



REPUBLIC OF KENYA



Ochieng & another (Suing as the Legal Representative of the Estate of Leonard Ochieng Nyamiel - Deceased) v Buong & another (Sued as the Legal Representative of the Estate of Owuor Ayoo alias Owuor Oyoo Odundo - Deceased) (Environmental and Land Originating Summons E010 of 2022 & Environment and Land Miscellaneous Application E001 of 2023 (Consolidated)) [2023] KEELC 21426 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21426 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS
E010 OF 2022 & ENVIRONMENT AND LAND MISCELLANEOUS
APPLICATION E001 OF 2023 (CONSOLIDATED)

GMA ONGONDO, J

NOVEMBER 8, 2023

BETWEEN

ROSE AKINYI OCHIENG PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LEONARD
OCHIENG NYAMIEL - DECEASED

AND

RUTH ALOO BUONG DEFENDANT
SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF OWUOR AYOO
ALIAS OWUOR OYOO ODUNDO - DECEASED

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023

BETWEEN

ROSE AKINYI OCHIENG (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF LEONARD OCHIENG NYAMIEL - DECEASED) PLAINTIFF

AND

RUTH ALOO BUONG (SUED AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF OWUOR AYOO ALIAS OWUOR OYOO ODUNDO -
DECEASED) DEFENDANT



RULING

1. This ruling is in respect of the applicant's Notice of Motion application dated 5th July 2023 and filed herein on even date (the application).
2. The applicant is represented by L.K. Obwanda and Company Advocates. The respondent is represented by Robert Ochieng Advocates.
3. Initially, the application was filed as Environment and Land Court Misc. Application No. E001 of 2023 but was consolidated with the main suit, to wit, Environment and Land Court O.S NO. E010 of 2022 on 26th October 2023.
4. The applicant filed the application under sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, chapter 21 Laws of Kenya and order 40 rules 1, 2, 3 and 4 and order 51 rule 1 of the *Civil Procedure Rules*, 2010, seeking the orders infra:
 - a. Spent
 - b. Moot.
 - c. That the honourable court be pleased to issue a temporary order of injunction restraining the respondent, his agents, servants and/or employees from trespassing, further destroying crops, disposing, alienating, transferring, leasing and/or in any other way interfering with any part of land parcel number Gem/Komolo/22 (the suit land herein) pending the hearing of the main suit.
 - d. That the honourable court be pleased to admit the plaintiff's surveyor's report dated 16th June 2023 as a further list of documents.
 - e. That in the alternative, this honourable court be pleased to order a resurvey of the portion of the suit land being claimed by the plaintiff and determine its acreage.
 - f. That the cost of this application is provided for.
5. The application is grounded on the supporting affidavit sworn on even date by the applicant, Rose Akinyi Ochieng'. The applicant contends that she has been utilizing a portion of the suit land measuring 0.84 Ha since 1980. That the respondent suddenly fenced the said portion of the suit land despite the plaintiff's crops growing thereon. That disregarding the active suit in court, the respondent is in the process of subdividing the suit land in order to transfer the same to a third party. Thus, the applicant urged the court to issue conservatory orders to preserve the substance of the suit.
6. Notably, the respondent did not file a replying affidavit herein.
7. On 14th July 2023, the court ordered and directed that the application be heard by way of written submissions in the spirit of article 159 (2) (b) of *the Constitution* of Kenya, 2010.
8. Accordingly, the applicant's counsel filed submissions dated 11th September 2023 on even date, and identified three issues for determination to wit: whether the application meets the threshold for the grant of an injunction; whether the court should admit the plaintiff surveyor's report dated 16th June 2023 as a further list of documents and who shall bear the costs of this application?
9. Counsel submitted that unless the injunction order sought is granted, the applicant risks suffering irreparable harm that will not be adequately compensated by an award of damages. That further,



the respondent will not suffer any prejudice if the surveyor's report dated 16th June 2023 is admitted as a further list of documents. Therefore, counsel urged the court to allow the instant application with costs. Reliance was placed on various authorities including the locus classicus case of *Giella -vs- Cassman Brown* (1973) EA 358 and *Nguruman Limited -vs- Jan Bonde Nielsen & 2 others* (2014) eKLR, to fortify the submissions.

