



**Ogita (Suing as the legal representative of the Oruto Rapemo - Deceased) v Yoya (Sued as the registered owner and personal representative of the Estate of Yoya Chuchu - Deceased) & 2 others (Land Case E007 of 2024) [2024] KEELC 7339 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7339 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**LAND CASE E007 OF 2024**  
**GMA ONGONDO, J**  
**NOVEMBER 6, 2024**

**BETWEEN**

**BENINA OGOCHI OGITA (SUING AS THE LEGAL REPRESENTATIVE OF THE ORUTO RAPEMO - DECEASED) ..... PLAINTIFF**

**AND**

**PETER AKOKO YOYA (SUED AS THE REGISTERED OWNER AND PERSONAL REPRESENTATIVE OF THE ESTATE OF YOYA CHUCHU - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR-RACHUONYO ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the plaintiff/applicant’s Notice of Motion application dated 29<sup>th</sup> July 2024 and filed herein on even date (the application) originated under Sections 1B, 3, 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, Order 40 Rules 1, 2 and 4 and Order 51 rule 1 and 2 of the [Civil Procedure Rules, 2010](#), through P. D. Onyango and Company Advocates, seeking the orders infra:
  - a. Moot
  - b. Moot
  - c. Moot
  - d. That pending the hearing and determination of this suit there be a temporary order of injunction restraining the respondents either by themselves, agents, representatives, servants and or any other person authorized by them from surveying, subdividing, selling, disposing or transferring land parcel number West Kasipul/Kasimba/109 (the suit land herein).



- e. That pending the hearing and determination of this suit there be a temporary order of injunction restraining the 1<sup>st</sup> defendant/respondent from intimidating, threatening or interfering with the plaintiff/applicant's possession of the suit land.
  - f. That the cost of this application be borne by the respondents.
2. The application is founded on six grounds as infra:
  - a. That the applicant is the wife and legal administrator of the Estate of Oruto Rapemo, the owner of the suit land.
  - b. That the respondents herein have illegally and unlawfully transferred the suit land into the name of the 1<sup>st</sup> respondent.
  - c. That the applicant is the one in possession of the suit land.
  - d. That the 1<sup>st</sup> respondent is threatening to subdivide and sell the suit land.
  - e. That the applicant stands to suffer irreparable loss and damage that cannot be compensated by way of costs if the suit land is sold and transferred to third parties.
  - f. That it is in the interest of justice that this application be allowed.
3. Further, the application is anchored on the applicant's supporting affidavit of seventeen paragraphs sworn on 27<sup>th</sup> July 2024, by Benina Ogochi Ogita, alongside the annexed documents marked as BOO-1 to 9 which are; a copy of the grant of letters of administration in the Estate of Oruto Rapemo, a copy of the official search certificate dated 24<sup>th</sup> September 2014 and green card, a copy of the death certificate for Oruto Rapemo, a copy of the certificate of confirmation of grant, a copy of the land transfer form, a copy of the official search certificate dated 21<sup>st</sup> February 2024, a copy of a letter from the area chief dated 20<sup>th</sup> April 2015, a copy of the police abstract, affidavit, letter from the Land Registrar dated 18<sup>th</sup> August 2023 and Gazette Notice dated 8<sup>th</sup> September 2023 and a copy of a letter from the Land Registrar dated 17<sup>th</sup> July 2024.
4. Briefly, the applicant laments that she is the widow and legal administratrix of the Estate of Oruto Rapemo (deceased 1 herein), who was the initial registered owner of the suit land. That the suit land is ancestral land. That she has been in possession and use of the suit land since getting married to deceased 1. That some portions of the suit land were also sold by deceased 1 to third parties who are in occupation thereof. That on or about 6<sup>th</sup> December 2023, she realized that the suit land had been fraudulently transferred and registered in the name of the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent on 7<sup>th</sup> April 2021 and a title deed duly issued.
5. Furthermore, the applicant states that the 1<sup>st</sup> respondent intends to dispose of the land. That further, the 1<sup>st</sup> respondent has been using government officers to intimidate her. That the orders sought herein are necessary to preserve the suit land. That further, the main suit has high chances of success and the balance of convenience tilts in her favour.
6. The 1<sup>st</sup> respondent through Oyatta and Associates Advocates, opposed the application by way of a Replying Affidavit sworn on 15<sup>th</sup> August 2024. He deponed that he is the registered proprietor of the suit land, following succession proceedings with respect to the estate of his late father. That his said late father, Mr. Yoya Chuchu Nyachur (deceased 2) purchased the suit land from deceased 1 on 8<sup>th</sup> February 1973, as evidenced by a written sale agreement (PAY-02). That deceased 2 was subsequently issued with a land certificate on 30<sup>th</sup> January 1974 and instructed one of his sons, Joseph Ongore Yoya (hereinafter referred to as Joseph), to reside thereon. That Joseph died and his remains were interred



