



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC CASE NO. 16 OF 2021

(FORMERLY MIGORI ELC CASE NO. 91 OF 2017)

SAMWELL ODOYO NYAMALA

(suing as the legal administrator ad litem of the estate of

ISMAEL NYAMALA WENDO-Deceased).....RESPONDENT/PLAINTIFF

VERSUS

NYANGWESO DIANGA WENDO.....1ST APPLICANT/DEFENDANT

JOYCE OMONDI WENDO.....2ND APPLICANT/DEFENDANT

FRANKLINE ODHIAMBO.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

CHAIRMAN HOMA BAY DISTRICT TRIBUNAL.....5TH DEFENDANT

RULING

1. By a Notice of motion dated 27th August 2020 initiated under Sections 1A, 1B,3A and 63 (e) of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 40 Rules 1 and 3 of the Civil Procedure Rules 2010 (the application herein), one Nyangweso Dianga Wendo, the 1st defendant (the 1st applicant herein) is seeking the orders infra: -

a) THAT pending the hearing and final determination of this suit, this honourable court be pleased to issue an order of interim injunction restraining the plaintiff/respondent by himself and /or his agents, servants, assignees, family members or any other person or persons acting under his direct or indirect instructions from entering onto, cultivating, occupying and/or in any manner or way whatsoever interfering with land parcel title number Kanyada/Kanyabala/817 (the suit land).

b) THAT the Officer Commanding Homa-Bay Police Station be and is hereby directed to oversee and supervise the implementation and/or compliance of this court's orders.

c) THAT the costs of this application be provided for.

2. The anchorage of the application is a 13- paragraphed supporting affidavit sworn on even date by the applicant together with an award and pictures marked as "NDWOO1 and NDWOO2" respectively and annexed to the affidavit. The application is also based on grounds 1 to 5 set out on its face which include; that the original plaintiff, Ismael Nyamala Wendo (deceased) who was the father of the current plaintiff, Samwell Odoyo Nyamala (Respondent) was the registered owner of the suit land, **LR NO. KANYADA /KANYABALA /817**. That the Homa-Bay Land Disputes Tribunal's award (NDWOO1) shows clear ground demarcation of the suit land. That the family members of the deceased and the applicants have been using, utilizing and cultivating various portions of the suit land until August 2020 when the current plaintiff/respondent moved into the suit land and cultivated the whole of it as shown in the pictures (NDWOO2) hence provoking the application.

3. The applicants are represented by M/s Apondi and Company Advocates following a notice of change of Advocates dated 17th March 2021, amended on 18th June 2021 duly filed in court on 19th March 2021. They were formerly represented by M/s Momanyi Aunga and Company Advocates apparently followed by M/s G.S. Okoth and Company Advocates.

4. It is important to note that the respondent substituted the original plaintiff (deceased) further to a notice of motion dated 26th November 2019 which was allowed on 12th November 2020. He is represented by M/s Ken Omollo and Company Advocates.
5. In a seven (7) paragraphed replying affidavit sworn on 2nd April 2021 and filed in court on 9th April, 2021, the respondent opposed the application. He termed the same misconceived, bad in law, an abuse of the court process and should be dismissed with costs for the reason that it was filed by a firm of Advocates who are not on record for the parties herein.
6. The respondent further deposed that the firm of M/s G.S. Okoth and Company Advocates took over this matter from M/s Momanyi Aunga and Company Advocates by a notice of change of Advocates marked as "SON-1" and annexed to the replying affidavit. That the application has no merits as it has not met the requirements concerning injunctions as laid down in the case of **Giella =vs=Cassman Brown Company Ltd (1973) EA 358**
7. By a seventeen (17) paragraphed further affidavit sworn on 18th June 2021 and filed in court on 24th June 2021, the applicant deposed, inter alia, that M/s Momanyi Aunga and Company Advocates was on record for him at the time of filing this application. That M/s G.S. Okoth and Company Advocates came on record for the 3rd defendant as shown in a letter dated 24th May 2021 and marked as "NDW-1" attached to the affidavit.
8. The application was argued by way of written submissions pursuant to the orders and directions of this court given on 16th December 2020; **see Orders 51 Rule 16 of the Civil Procedure Rules, and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.**
9. Accordingly, learned counsel for the applicants filed submissions of four (4) pages dated 18th June 2021 where reference was made to the application, the replying affidavit, **Giella-vs- Cassman Brown & Co.Ltd (1973) EA 358 case and Order 40 Rule 1 (supra)**. Counsel submitted that the applicants have established a prima facie case with triable issues against the respondent and that he is likely to suffer irreparable damage as held in the cases of **Paul Gitonga Wanjau =vs= Githuthi Tea Factory Company and others (2016) eKLR and Tritex Industries Ltd and 3 others =vs= National Housing Corporation and another (2014) eKLR** respectively.
10. Counsel further submitted that the applicants have met the threshold for grant of an interlocutory injunction sought in the application. That it is within the flexibility and discretion of the court to grant an interlocutory injunction remedy as held in the case of **Central Bank of Kenya and another=vs= Uhuru Highway Development Ltd and 4 others (1998) eKLR**.
11. Counsel also submitted that the firm of M/s Momanyi Aunga and Company Advocates was always on record for the 1st and 2nd defendants while the firm of M/s G.S. Okoth and Company Advocates was always on record for the 3rd defendant. That anything to the contrary is curable under Articles 159 (2) (d) of the Constitution of Kenya,2010 and that the application be heard on merit. He relied on the case of **Pan African Paper Mills Ltd =vs= Silvester Nyarango Obwocha (2018) eKLR** on the issue of representation herein.
12. The respondents did not file any submissions in this application inspite of the directions as shown in paragraph 8 hereinabove.
13. I have duly considered the application, the replying affidavit, the further affidavit and applicants' submissions including all the authorities relied upon therein. To that extent, it is duty of this court at the instant stage, to resolve whether; -
 - a) **The application is misconceived, bad in law and an abuse of the court process.**
 - b) **Depending on the outcome in issue number (a) hereinabove, the application has attained the threshold for the grant of orders sought therein.**
14. Regarding issue number one, the respondent deposed in the replying affidavit that the application should be dismissed for inter alia, the same is bad in law as it has been filed by a firm of advocates who are not on record for the parties in this matter. That M/s Momanyi Aunga and Company Advocates who lodged the application are no longer on record for the applicants since M/S G.S. Okoth and Company Advocates took over the matter from them as discerned in the notice of change of Advocates (SON-1).
15. In the further affidavit, the 1st applicant deposed in part that M/s Momanyi Aunga and Company Advocates were on record for them at the inception of the application while M/s G.S. Okoth and Company Advocates appears for the 3rd defendant only. They relied on a letter (NDW-1) and that if there is any typographical error therein, the same should not be visited on them to prevent proper administration of justice.
16. It is notable from the proceedings in this suit that on 12th November 2020, 22nd February 2021 and 16th December 2020, the firm of Momanyi Aunga and Company Advocates was for the 1st and 2nd defendants (the applicants herein). That on 22nd February 2021, Mr. Mudeyi held brief for G.S. Okoth learned counsel for the 3rd defendant.
17. The letter marked as "NDW-1" and annexed to the 1st applicant's further affidavit reveals that M/S G.S. Okoth and Company Advocates act for the 3rd defendant and not the applicants herein. By an amended notice of change of advocates dated 17th March 2021 and duly filed herein on 24th June 2021, M/S Apondi and Company Advocates act for the applicants who were previously represented by M/S Momanyi Aunga and Company Advocates. Therefore, was the notice of change of advocates marked as "SON-1" and annexed to the replying affidavit, in error and excusable?
18. It is noteworthy that the mistake of counsel should not be visited upon a client; **see Shabir Din=vs= Ram Parkash Anand (1955)**

