



**Navaka (Suing as administrator ad litem of the Estate of Nicodemus Omondi Onani (Deceased)
v Adundo (Administrator of the Estate Of Adundo Wameyo Wameyo (Deceased) & another
(Environment & Land Case E10 of 2023) [2024] KEELC 68 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 68 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E10 OF 2023
BN OLAO, J
JANUARY 23, 2024**

BETWEEN

**CHARLES NAVAKA (SUING AS ADMINISTRATOR AD LITEM OF THE
ESTATE OF NICODEMUS OMONDI ONANI (DECEASED) PLAINTIFF**

AND

**KALISTA BARASA ADUNDO (ADMINISTRATOR OF THE ESTATE OF
ADUNDO WAMEYO WAMEYO (DECEASED) 1ST DEFENDANT
BUSIA LAND REGISTRAR 2ND DEFENDANT**

RULING

1. This is in respect to the Notice of Motion dated 16th September 2023 by Charles Navaka (the Plaintiff herein and suing as Administrator to the Estate of his late father Nicodemus Omondi Onani) and which is premised under the Provisions of Order 40 Rules 1 and 2 of the [Civil Procedure Rules](#).
2. By the application, the plaintiff seeks the following orders:
 1. Spent
 2. Spent
 3. That the 1st defendant herein whether acting by himself, his agents, servants, employees and/or anybody acting under his instructions be and are hereby restrained from selling, charging, cultivating, disposing or in any other way dealing with the land parcel no Marachi/kingandole/531 pending the hearing and determination of this suit.
 4. That costs of the application be provided for.



3. The gravamen of the application is that Nicodemus Omondi Onani (hereafter Onani) and who was the father to the plaintiff had in 1978 jointly purchased the land parcel no Marachi/kingandole/531 (the suit land) with the 1st defendant's late father Adundo Wameyo Wameyo (also deceased and hereafter referred to as Wameyo). That the suit land was subsequently sub-divided into parcels No Marachi/kingandole/1244 and 1245 with the latter being the portion of Onani for which he had paid Kshs 3,500. That the family of Onani took possession of the parcel No. Marachi/kingandole/1245 in 1980 which they occupied peacefully. However, upon the demise of Wameyo, the 1st defendant who is his son forcefully and unlawfully evicted the plaintiff's family from the said land. Thereafter, between 2018 and 2023, the 1st defendant without the knowledge of the plaintiff and his family filed for Succession in respect to Wameyo's Estate in Busia court succession cause No 187 of 2014 and included the land parcel No Marachi/kingandole/1245 as part of his Estate. The plaintiff did a search at the Kakamega regional lands office and established that both Onani and Wameyo had signed the application to sub-divide the suit land into parcels No Marachi/kingandole/1244 and 1245 as well as the mutation form yet that is not reflected in the Green Card. That the 1st defendant conspired with officials at the Busia lands office and the documents in respect to the suit land are conspicuously missing with the intention being to grab the land of Onani and deprive his Estate of the same.
4. That despite several requests and demands, the 1st defendant and his family have refused to vacate the land belonging to Onani's family and continue to trespass thereon. The plaintiff and his family continue to suffer irreparable loss which cannot be compensated in damages.
5. The following documents are annexed to the supporting affidavit by the plaintiff:
 1. Copy of Limited Grant of Letters of Administration *Ad Litem* issued to the plaintiff and others in Busia cm court succession cause No 85 of 2023 for purposes of filing suit to safeguard the interests of Onani.
 2. Copy of Identity Card of the plaintiff.
 3. Copy of Mutation Form dated 1st February 1980 for the sub-division of the land parcel No Marachi/kingandole/531 to create land parcels No Marachi/kingandole/1244 and 1245 signed by Onani and Wameyo.
 4. Copy of receipt dated 3rd November 1979 in the name of Onani.
 5. Copy of application for consent to sub-divide the land parcel No Marachi/kingandole/531 measuring 26 acres into two portions marachi/kingandole/1244 and 1245 measuring 21 acres and 5 acres the latter being transferred to Onani.
 6. Copy of letter of consent to sub-divide the land parcel No Marachi/kingandole/531 dated 30th January 1979.
 7. Copy of Registry Index Map showing the sub-division of the land parcel No Marachi/kingandole/531 to create parcels No Marachi/kingandole/1244 and 1245.
 8. Copy of Green Card for the land parcel No Marachi/kingandole/531.
6. The application is opposed and the 1st defendant Kalista Barasa Adundo filed a replying affidavit dated 16th October 2023 in which he deposed, *inter alia*, that he is the personal representative to the Estate of Wameyo who died on 15th December 1981. That the deceased was survived by:
 1. Kalisto Barasa Adundo.
 2. Fredrick Adundo.



