



**Bett & 2 others v Samura (Enviromental and Land Originating Summons  
E010 of 2023) [2024] KEELC 270 (KLR) (22 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 270 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2023  
EM WASHE, J  
JANUARY 22, 2024**

**IN THE MATTER OF SECTION 28(H) OF THE LAND REGISTRATION  
ACT, NO.3 OF 2012, SECTION 13,37 AND 38 OF THE LIMITATIONS OF  
ACTIONS ACT, CHAPTER 23 LAWS OF KENYA AND SECTION 30(F) OF  
THE REGISTERED LAND ACT (REPEALED) CAP 300 LAWS OF KENYA**

**BETWEEN**

**WILSON BETT ..... 1<sup>ST</sup> APPLICANT**

**RECHO CHEBWOGEN MARITIM ..... 2<sup>ND</sup> APPLICANT**

**STANLEY KIPKEMBOI KIPKETUYI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KOILEKENOLE SAMURA ..... RESPONDENT**

**RULING**

1. The 1<sup>st</sup> to 3<sup>rd</sup> Applicants (hereinafter jointly referred to as “the Applicants”) have filed a Notice of Motion application dated 25.09.2023 (hereinafter referred to as “the present application”) against the Respondent seeking for the following Orders; -
  - a. That the service of this Application be dispensed with in the first instance and the same be certified urgent and heard ex-parte due to the urgent nature of the reliefs sought.
  - b. That pending the hearing and determination of this application, this Honourable Court be pleased to issue a temporary injunction/order restraining the Respondent by himself, his agents, assignees, employees and/or any other person from selling, leasing, charging, transferring to third parties, alienating or otherwise dealing and/or tampering with the whole of the Land Parcel Number Transmara/kimintet C/186 and Transmara/kimintet C/187.



- c. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue temporary injunction/orders restraining the Respondent by himself, his agents, assignees, employees and/or any other person from evicting or otherwise interfering with the Applicants' quiet occupation and enjoyment of the Land Parcels Transmara/kimintet C/186 and Transmara/kimintet C/187.
  - d. That this Honourable Court be pleased to adopt the judgement in Narok ELC Case No.556 OF 2017 which was in reference to the same portion of land and similar facts.
  - e. That this Honourable Court be pleased to Order the 1<sup>st</sup> Defendant to initiate the process of transferring to each applicant the respective portions of Land Parcels Number Transmara/kimintet C/186 and Transmara/kimintet C/187 that they are in occupation of being 3 acres for the 1<sup>st</sup> Applicant, 2 Acres for the 2<sup>nd</sup> Applicant and 3 Acres for the 3<sup>rd</sup> Applicant.
  - f. That costs for this Application be provided for.
2. The grounds upon which the prayers sought hereinabove are premised can be summarised as follows; -
- a. The Applicants herein separately and individually purchased various portions of land from the Respondent who originally owned the property known as LR No. Transmara/kimintet C/69.
  - b. Upon payment of the agreed purchase price, the Respondent handed over possession of the said portions of land to the Applicants individually within the original property known as LR No. Transmara/kimintet C/69.
  - c. The Applicants have been in occupation of the said portions of land on the Respondent's property known as LR No. Transmara/kimintet C/69 for over a period of 24 years.
  - d. However recently, the Respondent caused a sub-division of the property known as LR No. Transmara/kimintet C/69 thereby creating two parcels of land known as LR No. Transmara/kimintet C/186 and Transmara/kimintet C/187 which he now intends to dispose of to other third parties.
  - e. The Applicants position is that the portions of land which each one of them purchased from the Respondents are within the newly created properties known as LR NO. Transmara/kimintet C/186 and Transmara/kimintet C/187.
  - f. Consequently therefore, any disposition of the properties known as LR NO. Transmara/kimintet C/186 and Transmara/kimintet C/187 will dispossess them of their ownership over the individual portions of land and remove them from the places they have called home for over 24 years.
  - g. The Applicants are seeking this Honourable Court to issue a temporary injunction to stop the Respondent from disposing off the new sub-divisions known as LR No. Transmara/kimintet C/186 and Transmara/kimintet C/187 pending the hearing and determination of this Application.
  - h. Further to that, the Applicants are seeking this Honourable Court to issue a temporary injunction against the Respondent for evicting them and/or otherwise interfering with their quiet occupation and enjoyment on the various portions of land within the newly created parcels known as LR No Transmara/kimintet C/186 and Transmara/kimintet C/187 pending the hearing and disposal of the application.



