



REPUBLIC OF KENYA



**KENYA LAW**  
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**Athieno v Magundho & another (Sued as the administrator of the Estate of Camlus Odunga Akeye (Deceased)) (Environment & Land Case 2 of 2021) [2022] KEELC 2897 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2897 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**  
**ENVIRONMENT & LAND CASE 2 OF 2021**

**AY KOROSS, J**

**MAY 5, 2022**

**BETWEEN**

**AGNES ATHIENO ..... PLAINTIFF**

**AND**

**JENIFFER ODUNGA ..... 1<sup>ST</sup> DEFENDANT**

**PAULO ADONGO MAGUNDHO ..... 2<sup>ND</sup> DEFENDANT**

**SUED AS THE ADMINISTRATOR OF THE ESTATE OF CAMLUS ODUNGA  
AKEYE (DECEASED)**

**RULING**

1. Pursuant to the provisions of order 40 rules 1 and 2 of the *Civil Procedure Rules*, the plaintiff filed a motion dated 1/03/2021 seeking several prayers. Prayers 1 and 2 are spent and the main prayers pending determination are as follows;
  - a) A temporary injunction do issue restraining the defendants, their employees, agents, family, servants and/or whomsoever jointly and severally from transferring, disposing, entering into, developing any structure or evicting the plaintiff from land parcel numbers East Gem/uranga/1104 and East Gem/uranga/678 (suit properties) pending hearing and determination of the suit.
  - b) Costs of the motion be provided for.
2. The motion is based on the grounds set out on the face of the motion and on the supporting affidavit of the plaintiff dated 1/3/2021.



3. The plaintiff contended that she acquired and possessed the suit properties which were originally a subdivision of East Gem/ Ramula/1982 by virtue of a purchase that took place in 1973 and that she had lived on them since then.

#### **The defendants' case**

4. The 1<sup>st</sup> defendant's counsel filed a memorandum of appearance dated April 14, 2021 but did not file a response to the motion while the 2<sup>nd</sup> defendant who acts in person filed a replying affidavit in opposition to the motion dated 7/02/2022. She contended that because she was not an administrator of the estate of Camlus Odunga Akeye, she was wrongly joined in the proceedings and urged the court to strike out or dismiss the motion.

#### **The plaintiff's written submissions**

5. The plaintiff filed submissions dated 17/02/2022. Relying on the locus classicus case of *Giella vs Cassman* (1975) E.A 358, the plaintiff submitted on three settled limbs; prima facie case, irreparable harm and balance of convenience.
6. On the 1<sup>st</sup> limb, the plaintiff contended that she had established a prima facie case with probability of success and that the defendants intended to disinherit her or dispose off the suit properties. She relied on the case of *Mrao Ltd vs First American Bank of Kenya Limited & 2 Others* (2003) eKLR which enunciated the meaning of a prima facie case to be one whereby by the material presented, the court would conclude that there was a right that had been infringed by the opposite party as to call for a rebuttal.
7. On the second limb, the plaintiff submitted that the substratum of the suit would be affected if the defendants evicted her, disposed off the suit properties or continued to wantonly subdivide them thus she would suffer substantial loss which could not be compensated by way of damages.
8. On the 3<sup>rd</sup> limb, she submitted that save for a brief interruption occasioned by the 2<sup>nd</sup> defendant, she was in occupation and possession of the suit property and the balance of convenience tilted in her favour.

#### **The defendants' written submissions**

9. The 1<sup>st</sup> defendant did not file written submissions whereas the 2<sup>nd</sup> defendant filed written submissions dated 7/02/2022. relying on section 82(a) of the *Law of Succession Act* and several authorities including *Omwoyo & Another and Fredrick Wachira Ndegwa v Richard Wanjiku Ndanjeru & Another* (2018) eKLR which were neither attached to her submissions nor some properly cited, she contended that she was not an administrator of the estate of Camlus hence could not be sued.

