



**Agricultural Handling Services Limited v Chonga & 11 others (Environment & Land Case E108 of 2022) [2024] KEELC 13568 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13568 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E108 OF 2022  
SM KIBUNJA, J  
DECEMBER 4, 2024**

**BETWEEN**

**AGRICULTURAL HANDLING SERVICES LIMITED ..... PLAINTIFF**

**AND**

**THE HON KEN CHONGA ..... 1<sup>ST</sup> DEFENDANT  
LEWIS MUCHAI ..... 2<sup>ND</sup> DEFENDANT  
JOHN NJOROGE ..... 3<sup>RD</sup> DEFENDANT  
IBRAHIM MUTHAMA ..... 4<sup>TH</sup> DEFENDANT  
IQBAL GITAU ..... 5<sup>TH</sup> DEFENDANT  
OMARI KASHAHA ..... 6<sup>TH</sup> DEFENDANT  
MARGARET LUVUNO ..... 7<sup>TH</sup> DEFENDANT  
HUSSEIN SARBITI ..... 8<sup>TH</sup> DEFENDANT  
JANE MUCHE ..... 9<sup>TH</sup> DEFENDANT  
OMAR SALIM CHENGO ..... 10<sup>TH</sup> DEFENDANT  
ISSA OMAR ..... 11<sup>TH</sup> DEFENDANT  
CORNEL L SHISANYA ..... 12<sup>TH</sup> DEFENDANT**

**RULING**

[12<sup>th</sup> Defendant's Notice Of Motion Dated 9<sup>th</sup> February 2023]

1. Though the 12<sup>th</sup> defendant had informed the court that his preliminary objection dated the 28<sup>th</sup> October 2022, was still pending, the court has perused the record and confirmed that it was dismissed



with another for the 2<sup>nd</sup> defendant dated the 31<sup>st</sup> October 2022 through the ruling delivered on 15<sup>th</sup> February 2023, which also dismissed the plaintiff's application dated 14<sup>th</sup> October 2022. What is now pending is the notice of motion dated 9<sup>th</sup> February 2024.

2. In the notice of motion dated 9<sup>th</sup> February 2023, the 12<sup>th</sup> defendant is seeking for
  - a. Spent.
  - b. That the Honourable Court be pleased to issue an injunction order temporarily restraining the plaintiff/respondent together with their servants, agents and or any person under their authority from interfering, intermeddling, alienating , subdividing transferring the Land, demolishing the structures erected and being erected, by the applicant/occupants and all other buildings on the parcels of Land No. 324 and 334 Section III/Mtwapa Maweni settlement scheme and their subdivisions pending hearing and determination of this application.
  - c. That the Honourable Court be pleased to strike out this suit for failure to comply with the mandatory statutory provisions of the Law as specified in this application.
  - d. That the honourable court be pleased to direct the OCS Mtwapa Police Station to supervise the ongoing activities at Mtwapa Maweni Settlement Scheme and to maintain law and order and to make sure order 2 above is complied with.
  - e. That the Honourable Court be pleased to order the Registrar of Titles Mombasa to expunge all entries and documents which created plot no. 515-527 from 334 and 324/III/MN and declare the same to have been unlawful.
  - f. That the Honourable Court be pleased to order that all sub divisions arising from 515-527 was illegal as there were no consents from the owners.
  - g. That the Honourable Court be pleased to order the Court process server who filed an affidavit of service in this matter to come and explain how service was conducted because summons are still lying in the Court registry to date.
  - h. Costs of this application be provided for.

The application is supported by the affidavit of Cornel L. Shisanya, 12<sup>th</sup> defendant, sworn on 9<sup>th</sup> February 2023, in which he inter alia deposed that the decree in Mombasa H.C Misc Application 560 of 2004 (O.S) dated 30th March 2012, directing the Registrar of Titles to register plots numbers 334 and 324 MN/Kilifi/ Mtwapa in the names of applicant (Omar Salim Chengo), has not been challenged; that the government issued titles to them and thus the subdivision parcels 515-527 were a nullity and unlawful; that they are now constructing their demolished houses and non-genuine title owners should be restrained from interfering or intermeddling with the developments.

