



REPUBLIC OF KENYA



Nyamolo (Suing as the legal representative of the estate of Silvanus Nyamolo Obala- Deceased) v Owiyo (Environment & Land Case E20 of 2022) [2022] KEELC 15208 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E20 OF 2022**

AY KOROSS, J

DECEMBER 8, 2022

BETWEEN

**KENNETH OLUOCH NYAMOLO PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SILVANUS
NYAMOLO OBALA- DECEASED**

AND

MARY OKECH OWIYO DEFENDANT

RULING

1. Pursuant to the provisions of article 23 of the [Constitution of Kenya](#) and order 51 of the [Civil Procedure Rules](#), the plaintiff filed a notice of motion dated October 11, 2022 under certificate of urgency against the defendant in which he sought the following reliefs:
 - a. Spent;
 - b. That an injunction be issued restraining the defendant herein by herself, her servants, agents or whomsoever claiming through her from alienating, selling, charging, transferring or in any manner whatsoever interfering with land parcel no Siaya/Abom/2886 until this matter is heard and determined by this honourable court; and
 - c. That costs of the application be in the suit.
2. The application is premised on the grounds enumerated on the face of the application and on the affidavit deponed by the plaintiff Kenneth Oluoch Nyamolo filed on October 11, 2022.
3. The plaintiff deposed *inter alia*; there was contestation as to who between the plaintiff's family and defendant owned land parcel number Siaya/Abom/2886 (hereinafter 'the suit property'); his father Silvanus Nyamolo Obala(deceased) bought the suit property from the defendant's husband Jonathan



Owiyo Aliwa alias Owiwa Aliwa in 1973 and he and his family had been in quiet occupation and possession since then; Jonathan died before transferring the suit property to his father; upon succession of Jonathan's estate, the defendant transferred the suit property to herself and intended to dispose it off and, it would be in the interests of justice if the orders sought were granted.

4. The motion was canvassed by written submissions. Counsel for the plaintiff Mr Nyamweya filed his written submissions dated October 27, 2022.
5. Counsel anchored his arguments on order 40 rule 1 of the Civil Procedure Rules and urged the court to be guided by the principles that were laid out in the classical case of *Giella v Cassman Brown & another* [1973] EA 358 which settled the principles as follows;

"Firstly, 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."

6. Counsel submitted that as evidenced by documentary evidence that he had adduced before this court, the plaintiff had established a *prima facie* case and to buttress his position, he placed reliance on the case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* Civil Appeal Number 39 of 2002 where the court stated as follows;

"in civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party so as to call for an explanation or rebuttal from the latter."

7. Counsel submitted that the plaintiff and his family had been in occupation of the suit property for 49 years and they risked being dispossessed which would cause them to suffer irreparable damage. Counsel contended that the suit property was special to the plaintiff's family.
8. Despite the defendant attending court severally and even being given an opportunity to file her written submissions, she did not comply with the court's directions. Her counsel Oyaro J Associates & Advocates filed an application dated 2/12/2022 in which they sought several reliefs including an arrest of this ruling. The application was not certified urgent and is due for directions on 30/1/2023. Even if the motion is unopposed, this court is called upon to hear and determine it on its own merits.

Analysis and Determination

9. Having carefully considered the plaintiff's motion and written submissions, this court is of the considered view that the only issue falling for determination is whether the plaintiff has met the criteria for the grant of a temporary injunction.
10. My authority 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"

11. While order 40 rule (1) (a) and (b) of the [Civil Procedure Rules](#) provides: -

"Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further." Emphasis added.

12. The case of [Mrao Limited v First American Bank of Kenya Limited](#) (supra) reminds this court that its authority in an application for interlocutory injunction is discretionary and such discretion is to be exercised judiciously. And as is the position, judicial discretion has to be exercised on the basis of the law and evidence.

13. The conditions for consideration in granting an injunction are now settled and this court need not reinvent the wheel. See [Giella v Cassman Brown](#) (supra) and [Nguruman Limited v Jan Blonde Nielsen & 2 others](#) [2014] eKLR. Having addressed the law. I will now turn to the facts of this case.

14. On the 1st principle, the plaintiff had to demonstrate that he had established a *prima facie* case with probability of success. Counsel for the plaintiff relied on the case of [Mrao Limited v First American Bank of Kenya Limited](#) (supra) which defined a *prima facie* case as follows;

"...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 the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

15. From the documents adduced before this court, the defendant is the registered proprietor of the suit property having succeeded Jonathan's estate. The plaintiff's claim is founded on adverse possession and as evidenced by the official search over the suit property, he had lodged a caution over it by claiming a purchaser's interest.

16. The plaintiff averred that he and his family had been in occupation and possession of the suit property for close to 49 years. He alleged that the defendant intended to dispose it off. In my considered view, the alleged occupation for over a period of 12 years demonstrates that the plaintiff has an interest over the suit property and the alleged impending sale may infringe on his rights over it. On this condition, I find that the plaintiff has established a *prima facie* case with probability of success.



17. On the 2nd principle, the plaintiff had to demonstrate that he would suffer irreparable harm that could otherwise not be compensated by an award of damages. The plaintiff alleged occupancy of the suit property peacefully for 49 years and without interruption. This was not rebutted by the defendant. Taking into consideration that the claim is grounded on adverse possession and there is grave danger that the defendant may interfere with the plaintiff's alleged interests over the suit property by disposing it off, I am satisfied and find that in the event the plaintiff succeeds in his claim, he may suffer irreparable harm that cannot be compensated by an award of damages.
18. On the 3rd condition, the plaintiff is allegedly in occupation of the suit property. It is my finding that the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendant if an injunction was not granted but the plaintiff ultimately succeeds. Ombwayo J in *Pius Kipchirchir Kogo v Franklin Kimeli Tenai* [2018] eKLR expressed himself thus;
- "Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them is greater than that which may be caused to the defendants. If the inconvenience is equal, it is the plaintiff who suffers."
19. Ultimately, it is my finding that the plaintiff has met the threshold for grant of a temporary injunction, I allow the motion. Costs shall abide the outcome of the main suit. I hereby issue the following disposal orders;
- a. An injunction be and is hereby issued restraining the defendant by herself, her servants, agents or whomsoever claiming through her from alienating, selling, charging, transferring or in any manner whatsoever interfering with land parcel No Siaya/Abom/2886 until this matter is heard and determined.
 - b. Costs shall abide the outcome of the main suit.
 - c. The suit shall be mentioned before this court for directions on 30/1/2023.

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. Wangatia for the plaintiff

Mr. Oyaro for the defendant

Court assistant: Ishmael Orwa