- thereon, together with those of some of his children and his other brother called Walter. That at the time of their demise, the two brothers had built permanent residences on the suit land, where their families live to date.
7. Further, he stated that when deceased 1 attempted to reclaim the suit land, he was prosecuted and convicted of the offence of uttering false information and sentenced to 12 months' probation in Homa Bay Law Courts Criminal Case No. 541 of 1989. That the applicant does not reside on the suit land. Thus, he urged the court to dismiss the instant application with costs.
  8. By a further affidavit sworn on 26<sup>th</sup> August 2024, the applicant stated that the 1<sup>st</sup> respondent had failed to explain the root of his title in his replying affidavit. That deceased 1 allowed Joseph to put up his homestead on a portion of the suit land measuring about one and a half acres in area and that his family stays thereon to date. That she has been cultivating the remainder of the suit land.
  9. Notably, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not oppose the application.
  10. On 30<sup>th</sup> July 2024, the court ordered and directed that the application be heard by way of written submissions in the spirit of Article 159 (2)(b) of the Constitution of Kenya, 2010; see also Order 51 Rule 16 of the Civil Procedure Rules, 2010.
  11. Accordingly, the applicant's counsel filed submissions dated 29<sup>th</sup> August 2024 and submitted that the applicant has made out a prima facie case to warrant grant of the orders sought. That the 1<sup>st</sup> respondent intends to confirm boundaries, sub-divide and dispose the suit land to third parties which will occasion irreparable loss that cannot be compensated by way of damages. That the same would also render the suit an exercise in futility. That should the suit succeed, it will be inconveniencing and costly to recover the suit land from third parties. To buttress the submissions, reliance was placed on various authoritative pronouncements including the locus classicus case of *Giella v Cassman Brown* (1973) EA 358.
  12. Learned counsel for the 1<sup>st</sup> respondent filed submissions dated 30<sup>th</sup> September 2024 and stated that the applicant has not established any rights over the suit land nor specified any fraudulent acts committed by the 1<sup>st</sup> respondent. That therefore, the applicant has failed to establish a prima facie case. That further, the applicant has no claim over the suit land hence, will not suffer any irreparable injury that cannot be compensated by damages, should the orders sought in the present application be denied. That it is in fact the 1<sup>st</sup> respondent's relatives who live on the suit land that stand to suffer grave prejudice, if the orders sought herein are granted.
  13. Also, counsel submitted that the inconvenience caused by the injunctive orders sought over the suit land far outweigh any purported inconvenience to be experienced by the applicant. That no particulars or evidence of harassment of the applicant by the 1<sup>st</sup> respondent has been availed before this honourable court. Thus, counsel urged the court to dismiss the present application with costs to the 1<sup>st</sup> respondent. To reinforce the submissions, counsel relied on various authorities, inter alia, the case of *Giella v Cassman Brown & Co. Ltd. (supra)* and *Nguruman Limited v Jan Bonde Nielsen and 2 others* (2014) eKLR.
  14. I have duly considered the application, the response thereto and the parties' respective submissions. The principal issues for determination boil down to:
    - a. Whether the applicant has met the threshold for grant of an injunction order?
    - b. Who should bear the costs of this application?



15. On the first issue, an injunction is an equitable and discretionary remedy; see [National Bank of Kenya Limited v Shimmers Plaza Limited](#) [2009] eKLR.
16. An injunctive relief may be made against Government of Kenya officials in a proper case; see also [B v Attorney General](#) (2008) 1 KLR (G& F) 535.
17. The principles of injunctions were enunciated in the Giella case and as was reiterated in the case of [Nguruman Limited](#) (both supra) where the Court of Appeal held that;

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”
18. So, has the applicant demonstrated a prima facie case with a likelihood of success and that unless the court grants the injunction order there is real danger she will suffer irreparable harm that will not be adequately compensated by an award of damages?
19. The applicant has demonstrated that the suit land risks getting subdivided and transferred to third parties. Therefore, the character of the suit land may be altered and the instant suit be compromised thereby.
20. Taking into account the rival submissions herein, the application, the response thereto as well as the annexures, it is my considered view that the threshold for an interim preservation order under Section 13 (7)(a) of the [Environment and Land Court](#), 2015 (2011), has been met.
21. Indeed, in order for the issue of the title to be determined in the main suit, there is need to preserve the subject matter of the suit in accordance with the doctrine of *lis pendens*; see [Ogada v Mollin](#) (2009) KLR 620.
22. [Black's Law Dictionary](#) 10<sup>th</sup> Edition at page 1073, defines *lis pendens* as follows:

“The jurisdictional, power or control acquired by a court over property while a legal action is pending.”
23. The principle of *lis pendens* is therefore applicable in this suit; See [Naftali Ruthi Kinyua v Patrick Thuita Gachure & another](#) (2015) eKLR where the court held that the doctrine of *lis pendens* is applicable; see also Section 13 (7)(a) (*supra*).
24. In the foregone, I hereby find this application instituted by way of a notice of motion dated 29<sup>th</sup> July 2024 and filed herein on 30<sup>th</sup> July 2024 substantially merited for status quo order in lieu of injunction sought thereon.
25. Wherefore, the application is hereby allowed in terms of interim order of status quo to prevail over the suit land. In particular, the 1<sup>st</sup> respondent shall not alter boundaries, sub-divide, sell, charge or dispose of the suit land to third parties, pending the hearing and determination of this suit.
26. The costs of this application to be in the cause.



27. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024.**

**G.M.A ONG'ONDO**

**JUDGE**

Present

Mr. Bagada Maxwell holding brief for Mr. P. D. Onyango, Learned Counsel for the plaintiff/applicant

Ms. Kubai Mercy holding brief for Mr. Oyatta, Learned Counsel for the 1<sup>st</sup> defendant/respondent

Luanga, Court Assistant

