



**Oundo v Ojiambo; Were (Interested Party) (Environment & Land Case E008 of 2023) [2023] KEELC 18628 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18628 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E008 OF 2023**

**BN OLAO, J  
JULY 6, 2023**

**BETWEEN**

**FRERICKY FADEY OUNDO ..... PLAINTIFF**

**AND**

**JULIA AUMA OJIAMBO ..... DEFENDANT**

**AND**

**MORIS ODUOR WERE ..... INTERESTED PARTY**

**RULING**

1. The plaintiff Frerick Fadey Oundo (I presume Frerick must be a typo because the name on the title deed to the land parcel No Samia/ Bunjwanga/1991 and which is the subject of this dispute reads Fredrick Fadey Oundo) approached this Court vide his plaint dated March 28, 2023 seeking judgment against Julia Auma Ojiambo (the defendant herein) in the following terms with respect to the land parcel No Samia/ Bunjwanga/1991 (the suit land):
  1. A declaration that the plaintiff is the rightful owner with a lawful title to property title number Samia/Bujwanga/1991.
  2. A declaration that the defendant and/or her agents, servants, representatives actions or inactions over the suit land amounts to trespass.
  3. A permanent injunction restraining the defendant by herself, her agents, servants representatives or by any other person, acting on her authority, from entering, occupying, erecting any structure(s) on, cultivating, tilling or in any other way or manner whatsoever undertakes any activity on the land parcel known as title number Samia/Bujwanga/1991.
  4. General damages for trespass.



5. Costs of the suit and interest thereon.
  6. Any other remedy that this Honourable Court may deem fit and just to grant in the circumstances.
  7. Costs be provided for.
2. The basis of the plaintiff's claim is that he is the registered proprietor of the suit land which he purchased in 2021 from Moris Oduor Were the then registered owner and "the interested" party in this suit. The suit land is a sub-division of the land parcel No Samia/ Bunjwanga/959 which was first registered in 1974 but on which a restriction had been placed until the Interested Party attains the age of majority. Subsequently after the "Interested Party" had attained the age of majority, he sub-divided the land parcel No Samia/ Bunjwanga/959 into four parcels including the suit land.
  3. Sometime in 2021, one Moris Oduor Were, (the "Interested Party"), offered to sell him the suit land and after conducting due diligence and inspecting it to confirm it was vacant with known boundaries, he purchased it in March 2021 after which it was transferred to him and he obtained title thereto.
  4. However, on or about December 27, 2022 he was astounded to find sisal plants had recently been planted to act as a new boundary yet the original boundary was still in place. Later, the Busia County Land Surveyor informed him that the defendant was desirous of establishing boundaries between her land and the suit land and requested the plaintiff to be present. During a site visit on December 29, 2022, the "Interested Party" identified the land which he sold to the plaintiff and denied having sold it to the defendant or any other party. Mediation meetings between the parties bore no fruits as the defendant became un-corporative whenever such meetings were called.
  5. The plaintiff avers therefore that the defendant's acts amount to trespass by the defendant particulars whereof have been pleaded in paragraph 23 of the plaint.
  6. Simultaneously with the plaint, the plaintiff filed a Notice of Motion citing article 40 of the Constitution, section 26 of the Land Registration Act, Order 40 Rules 1, 2 & 4 of the Civil Procedure Rule and sections 1A, 1B and 3A of Civil Procedure Act seeking the following Orders:
    1. Spent
    2. Spent
    3. Pending the hearing and determination of this suit, this court be and is hereby pleased to issue a temporary injunction restraining the defendant/respondent by herself, her servants, agents and/or representatives or by any other persons acting on her authority from entering and/or trespassing into, occupying, undertaking any activity whatsoever or in any other way or manner interfering with part of or all that land known as title number Samia/Bujwanga/1991.
    4. The defendant/respondent be condemned to bear the costs of this application.
  7. That application which is the subject of this ruling is premised on the grounds set out therein and supported by the plaintiff's affidavit.
  8. The gravamen of the application is basically what is contained in the plaintiff's pleadings in the suit which I have already summarized above and which I shall revert to as and when necessary.
  9. Annexed to the supporting affidavit are the following documents:
    1. Certificate of Official Search for the land parcel No Samia/ Bunjwanga/1991 dated March 10, 2023.



