



**Oigara v Onderi & another (Miscellaneous Application
E004 of 2023) [2023] KEELC 17192 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
MISCELLANEOUS APPLICATION E004 OF 2023**

M SILA, J

MAY 4, 2023

BETWEEN

WILLIAMSON OBARA OIGARA APPLICANT

AND

SAMWEL OGEMBO ONDERI 1ST RESPONDENT

**JIMMY OMWENGA NYAKAGWA T/A FORTUNES AUCTIONEERS 2ND
RESPONDENT**

RULING

1. The application before me is that dated February 14, 2023. It seeks the following orders:-
 1. That the Honourable Court be pleased to certify this application as of utmost urgency and the same be heard ex parte in the first instance.
 2. That pending the hearing and determination of this application inter partes there be, and it is hereby ordered that there be injunctive orders restraining the respondents, their servants, agents and/or employees or any person on behalf of the respondents or on their own behalf from attaching and or selling the applicant's properties and or in any manner disposing them off.
 3. Costs of this application.
2. The application is based on the following grounds:-
 - (a) On the February 9, 2023, the 2nd respondent, on the instructions by the legal counsel for the 1st respondent proclaimed the applicant's goods to satisfy costs awarded by the Environment and Land Court Appeal No 9 of 2019 Charles Ogembo Onderi vs Williamson Obara Oigara (Kisii).



- (b) The assessment by the subordinate court are inordinately high, exaggerated and/or manufactured thus perpetuating an injustice upon the applicant.
 - (c) This court has supervisory jurisdiction on all its subordinate courts to ensure that justice is not only done but appear to be done (sic).
 - (d) The respondents will not suffer any prejudice if this application is allowed.
3. The application is supported by the affidavit of the applicant. In it, he has deposed that he is the owner of the land parcel South Mugirango/Bogetenga/1654; that in the year 2006, the 1st respondent trespassed into his land; that he subsequently filed the suit Ogembo SPMCC No 70 of 2007 in the Ogembo Magistrates' Court; that the suit was concluded in his favour; that the 1st respondent filed an appeal before the Environment and Land Court, being Kisii HCCA No 180 of 2010; that judgment on the appeal was delivered on February 1, 2023 and costs of the subordinate court were awarded to the 1st respondent; that the 1st respondent filed a bill of costs dated February 14, 2022; that a certificate of costs was issued on February 24, 2022; that he is aggrieved by some items taxed therein and claims that the 1st respondent claimed that hearing was for 15 days which was not the case; that he believes the appropriate Advocates' Remuneration Order was not used; that on February 9, 2023, his goods were proclaimed; that he believes that this court has supervisory jurisdiction over the subordinate court.
 4. The application is opposed through two replying affidavits, one sworn by Samwel Ogembo Onderi, and the other by the 2nd respondent. In his affidavit, Mr Samwel Ogembo Onderi has deposed that this application sues the wrong party, contrary to the parties in Kisii ELC Appeal No 9 of 2019 and Ogembo SPMCC No 70 of 2007. He has added that the law firm of Oreng & Company, who have filed this application are not on properly on record as there has been no invocation of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. He has averred that having succeeded in Kisii ELC Appeal No 9 of 2019, he filed a bill of costs before the Ogembo Magistrates' Court which was assessed. He deposes that if the applicant was aggrieved, he ought to have filed a reference to this court contesting the taxation.
 5. On his part, the 2nd respondent has deposed that he received instructions from Samwel Ogembo Onderi to execute costs assessed in Ogembo SPMCC No 70 of 2007 which he duly did.
 6. I have considered the application alongside the submissions of counsel. Mr Nyambati, learned counsel for the respondents raised three issues. One that the application has been filed by a stranger as the law firm of SW Oreng & Company are not properly on record for the applicant for failure to invoke the provisions of Order 9 Rule 9. He deposed that the law firm on record is M/s Nyatundo & Company Advocates. Secondly, that if the applicant was aggrieved by the assessment of costs, he ought to have filed a reference and thirdly, that the Certificate of Costs is not attached so that the court may know what was taxed. He also added that the application only seeks orders up to the inter partes hearing. On her part, Ms. Cheruiyot, learned counsel holding brief for Mr. Oreng who filed the application, submitted that there was a consent filed between the law firm of M/s Nyatundo & Company Advocates and M/s SW Oreng & Company Advocates, allowing the latter to come on record for the applicant. She otherwise relied on the supporting affidavit.
 7. I have considered the application. I have looked at the prayers sought. Prayer 1 merely seeks that the application be certified urgent and be heard ex parte in the first instance. That prayer is spent. Prayer 2, seeks orders that pending hearing of the application inter partes, there be orders of injunction to restrain the selling of the properties of the applicant. That prayer is spent as it would lapse once the application is heard inter partes. Prayer 3 seeks the costs of the application. As far as I can see, there is no substantive prayer sought in the application as the first two prayers only seek orders up to hearing of the



application inter partes. Even if I was to assume that prayer 2 seeks orders of injunction after hearing inter partes, it is not said why the court should grant an order of injunction. Assuming that the court gives the order of injunction, then what? The applicant ought to have been clear as to what substantive order he seeks from this court so that the respondents can know what sought of application they are facing. I am at a loss as to whether it was simply bad drafting or whether the applicant doesn't actually know what he wants from court. I really see no substantive prayer in the application for me to address.

8. If the position is that the applicant is aggrieved by an assessment of costs in the subordinate court that was done ex parte, he ought to have made this clear in his prayers. In any event he has avenue to apply, within the subordinate court, for taxation to be done inter partes so that he can be heard on any items that he wishes to challenge, not file a miscellaneous application before this court that merely seeks an injunction.
9. The long and short of it is that I find no merit in this application and it is hereby dismissed with costs.
10. I have not forgotten that I had ordered the applicant to deposit the sum of Kshs 60,000/= while this application was being heard. This money may be released to the respondents to defray part of the costs in Ogembo SPMCC No 70 of 2007.
11. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 4TH DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

