



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 7 OF 2021

**PETER BONGOYE ORENGE (Suing as the Legal Administrator of the Estate of
ORENGE NYANGECHI-Deceased.....1ST PLAINTIFF/APPLICANT**

**ISWARO NYATWANGA (Suing as the Legal Administrator of the Estate of
NYATWANGA OSASO-Deceased2ND PLAINTIFF/APPLICANT**

VERSUS

SAMWEL OMAGWA JAMES1ST DEFENDANT/RESPONDENT

NELSON MAYAKA MABUMBURI.....2ND DEFENDANT/RESPONDENT

SAMSON OSANO MABUMBURI.....3RD DEFENDANT/RESPONDENT

DAVID OMWOYO OSORO.....4TH DEFENDANT/RESPONDENT

LUCAS MAKORI NYANGATE.....5TH DEFENDANT/RESPONDENT

OMARE HENRY ORENGE.....6TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 6th March 2021 the Plaintiffs/Applicants filed an application seeking the following orders:

a) Spent

b) Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an interim order of injunction restraining the Defendants/Respondents either by themselves, their agents, servants and/or anyone claiming under them from re-entering, trespassing unto, cutting down trees, constructing temporary structures, cultivating doing framing, grazing on or interfering with and/or in any other manner whatsoever dealing with the suit properties that is L.R No. MAJOGE/MAGENCHE/1514 and MAJOGE/ MAGENCHE/1515 or any portions thereof.

c) The Honourable Court be pleased to grant an interim order of injunction restraining the Defendants/Respondents either by themselves, their agents, servants and/or anyone claiming under them from re-entering, trespassing unto, cutting down trees, constructing temporary structures, cultivating, doing farming, grazing on or interfering with and/or in any other manner whatsoever dealing with the suit properties that is L.R No. MAJOGE/MAGENCHE/ 1514 and MAJOGE/ MAGENCHE/1515 or any portions thereof pending the hearing and determination of the suit.

d) The O.C.S Kenyena- Police Station be ordered and/or directed to enforce and/or implement compliance with and observance of the court orders herein.

e) The costs of the application be borne by the Defendants/ Respondents.

2. The application is premised on the grounds set forth in the Notice of Motion and the Supporting Affidavit of Iswaro Nyatwanga sworn on

the 8th day of March 2021. In the said affidavit he deposes that the Applicants are the beneficiaries of the estates of Orege Nyangechi and Otwangwa Nyaswaso-deceased. The said deceased persons are the registered owners of the suit properties. It is his averment that the Defendants have trespassed onto the suit properties without any justifiable reasons, destroyed the boundary features and houses and started cultivating the land thus violating the Plaintiff's right to the suit properties. They have annexed copies of the title deed and photographs of the suit properties to the Supporting Affidavit.

3. The application is resisted through the Replying Affidavit of Samwel Omagwa, the 1st Defendant herein sworn on the 28th April 2021 in which he contends that the suit properties did not exist from the outset and that the said titles were fraudulently created out of L.R No. MAJOGE/ MAGENCHE/670 which belongs to the 1st Respondent.

4. In response to the Replying Affidavit, the 2nd Applicant swore and affidavit dated 29th April 2021 in which he refuted the 1st Defendant/Respondent's claim and reiterated that the Respondents have trespassed onto the suit properties. He added that the Applicants have no interest in parcel No. 670.

5. The application was canvassed by way of written submissions and the Applicant, 1st and 5th Defendants filed their submissions.

ISSUES FOR DETERMINATION

6. The main issue for determination is whether the Applicants have met the conditions for the grant of a temporary injunction.

ANALYSIS AND DETERMINATION

7. In order for the court to exercise its discretion in granting injunctive relief, the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the Applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

8. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

9. The basis of the Plaintiffs' claim is that the Defendants have trespassed onto their land and started cultivating the same without the Plaintiffs' consent. The Plaintiffs have exhibited the title deeds in respect of the suit properties as well as photographs depicting the activities taking place on the suit properties.