3. Charles Owino Adundo.
 4. Kenneth Wesonga Adundo.
 5. Christopher Opondo Wekedo.
 6. Erick Wafula Muyoma.
7. That Wameyo left behind the land parcel No Marachi/kingandole/531 measuring 26 acres and in the late 1980'S Onani leased a portion thereof for purposes of planting sugarcane which was contracted to Mumias Sugar Company. That the said Onani leased the land and planted sugar until 1990 when he stopped and surrendered vacant possession and never used it again until his demise on 13th November 2008. The suit land has been surveyed and shared between the family of Wameyo and Were Wameyo.
8. The portion for Wameyo is currently being used by the following:
- a. Fredrick Onyango Adungo – 1.0 hectare.
 - b. Kenneth Nesonga Adundo – 1.0 hectare.
 - c. Charles Owino Adundo – 1.0 hectare.
 - d. Kalista Barasa Adundo – 2.5 hectares.
 - e. Wafula Erick Mugoma – 0.06 hectare.
9. The portion for Were Wameyo measuring 4.20 hectares is being occupied by Christopher Opondo Nekedo, Charles Nakhabi Wakedo, Paul Simiyu Wakedo and Francis Nyongesa Were. That the suit land has never been sub-divided to create the land parcels No Marachi/kingandole/1244 and 1245 and was never occupied by the lawful beneficiaries of Onani's estate.
10. Annexed to the replying affidavit are the following documents:
- 1) Copy of Grant of Letters of Administration issued to the 1st defendant in respect to the Estate of Wameyo on 2nd October 2014 in Busia high court succession cause No 187 of 2014.
 - 2) Copy of Letter from Assistant chief Kingandole Sub-location dated 22nd May 2014 addressed to the high court Busia and detailing the dependants of Wameyo.
 - 3) Copy of letter from Assistant chief Kingandole sub-location dated 11th February 2014 addressed to the Registrar Of Birth & Death confirming the death of Wameyo.
 4. Copy of certificate of search for the land parcel No Marachi/kingandole/531 showing it was registered in the name of Adundo Wameyo on 9th November 1978.
 - 5) Copy of Green card for the land parcel No Marachi/kingandole/531 showing that as at 18th October 2017 it was registered in the names of the following pursuant to orders issued in Busia high court succession cause No 187 of 2014:
 1. Christopher Opondo Wakedo – 4.20 hectares.
 2. Fredrick Onyango Adundo – 1.0 hectare.
 3. Kenneth Wesonga Adundo – 1.0 hectare.
 4. Kalista Barasa Adundo – 2.5 hectares.
 5. Wafula Erick Mugoma – 0.60 hectare.



6. Map for the land parcel No Marachi/kingandole/531.

11. The plaintiff filed a supplementary affidavit dated 27th October 2023 in which he deposed that the 1st defendant in his replying affidavit has confirmed that he and his family have unlawfully occupied part of the suit land as if the whole of it was part of the Estate of Wameyo and in the process, they have grabbed the Estate of Onani. That contrary to the said replying affidavit, the late Onani had not leased part of the suit land but had purchased it in 1978 and even signed part of the mutation form. That the plaintiff and his family have been in peaceful occupation of the suit land farming it until the demise of Onani when the 1st defendant and his family interrupted their occupation and refused to vacate. That this court should expunge from the record the copy of certificate of search marked BA-3 as it is not certified by the Land Registrar and is therefore inadmissible. That the 1st defendant has no colour of right to occupy the suit land which was successfully sub-divided to create the land parcels No Marachi/kingandole/1244 and 1245 and the 1st defendant has colluded with individuals at the Busia lands office to tamper with the records and grab property belonging to the Estate of Onani. The plaintiff annexed to his supplementary affidavit the Mutation Form for the land parcel No Marachi/kingandole/531 which he had in fact already annexed to his earlier supporting affidavit but also added the Map from the Marachi/kingandole section from the regional surveyor records office Kakamega.
12. The application has been canvassed by way of written submissions. The same have been filed both by Mr Odhiambo instructed by the firm of O. O. Wilson Advocates for the plaintiff and by Mr Otanga instructed by the firm of Bogonko Otanga & Company Advocates for the 1st defendant. The 2nd defendant did not file any response to the application.
13. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
14. This being an application for an order of temporary injunction pending trial, it has to be determined in line with the principles set out in the case of *Giella v Cassman Brown & Co. Ltd* 1973 EA 358. That means, the plaintiff is required to meet the following:
 1. Establish a *prima facie* case with a probability of success.
 2. Demonstrate that unless the order of temporary injunction is granted, he might suffer irreparable injury which cannot adequately be compensated by an award of damages.
 3. If in doubt, the court will decide the application on the balance of convenience.

