



**Atweng'a v Ochola & 2 others (Environment and Land Miscellaneous Application E009 of 2022) [2022] KEELC 14574 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14574 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2022  
AY KOROSS, J  
NOVEMBER 3, 2022**

**BETWEEN**

**PATRICK OTIENO ATWENG'A ..... PLAINTIFF**

**AND**

**WILLIS ODHACH OCHOLA ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR BONDO ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY LAND SURVEYOR BONDO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Plaintiff's Case**

1. Pursuant to the provisions of sections 1A, 1B, 3A, 63 (c) and (e) of the *Civil Procedure Act*, section 13 (1) of the *Environment and Land Court Act*, section 73(1) of the *Land Registration Act*, order 40 rules 1 and 2 and order 51 of the *Civil Procedure Rules*, the plaintiff filed a notice of motion dated June 23, 2022 against the defendants in which he sought the following reliefs:
  - a. Spent;
  - b. Spent;
  - c. That the honourable court be pleased to grant a temporary injunction restraining the defendants by themselves, their officers, employees, servants or agents or otherwise howsoever from entering into, subdividing, interfering with the plaintiff's right to occupation, boundaries and demarcations, allocating and giving authority to any person to take possession and occupy such portion to be excised or illegally subdivided from land parcel number Asembo/Ramba/5611 measuring approximately 2.07 ha located in Bondo pending the hearing and determination of the suit;



- d. That the honourable court do issue an order lifting the caution lodged by the 1<sup>st</sup> defendant and registered by the 2<sup>nd</sup> defendant on February 15, 2022 over land parcel number Asembo/Ramba/5611; and
  - e. That costs of the motion be awarded to the plaintiff.
2. The motion is supported by grounds set out on its face and on the supporting affidavit of the plaintiff Patrick Otieno Atwen'ga dated June 23, 2022.
  3. The plaintiff contended that he was the registered proprietor of land parcel no. Asembo/Ramba/5611 ("the suit property"). However, the 1<sup>st</sup> defendant, a stranger, claiming beneficial interest on behalf of his [plaintiff's] children, lodged a caution against the suit property. His actions were contrary to the provisions of section 72 (1) of the Land Registration Act. When the 2<sup>nd</sup> defendant encouraged mediation between the parties, he was coerced to enter into an agreement with strangers in which he was to subdivide the suit property and give a portion to the family of the late Richard Ochar Atweng'a [Richard]; all in the name of depriving him of the suit property. The defendants had put in motion plans to subdivide the suit property.

#### **1<sup>st</sup> Defendant's**

4. In opposition, the 1<sup>st</sup> defendant filed a replying affidavit dated July 13, 2022. He contended that he and the plaintiff were cousins. The suit property was initially part of land parcel No Asembo/Ramba/2454 which was held in trust by the late Fredrick Atweng'a, James Onyango and the plaintiff for family members.
5. He averred the plaintiff subdivided land parcel No Asembo/Ramba/5491 and registered it in his own name yet it was land being held in trust for Richard's family. When he became privy that the plaintiff intended to dispose of the suit property, he, together with other family members, lodged a caution. The plaintiff voluntarily consented to the terms of an agreement that he would allocate 1.4 ha of the suit property to Richard's family.
6. It was his case that the plaintiff had not met the conditions for the grant of a temporary injunction.

#### **Parties Written Submissions**

7. As directed by the court, the parties disposed of the motion by way of rival written submissions. Mr Yoya Counsel for the plaintiff filed his submissions dated July 21, 2022.
8. The plaintiff identified 4 issues for determination; (i) whether the suit property was registered in his name to hold in trust for the family of Henry Atweng'a (deceased) (ii) whether the caution was wrongfully and unprocedurally registered and thus should be lifted (iii) whether injunctive orders should be issued and, (iv) whether the plaintiff was deserving of an order as to costs and damages for wrongful placement of a caution.
9. On the first issue, Counsel submitted that the suit property emanated from Siaya/Ramba/2454 which was registered in the names of Henry Atweng'a, James Onyango and Patrick Otieno as joint tenants. Upon the demise of Henry Atweng'a, the land devolved to the remaining survivors who then equally subdivided the land amongst themselves. Counsel placed reliance on the case of Isabela Chelangat v Samuel Tiro Rotich & 5 others [2012] eKLR where the court stated thus;

“The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will



or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence.”

