



Onyango v Abuto (Sued as the Administrator of the Estate of Michael Abuto Ongeche) (Environmental and Land Originating Summons E011 of 2024) [2025] KEELC 54 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEELC 54 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2024
FO NYAGAKA, J
JANUARY 21, 2025
IN THE MATTER OF LIMITATION OF ACTIONS ACT, CHAPTER 22 LAWS OF KENYA.
AND
IN THE MATTER OF THE REGISTRATION OF LAND ACT NO. 3 OF 2012.
IN THE MATTER OF LR. NO. LAMBWE/EAST/2070.

BETWEEN

CHARLES OPONDO ONYANGO APPLICANT

AND

THOMAS OCHIENG ABUTO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL ABUTO ONGECHE) RESPONDENT

RULING

1. By an application dated 7th October 2024, the Plaintiff moved this Court to under Order 40 Rule 1 of the Civil Procedure Rules. He sought the following orders.
 1. Spent.
 2. Spent.
 3. That the honorable Court be pleased to issue an order of temporary injunction restraining the Respondent his agent, servant and/or employee from cultivating, selling, disposing, alienating and or in any way interfering with land parcel number Lambwe East/2070 registered in the names of Michael Abuto Ongeche (deceased) unlawfully, pending the hearing and determination of this suit.



4. That costs of this application be provided.
2. The application was based on eleven (11) grounds, being that the deceased was at all times the owner of the suit property. Succession proceedings in respect of the deceased's Estate were ongoing at Mbita Law Courts in Succession Case number is E082 of 2023, In the Matter of the Estate of Michael Abuto Ongeche (deceased). The deceased passed away, leaving other beneficiaries apart from the applicant. The Respondent was not one of the beneficiaries. The respondent who was a stranger to the deceased's Estate recently, after filing the suit, started cultivating it without authority or permission or consent from the applicants or other beneficiaries' consent and was in the process of selling part of the suit property to a third party with a view to disinheriting the beneficiaries. His acts amounted to intermeddling in their deceased estate, hence illegal and unlawful. He had never occupied and/ or been in possession of the suit property as alleged. He lives on another parcel of land. There was an urgent need to restrain the Respondent's acts and secure the deceased Estate pending proper distribution thereof by the court at Mbita. The deceased's Estate was likely to suffer irreparable loss, waste and or damage if the application was not allowed. It was in the interest of justice that it be granted.
3. The application was supported by the Affidavit sworn by the Respondent on the same date. Largely, he repeated the contents of the grounds in support of the application, but in deposition form. He deposed that he was the administrator of the estate of the deceased. That sometimes back they lived in Lambwe East Location in Mbita Sub- County, but later relocated to Kabondo, their ancestral home in Rachuonyo Sub-County where they lived to the date of the Application. From the time they migrated to Kabondo their land, parcel number Lambwe/2070 registered in the name of Michael Abuto Ongeche remained fallow and without any occupant. In the year 2023 they commenced succession proceedings in Mbita law courts and was pending confirmation of the grant. Some weeks before the instant application he (the applicant) was served with the originating summons of this matter filed by the respondent. He was yet to respond.
4. The week before filing the instant application he (they) (although he did not specify who it was) received information that the Respondent had entered the suit property and began cultivating it after filing the suit. He was doing it without the applicant's consent or that of the other beneficiaries. He went to the parcel of land and confirmed the same. They even confirmed that the respondent was in the process of selling the land to a third party.
5. The deceased died leaving beneficiaries including the applicant. The Respondent had never been in possession of the suit property or occupation thereof. It was urgent to restrain him from intermeddling with the Estate of the deceased. He annexed but did not mark or commission copies of a letter from the Office of the Chief in Labwe East Location. It was dated 10th May 2024. He also annexed a copy of a Certificate of Death No. 1710756, a copy of the Certificate of Official Search dated 13th May 2024 and a Grant of Letters of Administration dated 04th July 2024.
6. The Plaintiff/Applicant but now Respondent opposed to the application through an affidavit which he swore on 3rd November 2024. He deposed that the application was misconceived, malicious and intended for and brought in bad faith. He had been in quiet occupation and use of the land parcel number Lambwe East/2070, registered in the names of the deceased Michael Abuto Ongeche. He entered the parcel of and adversely during the lifetime of the deceased. He brought the originating summons herein when the applicant obtained a Grant of Letters of Administration nominating him as the administrator of the estate of the deceased. He had been on the suit property for over 24 years since his entry in the year 2000. His occupation had been peaceful, uninterrupted and continuous. Therefore, it would be prejudicial for this honorable court to issue interim orders against him. The applicant had not established a prima facie case to warrant the grant of the orders sought.



