



**Owiti & another v Owiti & another (Environment and Land Appeal
E020 of 2022) [2024] KEELC 13596 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E020 OF 2022**

M SILA, J

DECEMBER 3, 2024

BETWEEN

JUSTINA AUMA OWITI 1ST APPELLANT

SUSAN OKETCH OWITI 2ND APPELLANT

AND

PETER NGOLA OWITI 1ST RESPONDENT

JACOB OGILA OWITI 2ND RESPONDENT

*(Being an appeal against the ruling of Hon. J. Munguti, Senior Principal
Magistrate, delivered on 17 March 2022, in respect of the application
dated 21 July 2021 in the suit Migori CMCCEL No. E045 of 2021)*

JUDGMENT

(Appellants having filed suit in the Magistrates' Court and contemporaneously filing an application for injunction to restrain the respondents from certain activities in the disputed land; respondents filing a reply to the application and a preliminary objection that the court had no jurisdiction; trial court proceeding to hear the application and the preliminary objection; in the ruling, trial court dismissing the preliminary objection; on the application for injunction trial court making an order for partition of the land; on appeal, held that the trial court fell into error in making orders that were tantamount to final orders without first hearing the parties; trial court erred in not addressing itself on the application for injunction; appeal allowed and application for injunction remitted back to the Magistrates' Court for hearing)

1. The appellants together with two others, namely Gerson Olang Owiti and Domtila Owiti, are together registered as proprietors of the land parcel Kanyamkago/Katieno/3768 measuring 0.64 Ha. The respondents are children of the aforesaid Domtila Owiti. Through a plaint filed on 27 July 2021, the



appellants sued the respondents claiming that they have commenced construction and demarcation of the suit land without any authority. They alleged that they are demarcating the suit land without applying for consent from the 24 beneficiaries of the land or pursuant to Section 94 of the [Land Registration Act](#), 2012. They also pleaded that the respondents have threatened to exhume the remains of the appellants' late husband and father of the respondents, one Joseph Owiti Ng'ola and they pleaded being apprehensive that the respondents have sold a portion of the land and are in the process of subdividing to the purchasers.

2. In the suit, the appellants asked for the following orders :
 - a. A permanent injunction to restrain the respondents from subdividing, constructing, alienating, offering for sale, selling, taking possession of, leasing, transferring, charging, or otherwise dealing with the suit land.
 - b. Costs of the suit.
 - c. Any other and further relief the court may deem fit to grant.
3. Together with the plaint, the appellants filed an application said to be brought pursuant to Section 3A of the [Civil Procedure Act](#), Cap 21, and Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules. The substantive order in the application was prayer (4) thereof which sought the following order :
 - (4) Pending hearing of the suit a temporary injunction order to issue against the defendant/respondent (sic) restraining them, their agents and/or servants from alienating, subdividing, fencing, construction (sic), selling, leasing, encroaching, wasting and/or trespassing, transferring, registration/allocation or further dealing in whatsoever manner with the plaintiffs'/applicants' land title Kanyamkago/Katiemo/3768 (the suit premises).
4. The application was based on grounds that the applicants together with two others were the registered proprietors of the suit land; that the land was transferred to them as inheritance from the estate of Joseph Owiti Ng'ola; that the respondents have defiantly proceeded to commence construction and demarcation of the land without any authority; that the respondents have threatened to exhume the body of the late Joseph Owiti Ng'ola; that the estate of Joseph Owiti Ng'ola has 24 beneficiaries and are all entitled to benefit from the estate; that the applicants were apprehensive that the respondents have sold a portion or the whole of the land and determined to allocate it to third parties; that the respondents were demarcating the suit land without the consent of the 24 beneficiaries or pursuant to Section 94 of the [Land Registration Act](#); that the respondents had no justification in interfering with the occupation of the suit land by the appellants' family members. The application was supported by the affidavit of Justina Auma Owiti. Inter alia she deposed that the late Joseph Owiti Ng'ola had four wives, three of whom were alive and he left 24 beneficiaries. She reiterated that the respondents were demarcating the land amongst themselves without any authority or consent from the other beneficiaries and she was apprehensive that they had sold or wished to sell the land. That is why they asked for the orders of injunction sought.
5. The respondents appointed counsel and filed a preliminary objection and a replying affidavit sworn by the 1st respondent to oppose the motion. The preliminary objection was to the following effect :
 - i. The entire suit as filed is defective and bad in law;
 - ii. The defendants are non-suited as they are not registered as owners of the land parcel Kanyamkago/Katiemo/3768;



- iii. If the contents of paragraphs 5,7,8 and 12 of the plaint were to be believed, then it is not in doubt that the dispute herein is about land partition which under Section 94 of the [Land Registration Act](#), lies with the Land Registrar;
 - iv. The suit as it is, is unmeritorious as the threshold to grant the prayers sought cannot be met; and
 - v. The suit as filed is premature non-starter and if anything is an abuse of the court process.
6. In the replying affidavit, it was deposed that the respondents were sons of Domtila Owiti, one of the registered proprietors of the suit land and the first wife of Joseph Owiti Ng'ola, and they are among the beneficiaries of the suit land. It was deposed that the suit land is owned in common; that being commonly owned the tenants are entitled to their shares and the same can be partitioned under Section 94 of the [Land Registration Act](#); that Section 94 allows for partition notwithstanding consent of the co-tenants; that they have not closed the gate and do not intend to exhume the remains of their father. He deposed further that his late father had four wives, Domtila, Susan Owiti, Justina Owiti and Salina Owiti respectively; that their mother, Domtila is old and living with disability; that owing to her situation they desire to construct for her a self-contained house for her convenience; that the 1st appellant is occupying 1/3rd of the homestead from end to end and her sons raise cows, goats, sheep, and poultry, which graze in all parts of the compound to the inconvenience of the other occupants particularly their mother. They asked that the application be dismissed.
 7. A supplementary affidavit was filed wherein the 1st appellant deposed that the preliminary objection that the matter should be heard before the Land Registrar is misplaced and urged that the court has jurisdiction. She deposed that the respondents had partitioned the land illegally. She averred that the family needs to convene a meeting to discuss and reach agreement on the subdivision. She added that it would be difficult to subdivide the land into 30 portions to all beneficiaries. She deposed that the respondents should not use the condition of their mother to illegally subdivide the land. She stated that the respondents have not been stopped from reconstructing their current house into a self-contained one to cater for the needs of their elderly mother.
 8. The trial Magistrate directed that the preliminary objection and the application be urged together, and directed that written submissions be filed. Ruling was subsequently delivered on 8 December 2021.
 9. In the ruling the trial Magistrate after reviewing the respective cases of the parties held as follows :

