of the court and a prayer for costs respectively. These flow from the orders that court would make on the substantive prayer. As matters are, there is no substantive prayer in the application. In the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* Civil Appeal No. 76 of 2014 [2014] eKLR thus;

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings.”

The court finds that there is no valid application before it for consideration and determination. The respondents deposed in their respective replying affidavits and submitted that the application is incompetent and frivolous.

12. On whether an order of temporary injunction could issue on the basis of facts presented, even if this court was for a moment to take it that the application before it is an application for interlocutory injunction pending the hearing and determination of the suit, the facts presented, do not support issuance of the orders.

According to the plaintiff/applicant, he discovered the respondents presence on the suit land in the month of April, 2021. That is a period of one and half years to the date when the Application was filed herein under certificate of urgency. An injunction is an equitable remedy and equity aids the vigilant not the indolent. Moreover, according to the applicant, the respondents had already developed some structures on the suit land. The respondents (particularly the 1st and 2nd respondents) aver to have entered the suit land in the year 1988, have been there to date and have done developments thereon. Can an order of temporary injunction issue in the circumstances? The purpose of a temporary injunctions as provided for in Order 40 Civil *Procedure Rules 2010*, is to prevent imminent danger of wastage, damage or alienation of property. An order of temporary injunction should not have the effect of an eviction order. In the circumstances it is my finding that an order of interlocutory injunction will not be available to the applicant on the basis of the facts presented.



13. I find that the grounds set out in the case of *Giella v Cassman Brown Company Limited* [1973] EA 358 for grant of temporary injunction namely; existence of a prima facie case with a probability of success, that irreparable loss will be occasioned to the applicant unless the order sought is granted and balance of convenience have not been demonstrated.
14. The upshot is that the application lacks merit. The same is dismissed with costs to the Respondents.
Orders accordingly.

RULING READ, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 10TH DAY OF NOVEMBER, 2022.

E. ASATI

JUDGE.

In the presence of:

Neville -Court Assistant.

for the Applicant/Plaintiff.

for the Respondents.

E. ASATI

JUDGE.

