



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT HOMABAY**

**ELC CASE NO.12 OF 2021**

**(FORMERLY MIGORI ELC CASE NO. 87 OF 2019)**

**DUNCAN NYAORI AGORO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PETER ODHIAMBO AGORO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**HESBON OTIENO AGORO.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**FELIX KAMANGA AGORO.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH OTIENO NYAORI alias NYAORI ATIENO...DEFENDANT/RESPONDENT**

**RULING**

1. The instant ruling is with regard to an application by way of a Notice of motion dated 3<sup>rd</sup> November 2019 and duly lodged on even date under Order 40 Rule 1,2 and 2A Civil Procedure Rules, 2010. The four (4) plaintiffs (applicants herein) who were formerly represented by the firm of Nyatundo and Company Advocates and currently by M/s Agure Odero and Company Advocates further to a Notice of change of Advocates dated 26<sup>th</sup> January 2021 and filed in court on even date, are seeking the orders infra:-

**a) Pending the hearing and determination of this suit, this honourable court be pleased to grant an order of temporary injunction restraining the defendant/respondent either by himself, agents servants and /or any other person acting under his instructions from alienating, transfer, interfering and/or evicting the plaintiff from a parcel of land otherwise known as LR NO. KABONDO/KAKANG'UTU EAST/371, and in particular a portion of the subject land measuring 1.50a acres or thereabout which has been in use and/or possession of the plaintiff.**

**b) Costs of this application be borne by the defendant/respondent**

**c) Such further and/or other orders be made as the court may deem fit and expedient.**

2. The application is based on grounds (a) to (i) set out on its face and the 1<sup>st</sup> applicant's twenty (20) paragraphed supporting affidavit sworn on even date together with a copy of an official search and a copy of an arbitration award annexed to the affidavit. Briefly, the applicants complain that in the year 1966, the suit land LR NO. KABONDO/KAKANG'UTU EAST/371 measuring approximately one decimal five zero (1.50) acres in area was registered in the name of the defendant by Noah Nyaori Aroko (deceased 1) who was his father and the 1<sup>st</sup> applicant's grandfather. That deceased-1 erected a demarcation therein until he passed on in the year 1991. That the 1<sup>st</sup> applicant's father, Micheal Agoro Nyaori (deceased-2) took over possession and use of the land until his death in the year 2002. That the defendant who had initially covenanted to process the title deed in respect of the suit land in favour of the 1<sup>st</sup> applicant to hold the same in trust for the estate of deceased -2 declined to complete the process and threatened to evict the 1<sup>st</sup> applicant therefrom.

3. By a twenty-one (21) paragraphed replying affidavit sworn on 28<sup>th</sup> January 2010 and filed in court on 29<sup>th</sup> January 2021, the defendant (respondent), opposed the application and sought its dismissal with costs. He denied the applicants' allegations. He deposed, inter alia, that after the death of deceased -2, one Regina Auko Nyaori, the respondent's mother was using part of the suit land with the consent of the respondent. Further, that the respondent's mother with the consent of the respondent allowed the 1<sup>st</sup> applicant who was a school pupil to use the same portion but invaded the same in the year 2008.

4. The respondent also deposed that he is in possession and occupation of the entire suit land as the 1<sup>st</sup> applicant has since vacated the suit land. That the applicants are currently using LR Nos KABONDO/KAKUNGUTU EAST/401 and 453 but not the suit land as shown in the photographs and copy of a certificate of official search marked as “JONAN-1 and 2” respectively annexed to the replying affidavit. That therefore, the applicants have not satisfied the conditions of granting injunctive orders as set out in the celebrated case of **Giella-vs-Cassman Brown and Company Ltd (19730 EA 358)**.

5. In a further affidavit of twenty (20) paragraphs sworn on 25<sup>th</sup> February 2020 and duly filed on 26<sup>th</sup> February 2020, the 1<sup>st</sup> applicant deposed, inter alia, that deceased -2 worked and tilled the suit land and never at any time worked or occupied LR NO. KABONDO/KAKANGUTU EAST/371 which has been occupied and used by one Caleb Odendo Akech for over 40 years. That his siblings and himself have been in possession and occupation of the suit land as shown in photo marked as “DAN-1 and annexed to the affidavit. That the respondent damaged his maize plantation thereon as revealed in a photo and crop damage assessment report marked as “DAN 2 (a) (i) (ii) (iii) and (b) annexed thereto.

6. It is note-worthy that the instant suit was commenced by way of an originating summons dated 3<sup>rd</sup> November 2019 and lodged in court on 3<sup>rd</sup> December 2019 under **sections 1A, 1B,3A and 63 ( e) Civil Procedure Act** Chapter 21 Laws of Kenya. The applicants are claiming to have acquired title to the suit land by way of adverse possession.

