



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oliko v Ariada (Environment & Land Case E004 of 2025)  
[2025] KEELC 1001 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1001 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E004 OF 2025**

**BN OLAO, J**

**MARCH 4, 2025**

**BETWEEN**

**CYPRIAN CHRISTOPHER OLIKO ..... APPLICANT**

**AND**

**ALBERT ARIADA ..... RESPONDENT**

**RULING**

1. What calls for my determination in this ruling is the Notice of Motion by Cyprian Christopher Oliko(the Applicant) dated 15<sup>th</sup> January 2025 in which he seeks the following orders:
  1. Spent
  2. Spent
  3. That this Honourable Court be pleased to issue a permanent (sic) injunction against the Respondent Albert Ariada,his agents, servants, family members or any other person working under him and/or his instructions restraining him from further trespassing, tiling, cultivating, planting, constructing any structure, drilling any hole be it a pit latrine or borehole and/or in any manner whatsoever dealing with the Applicant's land parcel No Bukhayo/bugengi/10161 pending the hearing and final determination of this suit.
  4. That the costs of this application be provided for.
2. The application is anchored on the provisions of Sections 1, 1B, 3 & 3A of the *Civil Procedure Act* and Orders 40 Rule 1, 2, 3, 4 and 5 and Order 51 Rule 1 of the *Civil Procedure Rules*. It is premised on the grounds set out therein and supported by the affidavit of the Applicant of even date.
3. The gravamen of the application is that the Applicant is the registered proprietor of the land parcel No Bukhayo/bugengi/10161 (the suit land) and is therefore entitled to quiet and peaceful enjoyment thereof. That while he was away during the festive season between 30<sup>th</sup> December 2024 and 1<sup>st</sup> January



2025, the Respondent trespassed thereon, fenced it using barbed wire and installed a gate yet the Applicant had also fenced it off, assembled construction materials and dug a foundation for the construction of a Commercial/Residential building of four (4) shops and eight (8) self-contained units. That his building plan was approved by the sub-county Public Health Office Matayos sub-county, the Director Urban Development and the County Physical Planner Busia. That there was no other building on the suit land and he commenced construction in October 2022 having purchased the suit land in 2019 but the chief visited it and stopped him from continuing with his construction. Being law abiding, he stopped his construction and in 2024, his fence was vandalized. He is therefore apprehensive that the Respondent may start constructing on, drilling a borehole or pit latrine to his detriment and violation of his Constitutional rights which will cause him irreparable loss. That he has a prima facie case and the balance of convenience is in his favour.

4. The following documents are annexed to the Motion:
  1. Copy of the title deed to the suit land issued on 29<sup>th</sup> November 2019 in the name of the Applicant.
  2. Several photographs.
  3. Building plan.
5. The application is opposed and the Respondent filed a replying affidavit dated 20<sup>th</sup> January 2025 in which he has deponed, inter alia, that the Applicant does not know where his alleged piece of land lies. That in October 2022, he stopped the Applicant from constructing on his (Respondent's) land parcel No Bukhayo/bugengi/7753 which had however not yet been transferred in his name since he had undergone a series of operations on his legs which had depleted his finances. That when he purchased his land, he had involved the local Administration who knew it and he was informed that the Applicant was building on his (Respondent's) land. A surveyor later came to the site and confirmed that the Plaintiff's land (the suit land) was some plots away from his land. He later obtained a map which shows that there are some two other plots being Bukhayo/bugengi/9545 as 11797 between the suit land and his land and so the parties are not even neighbours and he has no interest whatsoever in the suit land. That in December 2024 he hired someone to fence his land but was surprised to be served with Court papers yet the Plaintiff had been advised by the County Surveyor to vacate the Respondent's land. Annexed to the replying affidavit is a cadastral map for Bukhayo/bugengi registration section.
6. The Applicant filed a supplementary affidavit in which he deponed, inter alia, that the Respondent's main contention is that his land is not situated where he fenced which allegation is bare because there is no document to prove the existence of the Respondent's land. Further, that the allegation that the Surveyor visited the land and confirmed that the suit land belongs to the Respondent is not true since Surveyors do not confer ownership of land.
7. The application has been canvassed by way of written submissions.
8. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Mr Onsongoinstructed by the firm of Wycliffe Obwoye Onsongo & Company Advocates for the Applicant and by Mr J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Respondent.
9. The now well-trodden path in applications of this nature is the one set out in the case of *Giella -v- Cassman Brown & Company Ltd* 1973 EA 358. Therein, it was held that a party seeking such an order must establish the following:
  1. Show a prima facie case with a probability of success.



2. Demonstrate that unless the order is granted, he will suffer irreparable loss or injury which would not adequately be compensated by an award of damages.
3. If the Court is in doubt, it will determine the application on a balance of convenience.

A prima facie case, as was stated in the case of *Mrao -v- First American Bank Of Kenya Ltd & Others* C.a. Civil Appeal No39 of 2002 [2003 eKLR]:

“... is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Court of Appeal went on to adopt the above definition and added the following in the case of *Nguruman Ltd -v- Jan Bonde Nielsen & Others* C.a. Civil Appeal No77 of 2012 [2014 eKLR]:

“We adopt that definition save to add the following by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from that invasion. We reiterate that in considering whether or not a prima facie case has been established the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as is otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant’s case is more likely than not to ultimately succeed.” Emphasis added.