7. He deposed the further that the Originating Summons herein did not in any way affect the Mbita Succession case No. E82 of 2023. It is in the said succession cause that the applicant was appointed the administrator, hence he has been sued in the originating summons herein in that capacity. It was false that he (Charles Opondo) was in the process of selling the suit property when the same was still registered in the name of Michael Abuto Ongeche. The applicant had not brought any evidence to show that he was in the process of selling the land. It was not true that he, the Respondent now, was intermeddling with the Estate of the deceased since he entered into the suit land during the lifetime of the deceased and had been there for over 24 years peacefully. His long occupation of the land was why he brought the originating summons to be declared as having acquired it adversely and he be registered as the absolute owner. Having entered the land adversely he did not fall in the category of beneficiaries or liabilities of the estate of the deceased. If he had delayed him bringing the suit herein the Applicant would have presented the land for distribution to his detriment. The applicant had not proved or established a prima facie case against him to warrant the orders sought. He had failed to demonstrate sufficiently the irreparable injury they are likely to suffer should the honorable Court not grant the orders sought. The orders sought were untenable in law and as such the application ought to be dismissed in the interest of justice and fairness.
8. The application was canvassed by way of written submissions. The applicant filed his written submissions dated 16th December 2024. He started by summarizing the prayers in the application.
9. He submitted that the suit on whose basis the Respondent used to move to the suit property and start cultivating it illegally and unlawfully was baseless and had no merit hence needed to be stopped. He stated that from the Applicant's (that is to say, his own) List of Documents, the document on which the Respondent had based his claim to the property was a sale agreement between them and the Respondent in respect of parcel No. number Lambwe East/151 and not Lambwe East/2070. He added that in the supporting affidavit of the instant application the Applicant (Respondent in the OS) stated that the Respondent in the instant application actually occupied parcel No. 151 purporting it to be parcel No. Lambwe East/2070 was evicted by the family of one Dominic Dulo (deceased) and moved to occupy parcel No. 1462 on which the office of the Assistant Chief was awaiting to be built. It was not true that the Respondent had acquired the parcel of land by adverse possession, which explains why he was not living on it.
10. He added that the suit did not have any chances of success. The applicant had stated that after he filed this suit, he used it as a basis to enter the deceased's parcel of land and started cultivating the same. The estate of the deceased was yet to be distributed and was likely to suffer irreparable loss. The Respondent's suit was fake and baseless. He submitted further that the court should look at the reliefs sought to confirm it. The applicant or his brother had no legal right to sell the suit property which belonged to the deceased hence making the Respondent's claim weaker and without basis. He summed it that the Respondent did not have any sale agreement with respect to parcel No. Lambwe East/2070.

Issue, Analysis and Determination

11. I have considered the application, Replying Affidavit, the law and the written submissions filed. Only two issues command themselves for me for determination. One, is whether the application is merited. Two, is who to bear the costs of the application.
12. To begin with it is worth noting that the applicant, on filing the instant application, gave the grounds in support of the same. He also filed a Supporting Affidavit thereto. Following that, when the court analyzed the copies of the documents annexed to the Affidavit, it noted that all of them, as purported to support the facts deposed to in the respective paragraphs were not sealed by the Commissioner



for Oaths who commissioned the Affidavit. This was contrary to Rule 9 of the Oaths and Statutory Declaration Rules made under Section 6 of the *Oaths and Statutory Declarations Act*, Chapter 15 Laws of Kenya. The Rule provides that “All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”

13. In essence it means that when a deponent takes an oath before a commissioner for oaths he should, not only append this signature on the oath or affidavit immediately he takes the oath but must, have with him and present before the Commissioner for Oaths all the copies or documents that support the deposition, he makes so that the Commissioner confirms that they are, indeed, the ones that support of the oath. Failure to do so makes the depositions relating to the contents of the documents not presented to the Commissioner strange, illegal, not ‘authenticated’ by him and not relating to the Oath taken before him. They cannot support the oath. Even if they are added. Afterwards. Or even if they are sealed. And presented before a different commissioner for oaths, because that would be a different oath they would be attesting to.
14. In the circumstances of this case, the four documents the applicant relied on to support his depositions were not tendered before the Commissioner, otherwise he should have sealed and serialized them. They cannot therefore purport to support the oath. Any deposition that refers to them remained nothing but hearsay. The Court cannot rely on it. All that attendant or respective deposition is hereby ignored or not considered as evidence in support of the applicant’s claims.
15. That said, the next issue is that the applicant in his submissions referred to a number of facts he did not depose to in the Supporting Affidavit (and no supplementary one was filed). For instance, he referred to facts he deposed to in a different Affidavit than the supporting affidavit. Additionally, he referred to facts contained in his List of Documents he filed in response to the Originating Summons.
16. This Court humbly finds that all the depositions and facts the applicant referred to which were not in the Supporting Affidavit are strange to the application and could not be used to support the facts thereof. The Court cannot stretch beyond the application or facts before it to firm a party’s position. That would amount to trial by ambush because the other party(ies) would not be reasonably contemplating that such facts or evidence might be used in the issue before the court so that they prepare for it. It is instructive for the Applicant to know that submissions neither consist of pleadings of parties nor evidence. They are merely oral or written words of persuasion which could be best referred to as “marketing language” by the party for purposes of convincing the court to make a finding in his favor. Submissions cannot be used to introduce evidence or pleadings.
17. In The case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Court of Appeal held as follows.