10. In his submissions learned counsel for the Plaintiffs/Applicants contended that unless they are restrained, the Defendants are bound to continue with their acts of trespass. He has relied on **Kisii ELC Case No. 218 of 2011, Mireri Nyangiga v Silfanus Ng'ieia** and **Kisii Civil Appeal No. 175 of 2006 Ololdapash Johnson Oramat v Peter Njuguna Mai** where the court granted orders of injunction to stop acts of trespass by the Defendants.

11. On his part learned counsel for the 1st, 2nd, 3rd, 4th and 6th Defendants submitted that the Plaintiffs have failed to demonstrate that they have a prima facie case with a probability of success. He contended that the court is not able to ascertain when and where the photographs annexed to the Plaintiff/ Applicants' supporting affidavit were taken.

12. He further contended that the Applicants have not demonstrated that they will suffer irreparable loss if the orders of injunction are not granted. Counsel has placed reliance on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR** where the court defined irreparable injury as follows:

“An injury is irreparable where there is no standard by which their amount can be measured with accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be an adequate remedy”

13. Counsel further submitted that the balance of convenience does not tilt in the Applicants' favour and the court should not rely on the annexed photographs. He concluded by submitting that the Applicants had failed to surmount sequentially the three hurdles before an order of injunction can be granted.

14. Learned counsel for the 5th Defendant submitted that the Applicants fraudulently obtained Letters of Administration. He further submitted that even though the 5th Defendant has no interest in the suit properties he should not be part of those in respect of whom injunctive orders are issued. He relied on the case of **Naftali Ruth Kinyuua v Patrick Thuita Gachure & Another (2015) eKLR** for the proposition that the Applicant must show that he owns the suit property or that he has a valid claim which would be capable of defeating a third party claim in respect thereof.

15. He submitted that the test for irreparable loss is defined in **Halsbury's Laws of England, Third Edition Volume 21, P.352** as follows:

“Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first that the injury is irreparable and second that it is continuous. By irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter.”

16. It was counsel’s contention that the Applicants had not indicated that they would suffer irreparable loss and therefore their application should be dismissed.

17. It is trite law that at an interlocutory stage, the court should not make up its mind on whether the Applicant has a foolproof case as all that the Applicant needs to demonstrate is that he has an arguable case. See the case of **Nguruman** (supra).

18. Additionally, in the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1**, the court stated as follows: -

“in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties’ cases,”

19. Having considered the application, rival affidavits, submissions and the case law cited to me by counsel, I am persuaded that the Applicants have demonstrated that they have a prima facie case with a probability of success as they have shown that their rights to the suit properties are being violated.

20. On the issue of irreparable damage, the court in the case of **Panari Enterprises Ltd -vs- Lijoodi & 2 others (2014) eKLR** held as follows:

“Land is unique and no one parcel can be equated in value to another though the value of the suit property can be ascertained, it would be right to say that the plaintiff can be compensated in damages. I hold that the damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach”

I concur with the observation in the above decision and hold that if the injunction is not granted, the Applicants will suffer irreparable loss.

21. In view of the foregoing, I need not consider the balance of convenience but even if I had to decide the matter on a balance of convenience,

I would hold that it tilts in favour of the Applicants. At any rate the Respondents have argued that they have no interest in the suit properties so they will suffer no prejudice if the order of temporary injunction is granted.

22. The upshot is that I find merit in the application and I grant it and make the following orders:

f) A temporary injunction is hereby granted restraining the Defendants/ Respondents either by themselves, their agents, servants and/or anyone claiming under them from re-entering, trespassing unto, cutting down trees, constructing temporary structures, cultivating, doing farming, grazing on or interfering with and/or in any other manner whatsoever dealing with the suit properties that is L.R No. MAJOGI/MAGENCHE/ 1514 and MAJOGI/ MAGENCHE/1515 or any portions thereof pending the hearing and determination of the suit.

g) The O.C.S Kenya Police Station is hereby directed to enforce and/or implement compliance with and observance of the court orders herein.

h) The costs of the application be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF NOVEMBER, 2021.

J.M ONYANGO

JUDGE