Having considered the submissions by advocate on record and the affidavits of the applicants and the respondents the issue that falls for determination is whether the applicants have met the criteria for grant of an injunction.

The court having considered the evidence tabled in the affidavits finds that the people sought to be enjoined belong to the same family with their father or patriarch being Joseph Owiti Ng'ola. Under these circumstances is it possible to stop any of the children or grandchildren from their patriarch's land. There are claims that some of the defendants may have sold the land to 3rd parties but no names of alleged buyers mentioned or agreement. Then there is a claim that the 1st applicant has occupied 1/3 of the homestead from one end to the other and where her son keeps animals which graze all over inconveniencing other beneficiaries of the suit (sic).

An issue like this, where it is clear an injunction cannot issue to the fact that all the parties are in one way or another beneficiaries of the same estate I find that the ends of justice demand the court to find a way to ease the tension in the family.



I also note the land is small 1.5 hectares (sic) against 24 – 30 beneficiaries with the claims that some of the beneficiaries among them the applicants and 14 others the only left out (sic) is to turn to Luo Customary Law and subdivide this land according to the households of the late Joseph Owiti Ng'ola namely the house of Domtila Owiti, the house of Susana Owiti, the house of Justina Owiti and the house of Selina Owiti. The subdivision should be based on equality of each house with a condition that nobody's standing house should be demolished. The subdivision should further give every household access to roads.

In summary the final order in the application dated 27/7/2021 and the preliminary objection are that the preliminary objection is dismissed. That land parcel No. Kanyamkago/Katiemo/3768 be partitioned under Section 94 (2) Registration of Land Act No. 2 of 2012 (sic). To the 4 houses of the late Joseph Owiti Ng'ola namely Domtila Owiti, Susana Owiti, Justina Owiti, and Salome Owiti. The subdivision should be equal and every household should have access to the public road serving the land.

Lastly considering the court did have the opportunity to get evidence of how the houses are spread on the ground I direct that in the event the households are not on separate sections then the subdivision should not be taken as authority to demolish houses of bona fide beneficiaries already standing unless they are willing to demolish which should be in writing and filed in this file.

In the case above, the subdivision should give that household several portions but their total of acreage should abide the equality factor stated herein above.

On the issue of costs this being a family matter each party is to bear their respective costs.

10. Aggrieved by the above ruling, the applicants filed this appeal contending inter alia that the trial court made conclusive findings in the application.
11. I invited counsel to file submissions on the appeal and I have taken note of the submissions filed.
12. My disposition will be brief since to me the issues are very clear.
13. What was before court was an application for injunction together with a preliminary objection. In the beginning of its ruling the court indeed appreciated this position. The court then proceeded to dismiss the preliminary objection. However, I do not see any pronouncement of the court regarding the application for injunction. What the court needed to do was to assess whether the applicants had met the test of grant of an injunction as held in the case of *Giella vs Cassman Brown (1973) EA 358*, i.e determine whether the appellants had demonstrated a prima facie case with a probability of success; whether they had demonstrated that they stood to suffer irreparable loss if the injunction was not granted; and if the court was in doubt, decide the application on a balance of convenience. This the court did not do at all. Instead, what the court did was to proceed to make final pronouncements regarding the dispute at hand. Inter alia the court ordered the land to be partitioned to the four houses equally with regard being given to where the parties had developed their houses. With respect, such pronouncement could only be made after hearing the parties on merit. It was not among the prayers in the application for injunction and the court could not go ahead to make such orders within the context of the application before it.
14. I really do not see the point of saying more for it is as clear as day that the court erred. Instead of addressing itself on the issue of the injunction the court proceeded to make final orders before first hearing the parties.



15. For the above reasons, I find merit in this appeal. Save for the part of the ruling that dismissed the preliminary objection, I set aside all other orders of the court. What then should this court do regarding the application for injunction? In my view the trial court never addressed itself on whether or not the orders of injunction were merited. Given that position, I will remit back the matter to the Magistrates' Court with direction that the court proceeds to determine whether or not the application for injunction should be allowed or not, or make such orders within the context of an application for injunction.
16. The last issue is costs. Given the relationship of the parties, there will be no orders as to costs.
17. I should end here, but I would advise the parties to really think of settling their dispute at home. I in fact encourage them to have a family sitting and agree on all issues that have brought them to court. They know themselves, know their circumstances, and they are therefore the persons best placed to come up with solutions.
18. Judgment accordingly.

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MIGORI

In presence of :-

Ms. Agade holding brief for Ms. Apondi for Appellant

No appearance on part of Ms. Agutu and Company for Respondents

Court Assistant – Tom Maurice