10. Learned counsel for the respondent filed submissions dated 1st November 2023 and identified four issues for determination thus: whether the applicant meets the requirements for injunction to be granted; whether the applicant has satisfied this honourable court with sufficient reason to allow additional documents after the close of pleadings; whether the court should order a resurvey of the portion claimed by the applicant and who is to bear the costs of the application?
11. Counsel submitted that the applicant has not met the threshold for granting of an injunction order. That grave injustice will be occasioned to the respondent if the court allows the applicant to file the surveyor's report dated 16th June 2023 as the same could alter the respondent's entire defence. That further, the court being an impartial arbiter, ought not to order a resurvey of the portion of the suit land which the plaintiff claims. That equity aids the vigilant and not the dormant. To buttress the submissions, counsel relied on various authorities, inter alia, the case of *Raila Odinga and others -vs- IEBC and 3 others*, Supreme Court of Kenya Presidential Petition Nos. 3, 4 and 5 of 2013 (2013) eKLR.
12. I have duly considered the application, the response thereto and the parties' respective submissions. The principal issues for determination are:
 - a. Whether the applicant has met the threshold for grant of an injunction order?
 - b. Whether the surveyor's report dated 16th June 2023 should be admitted as part of the applicant's documents?
 - c. Who should bear the costs of this application?
13. On the first issue, the principles of injunctions were enunciated in the *Giella* case and as was *reiterated in the case of Nguruman Limited* (supra) where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”
14. So, has the applicant demonstrated a prima facie case with a likelihood of success and that unless the court grants the injunction order there is real danger she will suffer irreparable harm that will not be adequately compensated by an award of damages? From the rival submissions herein and after perusal of the proceedings, it is my considered view that the threshold for an interim preservation order under section 13 (7)(a) of the *Environment and Land Court*, 2015 (2011), has been met. The plaintiff has demonstrated that the suit land risks getting subdivided and transferred to third parties, thereby compromising the instant suit.



15. Indeed, in order for the issue of the title to be determined in the main suit, there is need to preserve the subject matter of the suit in accordance with the doctrine of lis pendens; see *Ogada -vs- Mollin* (2009) KLR 620.
16. *Black's Law Dictionary* 10th Edition at page 1073, defines lis pendens as follows:

“The jurisdictional, power or control acquired by a court over property while a legal action is pending.”
17. In the case of *Mawji -vs- US International University & another* [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”
18. The principle of lis pendens is therefore applicable in this suit; See *Naftali Ruthi Kinyua -vs- Patrick Thuita Gachure & another* (2015) eKLR where the court held that the doctrine of lis pendens is applicable pursuant to the provisions of section 107 of the *Land Registration Act*, 2016 (2012) as well as section 3 (1) of the *Judicature Act*, Chapter 8 Laws of Kenya.
19. On the second issue, the respondent’s counsel submitted that the same could alter the respondent’s response to the entire suit. That the respondent’s right to be heard as safeguarded under Article 50 of *the Constitution* of Kenya, 2010, is bound to be violated thereby.
20. In the case of *Kiai Mbaki & 2 Others -vs- Gichuhi Macharia & another* (2005) eKLR, the court stated that:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”
21. I note that hearing of the main suit is still at its inchoate stage and only the plaintiff has testified. Thus, it is my considered view that allowing the surveyor’s report dated 16th June 2023 to form part of the applicant’s documents would not prejudice the respondent.
22. Furthermore, the respondent will have an opportunity to interrogate the contents of the said report in conformity with the provisions of article 50 (supra). Also, it is borne in mind that fair hearing is a judicial or administrative hearing conducted in accordance with due process as defined in *Black's Law Dictionary*, 10th Edition at 837.
23. In the foregone, I hereby find this application instituted by way of a notice of motion dated 5th July 2023 and filed herein on even date substantially merited.
24. Wherefore, the application is hereby allowed in terms of interim order of status quo to prevail over the suit land. In particular, the defendant shall not further destroy crops, fence, subdivide, sell, transfer or erect permanent structures thereon, pending the hearing and determination of this suit.



25. The costs of this application to be in the cause.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 8TH DAY OF NOVEMBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

Ms. Quinter Adoyo instructed by L. K. Obwanda, learned counsel for the applicant

