



REPUBLIC OF KENYA



Hanrietta Achieng Okumu t/a Osaka Timber Yard v Simarla & 2 others (Environment & Land Case E011 of 2022) [2022] KEELC 15209 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT & LAND CASE E011 OF 2022
AY KOROSS, J
DECEMBER 8, 2022**

BETWEEN

HANRIETTA ACHIENG OKUMU T/A OSAKA TIMBER YARD PLAINTIFF

AND

DALMAS OMBEDHO SIMARLA 1ST DEFENDANT

JOHN OPONDO OWINO 2ND DEFENDANT

DOMNIC ODUOR 3RD DEFENDANT

RULING

The Plaintiff's Case

1. The application that is the subject of this ruling is a notice of motion by the plaintiff against the defendants dated 13/07/2022. The motion has been moved pursuant to the provisions of section 68 (1) of the *Land Registration Act*, order 40 rules 1, 2 & 4 of the *Civil Procedure Rules* and sections 1A, 1B and 3A of the *Civil Procedure Act*. She sought the following reliefs:
 - a. Spent;
 - b. Spent;
 - c. Pending the hearing and determination of this application and the originating summons, an order of inhibition be granted inhibiting the registration of any dealings on land parcel number Uholo/Ugunja/559;
 - d. That this honourable court be pleased to issue a temporary order of injunction restraining the defendants whether by themselves, their servants, agents or any person whomsoever from doing any acts, evicting, demolishing the plaintiff's structures, selling, leasing, charging or otherwise howsoever interfering with the plaintiff's quiet, peaceful, actual and exclusive



possession, user, development and enjoyment of the land parcel no. Uholo/Ugunja/559 pending the hearing and determination of the suit; and

- e. Costs of the application be borne by the defendants.
2. The application is premised on the grounds enumerated on the face of the motion and on the supporting affidavit of the plaintiff Hanrietta Achieng Okumu sworn on 13/07/2022.
3. The plaintiff contended *inter alia*; Uholo/Ugunja/559 (hereinafter referred to as ‘the suit property’) was registered in the name of the 1st defendant; she had been in exclusive possession of the suit property from the year 2008; she had put up a temporary structure thereon, connected electricity on it and had been running her business under the name and style of Osaka Timber Yard and consequently, her rights of adverse possession over the suit property had accrued.
4. The plaintiff further deponed *inter alia*; her lease over an adjacent parcel of land known as Uholo/Ugunja/560 was terminated on 30/03/2022; on or about 09/06/2022, the 2nd and 3rd defendants wilfully and unlawfully trespassed onto the suit property and extensively demolished and damaged her developments thereon; the 2nd and 3rd defendants actions would occasion her irreparable loss and damage and the defendants would not be prejudiced.

The 2nd and 3rd defendants’ case

5. In opposition, the 2nd respondent filed a replying affidavit sworn on 07/09/2022.
6. He deponed *inter alia*; he was the registered owner of Uholo/Ugunja/560; the 1st defendant who was the registered proprietor of the suit property died over 10 years ago and his wife had leased the suit property to the 3rd defendant who was in actual occupation of the same; the plaintiff’s claim of malicious damage of property was farfetched and ill intentioned; the plaintiff wilfully demolished the developments on Uholo/Ugunja/560 together with those on the suit property; he was in the process of developing Uholo/Ugunja/560 and the orders sought would cause him irreparable loss and the application was misconceived, frivolous and an abuse of court process.
7. In opposition, the 3rd defendant filed a replying affidavit sworn on 07/09/2022. He reiterated some of the averments deposed by the 2nd defendant and I need not restate them. He deposed *inter alia*, by virtue of a tenancy agreement between him and the 1st defendant’s widow one Grace Akongo Ombedho, he had utilised the suit property since 2015; the suit property and Uholo/Ugunja/560 were subdivisions of Uholo/Ugunja/3299; at the behest of Grace Akongo Ombedho, the plaintiff vacated Uholo/Ugunja/3299; the plaintiff was not in occupation of the suit property; he was not a trespasser and he would suffer irreparable loss if the orders sought were granted.
8. The 1st defendant who was allegedly deceased did not participate in these proceedings.

Plaintiff’s rebuttal

9. The plaintiff filed a further affidavit dated 21/09/2022. She reiterated the averments made in the supporting affidavit and deponed *inter alia*, her claim against the 2nd and 3rd defendants were for malicious damage to property; the 2nd defendant’s affidavit was contradictory; Uholo/Ugunja/3299 was a separate property from the suit property and her prayer for injunction against the 2nd and 3rd defendants was to restrain their acts of trespass.



