



**Kyangi v Obado (Environment and Land Miscellaneous Application
E013 of 2024) [2025] KEELC 3427 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2024
FO NYAGAKA, J
APRIL 1, 2025**

BETWEEN

CHARLES OYOO KYANGI PLAINTIFF

AND

NICHOLAS JUMA OBADO DEFENDANT

RULING

Brief Facts

1. The Applicant filed the instant application dated 22nd October, 2024 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That stay of execution be granted restraining the Respondents by themselves, their agents/ servants and all those claiming under them from interfering, disposing of and/or transferring to whoever the parcel of land Number Kawere/Konyango/Karading/2599 pending the hearing and determination of the suit.
 4. The costs of the application be provided.
2. The Application was based on grounds set out and supported by the Affidavit of Charles Oyoo Kyangi the Applicant herein sworn on 22nd October, 2024. He stated that he was the registered owner of the parcel no. Kawere/Konyango/Karading/2599 having purchased the same from Oyugi Obado (deceased) in 1995/6. He stated he had purchased one acre and paid the full purchase price thereof. He further stated that the Respondent had since trespassed onto the suit land despite having been warned to desist from the same. He stated that he has been on the land for 29 years uninterrupted and urged the court to allow the application as prayed.



Response

3. The Respondent filed his Replying Affidavit sworn 21st December, 2024. He averred that the application was an abuse of the court process as the Applicant has never been in occupation and use of the suit land as alleged. He further averred that he has been the one in occupation and that the Applicant was merely holding the parcel in trust. He also averred that the Applicant has not demonstrated any loss he stands to suffer that cannot be remedied by costs. He urged the court to dismiss the application for lack of merit.
4. Upon the Court reading the Application and the Response it was of the opinion that in order to obtain a proper picture of the situation it should receive independent information through the Area Chief and Assistant Chief. It therefore summoned the two officers who attended court and gave the information on oath.
5. Both the Chief and the Assistant Chief stated on oath that the Defendant had recently, from about August of the previous year, moved onto the land and started clearing and cultivating it. That for a long time it had lain fallow but the Applicant had for some years just before the suit, while constructing at a market called Opapo, been depositing soil excavated from the construction site on the suit land. This was done yet the Respondent did not raise any issues over the same. Further, the land had been fenced but with time the fence wore out.

Submissions

6. Counsel for the Applicant filed his submissions dated 5th February, 2025 where he submits that at the time of purchase of the land, the Respondent was a toddler and could not be in occupation of the land. He submits that since the vendor was his elder brother, the Respondent was aware of the though he was quite young. He submits that the Respondent started to trespass in 2023 and not earlier. He argues that if the Respondent had a genuine claim, he would have started cultivation earlier. He submits that the Respondent has not challenged the validity of the title in the Applicant's name. It was counsel's submission that the court ought to reject the Respondent's affidavit since it failed to address the issues related to the application. He relied on the case of ELC No. E018 of 2023 *Musti Investment Ltd & Another V Philip Kilonzo & 12 Others* and submits that the Applicant has satisfied the requirements for grant of a temporary injunction. He submits that the Respondent does not have a dependable income and thus he may not be able to pay any compensation in damages.
7. Counsel for the Respondent on the other hand filed his submissions dated 6th February, 2025 where he identified one issue for determination, whether or not the Plaintiff's application meets the threshold for granting orders of injunction. He relied on the case of *Giella V Cassman Brown and Company Ltd* which provided the three conditions to be met for grant of the same. On the first condition of a prima facie case, counsel relied on Order 40 rule 1 of the *Civil Procedure Rules* and submits that no evidence has been adduced by the Applicant that the suit land was in danger of being wasted by the Respondent in any manner. He submits that the Applicant has failed to establish a prima facie case against the Defendant to warrant the court to grant interim orders sought.
8. The second condition on irreparable harm, it was counsel's submission that the Respondent has been in use and occupation of the suit land. He added that the Applicant apart from holding the suit land, he has not been in possession of the suit land. He argues that no harm will be suffered by the Applicant that cannot be compensated by damages if the orders sought are not granted. He added that the Respondent cannot dispose off the suit parcel since it's registered in the Applicant's name. He relied on the Court of Appeal case in *Nguruman Limited V Bonde Nielsen & 2 Others* [2014] eKLR as cited in *Isaac Musyoki Komoni V Sammy Kaumbulu Mbuvi* [2022] eKLR. It was counsel's submission that the Applicant



failed to demonstrate that he stands to suffer in irreparable harm that cannot be compensated by award of damages if the injunction order is not granted.

