



REPUBLIC OF KENYA



KENYA LAW
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**Odada v Odada (Enviromental and Land Originating Summons
E002 of 2025) [2025] KEELC 4784 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4784 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2025

E ASATI, J

JUNE 26, 2025

**IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF TITLE
BY ADVERSE POSSESSION OF A PORTION OF LAND MEASURING 0.1HA
TO BE HIVED OFF LAND PARCEL NUMBER KISUMU/WAWIDHI 'B'/438**

AND

IN THE MATTER OF LIMITATION OF ACTION ACT, CAP 22 LAWS OF KENYA

BETWEEN

BENARD ALOO ODADA PLAINTIFF

AND

ELIJAH OUMA ODADA DEFENDANT

RULING

2. The Notice of Motion dated 2nd December, 2024 seeks for an order of temporary injunction restraining the Respondent whether by himself, his agents, servant and/or anybody acting under his directions or claiming against/through him from trespassing, encroaching, demolishing/erecting structures on, disposing, transferring, alienating, selling, charging or in any way wasting a portion of land measuring 0.10 Ha forming part of parcel number Kisumu/Wawidhi "B"/438 and that costs of the application be provided.
3. The application was supported by the contents of the Supporting Affidavit sworn on 2nd December, 2024. The Applicant's case is that he had bought the piece of land and has been in occupation until recently when the Defendant invaded the land, fenced off a portion measuring 0.10Ha forming part of the suit land parcel known as Kisumu/Wawidhi "B"/438 claiming to have purchased the same from one Paul Ochieng Rete. That the Applicant conducted search and confirmed that the Defendant is the current owner of the land parcel known as Kisumu/Wawidhi "B"/438. That there is danger that



- the Defendant is now likely to carry out eviction by damaging crops thereon to the detriment of the Applicant unless stopped by court.
4. The application was opposed vide the contents of the Replying Affidavit sworn by the Respondent on 10th February, 2025. The Respondent's case is that he is the registered owner of the suit land which he bought from one Paul Ochieng Rete. That he immediately took possession of the suit land after purchase. That the Plaintiff encroached onto a portion of the suit land in the year 2018. That the Plaintiff is an encroacher whose encroachment has been fought at every step.
 5. That the Plaintiff does not have possession of the property and did not have the same as at the time the suit was filed. That a prima facie case has not been demonstrated.
 6. The application was heard by way of written submission. It was submitted on behalf of the Applicant vide the written submissions dated 18th April, 2025 filed by Tawo & Company Advocates that the application warrants the injunctive relief sought. Counsel relied on the provisions of Order 40 Rule 1 (a) of the *Civil Procedure Rules* 2010 and the case of *Giella -vs- Cassman Brown & Company Limited (1973)EA* and submitted that the Applicant has demonstrated that he has adverse possession of the suit land which he acquired in the year 2003 vide the land sale agreement dated 3rd April, 2003. That in the boundary dispute report, witnesses confirmed that he had been in occupation. That from the photographs it was clear that the Applicant was ploughing the suit land together with parcel number Kisumu/Wawidhi "B"/438 and 439 before the Respondent went and fenced it. That the Applicant has demonstrated a prima facie case with a probability of success.
 7. That the Applicant has demonstrated that he has crops growing on the property. That it follows that he will suffer irreparable damage should the application not be granted at once. That the Respondent fenced off the crops to the Applicant. Counsel relied on the case of *Kipchirchir Kogo -vs- Frank Kimeli Tenai* [2018]eKLR. Counsel urged the court to allow the application with costs.
 8. On behalf of the Defendant, written submissions dated 19th May, 2025 were filed by the firm of Olel Onyango Ingutiah Advocates. Counsel submitted that the Applicant had failed to prove a prima facie case. That there are no grounds on the face of the application on which the application is brought.
 9. That the size and location of the portion of land the Plaintiff claims to have bought was not indicated. That the defendant has demonstrated that the Plaintiff has only conducted intermittent activities as a trespasser upon the suit property and that on every occasion, the Defendant has intervened. That the photographs relied on attached to the Replying Affidavit show that there are no crops on the suit land that may be destroyed as claimed by the Plaintiff. That the Defendant has possession of the suit property currently. That the court should refuse to grant the orders sought in the absence of demonstration as to how irreparable loss will be suffered by the Plaintiff.
 10. On the issue of balance of convenience, Counsel submitted that as the Defendant has demonstrated that he has possession of the suit land which he rightfully bought and got title in respect thereof, the balance of convenience tilts in favour of maintaining the current position. Counsel urged the court to dismiss the application with costs.
 11. The substantive relief sought is an order of temporary injunction. The Grounds for grant of a temporary order of injunction as set out in Order 40 Rule 1 of the Civil Procedure Act are that the applicant must demonstrate that the suit property is in danger of being wasted, destroyed or alienated or wrongly sold. And as held in the case of *Giella vs Cassman Brown Co. Ltd (1973) 358* in order for an order of interlocutory injunction to issue, the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant



would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience.

12. It is clear from the facts presented by the Applicant that he does not live on the suit land but only cultivates. His complaint is that the Respondent has fenced off a portion measuring 0.10Ha of the suit land with crops growing thereon.
13. The certificate of official search annexed to the application shows that land parcel No. Kisumu/Wawidhi "B"/438 measuring 0.46Ha is registered in the name of the Defendant since 1st August, 2019.
14. From the Originating Summons, the Applicant claims only a portion thereof measuring 0.10 Ha.
15. I have keenly considered the application and the grounds in opposition thereto. I find no evidence that the Applicant had crops on the land as at the time of filing suit. The boundary dispute report relied on by the Applicant and attached to the Supporting Affidavit indicates that it was the proprietor of parcel number 6764 who had ploughed the whole of parcel number 439 and 438.
16. The court finds that the grounds for granting of a temporary injunction have not been demonstrated. The application is dismissed. Costs to the Respondent.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 26TH DAY OF JUNE, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Tawo for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