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
18. The third preliminary issue is that the Respondent did not file submissions in support of his opposition to the application. Well, it would have been beneficial for the court to hear his side of the argument, but it was not forthcoming. That does not prejudice his case in opposition to the application. All that it does is to make the court miss the “marketing language” that would or would not convince it to make a finding in his favor. The Court is nevertheless enjoined to consider the merits of the application.



After all, there are many cases that are decided without parties' submissions. With that, this Court now proceeds to decide on the merits of the application.

19. The law regarding the grant or refusal to grant an order of injunction is now settled. This Court starts the determination herein by noting that the application was brought under the correct provision which was accompanied by what the Applicant termed as "all the other enabling provisions of the law." This Court does not hesitate to find that the meaningless phrase "all other enabling provisions of the law", for reason of failure by the applicant to explain and show what it means, is irrelevant.
20. The provision that governs the grant or otherwise of the injunction are stipulated in Order 40 Rule 1 of the Rules. It is to the effect that;

"Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances according reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks or until the disposal of the suit or until further orders."

21. Further, Order 40 Rules 6 provides;

"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

22. Thus, if this Court finds it merited to issue the injunction herein, it shall be only for twelve months. That said, the law regarding the grant of temporary injunctions is enunciated in the case of *Giella V. Cassman Brown & Co. LTD* (1973) EA 358. In it, the Court held that for a party to succeed for grant of such an order he/she/it has to satisfy 3 conditions, namely, he/she have a prima facie case with a probability of success, and if he does so, that he will suffer loss which may not be compensated by way of damages, and where the Court was in doubt it should decide the matter on a balance of convenience.
23. Courts have repeated these principles severally. Thus, in *Nguruman Limited V. Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012, the Court emphasized the importance of satisfying all the three requirements for an order of injunction to issue. It stated: -

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.



24. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied separately, distinctly and in a logical manner such that each form sequential hurdles the applicant is expected to surmount. It will, however, not be sufficient for the applicant to establish a prima facie case alone. He has to go a step further and show that he will suffer irreparable injury the event the injunction is not granted. Where the Court is in doubt it settles the issue on a balance of convenience. But the existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.
25. Applying the above principles to the facts of the instant case, the Applicant contended that the Respondent was not in occupation of the land. That he moved onto it and started cultivating after he filed the instant suit. He also stated that the registered owner died in the year 2002. That sometime after wards they (“we”) moved to Kabondo and have been residing there since then to date. Further, that they left the land fallow and with no one on it. The Applicant deposed that the Respondent was about to sell a portion of the land to a third party, but he did not back up that evidence with any documentary evidence. That must have been a claim to whip this Court’s emotions towards seeing an urgency that does not exist.
26. On his part the Respondent argued that he moved onto the land without the permission of the deceased, Michael Abuto Ongeche during his lifetime. Even after the death of the owner, he continued to occupy and use the land to date. He contended that for the court to issue an injunction it would mean dispossessing him of the land he had been on for over 24 years.
27. The Respondent’s depositions about the length of time he had been on the land, coupled with the admission by the applicant that by the time he filed the Application the Respondent was already on the land and had cultivated it makes this Court to believe the Respondent more than the Applicant. The Applicant has not established a prima facie case to warrant the grant of the orders sought. In any event, the balance of convenience tilts in favour of the Respondent who had already moved this Court was before the instant application for a declaration that he is in adverse possession of the suit property. Thus, the application fails. It is dismissed with costs to the Respondent.
28. The Originating Summons is to proceed to hearing. To hasten the hearing thereof, the parties herein are directed to file and exchange their well paginated trial bundles in accordance with Order 11 of the Civil Procedure Rules and Section 28(g) of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts, strictly within the next twenty-one (21) days. The Originating Summons shall come for directions and mention on March 4, 2025.
29. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 21ST DAY OF JANUARY, 2025

Hon. Dr. iur Nyagaka

Judge

In the presence of,

1. Ms. Mimba Advocate for the Applicant -Absent
2. Nyakwamba Advocate for the Respondent Present.