7. In a 22 –paragraphed replying affidavit sworn on 28<sup>th</sup> January 2020 and filed in court on 29<sup>th</sup> January 2020, the respondent opposed the originating summons and sought that the same be dismissed with costs to him. He denied the plaintiffs’ claim and stated that it is only the 1<sup>st</sup> plaintiff who alleges to have acquired interest in the suit land by adverse possession.

8. On 26<sup>th</sup> January 2021, this court did order and direct that:

*“Notice of motion dated 3<sup>rd</sup> November 2019 be heard by way of written submissions within the next 14 days from this date.”*

9. Accordingly, learned counsel for the applicants filed herein a six (6) paged submissions dated 25<sup>th</sup> May 2021 on 27<sup>th</sup> May 2021. Therein, the issue for determination framed and analyzed in favor of the applicants include; Whether the plaintiffs are entitled to the orders sought in the originating summons. Counsel relied on statements, affidavits and photographs duly filed herein alongside the Court of Appeal decision in the **Mwangi =vs= Kenya Airways Ltd (2003) eKLR**, among other pronouncements.

10. The respondent failed to file submissions in this application.

11. I have carefully examined the application, the replying affidavit, the further affidavit, the originating summons and alongside the replying affidavit thereto and the applicants’ submissions including all the authorities relied upon therein. In the foregone, have the applicants satisfied the requisite condition for the grant of orders sought in the application?

12. I bear in mind all the provision of the law under which the application is mounted. Indeed, the courts discretion is exercised always on a factual situation for the purposes of upholding the law and preservation of claims of parties so that they may be heard and determined according to the law as observed in the case of **Oraro =Vs= Mbaja (2005) eKLR 149/150**.

13. It is established law that in an interlocutory injunction application, the applicant has to satisfy the triple conditions; establish a prima facie case, demonstrate irreparable injury and that the balance of convenience tilts in favour of the applicant: see **Giella case (supra)**.

14. I take into account the meaning of **“a Prima facie case”** in civil cases ; see the Court of Appeal decision in **Mrao Ltd =Vs= First American Bank of Kenya Ltd and 2 Others (2003) eKLR 125**.

15. In the case of **Nguruman Ltd =vs= Jan Bonde Nielsen and 2 others (2014) eKLR**, the Court of Appeal concluded thus :-

**“ We stress that it must be borne in mind that the very foundation of the jurisdiction to give orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits.....(Emphasis mine).**

16. By grounds (e) to (s) of the originating summons, the applicants stated that they depend on the suit land for their livelihood. That to deprive them of the suit land would occasion irreparable loss to them as deposed in paragraphs 15 and 16 of the 1<sup>st</sup> applicant’s supporting affidavit to the originating summons. That the respondent shall not suffer any loss if the application is allowed and that the orders sought therein are merited.

17. In the replying affidavit especially at paragraph 17 and 18, the respondent deposed that the application has not satisfied the requirements for the grant of orders sought therein. That the applicants are not in actual and constructive use of the suit land hence, not dispossessed thereby.

18. It is trite law that a court may apply the doctrine of lis pendens which is meant to maintain the status quo over a property until the suit is determined or terminated: see **Ogada-vs-Mollin (2009) KLR 620**.

19. Notably, this court is mandated to grant preservation orders under section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011). Indeed, status quo order is envisaged thereunder.

20. Moreover, this court may grant appropriate relief including a conservatory order as stipulated in Article 23 (3) of the Constitution of Kenya, 2010, in any proceedings brought under Article 22 of the same Constitution. The bottom line is to preserve the property in dispute as observed in Oraro and Ogada cases (Supra).

21. In the upshot, I find that the applicants are entitled to an interim preservation order in respect of the suit land in view of the character and circumstances of the case in order to meet the ends of justice. The application is meritorious.

22. So, I proceed to order and direct the parties to maintain the obtaining status quo over the suit land in lieu of an interlocutory injunction as sought in the application. In particular, the respondent shall not move to alienate, sub divide, transfer, erect permanent structures on the suit land and or evict the applicants from the same pending the hearing and determination of the suit.

23. The costs of the application shall be in the cause.

24. To facilitate the hearing and determination of the suit, mention for directions fixed for 29<sup>th</sup> September, 2021. The Hon. Deputy registrar of this court to notify the parties accordingly.

**DELIVERED, DATED and SIGNED at HOMA BAY this 16<sup>th</sup> day of September, 2021**

**G.M.A. ONGONDO**

**JUDGE**