

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. E053 OF 2024

DR. BONIFACE OKUMU OSODO.....APPELLANT
VERSUS
CHRISTIAN SIMIGINI OSODO.....
RESPONDENT

(An appeal arising from orders made in the ruling of Hon. Anne Karimi Njeru, Senior Resident Magistrate, SRM, in Port Victoria SRMCCC No. E001 of 2024, of 17th September 2024)

JUDGEMENT

1. The suit, at the trial court, was by the appellant herein, against the respondent. It sought a permanent injunction, to restrain the respondent from interfering with, visiting, threatening to kill or forcefully entering the home of the appellant, situate within Bunyala/Mudembi/3129. There was a prayer for police protection.
2. The appellant filed a Motion, under certificate of urgency, simultaneously with the plaint, seeking a temporary injunction, to restrain the respondent from entering, interfering, visiting, threatening or forcefully entering the said property, Bunyala/Mudembi/3129, pending hearing and determination of the suit. There were also prayers that the respondent be barred from being seen within the Bunyala area, unless accompanied by police officers, for the officer in charge of the Rumbwa Police Station to be ordered to conduct investigations and report to court, and for the police to provide him with security.

3. The respondent reacted to that application, by an affidavit, sworn on 3rd June 2024, in which he asserted that the land in question, Bunyala/Mudembi/3129, was ancestral land, to which he had beneficial interest, and in respect of which he could not be barred from entering.
4. The trial court delivered a ruling, on 17th September 2024, where it noted that the dispute was over occupation of the land. It noted too that the appellant had conceded, in his written submissions, that the land was ancestral, and that what he wanted was to restrict access to it, by the respondent, for his safety. In the end, the court concluded that the test in *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 (Sir William Duffus P, Spry VP & Law JA), for grant of temporary injunctions, had not been established.
5. The appellant was aggrieved, hence the instant appeal. The principal ground is that the trial court had converted a suit over security to one over land.
6. Directions were given, on 22nd September 2025, for canvassing of the appeal, by way of written submissions. Both sides complied, by filing their respective written submissions, which I have read and noted the arguments made.
7. Did the trial court convert a dispute over security into one on land? I do not think so. The primary prayer, in the application, dated 22nd May 2024, was for an injunction order, to restrain access to land, Bunyala/Mudembi/3129. There was no way the trial court was going to consider grant of that prayer without delving into the underlying land issues, which, in any event, were raised by the parties, in their various filings. What the trial court discussed, with respect to the land issues, was based on what the parties themselves raised in their papers. Those issues were at the heart of what needed to be considered, in assessing whether or not temporary injunctive

relief could be granted, based on *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 (Sir William Duffus P, Spry VP & Law JA). The trial court did not create alternative facts.

8. I note that it is argued that the trial court considered issues that ought to have been considered at trial. Yet, the principal prayers, in both the plaint and the Motion, are on injunctions, permanent and temporary, for whom the considerations, for grant of either, are similar. The facts, around which the court has to determine either, are the same. The danger with seeking a permanent injunction in the main suit, and then filing an interlocutory application for a temporary injunction order pending the suit, is that the same facts will have to be considered, and the determination, at the interlocutory stage, may be a pointer to what may happen at the main hearing. It is a very thin line.
9. Indeed, in suits of this nature, where similar prayers are sought in the plaint and in an interlocutory application, the main suit may, obliquely, be disposed of, unintentionally, at the interlocutory stage. Parties ought to be careful, with what they seek at the interlocutory stage, to obviate the possibility or risk of weakening their cases, or having them substantially or finally determined, at that point.
10. On the land matter not being the primary matter, my answer will be simple, it was the appellant who elevated it to that. The principal prayer, in the plaint, is for a permanent injunction, to restrain the respondent from accessing the land. The principal prayer, in the Motion, was for a temporary injunction, again, to restrain access to the land, by the respondent. The placing or situating of these 2 principal prayers, locates the land issue at the heart of the suit, and pushes the security issues to the periphery.

11. In any case, the safety and security issues should not be in the realm of civil matters. The threats, that the appellant refers to, relate to a threat to kill him. Those are matters in the realm of criminal law. That would explain why they were reported to the police, for investigations and possible prosecution, and not to administrative officers, such as the Chief or County Commissioners. Any proceedings, to fast-track investigations, founded on those reports, of the threats, ought to have been placed before the appropriate court, in criminal or constitutional proceedings, where the Inspector-General of Police/Director of Criminal Investigations, or their subordinates, and the Director of Public Prosecutions are parties. Surely, orders cannot be sought against the police, when the relevant offices or entities responsible for security, policing and prosecution, who should be the right parties to address such issues, are not even made parties to the matter.
12. I am not persuaded that the trial court did not exercise discretion properly. It handled what was placed before it, based on the facts deponed in support of the application. It properly handled the application, based on those facts, and arrived at the correct findings and conclusion. The suit and the application were not properly conceived, for the purpose of meeting the objectives that the appellant was pursuing. They could not, possibly, be a proper vehicle, for grant of the sort of orders sought.
13. One more thing, the primary prayers, in the plaint and the Motion, were for injunctive relief, to restrain access to land. Issues around title to land, who could use certain land, and who could occupy or have access to it, are outside of the jurisdiction of the High Court. Article 162(2) of the Constitution confers jurisdiction, over such matters, on the Environment and Land Court. Article 165(5) of the Constitution, asserts, in no uncertain terms, that the High Court shall not exercise jurisdiction over such issues. An

appeal on whether or not an injunction should have been granted, to bar a person from accessing land, would be outside my remit, in the circumstances.

14. There is no merit in the appeal herein, and I hereby dismiss the same. Let the trial court records be returned to the trial court, while the instant file shall be closed. This being a dispute between a father and his son, I shall refrain from making orders on costs. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA, ON THIS 22ND DAY OF DECEMBER
2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Barrack, instructed by Kendi & Company, Advocates for the appellant.

Mr. Okanda, instructed by Otieno Okanda & Company, Advocates for the respondent.