Parties' submissions

10. Counsel for the plaintiff M/s Oduol filed written submissions dated 20/09/2022. Counsel submitted that the applicable principles in deciding whether to grant an order of temporary injunction were set out in the case of *Giella v Cassman Brown & another* [1973]EA 358 where the court expressed itself that the guiding principles were that an applicant must establish a *prima facie* case, show that she stood to suffer irreparable harm that could not be compensated by damages and if the court was still in doubt, the matter could be decided on a balance of convenience.
11. On the 1st principle Counsel submitted that the plaintiff had been in occupation of the suit property for over 12 years and the issues raised by the 2nd and 3rd defendants were worthy of this court's determination. Counsel placed reliance on the case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] KLR 125 where the court stated;

‘...a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and a probability of success of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case.’
12. Counsel submitted even if the 2nd and 3rd defendants had evicted the plaintiff from the suit property and subsisted in their trespass, an injunction could ensue and she placed reliance on the case of *Karak Brothers Company Limited v Burden* [1972] ALLER 1210 which was cited with approval in the case of *Francis Kibii Cherutich v John Mbutia & 2 others* [2013] eKLR where the court observed:

‘An injunction can and will issue against a person in occupation of land if such person cannot demonstrate that his occupation is lawful or that he has a legitimate arguable claim over the said land.’
13. On the 2nd principle, Counsel submitted that the plaintiff had suffered irreparable loss and continued to suffer and no amount of compensation was adequate. Counsel relied on the case of *Panari Enterprises Limited v Lijoodi & 2 others* [2014] eKLR which held;

‘...I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right.’
14. On 3rd principle, it was Counsel's submission that the balance of convenience tilted in the plaintiff's favour because she had been in occupation of the suit property. Counsel cited the case of *Benson Ochieng Opiyo v John Otieno Nyadero* [2021] eKLR where the court stated:

‘The Plaintiff has contended that he has always had possession and occupation of the suit property at the exclusion of the Defendant. Damages, if any the Defendant may suffer is incomparable to that of the Plaintiff.’
15. Mr. Odera Counsel for the 2nd and 3rd defendants filed written submissions dated 07/09/2022. He also placed reliance on *Giella v Cassman Brown* (*supra*).
16. On the 1st principle, it was Counsel's submission that the issues raised by the respective parties had to await a full trial. On the 2nd principle, Counsel submitted that the plaintiff did not stand a chance



to suffer irreparable injury and he placed reliance on *Pius Kipchirchir Kogo v Franklin Kimeli Tenai* [2018] eKLR where the court held:

‘The Applicant must further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.’

17. Counsel stated that the plaintiff had vacated Uholo/Ugunja/560 and the 3rd defendant was in occupation of the suit property and consequently, the plaintiff would not suffer any loss if the injunction was not granted because she was not in occupation.
18. On the 3rd principle, Counsel in relying on *Pius Kipchirchir Kogo v Franklin Kimeli Tenai* (supra) submitted that the balance of convenience tilted towards the 2nd and 3rd defendants because they stood to suffer substantive loss if the suit was finally determined in the defendants’ favour. Further, it was Counsel’s submission that the plaintiff had failed to demonstrate that the suit property was in danger of being sold, wasted or alienated.

Analysis and determination

19. I have carefully considered the motion, its grounds, affidavits and respective parties’ rival submissions and the issues falling for determination are;
 - a. Whether the motion is merited; and
 - b. What about costs?
20. The power of this court to award an order of temporary injunction emanates from section 63 (c) and (e) of the *Civil Procedure Act* and order 40 rule 1 of the *Civil Procedure Rules*. This section 63 (c) and (e) provides as follows

‘In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

- (a).....
- (b).....
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
- (d)
- (e) make such other interlocutory orders as may appear to the court to be just and convenient’

21. On inhibitions, my authority ensues from section 68 of the *Land Registration Act* that states that:

‘The court may make an order (an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.’

22. Interlocutory injunctions are meant to preserve the substratum of the suit pending its hearing and determination. The grant of interlocutory injunctions is not meant to occasion prejudice to any party.