2. Green Card for the land parcel No Samia/ Bunjwanga/959.
  3. Green Card for the land parcel No Samia/ Bunjwanga/1991.
  4. Title deed for the land parcel No Samia/ Bunjwanga/1991 in the name of Moris Oduor Were.
  5. Mutation Form.
  6. Sale agreements dated March 10, 2021 and March 26, 2021.
  7. Certificate of Official Search for the land parcel No Samia/ Bunjwanga/1991 dated March 9, 2021.
  8. Application for consent to transfer land parcel No Samia/ Bunjwanga/1991.
  9. Letter of consent.
  10. Transfer.
  11. Receipt.
  12. Title deed for land parcel No Samia/ Bunjwanga/1991 in the name of the plaintiff.
  13. Photographs.
10. The application is opposed and the defendant filed an un-dated replying affidavit in which she deposed, inter alia, that the application is frivolous, vexation and an abuse of the process of the court for failing to raise any prima facie case against her to warrant the orders sought.
  11. She added that her late husband Hillary Peter Ojiambo purchased from the late Were Ragama the land parcel No Samia/ Bunjwanga/959 at a consideration of Kshs.5,400 on August 4, 1972 which sum was fully paid. That she and her late husband took vacant possession and started tilling it. Later, her late husband decided to build a hospital and purchased the neighbouring land parcel No Samia/ Bunjwanga/1013 having already built their home on the land parcel No Samia/ Bunjwanga/1100. That the land parcel No Samia/ Bunjwanga/959 is between those two parcels. Her late husband died in 1997 before the hospital could be put up but she continued farming on the land parcel No Samia/ Bunjwanga/959 without interruption doing large scale farming of orchards, bananas, cassava, simsim, oranges and even rearing cross-breed milk goats which initiated the national milk goat farming. That the said parcels of land were fenced using cedar posts, barbed wire, Keiapple and sisal. The late Were Ragama died before transferring the land to her late husband who also died before he could get the title. However, the Respondent continued using the land peacefully and is still in occupation to-date.
  12. The Respondent later learnt that the “Interested Party” who is the son to the late Were Ragama had filed for letters of Administration to the Estate of his late father and had sub-divided the land parcel No Samia/ Bunjwanga/959 to create parcels No Samia/ Bunjwanga/1983 to 1998 and the portion which her late husband bought falls on land parcel No Samia/ Bunjwanga/1991 (the suit land herein) which was registered in the name of the “Interested Party”. She therefore placed a restriction on the suit land and reported the matter to the area Chief Busembe Sub-location because she was aware that the “Interested Party” was intending to sell the suit land.
  13. Meetings were called and the “Interested Party” admitted that the Respondent’s late husband had purchased the suit land but added that he did not know that that was the land in the title deed. After the meeting, she continued staying peacefully with the “Interested Party” as her neighbour. That the plaintiff has never been in occupation of the suit land and neither has he utilized it for farming otherwise she could have raised a complaint long ago because the suit land is between her two other



parcels of land and over the years, she has worked with the survey officers to consolidate the three parcels into one title and was surprised when on December 22, 2022, she visited the Lands Office only to learn that the suit land is registered in the names of the plaintiff and that the restriction had been removed without her consent. That an order of injunction will prejudice her as she is still in occupation of the suit land. It is therefore in the interest of justice that the orders sought are not granted.

