



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

**AT MIGORI**

**ELC CASE NO. 821 OF 2017**

**CAREN ONDIEK AGWA (Suing as the**

**administrator of the Estate of the late**

**JOSHUA AGWA AKOKO.....PLAINTIFF/APPLICANT**

**VERSUS**

**MELKISHADEK AKOKO OCHICH.....DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of an application by way of a Motion dated 7<sup>th</sup> September, 2017 brought pursuant to Order 40 Rules 1(a) of the Civil Procedure Rules and Section 1A & B, 3A & 63 (e) of the Civil Procedure Act by the Plaintiff/applicant against the defendant/respondent. She is seeking principal orders as hereunder;

**i. THAT a temporary injunction do issue directed at the defendant, his employees, workers, agents and/or whomsoever jointly and severally restraining them from trespassing, fencing off, constructing, remaining on, cultivating, evicting the plaintiff, or in any way interfering whatsoever with the deceased's land parcel Central Karachuonyo/Kogweno/Kawuor/1322 (hereinafter referred to as the suit land) pending the hearing and determination of this suit.**

**ii. THAT the costs of this application be provided for.**

2. The plaintiff /applicant is represented by learned counsel Mr. Bruce Odeny of Bruce Odeny and Co. Advocates. The defendant/respondent is represented by learned counsel Mr. Marvin Odero of Okongo Wandago & Co. Advocates.

3. On 15/2/2018, by the discretion of this court under **Order 51, Rule 16 of the Civil Procedure Rules, 2010** and direction No. 33(a) of the Environment and Land Court practice directions, 2014, counsel for the respective parties were directed to canvass the application by oral submissions. Time was limited to five (5) minutes for each counsel and they submitted accordingly.

4. The application is premised on a supporting affidavit sworn on 7/9/17 by the plaintiff/applicant and the following documents;

**a) A certificate of death Serial No. 928205 in relation to Joshua Agwa Akoko issued on 27/4/2006 marked AA0 -1**

**b) A limited Grant of Letters of Administration Ad Litem issued to the plaintiff/applicant in Oyugis SPMC Succession Cause No. 214 of 2017 marked AA0 – 2**

**c) A certificate of Official Search of 24/9/2015 in respect of the suit property marked AA0 - 3**

5. The application is further anchored on four (4) grounds. These include :-

a) The deceased plaintiff is the registered owner of land parcel **CENTRAL KARACHUONYO/KOGWENO/KAWUOR/1322**.

b) The plaintiff is both the administrator and widow to the deceased and in actual physical possession and control of the property.

c) On 20<sup>th</sup> August 2017 the defendant unlawfully trespassed into the suit property and started constructing a semi-permanent house with intentions of settling there.

6. In his replying affidavit sworn on 12<sup>th</sup> February 2018, the defendant/respondent opposed the application, urged the court to dispense with it and that the main suit be adjudicated. He averred, inter alia, that he bought the suit land which measures approximately 0.96 hectares out of **LR NO. CENTRAL KARACHUONYO/KOGWENO/KAWUOR/137** which measured about 1.6 hectares registered in the name of the deceased who put him into exclusive continuous and uninterrupted possession of the suit property since 08/1/2004. He stated that he has put up a semi-permanent house and a permanent fence on and around the suit land respectively.

7. In support of his replying affidavit, the defendant /respondent exhibited, among others, the following documents:-

**a) Certificate of Official Search dated 8/2/2017 showing that he is the proprietor of the suit property marked MA0 -1**

**b) Land sale agreement dated 8/1/2004 marked MA0 -2**

**c) Sale of land agreement of 26/12/2003 marked MA0 -3**

8. By a supplementary affidavit sworn on 15/2/2018, the plaintiff/applicant, termed the replying affidavit, false and forgery, among others. He exhibited to the affidavit, an order dated 21/3/2017 issued in Kisumu High Court Petition No. 3 of 2017 (COA 1) and sale of land agreement dated 8/1/2004 (COA 2)

