



Odero (Suing as the Legal Representative of the Estate of Henry Achok - Deceased) v Omamo & 4 others (Environment & Land Case 2 of 2023) [2024] KEELC 543 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELC 543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 2 OF 2023
AY KOROSS, J
FEBRUARY 8, 2024**

BETWEEN

**BERNARD WANJARE ODERO PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HENRY
ACHOK - DECEASED**

AND

**JACOB OJOO OMAMO 1ST DEFENDANT
LAND REGISTRAR, BONDO 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT
ANTHONY ONYANGO 4TH DEFENDANT
RAEL A. MIDIWO 5TH DEFENDANT**

RULING

1. In the notice of motion dated 12/08/2023 that is the subject of this ruling, the plaintiff seeks several reliefs from this court and some of them are spent and the main prayers pending determination are: -
 - a. That pending the hearing and determination of the main suit, the honourable court be pleased to grant a temporary injunction restraining the 4th and 5th defendants by themselves, their agents and or servants from trespassing, wasting, transferring, mortgaging or making entries in the land register or otherwise interfering or dealing with land parcels no. North Sakwa/ Maranda/3536, 3537 and 3538 formerly land parcel no. North Sakwa Maranda 822.
 - b. That on failure to comply with prayer (a) above, the 4th and 5th defendants be cited for contempt of court and be punished accordingly for failure to comply with the order dated 3/11/2021.



- c. That costs of the motion be provided for.
2. The motion is predicated on grounds particularised on its face and on the annexed affidavit deposed on 12/08/2023 by the plaintiff Bernard Wanjare Otero Otieno who is the administrator ad litem of the estate of Henry Achok (deceased).
3. In summary and according to him, the deceased was the registered owner of land parcel no. North Sakwa Maranda 822 (mother parcel) which was allegedly fraudulently transferred to the 1st defendant who was then a minor. That upon instituting these proceedings, this court issued orders restraining the 2nd defendant from transacting on land parcels no. North Sakwa/Maranda/3536, 3537 and 3538 (suit properties) which were subdivisions of the mother parcel.
4. Nevertheless, despite the existence of these orders, the 1st defendant had purportedly sold a portion of the suit properties to the 4th and 5th defendants who had since commenced construction.

Defendants' case

5. Despite directions, the 1st, 2nd and 3rd defendants did not file any of their respective responses. However, in opposition, the 4th defendant filed a replying affidavit sworn on 10/09/2023 whilst the 5th defendant filed hers that was deposed on 25/09/2023.
6. In his affidavit, the 4th defendant averred that he was a stranger to the plaintiff's assertion and was not privy to any previous orders issued by this court and had not been aware of these proceedings. He averred he bought North Sakwa/Maranda/3537 and 3538 from the 1st defendant for valuable consideration and a title document had been issued to him and his homestead stood on it.
7. The 5th defendant's affidavit was of a similar tone as that of the 4th defendant save that she allegedly purchased North Sakwa/Maranda/3620 from the 1st defendant and she had ongoing constructions on this particular parcel of land.

Plaintiff's written submissions

8. As directed by the court, parties disposed of the motion by way of rival written submissions. The 1st to 3rd respondents did not file any while the firm of M/s. Masinde & Company Advocates who are on record for the plaintiff filed theirs dated 4/10/2023. In them, counsel identified 3 issues for determination the first 2 issues were on whether the prayers sought in the motion should be granted and the last one was whether the title document of an innocent purchaser could be challenged.
9. On the 1st two issues, counsel submitted the plaintiff had met the threshold of temporary injunctions as envisaged by the cases of *Giella v Cassman Brown & another* [1973] EA 358 and *Mrao Ltd vs. First American Bank of Kenya Ltd* (2003) eKLR. According to counsel, the plaintiff had established a prima facie case, he would suffer irreparable harm and balance of convenience tilted in his favour. On the last issue, Counsel submitted that a title document of an innocent purchaser for value could be challenged.

4th and 5th defendants' submissions

10. The firm of M/s. Odongo Awino who are on record for them filed written submissions dated 27/10/2023 and counsel reiterated the averments made in the replying affidavits and submitted that by the fact that the 4th and 5th defendants had title documents issued in their names and were in occupation, the orders sought were incapable of being issued.



11. Further, counsel submitted the 4th and 5th defendant's acquired titles to their respective parcels of land two years prior to these proceedings being instituted. In addition, counsel submitted the plaintiff had not met the threshold of *Giella v Cassman Brown* (Supra).

Issues for determination

12. I have carefully considered the motion, its grounds, affidavits, parties' respective submissions, provisions of law and authorities cited and the issues arising for determination are;
- a. Whether the motion is merited.
 - b. What orders should this court issue including an order as to costs.