14. Annexed to the replying affidavit are the following documents:
  1. Sale agreement between Were Ragama as vendor and Hillary Peter Ojiambo dated August 4, 1972 for the purchase of 7.2 Hectares out of land parcel No Samia/ Bunjwanga/959.
  2. Acknowledgment dated November 9, 2012.
  3. Grant issued to the Respondent on June 30, 1998 in Nairobi High Court Succession Cause No. 913 of 1998 in respect to the Estate of Hillary Peter Ojiambo.
  4. Certificate of Search in respect of land parcel No Samia/ Bunjwanga/1991.
  5. Minutes of a meeting held on June 22, 2013 to discuss land dispute between family of the late Hillary Ojiambo and that of Morris Oduor Were.
  6. Minutes of second meeting held on June 23, 2013.
  7. Photographs.
15. The “Interested Party” filed a “replying affidavit” dated April 20, 2023 containing several annexures. For reasons which I will state shortly, I shall not refer to the said replying affidavit or the bundles of annexures.
16. The application has been canvassed by way of written submissions. These have been filed both by Mr Ouru instructed by the firm of Oundo Muriuki & Company Advocates for the plaintiff and by Ms Nabulindo instructed by the firm of D. K. Nabulindo & Company Advocates for the defendant.
17. I have considered the application, the rival affidavits by the parties and the annexures thereto.
18. Before I delve into the merits or otherwise of the application, I must now first address the locus standi of one Moris Oduor Were as an “Interested Party” in these proceedings in which he has been cited by the plaintiff in his plaint. I have deliberately applied inverted commas against the words “Interested Party” because in my view, Moris Oduor Were is essentially a busy body in these proceedings and his replying affidavit must be expunged together with the annexures thereto for the following reasons.
19. Firstly, to enable Moris Oduor Were to be enjoined in these proceedings as an “Interested Party” he ought to have moved this Court vide an application anchored upon the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules to be so enjoined. There is no evidence that any such application was made seeking such an order from this or any other Court and that such application was allowed.
20. Secondly, an “Interested Party” was defined by the Supreme Court in the case of Trusted Society of Human Rights Alliance v Mumo Matemu [2014] eKLR as follows:

“An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decisions of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or herself appears in the proceedings and champions his or her cause...”



In the case of *Francis Kariuki Muruatetu & another v R & others* [2016] eKLR, the Supreme Court while stating that a party must move the court by way of formal application to be enjoined as an Interested Party went on to identify the following elements which such a party must satisfy. It said that to be enjoined as an Interested Party, in any proceedings, the party must:

1. Set out the personal interest on stake in the matter in dispute.
  2. Show the prejudice to be suffered in case of non-joinder.
  3. Set out the case he or she intends to make before the court.
21. This court is of course not considering such an application at this stage. However, as is clear from the affidavits by both parties and the annexures, Moris Oduor Were relinquished his interest in the suit land when he sold it to the plaintiff vide a sale agreement dated March 26, 2021. The plaintiff currently holds a title deed issued in his name on March 31, 2021. It is therefore not conceivable that the said Morris Oduor Were has any interest in the suit land remote or otherwise. I must therefore strike out his name from these proceedings including all the documents filed. He can however participate in any other capacity.
22. Having dispensed with the procedural issue, I can now consider the plaintiff's application.
23. The applicable principles on whether or not to grant any order of temporary injunction were set out in the case of *Giella v Cassman Brown & another* [1973] E A 358 as follows:
1. The applicant must establish a prima facie case with a probability of success.
  2. The applicant must demonstrate that he stands to suffer irreparable harm which cannot adequately be compensated by any award of damages if the order is not granted.
  3. If the court is in doubt, it will determine the application on a balance of convenience.
24. A prima facie case was defined in the case of *Mrao v First American Bank of Kenya Ltd & others* CA Civil Appeal No 39 of 2002 as:

“... 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.”

In *Nguruman Ltd v Jan Bonde Nielsen & others* CA Civil Appeal No 77 of 2012 [2014] eKLR the Court of Appeal observed as follows with regard to a prima facie case:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.”

Finally, as was stated in the case of *Films Rover International Ltd v Cannon Films Sales Ltd* [1986] 3 ALL ER 772, a court considering such an application must take the route which appears to carry the lower risk of injustice should it turn out to have been wrong. It must also be remembered that a party approaching the court for such an order which is an equitable remedy must do so with clean hands.

25. Guided by the above principles and others, it is common ground that the plaintiff is currently the registered proprietor of the suit land and holds a title issued to him on March 31, 2021. Other documents filed by him indicate that the necessary consent of the Land Control Board was obtained.