23. *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] KLR 125 reminds this court that its power in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case, judicial discretion has to be exercised on the basis of law and evidence.
24. The principles that guide the court in determining whether a temporary injunction ought to be issued are outlined in the celebrated case of *Giella v Cassman Brown* (supra) see also *Nguruman Limited v Jan Blonde Nielsen & 2 others* [2014] eKLR. Having addressed the law, I will now turn to the facts of this case.
25. From the pleadings, there was no culpability ascribed by the plaintiff against the 1st defendant who is the registered proprietor of the suit property and this court is unsure if service upon him via registered post was returned unserved. In my considered view, his deafening silence in the entire proceedings may hold credence to the 2nd and 3rd defendants' assertions that he died over 10 years ago.
26. A suit against a deceased person is only sustainable against his estate and any suit against a deceased person is a nullity and it is immaterial whether one was privy to his demise or not. At this stage, I am reluctant to grant any orders against the 1st defendant. I rely on the case of *Japhet Nzila Muangi v Hamisi Juma Malee* [2022] eKLR which was cited with approval in the Court of Appeal decision of *Geeta Bharat Shah & 4 others v Omar Said Mwatayari & another*, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008, (2009) eKLR where the court expressed itself thus;
- ‘In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity’
27. The plaintiff, the 2nd and 3rd defendants have barbed accusations and counteraccusations against each other. From the annexures attached to their respective pleadings including photographs, these are my deductions: the suit property was a subdivision of Uholo/Ugunja/378; the suit property, Uholo/Ugunja/560 and Uholo/Ugunja/3299 are adjacent to each other; the 2nd defendant is the registered proprietor of Uholo/Ugunja/560; the plaintiff was given a notice to vacate Uholo/Ugunja/560 and the 3rd defendant is a tenant of Uholo/Ugunja/3299.
28. From the photographs adduced, a demolition of a development took place. It is not in dispute that the plaintiff was in occupation of the suit property and Uholo/Ugunja/560. She averred that she voluntarily vacated Uholo/Ugunja/560. She asserted that the 2nd and 3rd defendant forcefully evicted her from the suit property. Her claim against them was damages in respect of the illegal demolition. The defendants have denied culpability and asserted that the plaintiff voluntarily vacated Uholo/Ugunja/560 and the suit property.
29. In view of a possibility of a correlation between all these properties including the existence of a boundary dispute between the suit property, Uholo/Ugunja/560 and probably the adjacent property of Uholo/Ugunja/3299, I find this is a suit that has to await the main hearing.
30. Additionally, it is not in dispute that the plaintiff is currently not in occupation of the suit property. Though the plaintiff cited the persuasive decision of *Francis Kibii Cherutich v John Mbutia & 2 others* (supra), I have looked at this decision which was a departure from the legal position that an injunction cannot prevent what has occurred. In my considered view, the circumstances of that case were different from those of this case. In that case, the plaintiff held a valid allotment letter whilst the defendants who were in occupation had nothing to prove their proprietorship.



31. In my view and considering the prevailing circumstances of this case, it is my finding that the motion has been overtaken by events and I rely on the case of Stanley Kirui v Westlands Pride Limited (2013) eKLR where it was held:-

‘...the court cannot injunct what has already happened. I will be guided by the findings in case of *Mavoloni company Ltd v Standard Chartered Estate Management Ltd*, Civil Appeal No 266 of 1997 (1997) LLR 5086, where the court held that “an injunction cannot be granted once the event intended to be injuncted has been overtaken by events.” Similar findings were held in the case of *Esso Kenya Ltd v Mark Makwata Kiya*, Civil Appeal No 69 of 1991 where it was stated “an injunction cannot issue to restrain an event that has taken place.’

32. It is my finding that the plaintiff has neither established a prima facie case with a probability of success nor demonstrated that she would stand to suffer irreparable loss that cannot be not be adequately compensated by an award in damages by the 2nd and 3rd defendants. More so, it is paramount for the plaintiff to establish the status of the 1st defendant before the case is set down for pretrial directions.

33. However, considering that the plaintiff’s claim against the 1st defendant is on adverse possession and there is a high probability that the 2nd and 3rd defendants who are already the occupants of adjacent parcels of land may have encroached on the suit property, I am of the considered view that this is a matter that warrants the preservation of status quo pending determination of the main suit. I accordingly order the following disposal orders;

- a. The district land registrar and district land surveyor within ugunja/ugunya Sub County shall survey and ascertain the boundaries between Uholo/Ugunja/559, Uholo/Ugunja/560 and Uholo/Ugunja/3299 and their costs shall be borne by the plaintiff.
- b. That pending the hearing and determination of this suit, there shall be no constructions or further constructions or development on the suit property by the 2nd and 3rd defendant.
- c. Costs shall be in the cause.
- d. Suit shall be mentioned for directions on 15/02/2023.

DELIVERED AND DATED AT SIAYA THIS 8TH DAY OF DECEMBER 2022.

HON. A. Y. KOROSS

JUDGE

8/12/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Ndolo h/b for Ms Oduor for the plaintiff

Mr. Odera for the 2nd and 3rd defendants

Court assistant: Ishmael Orwa