3. During the mention of 24th October 2024, the 12th defendant informed the court that the counsel for the plaintiff had filed a reply to his application. I have perused the physical record and CTS but no such reply has been seen.
4. The 12th defendant and the plaintiff had filed their submissions on 14th November 2022 and 16th January 2023 respectively, touching only on the preliminary objections. None was filed on the notice of motion dated 9<sup>th</sup> February 2023, but the court will proceed and make its determinations on it nevertheless.
5. The issues for determination by the court on the application dated 9<sup>th</sup> February 2023 are as follows:
  - a. Whether the 12<sup>th</sup> defendant has met the threshold for the orders sought to be issued.



- b. Who bears the costs?
6. The court has carefully considered the grounds on the application, affidavit evidence, the record and come to the following findings:

- a. The court will consider the application as undefended, as no reply was traced on the physical record or in the case tracking system. Nevertheless, the court must interrogate the application, and determine whether it is merited. In the case of Gideon Sitelu Konchellah versus. Julius Lekakeny Ole Sunkuli & 2 others (2018) eKLR the Supreme Court of Kenya held that;

“...as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court....”

- b. In considering the prayer for temporary injunction, the court has to consider whether the 12<sup>th</sup> defendant has established the threshold set in the case of Giella vs. Cassman Brown [1973] EA 358, among others, where the court stated as follows:

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

A prima facie case was discussed in the case of Mrao Limited vs. First American Bank of Kenya & 2 Others [2003] eKLR as follows:

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude 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 12<sup>th</sup> Defendant claims that based on the order in H.C Misc. 560 OF 2004 plot 334 and 324/III/MN belonged to the defendants and that titles had even been issued, and thus it was unlawful for the creation of the subdivisions 515-527, which is what the plaintiff is claiming ownership under. This shows therefore that a prima facie case has been established.

- c. The second principle of irreparable injury was discussed in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR) where the court stated that:

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself



sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

The 12<sup>th</sup> defendant deposed in his supporting affidavit among others that “.....we are now reconstructing our demolished houses and non-genuine title owners should be restrained from interfering and intermeddling with our developments and they should as well be evicted”. This deposition leads the court to infer that the defendants are not in possession of the suit properties and the 12<sup>th</sup> Defendant has therefore failed the irreparable injury test.

- d. The third principle of balance of convenience was also discussed in the Pius Kipchirchir case (supra) where the court stated:

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

In this case, the court does not know the status of the suit land as the 12<sup>th</sup> defendant failed to attach such evidence like photos, and as the 12<sup>th</sup> defendant is not in possession of the suit properties the balance of inconvenience does not lie in his favour, and he fails on this test too.

- e. On the prayer for striking out the suit I find there was no elaboration of the grounds specified in Order 2 Rule 15 of the Civil Procedure Rules cited. Furthermore, prayers 3,4,5 & 6 of the notice of motion are premature in the sense that they are final orders being sought at the interlocutory stage. Prayer 7 has now been overtaken by events as the function of a court summons is to inform defendants of an existing case, and it is clear that since 28<sup>th</sup> October 2022, the 12<sup>th</sup> defendant has been participating in court proceedings.
- f. Costs follow the event except where otherwise directed by the court on good reasons, as provided by section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya. It is clear that the 12<sup>th</sup> Defendant has been unsuccessful in prosecuting his application and though I have no good cause to depart from that edict, no order on costs will be made as no party filed any reply or participated in its hearing.

7. From the foregoing conclusions, I find and order as follows:

- a. The 12<sup>th</sup> defendant’s notice of motion dated the 9<sup>th</sup> February 2023 has no merit and is dismissed in its entirety.
- a. There are no orders as to costs.

It is so ordered.



**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4<sup>TH</sup> DAY OF DECEMBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

IN THE PRESENCE OF:

PLAINTIFF : No Appearance

DEFENDANTS : No Appearance

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

