



Omondi & another v Kinyua & another (Environmental and Land Originating Summons E012 of 2024) [2025] KEELC 4048 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4048 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2024**

MAO ODENY, J

MAY 28, 2025

BETWEEN

PIUS ISHOME OMONDI 1ST APPLICANT

MARTIN OLOO OMONDI 2ND APPLICANT

AND

JOEL MUNA KINYUA 1ST RESPONDENT

PAUL NGIGE NJUGUNA 2ND RESPONDENT

RULING

1. This ruling is in respect of two Notice of Motion applications one dated 31st October, 2024 and another dated 5th December 2024 filed by the Applicants. The first Application sought the following orders:
 - a. Spent
 - b. Spent
 - c. That an interim injunction do issue restraining the Respondents, their agents, servants or any persons acting under their instructions, from evicting, interfering, or in any way dealing with the Applicant's peaceful possession and occupation of the suit property pending the hearing and determination of the Originating Summons herein.
 - d. Spent
 - e. That the costs of this application be provided for.
2. The application was supported by the annexed affidavit of Pius Ishome Omondi, the 1st Applicant where he deponed that he has lived on the suit property peacefully since 1982 and he discovered in September 2019, that the Respondents had allegedly colluded with the administrators of his late



father's estate and obtained an interest in the suit property. It was his deposition that the Respondents have threatened to evict him and he urged the court to grant the orders sought.

3. Joel Muna Kinyua, the 1st Respondent filed a Replying Affidavit sworn on 7th January, 2025 and deponed that they are the registered owners of all that parcel of land known as Nakuru/Kirengero Settlement Scheme/ 153 and the Applicants trespassed on the same. It was his deposition that they filed a suit in Nakuru Chief Magistrate Court MCELC/245/2019 where the case was heard and determined in their favour.
4. He further stated that Applicant had already been evicted as per the court judgment and that there has been neither an appeal nor a review therefore the temporary injunction sought by the Applicant has been overtaken by events.
5. The second application is a Notice of Motion Application dated 5th December, 2024 filed by the Respondents seeking the following orders:
 - a. That the claim brought against the Respondents be dismissed.
 - b. That costs be in suit. (sic)
6. The application was supported by the annexed affidavit of Joel Muna Kinyua sworn on 5th December, 2024 where he deponed that the present suit is res-judicata as the subject matter was canvassed in: Nakuru Magistrates Court Elc 245 Of 2019: Joel Muna & Another Vs Pius Ishome Omondi & Another And Nakuru Succession Cause No 703 Of 2012 Pius Ishome Omondi Vs Joel Muna & Others.
7. Pius Ishome Omondi filed a Replying Affidavit sworn on 28th January, 2025 and stated that the claim for adverse possession in the Originating Summons has never been litigated before. He urged the court to dismiss the Respondents' application.

Applicants' Submissions

8. Counsel for the Applicants filed submissions dated 6th December, 2024, relied on the case of *Giella vs Cassman Brown* [1973] EA 358 and submitted that the Applicants have established a prima-facie case as they have been in open, continuous and exclusive occupation of the suit property for over 40 years. Counsel submitted that they have constructed residential structures, cultivated crops and reared animals.
9. Counsel submitted that the Applicants eviction cannot be compensated by monetary damages as their way of life would be jeopardized. Further that the balance of convenience tilts in favor of granting the injunction to preserve the status quo.

Respondents Submissions

10. Counsel for the Respondents filed submissions dated 7th January, 2025 and submitted that there is no serious issue to be tried since the Applicants have neither ownership nor possession of the suit property and will also suffer no irreparable harm if the injunction is not granted as they were already evicted from the suit property.
11. Counsel submitted that the Respondents will suffer greater harm if the injunction order is granted as they are already in occupation of the suit property and are already farming the land. Counsel submitted that court orders are not issued in vain and the application is moot.



12. Counsel further submitted that the Applicants have not presented any proceedings before this court for the determination of the question whether the eviction was not proper or done in contravention of a Court order. According to counsel, the Applicants cannot assert that there are still live issues between the parties requiring determination and relied on the cases of *Giella vs Cassman Brown and Co Ltd*, *R.J.R Macdonald vs Canada (Attorney General)* and *Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others* [2020] eKLR.

Analysis And Determination

13. The issues for determination are: whether the applicants are entitled to an order of interim injunction pending the hearing of the originating summons and whether the claim against the Respondents should be dismissed.
14. The submissions by the Applicant seem to be in support of the merit of the Originating Summons and not the application for injunction. For order of injunction to issue, an Applicant must satisfy three conditions set out in the case of *Giella Vs. Cassman Brown* (1973) EA 358, namely must establish a prima facie case with a probability of success, irreparable harm that cannot be adequately compensated by an award of damages and if the Court is in doubt, it should decide on a balance of convenience.
15. From the facts presented by the Applicants, they have not countered the assertion by the Respondent that there was a case in the Chief Magistrate's Court involving the same issue which was heard and determined and a judgment issued in their favour and they have since been evicted from the suit land.
16. The purpose of a temporary injunction is to protect a party from irreparable harm until hearing and determination of a case. It also aims to preserve the substratum of the suit and stop any activities/actions that could lead to irreversible damage, and ensure a fair trial by maintaining the status quo.
17. It is the Respondents contention that eviction has already taken place and the injunctive orders sought by the Applicants has been overtaken by events. The Applicants admitted that there was a case *Nakuru No CM ELC No 245 of 2019* between the same parties and in respect of the same parcel of land. His only contention is that the issue of adverse possession was never litigated.
18. The 1st Respondent in his Replying Affidavit sworn on 7th January 2025 deponed that pursuant to the judgment and the court order issued by the Nakuru Chief Magistrate Court in *MCELC 245 of 2019*, the Applicants were served with an eviction Notice on 26th October, 2024 by SANJOMU Auctioneers in which they were informed that they would be evicted from the suit property and the same was implemented leading to the eviction of the Applicants.
19. This court has looked at the annexures attached to the 1st Respondent's Replying Affidavit sworn on 7th January 2025 and notes that there is indeed a court order issued in the following terms:
- “ThatT an order of eviction be and is hereby issued against the defendants from the suit land NAKURU/KIRENGERO SETTELENT SCHEME/153 under supervision of police from Kirengero Police station.”
20. The Applicant was a party to the suit and has not given any evidence to refute the fact that there was a judgment and an order for his eviction. The photographs attached to the 1st Respondent's Replying Affidavit have not been controverted. I am not aware of any appeal against that judgment/decre, as the current suit is a fresh suit and not an appeal.
21. I find that the Applicant has not met the threshold for grant of an order of a temporary injunction and the application is therefore dismissed with costs.



22. In respect of dismissal of the Applicant's claim in the Originating Summons as sought by the Respondents, the application relies on the doctrine of res judicata but has not advanced the same properly in the application. The Respondents are at liberty to file a proper application on the doctrine of res judicata if they so wish. The application dated 5th December 2024 is hereby struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF MAY 2025 .

M. A. ODENY

JUDGE