9. He submits that the balance of convenience tilts in favour of the Respondent as he is the one in occupation of the suit land. He submits if the orders sought are granted, it would amount to eviction of the Respondents from the suit land. He further submits that no hardship will be borne by the Applicant if the orders are not granted. He relied on the case of *Virginia Edith Wambui V Joash Ochieng Ougo* Civil Appeal No. 3 of 1987 eKLR and submits that the status quo as at the time of filing the suit is that the Respondent was and is still in occupation of the suit land. He urges the court to dismiss the application with costs.

Analysis and Determination

10. This court has considered the application and is of the view that the main issue for determination is whether the application is merited. The Applicant contends that he is the registered owner of the parcel no. Kawere/Konyango/Karanding/2599 having purchased the same from Oyugi Obado (deceased) in the year 1995/6. He further contends that the Respondent has since trespassed onto the land despite numerous attempts to have him vacate. The Respondent on the other hand denied the allegation and stated that he has been the one in occupation of the suit property and that the Applicant was only holding it in trust.
11. The principles upon which the court should grant an injunction were set out in the case of *Giella V Cassman Brown & Company Ltd* 1973 EA 358 as follows:

“First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
12. In the case of *Mrao V First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”
13. It is trite law that in interrogating the requirements for grant of a temporary injunction, the requirement of a prima facie case ought to be first established which if this court finds otherwise, it shall not proceed into the other two conditions. It is noteworthy that from the oral evidence of the area chief and the assistant chief that the suit land had remained fallow for some time until sometime towards end of 2024 when the Respondent moved onto the suit land and started cultivation. The Respondent on the other hand did not rebut the said evidence by the chief. It is not in contention that the suit land is registered in the Applicant’s name as evidenced from the title deed issued on 14th April, 2015. It is a fact that the Respondent’s occupation was certainly an intrusion intended to interrupt the then obtaining status quo and at best constituted interfering with the Applicant’s quiet possession of the suit land. It is this court’s view that Applicant’s acts border on trespass which is an illegal act, and this court cannot condone such as the basis of denying the grant of the orders of injunction. What I mean is that a party cannot suddenly in a recent moment in time move onto another’s property, be called upon to move out and refuse, and then expect the Court to declare that to be the basis for denying an injunction to the owner or party who has been in long-term occupation and whose situation has



just been interrupted by the intruder. For courts to do so would justify crooked people's, and there are myriads of such in our country today, illegal occupancy to the chagrin of the innocent.

14. In the circumstances, it is my opinion that the Applicant has established a prima facie case with a likelihood of success. I do find that the Applicant being the registered proprietor of the property who has been in occupation of the suit property has established his legal right to the said occupation to the exclusion of the Defendant until the determination of this suit.
15. Moreover, the Respondent's claim on trust cannot be interrogated at this interlocutory stage of the case as a basis of his recent interruption of the quiet possession of the suit land by the Applicant since the same can only be dealt with during hearing of the suit on merit. Additionally, the Applicant has established that he is likely to suffer irreparable harm if the orders sought are not granted since he has been using the land to deposit some construction materials on development on the suit land.
16. The upshot of the foregoing is that the application dated October 22, 2024 is merited and it is hereby allowed as prayed. Costs of the application to be borne by the Respondent.
17. The suit shall be Mention for compliance with Order 11 of the *Civil Procedure Rules* to be on 5th June 2024. Each of the parties is directed to file clearly legible and duly paginated trial bundles containing the parties' pleadings, witnesses' statements and the parties' documents listed in the respective Lists filed in accordance with Order 3 Rule 5 and Order 7 Rule 5 of the Rules. Similarly, the parties to seek instructions in advance of the mention on who of the makers of the documents to be relied on by the adverse party is to be called at the hearing.
18. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM ON THIS 1ST DAY OF APRIL, 2025.

HON. DR. IUR FRED NYAGAKA

JUDGE