10. Counsel submitted that Siaya/Ramba/2454 was therefore not available for succession and was not subject to customary trust.
11. On the second issue, Counsel submitted that the plaintiff was not notified of the caution’s registration which was in total disregard of section 72 of the Land Registration Act. In this regard, he relied on the case of Maria Nganga Gwako v Charles Mwenzi Nganga, Civil Appeal Number 287 of 2012 [2014] eKLR where the court stated that a cautioner must justify why he placed a caution.
12. On the third issue, Counsel stated that the caution ought to be removed and the defendants restrained from further dealing with the suit property. He placed reliance on the case of Ahmed Ibrahim Suleiman & another v Noor Khamisi Surur (2013) eKLR where the court held that a cautioner must have an interest on the suit property.
13. On the last issue, Counsel submitted that in line with section 75 of the Land Registration Act, he was entitled to damages because the caution was unlawfully registered. To this end, he cited the case of Zablon Kamau Nyoro (suing as the legal representative of the estate of John Nyoro Ngigi v Lason Mayodi Ombisa & 2 others) [2019] eKLR.
14. The 1<sup>st</sup> defendant’s Counsel Mr Jaoko filed his written submissions dated August 18, 2022. He identified 3 issues: (i) whether the 1<sup>st</sup> defendant was justified in lodging a caution against the suit property (ii) whether the plaintiff satisfied the conditions to warrant issuance of a temporary injunction and (iii) whether the plaintiff should be awarded costs.
15. Counsel placed reliance on Giella v Cassman Brown & another [1973] EA 358. In this decision, the settled principles were, *inter alia*, an applicant must; establish a *prima facie* case with probability of success, show that he stood to suffer irreparable harm which could not be adequately compensated by an award for damages and, if the court was still in doubt, it could decide it on a balance of convenience.
16. Counsel contended that the plaintiff had failed to prove that he had a prima facie case because he had not established that he had exclusive ownership of the suit property; it was held in customary trust. Further, the plaintiff was guilty of material non-disclosure; the root of his title was not disclosed.
17. On the second condition, Counsel submitted that the plaintiff could be compensated by an award of damages.
18. On the third condition, Counsel submitted that the balance of convenience tilted in the 1<sup>st</sup> defendant’s favour and those of other family members. On this, Counsel relied on the authority of Selly Jepchumba Samoei & 3 others v Kimwei Arap Samoei [2020] eKLR where the court cited with approval the Supreme Court of Kenya decision of Isack M’Inanga Kiebia -v- Isaaya Theuri M’Lintari & another Supreme Court Petition No 15 of 2015 where the court had this say: -

“The categories of a customary trust are therefore not closed. It is for the court to make a determination on the basis of evidence, as to which category of such trust subsists as to bind the registered proprietor”.



19. To buttress the 1<sup>st</sup> defendant's case as to why the caution should not be removed, Counsel relied on the case of *Sabina Somoine Parteyie v County Lands Registrar Kajiado & another* [2021] eKLR where the court found as follows;

“I find that this miscellaneous cause as it stands is incompetent and will proceed to strike it out and direct the applicant to file a substantive suit.”

### **Analysis and Determination**

20. I have carefully considered the motion, its grounds, affidavits and respective parties' submissions and the issues falling for determination are; (i) whether the motion is competent (ii) if (i) is in the affirmative, whether the motion is merited and (iii) who shall bear costs. I will sequentially analyse the legal and jurisprudential frameworks on these issues.

21. Competence is paramount and it behooves this court to address it at the outset. Mr Jaoko submitted that the suit required a substantive hearing and joinder of parties should be undertaken. Counsel relied on the case of *Sabina Somoine Parteyie v County Lands Registrar Kajiado & another* (*supra*). The plaintiff did not submit on this.

22. Supplementary proceedings have been described by *Black's Law Dictionary*, 11<sup>th</sup> edition, p 1458 as;

“A proceeding held in enforcement of a judgment...a proceeding that in some way supplements another.”

23. From the record, the plaintiff either by oversight or otherwise filed the motion that is the subject of this ruling as a miscellaneous application. At the time of filing it, he annexed a plaint to it. Though the plaint was not filed, it raises substantive issues that have also been raised in this application.

24. The unfiled plaint points out that the plaintiff was privy that the issues for determination had to be subjected to a full hearing. In the absence of a filed plaint, it stands, the motion does not supplement any suit.

25. In the case of *Anastacia Wagiciengo v Ezekiel Wafula* [2018] eKLR, the court stated thus;

“It is important to point out that interlocutory orders envisaged under section 63(e) of the Civil Procedure Act cannot be granted in a vacuum. ... interlocutory orders must be premised on substantive proceedings, they must be so prescribed and they must be to prevent the ends of justice from being defeated”.

26. From the motion, replying affidavit and annexures, the main issues in dispute were on ownership of the suit property, its alleged intended subdivision, interests of family members over it and an alleged agreement that was executed by family members. In my humble opinion, these issues are so weighty and they have to be subjected to a full hearing.

27. In agreeing with Mr Jaoko, It is my finding that the orders sought in the motion require substantive interrogation and cannot be dealt with by the nature of a miscellaneous application. In the absence of such substantive proceedings, I find the motion was incurably defective and incompetent. It has to suffer the same fate as the decision of *Sabina Somoine Parteyie v County Lands Registrar Kajiado & another* case that was cited by Mr Jaoko. I hereby strike out the motion with costs to the 1<sup>st</sup> defendant.

**DELIVERED AND DATED AT SIAYA THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**HON. A. Y. KOROSS**



**JUDGE**

**3/11/2022**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Mr. Odete h/b for Mr. Tonge Yoya for the plaintiff

Mr. Jaoko for the 1<sup>st</sup> defendant

Court assistant: Ishmael Orwa