#### **Analysis and determination**

10. I have carefully considered the motion, grounds in support, supporting affidavit and the 2<sup>nd</sup> defendants replying affidavit and parties' rival submissions and the two issues falling for determination are: (i) Whether the plaintiff has met the threshold for the grant of a temporary injunction and, (ii) Who shall bear costs of this motion.

I will proceed to analyze the legal and jurisprudential framework on the issues.

11. The case of *Giella vs Cassman* (Supra) has long settled the principles that have guided courts in determining whether or not an applicant has met the threshold to warrant the grant of a temporary injunction. Has the plaintiff met the threshold? In answering this question, this court shall sequentially juxtapose the principles of *Giella vs Cassman* (Supra) against the facts of this case.



12. On the 1<sup>st</sup> limb, has the plaintiff established a prima facie case with probability of success at the intended trial? In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case to mean a genuine and arguable case based on the material presented before the court.
13. In establishing whether the plaintiff has established a prima facie case, this court is alive that it has to restrain itself from making pre-emptive assertions which may have a bearing on the pending suit where the plaintiff is constitutionally entitled to have a fair hearing (See the Supreme Court of Kenya decision in *Deynes Muriithi & 4 others v Law Society of Kenya & another* [2016] eKLR).
14. The plaintiff has not rebutted the 2<sup>nd</sup> defendant's assertion that she is not the administrator of the estate of Camlus. I agree with the 2<sup>nd</sup> defendant's submission that by virtue Section 82(a) of the *Law of Succession Act*, powers to sue or to be sued on behalf of an estate of a deceased are only donated to personal representatives and persuaded by the decision of Mrima J in the case *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* (2016) eKLR which stated that in the absence of letters of administration, a suit is a non-starter and compounded by the fact that the agreement of sale which is the basis of plaintiff's claim of adverse possession has not been availed to this court, I am not satisfied that the plaintiff had established a prima facie case.
15. While briefly addressing the two other residual limbs, this court shall bear in mind the Court of Appeal decision in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR which stated with approval the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 where Lord Diplock which specified thus;
 

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief.”
16. On the 2<sup>nd</sup> limb, the plaintiff has to demonstrate that irreparable injury will occur to her if the injunction is not granted and there is no other remedy open to her by which she will protect herself from the consequences of the apprehended injury. The plaintiff has contended that she has heavily invested on the suit properties and that she has been ploughing the suit properties. In the considered view of this court, a mere statement of irreparable harm does not suffice rather, the plaintiff has to adduce tangible proof that indeed she risks to suffer irreparable harm. The plaintiff fails on this limb.
17. In the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) EKLOR Ombwayo J, defined the concept of balance of convenience as thus;
 

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed” .
18. The 2<sup>nd</sup> defendant is neither a registered proprietor of any of the suit properties nor is she the administrator of the estate of Camlus and she will be highly prejudiced if the orders sought are issued against her and the balance of convenience tilts in the 2<sup>nd</sup> defendant's favour.
19. It is my finding that the plaintiff's motion dated 1/03/2021 is not merited and because it is trite law that costs follow the event, I award costs to the defendants. Ultimately, I make the following disposal orders: -
  - a) The notice of motion dated 1/03/2021 is hereby dismissed with costs to the 2<sup>nd</sup> defendants.



- b) The plaintiff shall fully comply with the provisions of order 11, of the Civil Procedure Rules, within 21 days of delivery of this ruling and the defendants shall comply with order 11, of the Civil Procedure Rules within 21 days after the period stipulated for compliance by the plaintiff.
- c) Parties shall appear before the deputy registrar for pretrial directions on 8/06/2022.

**RULING DELIVERED VIRTUALLY.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 5<sup>TH</sup> DAY OF MAY 2022.**

**In the Presence of:**

M/s Mwangi for the applicant

N/A for the 1<sup>st</sup> defendant

2<sup>nd</sup> defendant present in open court

Court assistant: Ishmael Orwa

**HON. A. Y. KOROSS**

**JUDGE**

**5/5/2022**

