



**Demo v Ondoro & 3 others (Environment & Land Case E004 of 2022)
[2022] KEELC 12601 (KLR) (1 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12601 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E004 OF 2022
JM KAMAU, J
SEPTEMBER 1, 2022**

BETWEEN

MICHAEL MOTURI DEMO PLAINTIFF

AND

RHODA MONGINA ONDORO 1ST DEFENDANT

JOHNSTONE NYANYUKI MENGE 2ND DEFENDANT

JAMES ONGERA KEMONI 3RD DEFENDANT

YUNES BOERA NYAMWANGE 4TH DEFENDANT

RULING

1. The plaintiff's application by way of notice of motion is dated May 11, 2022 for an interim injunction against the defendants restraining them from harvesting tea, disposing of, waste, damaging, alienating, selling, erecting any structure/buildings and/or carrying any farming activities in or within the parcels of land known as Gesima Settlement Scheme/337,338,339,342 and 343 and an enforcement order by the officer commanding Manga police station. There is also a prayer that during the hearing and determination of this suit there be no registration of any instrument or transfer of ownership over the suit property. The application is supported by the grounds that the plaintiff is a bona fide beneficiary and heir of the Estate of the late Joseph Zachary Onduko who did purchase plot no 11 Gesima Settlement Scheme from one Stanley Ondoro Boraya and that 2 plots, plot nos 2 and 11 were amalgamated and registered in the name of the said Stanley Ondoro Boraya and a new Title, plot no 2 Gesima Settlement Scheme came into existence. Both covenanting parties passed on before the transfer. The defendants have now encroached onto the suit land and are keen on disinherit the plaintiff/applicant of the suit land by forcefully evicting him and his family from the suit land and transferring the same, the 1st defendant/respondent having acquired the letters of administration relating to the Estate of Stanley Ondoro Boraya Estate. The applicant also possesses a grant of letters of administration



ad litem in respect to the estate of Joseph Zachary Onduko, the said purchaser of the suit property. On his part, the 2nd defendant/respondent has sworn a replying affidavit where he disputes that LR No Gesima Settlement Scheme /338 and 339 belong to and are registered in his name as indicated in the copies of title deeds and green cards annexed to the replying affidavit which he claims to have bought from the said late Boraya in 1993 before the latter's demise. He has already developed Gesima Settlement Scheme /338 and 339 with a permanent building and some temporary structure, a tea plantation and eucalyptus trees besides grazing on the land. He has been in occupation of the suit land for over 29 years with the plaintiff's knowledge. He admits that plot no 11 is no longer in existence after the amalgamation of plot no 11 into plot no 2. He finally depones that should the orders sought be granted, the same would permanently dispossess and disinherit him of his lawful and statutory rights over and in respect of the subject properties. He therefore urges the court not to grant the orders sought in the application. I invited parties to file written submissions and also highlight the same and this was duly complied with. It is now my turn to rule on the application.

2. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. Order 40 of the [Civil Procedure Rules](#) recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.
3. The three well-known tests enunciated in *Giella v Cassman Brown* (1973) EA 358 are to the effect that a party seeking a temporary injunction has to establish a *prima facie* case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience. It is not uncommon nowadays to have a property in dispute to change hands severally before the matter in court is determined which keeps complicating the matter and necessitates the amendment of the pleadings all the time as a result of which the case remains in court unnecessarily. It is not also safe to conclude that the applicant, if successful, would be compensated in monetary terms. Land is very scarce today and extreme care needs to be taken before making a conclusion that the injury or damage to be suffered is not irreparable or is capable of compensation. The Judgment sought herein is a Judgment in rem, in contrast to a judgment in personam. It is meant to determine the status of property on a basis which binds the whole world. In Latin: "with respect to the thing", which concerns proprietary legal rights. And as I have held variously, it would turn the entire proceedings herein into an academic exercise and later burden this court with a flurry of applications if the subject of litigation is not reserved. It is of paramount importance to ensure realization of the ultimate winners' fruits of litigation and that nothing complicates the matters after the final Judgment.
4. The property therefore needs to be preserved until its ownership is established. As to the order of restraining the respondents from harvesting tea, or carrying out any farming activities in or within the parcels of land known as Gesima Settlement Scheme/ 337,338, 339, 342 and 343 I would certainly hesitate to give such orders since the farming activities do not affect the proprietary legal rights of the same and the land remains intact for the ultimate owner to enjoy all his constitutional rights therein.
5. But because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. In 2010 the rules committee, being conscious of the susceptibility to abuse of the remedy of temporary injunctions, introduced in the [Civil Procedure](#)



Rules certain strictures in order 40 rule 4, intended to obviate those abuses. One of conditions is that, all applications for injunction must be heard expeditiously and in any event within 60 days from the date of filing unless for good reason time is extended by the court. The next requirement is that after inter partes hearing the ruling has to be delivered either at once or within 30 days of the conclusion of the hearing. Finally, where a suit in respect of which an interlocutory injunction has been granted is not determined within 12 months from the date of the grant, the injunction is to lapse unless for some sufficient reason. The importance of adhering to these strictures, which are rarely complied with, with the result that a suit filed specifically for injunction remains pending determination for years. It is not for nothing that the rules and general principles governing the grant of interlocutory injunction have been painstakingly developed. The timelines for each stage need to be complied with. Having said so, I allow the notice of motion application dated May 11, 2022 as follows:

6.

- a. A temporary injunction be and is hereby issued against the defendants, their agents, employees, servants, representatives and/or assigns restraining them from disposing of, wasting, damaging, alienating, selling, the parcels of land known as Gesima Settlement Scheme/337,338,339,342 and 343 or any part thereof until the Hearing and determination of this suit.

7.

- b. All the farming activities within the suit premises shall be carried out responsibly and prudently.

8.

- c. This suit shall be set down for hearing to be finalized within the next one hundred and eighty (180) days from the date hereof failure to which the orders herein shall automatically lapse.

9.

- d. The costs of the application shall be in the course.

That is the order of this court.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 1ST DAY OF SEPTEMBER, 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Plaintiff:

Mr. Okenye for Zablon Mokuia Advocate for the 1st Respondent

Ms. Mosomi for the 3rd Respondent