On the face of it, there is nothing to suggest that his title to the suit land was obtained through fraud, illegally or by misrepresentation. He is therefore the absolute owner and the title is protected by section 26(1) of the [Land Registration Act](#) which reads:

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- (1): “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –
- a. On the ground of fraud in misrepresentation to which the person is proved to be a party; or
  - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Article 40(1) of the [Constitution](#) also protects the right to own property.

26. The defendant’s case on the other hand is that his late husband had purchased from the late Were Ragama a portion of land measuring 7.2 Hectares out of the land parcel No Samia/ Bunjwanga/959 in 1972 and that when the said land was sub-divided, that portion fell within the suit land. As of now, no fraud has been imputed on the part of the plaintiff. In my view, he has established a prima facie case.
27. However, the rule in *Giella v Cassman (supra)*, has to be considered sequentially. This was reiterated in the case of [Nguruman Ltd v Jan Bonde Nielsen \(supra\)](#) where the court stated that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted; and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. 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 Afraha 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.” Emphasis mine.

And with regard to what is irreparable injury, the same Court went on to add that:

“The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is 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 adequately remedy.”

28. On the issue of irreparable injury that cannot be adequately compensated by an award of damages, I have looked at the photographs of the suit land as presented by both parties. The suit land is vacant and is not developed as yet by either of the parties. Indeed as per paragraphs 15 and 21 of the plaintiffs’ supporting affidavit, his main complaint is that he found sisal and bamboo seedlings and trees cut. The defendant herself as per paragraphs 9, 10, 11 and 12 had intended to put up a hospital which did not materialize. She then did farming of orchards, bananas, cassava, oranges and kept goats in addition to fencing the suit land. However, other than the sisal plants as shown in the photographs, there is no crop of bananas, cassava, oranges or even a temporary structure on the suit land. I do not therefore see what irreparable injury the plaintiff will suffer if the order for temporary injunction is declined. The only discernible investment that I can see is the purchase price of Kshs.1,800,000 paid in acquiring the suit land and which, should anything happen to it, cannot be described as irreparable loss given the circumstances of this case. In view of the above, the plaintiff has failed to meet the second limb set out in the *Giella -v- Cassman Brown Case* (supra). The grant of a temporary injunction is therefore not deserved.
29. Most importantly, the circumstances under which a temporary injunction may be granted are set out in Order 40 Rule 1 of the *Civil Procedure Rules* as follows:
- “Where in any suit it is proved by affidavit or otherwise-
- a. That any property in dispute in a suit is a danger of being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree; or
  - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.” Emphasis mine.
30. Other than the planting of bamboo, sisal and other trees by either of the party, I am not persuaded that there is any danger of the defendant wasting, damaging or alienating the suit land to warrant the grant of the orders sought. The plaintiff has not met the threshold set out in the case of *Giella -v- Cassman Brown* (supra).
31. Having said so, each party is laying a claim to the suit land. The plaintiff through a sale agreement dated March 26, 2021 which culminated in him obtaining a title deed. The defendant through a sale agreement dated August 4, 1972 but which was not perfected by issuance of a title deed since her husband died before the process could be completed. Those rival claims are what the trial court will eventually have to determine.
32. In view of the above and in order to preserve the suit land pending the hearing and determination of this case. I make the following orders:



1. None of the parties by themselves, their agents, servants, agents or any other persons acting through them shall enter, occupy, plough, charge, dispose, alienate or carry out any other activity on the land parcel No Samia/ Bunjwanga/1991 until this case is heard and finally determined or until any other orders by this court.
2. The defendant has not yet filed his defence. That be done within 15 days of this ruling including the list of witnesses and any documents.
3. Pre-trial shall thereafter be held before the Deputy Registrar on July 25, 2023 who shall then fix a date for hearing upon confirming compliance.
4. The parties shall meet their own costs of this application.

**RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 6<sup>TH</sup> DAY OF JULY 2023  
BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 24<sup>TH</sup> APRIL 2023.**

**BOAZ N. OLAO**

**JUDGE**