19. Section 19 (1) of the Environment and Land Court Act 2015 (2011) stipulates the procedure and powers of this court which include acting expeditiously without undue regard to technicalities of procedure. This legal provision is aligned to Article 159 (2) (d) and (e) of the Constitution of Kenya, 2010. On that account, the notice marked as “SON 1” was procedurally filed but in error. It is curable in the obtaining scenario hence the application is not misconceived, bad in law and an abuse of the court process.

20. As regards issue number two, the applicants asserted that the award (ND WOO1) clearly shows how they live on the ground. That in August 2020, the respondent unlawfully ploughed the whole suit land including their various and distinct portions and started planting maize thereon.

21. On the other hand, the respondent contended that the application has not attained the threshold in **Giella case** (supra. This court is conscious of the three (3) pillars upon which an order of interim injunction is beacons as emphasized in the Court of Appeal decision in **Nguruman Limited-vs-Jan Bonde Nielsen and 2-others (2014) eKLR**.

22. In the case of **National Bank of Kenya Limited-vs-Shimmers Plaza Limited (2019) KLR 278 at 283**, the Court of Appeal noted that an injunction is an equitable and discretionary remedy. That the duration of the remedy is at the discretion of the trial judge and depends on the circumstances of each case: see also **CBK and Pan African Paper Mills cases** (supra).

23. Under Section 13 (7) (a) of the Environment and Land Court(ELC) Act, 2015 (2011), this court has the mandate to grant interim preservation orders. Indeed, the same include interlocutory injunction sought in this application.

24. Moreover, this court may grant interim injunctions and conservatory orders even in cases of violation of Constitutional rights and freedoms, inter alia, protection of the right to property as enshrined in section 40 of the Constitution of Kenya, 2010. This power is rooted under Article 23 (3) (a) of the Constitution and mirrored in the ELC Act.

25. It is settled law that the court may apply the doctrine of lis pendens which is meant to maintain the prevailing status quo over the property in dispute until the suit is determined or terminated; see the Court of Appeal decision in **Ogada-vs-Mollin (2009) KLR 620**.

26. In the obtaining scenario, the order merited is the maintenance of the status quo in respect of the suit land in lieu of the interim injunction as sought in the application pending the hearing and outcome of this suit. Indeed, the target is to preserve the suit land to attain the best ends of justice.

27. A fortiori, the application dated 27th August 2020 is merited. Thus, the same is hereby determined infra;

a) The parties herein shall maintain the obtaining status quo over the suit land, LR No. Kanyada/Kanyabala/ 817 pending the hearing and determination of the suit. In particular, the parties herein to possess and occupy their respective portions of the suit land without any interference whatsoever pending the outcome of the suit.

b) The officer Commanding Homa Bay Police Station be and is hereby directed to oversee and supervise the implementation of order number (a) hereinabove.

c) Costs of the application be in the cause.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 21ST DAY OF SEPTEMBER 2021

G. M. A. ONGONDO

JUDGE

In presence of :-

Mr. Robert Ochieng' holding brief for Ms Apondi for the Applicants as well as for Ken Omollo for the Respondent and G. S. Okoth for 3rd Defendants.