Analysis and determination

13. The legal and jurisprudential frameworks on the issues earlier identified as falling for determination together with their facts will sequentially be analysed: -
- a. Whether the motion is merited.
14. This court is empowered by Section 63 (c) and (e) of the *Civil Procedure Act* and order 40 rule 1 of the *Civil Procedure Rules* to issue orders of temporary injunction and 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.”

15. On inhibitions, the authority of this court ensues from Section 68 of the *Land Registration Act* which 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.”

16. Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit and the grant of interlocutory injunctions is not meant to occasion prejudice to any party.
17. The decision of *Mrao Limited vs. First American Bank of Kenya Limited* (Supra) reminds this court that its power in an application for 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.



18. The principles that guide the court in determining whether a temporary injunction ought to be issued was settled in the celebrated case of *Giella vs. Cassman Brown* (Supra).
19. Having addressed the law. I will now turn to the facts of this case and in particular the actions of the 1st defendant and the ruling of my brother Ombwayo J that was rendered on 3/09/2021.
20. This ruling and the orders ensuing therefrom are is still in force and from them, it is discerned the plaintiff had met the ingredients of *Giella vs. Cassman Brown* (Supra) and the court restrained the 2nd defendant from dealing with the suit properties.
21. As evident from the record, at the time of filing suit, the suit properties were still registered in the name of the 1st defendant. However, in his replying affidavit deposed on 20/11/2020 the 1st defendant asserted that on diverse dates of 3/10/2019 and 8/06/2020, he sold portions of either the mother parcel or of suit properties to the 4th and 5th defendants.
22. He further asserted the 4th defendant was carrying out farming activities on his purchased portion while the 5th defendant was constructing on her purchased portion. At the time, all the suit properties were registered in the 1st defendant's name.
23. Well knowing the existence of the suit against him and in breach of the doctrine of *lis pendens*, the 1st defendant callously caused North Sakwa/Maranda/3537 and 3538 to be registered in the names of the 4th defendant whilst North Sakwa/Maranda/3536 was subdivided to create North Sakwa/Maranda/3620 which was eventually registered in the 5th defendant's name.
24. All these dealings took place between 4/02/2020 and 31/08/2020 which was during the subsistence of the suit and well before the 1st defendant filed his replying affidavit of 20/11/2020.
25. At the time of issuance of the ruling, the substance of the suit properties had changed and it is not without doubt this was not within the court's knowledge or that of the plaintiff. Consequently, and upon discovery, the 4th and 5th defendants were joined to these proceedings which was done by an in an amended plaint dated 25/04/2023.
26. It appears the 4th and 5th defendants were not privy to these proceedings and only became aware after the amended plaint was served upon them. Therefore, one cannot be deemed to be in contempt. Nonetheless, I have agonised over the actions of the 1st defendant which have led to the plaintiff and 4th and 5th defendants finding themselves in the quagmire they are in.
27. I say so because from the photographs, the 4th defendant has allegedly constructed his house on his alleged purchased portion while the 5th defendant has allegedly commenced construction. In other words, the motion has been overtaken by events. On this, 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 vs 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 Vs 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.”
28. Considering the unique circumstances of this case and subsisting orders of 3/09/2021, it will be in the interest of justice if an order of status quo is issued. In addition, an order of inhibition commends itself to be granted.



29. Further, it would be paramount if registers of all properties that emerged from the mother parcel were tendered to this court. It is trite law costs follow the event and costs of the motion shall abide the outcome of the main suit. I accordingly issue the following disposal orders;

- a. The orders issued on 3/09/2021 be served upon all parties to these proceedings and in particular the land registrar-Bondo.
- b. That pending the hearing and determination of this suit, there shall be no constructions or further constructions or development on land parcels no. North Sakwa/Maranda/3537, 3538 and 3620.
- c. That pending hearing and determination of the main suit, an order of inhibition is hereby issued restricting the registration of any disposition in the registers of land parcels no. North Sakwa/Maranda/3537, 3538 and 3620 or any other property that was derived from North Sakwa/Maranda/3536.
- d. That within 14 days from the date of this ruling, the land registrar-Bondo to avail to this court certified copies of all registers that emerged from the subdivision of North Sakwa /Maranda 822.
- e. That upon compliance with order (d) above, the plaintiff shall within 14 days thereof, be at liberty to move this court in an appropriate manner for purposes of amending his pleadings.
- f. That within 3 days of rendering this decision, the plaintiff shall serve the orders of this court upon all parties.
- g. Costs shall abide the outcome of the main suit.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 8TH DAY OF FEBRUARY 2024.

HON. A. Y. KOROSS

JUDGE

08/2/2024

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the Presence of:

Miss. Mutunda for the plaintiff

Mr. Odongo for 4th and 5th defendants

N/A for 1st defendant

N/A for 2nd defendant

N/A for 3rd defendant

Court assistant: Ishmael Orwa