A *prima facie* case was defined in the case of *Mrao v First American Bank Of Kenya Ltd & Others* C.a. Civil Appeal No 39 of 2002 2003 eKLR as:

“... a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In the case of *Nguruman Ltd v Jan Bonde Nielsen & Others* C.a. Civil Appeal No 77 of 2012 [2014 eKLR], the Court of Appeal adopted *Giella v Cassman Brown (supra)* and went on to add that:

“We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”.



The court went on to state thus;

“The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as is otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

And as was held in the case of *Films Rover International v Cannon Film Sales Ltd* 1986 3 ALL E.R. 776, a court considering such an application should take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

15. Guided by the above, it is common knowledge that the suit land, as per the copy of the Green Card, was first registered in the name of one Kede Wameyo on 8th November 1966 as the first proprietor. It is currently registered in the names of the 1st defendant and five (5) others since 18th October 2017 with each entitled to an identifiable portion thereof. The certificate of search annexed to the 1st defendant’s replying affidavit shows that infact Wameyo was the second registered proprietor on 9th November 1978 following correction of name. As the registered proprietors, the 1st defendant and his co-proprietors are deemed, as per Section 24(a) of the [Land Registration Act](#), to be the “absolute” owners of the suit land. Their title can however be impeached or subjected to other overriding interests. The plaintiff has pleaded that infact his deceased father Onani purchased a portion thereof measuring 5 acres and which is supposed to be land parcel No Marachi/kingandole/1245. This has been rebutted by the 1st defendant who has deposed that the said Onani only leased the suit land to grow sugar cane and vacated it in 1990. Documents including Mutation Forms and Application for transfer have been produced which suggest a sale. At this point, the court is not required to examine closely the merits of the case or otherwise. All I need to consider is whether or not the plaintiff has shown “that he has a fair and bone fide question to raise as to the existence of the right which he alleges” – [Nguruman Ltd v Jan Bonde Nielsen](#) (*supra*). I think a prima facie case is established.
16. On the issue of irreparable loss, however, it is clear that the plaintiff and his family are not in occupation of the suit land. They claim to have been forcefully evicted therefrom while the 1st defendant claims that infact the plaintiff’s family vacated in 1990 and never went back. Those will be issues for the trial. What is clear however is that the 1st defendant cannot be restrained from cultivating land of which he is in occupation and possession. It is doubtful if that remedy is available to the plaintiff in the circumstances.
17. Based on the balance of convenience, however, I am persuaded that pending the hearing and determination of the suit, it is necessary that the suit land is preserved. Otherwise, this court will not be in a position to determine whether or not Onani purchased a portion thereof measuring 5 acres and which was designated as land parcel No Marachi/kingadole/1245 and if the plaintiff and his family are entitled to the same or whether infact Onani was simply a lessee who voluntarily vacated it and was not forcefully and unlawfully evicted therefrom Pending the resolution of those competing interests, it is in the interest of justice that the status quo prevailing is maintained but with an order that the suit land is not alienated.



18. In the circumstances of this case, I find it prudent to invoke the provisions of Section 68(1) of the [Land Registration Act](#) which provides:

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until further orders, the registration of any dealing with any land, lease or charge”.

19. Ultimately therefore and having considered the Notice of Motion dated 16th September 2023, this court makes the following disposal orders:

1. The defendant and his family shall remain in occupation and possession of the land parcel No Marachi/kingandole/531 or any sub-division thereof but they shall not sell, charge, lease or in any way alienate the same until this suit is heard and finally determined or until further orders or this court.
2. The Land Registrar Busia and who is the 2nd defendant in this case shall forthwith comply with the above inhibition order by registering the same on the title No Marachi/kingandole/531 or any resultant sub-divisions thereof.
3. The parties shall as soon as possible file and exchange all relevant documents and attend pre-trial before the Deputy Registrar on 19th February 2024 to confirm compliance and take a date for hearing.
4. The plaintiff is cautioned that this suit must be heard and determined within the next 12 months or else the order of inhibition shall lapse unless otherwise extended by this court.
5. The Deputy Registrar shall forthwith serve this order on the Land Registrar Busia to ensure compliance with order (2) above.
6. Costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF JANUARY 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