9. In his submissions learned counsel for the plaintiff/applicant referred to orders sought, affidavit in support of the application and the case of **Giella –v- Cassman Brown Co. Ltd (1973) EA 358**. He submitted that the documents presented to the court by the defendant/respondent in response to the application are a forgery. He further submitted that the plaintiff continued to till the suit property until last year when the defendant did trespass into the land. The deceased died 12 years ago and succession is going on in Oyugis Law Courts since 2/6/2017. He submitted that the future of the plaintiff is bleak and she may not enjoy the fruits of the estate and that her husband was buried on the land.

10. Learned Counsel for the defendant/respondent submitted by reliance on the replying affidavit in its entirety. He urged this court to disregard document marked COA 2 to the supplementary affidavit and there is no evidence of fraud as alleged as well as syndicate by the local area chief is not averred in the supporting and the supplementary affidavits. He urged the court to examine the pleadings, the application, and the replying affidavit and dismiss the application.

11. I have studied the entire application, the replying affidavit, the supplementary affidavit and submissions by both counsel. The issues for determination at this interim stage are whether the plaintiff/applicant has met the three (3) principles of granting an injunction as laid down in **Giella case (supra)** and whether she is entitled to the orders sought. The principles are :-

a) **The applicant must show a prima facie case with a probability of success.**

b) **The applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.**

c) **If the court is in doubt, it will decide an application on the balance of convenience.**

12. A prima facie in a Civil application includes but is not confined to “ a genuine and arguable case” as defined in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125**. There is apparent infringement of the rights of the plaintiff/applicant by the defendant/respondent as discerned in the application. By his replying affidavit and documents marked MAO -1 to 3, the defendant/respondents has seriously contested the plaintiff /applicant’s claim. Therefore the suit land calls for an order of preservation worthwhile to enable the court to hear and determine the suit on its merits.

13. In **Musa Angira –vs- Industrial and Commercial Development Corporation (2015) e KLR**, it was held that the issues in the matter were highly contested and the court was of the view that to conserve and preserve the suit property, an order for the maintenance of the maintained status quo was merited in lieu of a temporary injunction in the terms sought in the matter. It was ordered accordingly.

14. In the instant application, the issue are highly contested. The parties did not agree to maintain status quo prevailing on the suit land. **Practice direction No. 32 of the Environment and Land Court Practice Directions dated 25<sup>th</sup> July, 2014** reads:-

*“During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interest of justice” (Emphasis added)*

15. Under **Section 13(7) of the Environment and Land court Act (2015), 2011**, this court has powers to order and grant interim preservation orders. I am of the view that those orders include maintenance of the prevailing status quo as aptly held by Hon. Justice Mutungi J. In **Angira Angira case (Ibid)**.

16. In **National Bank of Kenya Ltd –v- Shimmers Plaza Ltd (2009) KLR 278** at 283, it was held that an injunction is an equitable and discretionary remedy. It’s duration is the sole discretion of the trial judge and depends on circumstances of each case.

17. In the upshot, the application is lighted by the fact that the issues in this suit are strongly contested, the provisions of the law and case law cited. I find that the merited order at this stage, is maintenance of the obtaining status quo on the suit land rather than an injunction in the terms sought in the application.

18. Accordingly, I order the parties to maintain the obtaining status Quo whereby either party shall not erect further permanent structures on and or transfer or sub divide or part with any portion of the suit land pending the hearing and determination of the suit.

20. Costs of the application shall be in the cause.

**DELIVERED, SIGNED and DATED** in open court at MIGORI this **14<sup>th</sup>** day of **MARCH , 2018**

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of:**

No appearance for the Defendant/Respondent

Mr. Agure Odero learned counsel holding brief for Mr. Bruce Odeny learned counsel for the Plaintiffs/Applicant

Tom Maurice Court Assistant

**G. M. A. ONGONDO**

**JUDGE**