Finally, as was held in the English case of *Films Rover International Ltd -v- Cannon Film Sales Ltd* 1963 3 ALLER 772, a Court considering such an application should take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

10. Guided by the above and other relevant precedents, it is common ground that the Applicant is the registered proprietor of the suit land. He holds title deed thereto issued to him on 29<sup>th</sup> November 2019. I have not heard the Respondent challenge the validity of the title. His case is that the Applicant does not know the location of his land and is infact constructing on the Respondent’s parcel of land being land parcel No Bukhayo/bugengi/7753. So in December 2024, he hired someone to fence his land and the Plaintiff should get the County Surveyor to show him where the suit land is situated.
11. It may be rather early in these proceedings to make a finding that this is a boundary dispute between the Plaintiff and the Defendant. But it is unlikely to be one because in paragraph eight (8) of his replying affidavit, the Respondent has deponed as follows:
  - 8: “That I have obtained the current map Diagram NO 21 of the area and it shows that between the Plaintiff’s parcel of land Bukhayo/bugengi/10161 and my land Bukhayo/bugengi/7753there are 2 different parcels of land namely Bukhayo/bugengi/9545and Bukhayo/bugengi/111797. Annexed hereto and marked ADA-1 is the said diagram.”



Having said so, as the registered proprietor of the suit land, the Applicant is entitled to the rights under Section 24 (a) of the [Land Registration Act](#) which reads:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto ...”

Section 26 (1) of the same [Act](#) provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The suit land is the subject matter in this dispute and since the title thereto is in the Applicant’s name, he is prima facie, the proprietor thereof. The Respondent’s case is that the Applicant does not know the location of his case and is infact constructing his building on the Respondent’s land parcel No Bukhayo/bugengi/7753 which is some two (2) plots away from the suit land. As to whether the Applicant is constructing on the suit land which the Respondent has illegally fenced off or if infact it is the Applicant who is interfering with the Respondent’s land parcel No Bukhayo/bugengi/7753, those are issues which will be determined at the trial. At this stage, what I am required to determine is whether on the face of it, the Applicant has demonstrated that he has a bona fide question to raise as to the violation of his right to the suit land.

12. I am also guided by the decision in the case of *Jaj Super Power Cash & Carry Ltd -v- Nairobi City Council & 2 Others* C.a Civil Appeal No111 of 2002 where the Court of Appeal stated thus:

“This Court has recognized and held that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

Again I must emphasize that at this point in time, who between the Applicant and the Respondent is the trespasser will be a matter to be finally determined on the evidence. However, on the material now available before me and more so the fact that the Applicant is the registered proprietor of the suit land, any person constructing thereon is a candidate for an order of temporary injunction pending trial. The Applicant has, in my view established a prima facie case to warrant the grant of the orders sought.

13. On the issue of irreparable loss or injury which would not adequately be compensated by an award of damages, the Applicant has deponed in paragraph 14 of his supporting affidavit that he stands to suffer irreparable loss if the Respondent is not restrained. In the case of [Paul Gitonga Wanjau -v-](#)



Gathuthi Tea Factory Company Ltd & 2 Others 2016 eKLR, the Court citing from Halsbury's Law Of England said irreparable loss is:

“Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction if his rights cannot be adequately protected or vindicated by damages”.

In the case of Ernest Muriuki Mungai -v- Gichugu Constituency Development Fund & Another 2017 eKLR, I adopted the following definition of irreparable injury from Black's Law Dictionary 9<sup>th</sup> Edition:

“The term ‘irreparable injury’, however, is not to be taken in its strict sense. The rule does not require that the threatened injury should be one not physically capable of being repaired. If the threatened injury would be substantial and serious – one not easily to be estimated or repaired by money – and if the loss or inconvenience to the Plaintiff if the injunction should be refused (his title proving good) would be much greater than any which can be suffered by the Defendant through the granting of the injunction, although his title ultimately prevails, the case is one of such probable great or irreparable damages as will justify a preliminary injunction.” Emphasis mine.

If the order of injunction is declined and the Applicant prevails at the trial after the Respondent has developed the suit land, the injury to the Applicant will be substantial and he would suffer great inconvenience taking into account that he intends to construct commercial and residential houses of four (4) shops and eight (8) one-bedroom self-contained units as per the annexed building plans. Taking all that into account, I am persuaded that the Applicant has demonstrated that he will suffer substantial loss and injury if the order sought is not granted.

14. If this Court was in doubt, which I am not, and have to determine the application on the balance of convenience, the same would tilt in favour of granting it.
15. Ultimately therefore and having considered all the evidence herein, I allow the Notice of Motion dated 15<sup>th</sup> January 2025 and make the following disposal orders:
  1. A temporary order of injunction is issued restraining the Respondent by himself, his agents, servants, family members or any other person acting through him from trespassing, tilling, cultivating, planting, constructing any structure, drilling any hold be it a pit latrine or borehole or in any manner whatsoever dealing with the Applicant's land parcel No Bukhayo/bugengi/10161 pending the hearing and determination of this suit.
  2. The parties to ensure that this matter is heard and determined within the next 12 months otherwise the order of temporary injunction shall lapse unless otherwise extended by this Court.
  3. As the parties all appear to have filed their documents, let the file be listed for pre-trial before the Deputy Registrar who shall give them a hearing date upon confirming compliance under order 11 of Civil Procedure Rules on 17<sup>th</sup> March 2025.
  4. Costs shall abide by the outcome of the suit.

**BOAZ N. OLAO**

**JUDGE**



**4TH MARCH 2025**

**RULING DATED, SIGNED AND DELIVERED ON THIS 4TH DAY OF MARCH 2025 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**4TH MARCH 2025**

