



Ochieng v Webuye & 2 others; Mosigis (Interested Party) (Environment & Land Case E002 of 2023) [2023] KEELC 18735 (KLR) (11 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E002 OF 2023**

**BN OLAO, J
JULY 11, 2023**

BETWEEN

JANET NGWABE OCHIENG APPLICANT

AND

ANNA GABRIEL WEBUYE 1ST RESPONDENT

LAWRENCE KEBASO ONGATI 2ND RESPONDENT

RUTH MOKEIRA KEBASO 3RD RESPONDENT

AND

JAMES OMATTO MOSIGIS INTERESTED PARTY

RULING

1. Janet Ngwabe Ochieng (the applicant) moved to this court by her Originating Summons dated January 27, 2023 and predicated under Order 37 of the Civil Procedure Rules as well as sections 13 and 17 of the Limitation of Actions Act seeking judgment against Anna Gabriel Webuye, Lawrence Kebaso Ongati And Ruth Mokeira Kebaso (the 1st, 2nd, and 3rd respondents respectively) in the following terms with respect to the land parcel No Bukhayo/bugengi/2936 (the suit land).
 - a. The applicant be declared to have acquired title in L.R Bukhayo/bugengi/2936 notwithstanding the alleged encroachment on L.R Bukhayo/bugengi/2937 by the use or title holder of L.R Bukhayo/bugengi/2936.
 - b. The respondents be ordered to sign all transfer documents to effect transfer of L.R Bukhayo/bugengi/2936 in default, the Deputy Registrar of this honourable court be authorized to sign all transfer documents.



2. The basis of the applicant's claim as can be gleaned from both the grounds set out in the originating summons and the supporting affidavit is that the suit land originally belonged to the 1st respondent's husband before it was registered in the name of the 1st respondent. That on March 27, 2001, the 1st respondent sold it to the applicant who developed thereon shops and residential units from which she collects rent. That the applicant has been in occupation of the suit land including a portion of the land parcel No Bukhayo/bugengi/2937 peacefully, notoriously, continuously and without interruption for a period of over 12 years even after the 1st respondent became the registered proprietor of the suit land on 19th June 2007 following succession proceedings.
3. By a Notice of Motion dated March 24, 2023, the applicant sought the following orders:
 1. Spent
 2. Spent
 3. That pending the hearing and determination of this suit, the 2nd and 3rd respondents whether by themselves, their servants, workers or agents or otherwise (sic) from entering upon the suit land, cultivating, ploughing, constructing structures or otherwise interfering with premises that may be detrimental to the plaintiff's quiet enjoyment of the suit land.
 4. That pending the determination of this suit, the status quo obtaining as at the time of filing of the suit be maintained with the plaintiff and her tenants having free access to the pit latrines that they have been using.
 5. That costs of this application be provided for.
4. That application which is the subject of this application is predicated on Order 40 Rules 1 and 4 of the *Civil Procedure Rules*, section 3A of the *Civil Procedures Act* and articles 40 and 159 of the Constitution. It is premised on the grounds set out therein and supported by the applicant's affidavit dated March 24, 2023.
5. The gist of the application is that the 1st respondent is the proprietor of the suit land which she sold to the applicant vide an agreement dated March 27, 2001. That the applicant took possession of the suit land on which she has developed shops and residential units and she has continuously, peacefully and notoriously been in occupation of the suit land for a period of over 12 years. She has been advised that the 1st Respondent's title has been extinguished in her favour and the 1st respondent holds title to the suit land in trust for her. That soon after this Originating Summons was filed, the Respondents accompanied by the Land Registrar moved to the suit land without notice and sub-divided it into two in the guise of determining a boundary between the land parcels No Bukhayo/mundika/2936 and 2937. That this was done without notice to her and as a result of that illegal sub-division, her tenants cannot access the pit latrine which they have been using and many of them intend to terminate their tenancy. Further, the 2nd respondent is now digging a pit latrine on part of the suit land which has been fenced.
6. Annexed to the application are the following documents:
 1. Sale agreement dated March 27, 2001 between the applicant as purchaser and the 1st respondent as vendor of the suit land.
 2. Copy of the Register for the land parcel No Bukhayo/bugengi/2936.



7. The reference to the suit land in the supporting affidavit as Bukhayo/mundika/2936 must be in error and I will treat it as such because the copy of Register of title as well as the Originating Summons properly capture the suit land as Bukhayo/bugengi/2936.
8. The 1st respondent did not file any response to that application. The 1st respondent's replying affidavit dated April 3, 2023 and filed on April 6, 2023 was only in response to the main Originating Summons while the 3rd respondent did not file any.
9. The 2nd respondent filed a replying affidavit dated April 3, 2023 also on behalf of the 3rd respondent in response to the main Originating Summons and another dated April 19, 2023 in response to the application. He describes the application as devoid of merit, scandalous, frivolous and an abuse of the process of this court. He adds that the Applicant is a Ugandan citizen by birth and is not entitled to own any agricultural land unless it is by way of a leasehold as provided under the 2010 Constitution and the Land Registration Act. In the circumstances, no prima facie case has been disclosed. That he purchased the land parcel No Bukhayo/Mundika/2937 (again another typing error) in 2016 and discovered that the applicant had constructed part of her shops and pit latrine thereon. That by mutual agreement, the applicant agreed to remove her pit latrines. That the respondents have no intention of trespassing onto the suit land.
10. The application has been canvassed by way of the written submissions. These have been filed both by Mr Juma Instructed By The Firm Of J. V. Juma & Company Advocates For The Applicant And By Mr Bogonko Instructed By The Firm of Bogonko, Otanga & Company Advocates for the Respondents.
11. I have considered the application, the rival affidavits and submissions by counsel.
12. This being an application for temporary injunction, it has to be determined in line with the principles set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358. These are:
 1. The applicant must show a prima facie case with a probability of success.
 2. Secondly, such injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages.
 3. Thirdly, and if in doubt, the court will determine such an application on the balance of convenience.
13. As to what amounts to a *prima facie* case, this was defined in the case of *Mrao v First American Bank of Kenya Ltd & others* CA Civil Appeal No 39 of 2002 [2000] eKLR as follows:

“A *prima facie* case in a civil application includes but is not confined to “a genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Being an equitable remedy, the applicant must approach the court with clean hands. And as was held in *Films Rover International Ltd v Cannon Films Sales Ltd* [1986] 3 ALL E.R. 772, a Court considering such an application will take the course which appears to carry the lower risk of injustice.
14. Guided by all the above, it is common ground that the suit land is registered in the name of the 1st respondent. It is also clear from the copy of sale agreement dated March 27, 2001 that the Applicant purchased the suit land at a consideration of Kshs.45,000. I have no doubt that she is in occupation and possession of the same. Indeed in paragraph 9 of his replying affidavit, the 2nd Respondent says



they have no intention of trespassing onto the suit land. As a person in occupation and possession of the suit land, the applicant is entitled to enjoy all the rights that are appurtenant thereto.

15. It has been averred that the applicant is a Ugandan who is not entitled to own any agricultural land. Other than that bare averment, the 2nd respondent did not offer any evidence to show that the applicant is a Ugandan. On the other hand, however, the applicant did not file any supplementary affidavit to rebut that averment. If indeed she is a Ugandan, then article 65(1) of the Constitution will come into play. It reads:

65(1) “A person who is not a citizen may hold land on the basis of a leasehold tenure only, and any such lease however granted, shall not exceed ninety-nine years.”

However, at this interlocutory stage and without the benefit of the full viva voce evidence tested in cross-examination, it would be premature for this court to purport to make any finding with regard to the Applicant’s Nationality or the tenure of the suit land. Those will be issues to be determined at the trial.

16. For now, the Applicant is in occupation and possession of the suit land on the basis of a sale agreement which is not disputed. And as was held by the Court of Appeal in *Mwangi & another v Mwangi* [1980] KLR 328, the right of a person in possession and occupation as land are equitable rights. They are binding on the land and the land is subject to them.
17. In view of the above, I am satisfied that applicant has established a *prima facie* case with a probability of success at the trial.

The applicant is also required to demonstrate that if the order of temporary injunction is not granted, she will suffer irreparable injury that cannot adequately be compensated with an award of damages. In the case of *Nguruman Ltd v Jan Bonde Nielsen & others* [2014] eKLR, the Court of Appeal said the following in reference to the three conditions set at in *Giella v Cassman Brown (supra)*:

“It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraba Education Society* 2001 Vol 1 EA 86. If the Applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage.”

And as to what is irreparable injury, the same court went on to describe it as:

“...injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

It is also worth noting that under Order 40(1) of the Civil Procedure Rules the purpose of a temporary injunction is to prevent property from being “wasted, damaged or alienated” in such a way that one party may be obstructed in the execution of a decree that may be passed against him.

18. It is clear from paragraphs 12 to 15 of the applicant’s supporting affidavit that the Land Registrar at the behest of the respondents has not only purported to sub-divide the suit land into two portions



giving the 2nd respondent a longer portion under the guise of determining a boundary dispute but also, as a result of those activities, the applicant's tenants do not have access to toilet facilities as they can no longer use the pit latrines. As a consequence, many of the tenants intend to terminate their tenancy. Further, the 2nd Respondent has fenced off part of the suit land on which he is now digging pit latrines. In my view those activities compounded by the claim that the applicant's tenants no longer have access to the toilet facilities is an injury which is grave enough as to amount to irreparable injury let alone being reprehensible conduct. The applicant is therefore deserving of the orders sought as she has surmounted the second hurdle.

19. If there was any doubt, and I do not entertain any, I would resolve it in favour of granting the order of temporary injunction. The greater cause of justice demands that I do so.
20. In the circumstances and having considered the matters herein, I make the following disposal orders in respect to the Notice of Motion date March 24, 2023.
 1. Prayers No 3 and 4 are granted as prayed.
 2. The Respondents shall within 15 days from the date of this ruling file and serve their defences, written statements and any documentary evidence upon the applicant.
 3. The Applicant shall within 3 days of such service. If need be, file any reply to the defence.
 4. The parties shall thereafter appear before the Deputy Registrar on August 2, 2023 for pre-trial and for fixing a date for hearing.
 5. Costs shall be in the cause.

BOAZ N. OLAO

JUDGE

11TH JULY 2023

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 11TH DAY OF JULY 2023 AS WAS ADVISED TO THE PARTIES ON 9TH MAY 2023.

BOAZ N. OLAO

JUDGE

11TH JULY 2023