- i. The Applicants conclude their grounds by stating that in the event these orders are not granted, then they will suffer irreparable losses and injury by the time the substantive suit is heard and determined which can not be compensated by way of damages.
3. The Respondent was indeed served with the present Application and opposed the same by filing a Replying Affidavit sworn on the 06.10.2023.
4. The grounds outlined in the Replying Affidavit sworn on the 06.10.2023 in opposition of the present Application can be summarised as follows; -
  - a. The Respondent denied ever selling any portions of his property known as LR No.Transmara/kimintet C/69 to any of the Applicants herein.
  - b. Consequently therefore, the purported Agreements For Sale produced by the Applicants are forgeries and subject to investigations by the Directorate of Criminal Investigations.
  - c. In the meantime, the Respondent denies that the purported Agreements For Sale bestow any proprietary interests to the Applicants over any portion of the land formerly known as LR.No.Transmara/kimintet C/69 as alleged in the present application.
  - d. The Respondent further submitted that indeed some people who had lawfully purchased his property known as LR.No.Transmara/kimintet C/69 filed a suit before the Narok ELC and obtained orders directing that the said property be sub-divided and he transfers their portions into their names.
  - e. Based on this directions from the proceedings in Narok, the property known as LR No.Transmara/kimintet C/69 was sub-divided upon securing the necessary Land Control Board Consent.
  - f. The Respondent further pleaded that none of the Applicants herein is in occupation of any portion of either the original LR No.Transmara/kimintet C/69 or the resultant properties known as LR.No.Transmara/kimintet C/186 and Transmara/kimintet C/187 as alleged.
  - g. Lastly, the Respondent indicated that the Applicants have moved this Honourable Court for a prayer of adverse possession through a Notice of Motion application contrary to the provisions of Order 37 Rule 7 of the *Civil Procedure Rules*, 2010 and therefore both the present Application and the purported Notice of Motion should be dismissed forthwith.
5. The Applicants upon being served with the Replying Affidavit dated 06.10.2023 responded through a Further Affidavit sworn on the 01.11.2023.
6. The Applicants in their Further Affidavit sworn 01.11.2023 reiterated the following facts; -
  - a. The Applicants reconfirmed that the Agreements For Sale between them and the Respondents are indeed valid and binding.
  - b. The present Application was competently before the Honourable Court based on the Originating Summons dated 26.09.2023.
  - c. The Applicants were in actual possession which they have enjoyed by cultivating on the said portions of land up to date and even the 3<sup>rd</sup> Applicant has buried his daughter on the said portion he purchased.



- d. The Applicants stated that although they were not parties to the proceedings before the Narok ELC, their belief was that the implementation of the orders therein would also resolve their pending issue of documentation but that has not happened.
  - e. Unfortunately, the Respondent has now began threatening to evict them from their portions of land and disposing it off to third parties hence the present application.
7. The parties herein then proceeded to prepare and file their submissions with the Applicants filing theirs on 01.11.2023 while the Respondent file his on the 30.11.2023.
  8. The Honourable Court has indeed gone through the present Application, the Replying affidavit, Further Affidavit as well as the submission by both sides.
  9. It is the Honourable Court's considered view from the onset that the only prayers which can be dealt with through the present application are Prayers No.2 and Prayer No.3.
  10. This is because if the Honourable Court is to evaluate and/or delve into the substance of Prayer No.3 and 4, then it would require it to go to the merits of the substantive Originating Motion dated 26.09.2023 including whether or not the decision of the Narok ELC applies to the Applicants herein.
  11. In effect therefore, any determination of Prayer No.3 and 4 can not be done without making findings on the substantive Originating Summon which is not the subject of determination at this point.
  12. In other words, the only issue for determination in the present application is whether or not the Applicants are entitled to an order of temporary injunction against the Respondent stopping him from evicting, interfering and/or selling off their portions of land claimed to be within the properties known as LR.No.Transmara/kimintet C/186 and Transmara/kimintet C/187.
  13. The statutory provision dealing with temporary injunction is Order 40 Rule 1 which reads as follows; -
    - “ 1. 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 affording 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 fit until the disposal of the suit or until further orders”
  14. In the case *Kibutiri v Kenya Shell Limited* Nairobi High Court Civil Case No. 3398 Of 1980 (1981) KLR, the Court pronounced itself as follows; -
    - “The conditions for granting a temporary injunction is East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by



an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries v Trufoods* (1972) EA 420.”

15. Based on the three ingredients outlined hereinabove, this Honourable Court will now proceed to evaluate the facts of the present application and make the appropriate determination.
16. The first ingredient for determination is whether or not the Applicants have established a prima facie case.
17. The description of a prima facie case was discussed in the case of *Mrao v First American Bank Of Kenya & 2 Others* (2003) KLR,125 wherein the Court stated as follows; -

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is 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.”
18. In this present Application, the Applicants are seeking for adverse possession against the Respondent on the basis of their occupation in the original property known as LR No. Transmara/kimintet C/69 and now within LR No. Transmara/kimintet C/186 and Transmara/kimintet C/186 and Transmara/kimintet C/187.
19. The Applicants have pleaded that their occupation on portions of LR No. Transmara/kimintet C/186 and Transmara/kimintet C/187 was based on various Agreements For Sale with the Respondent and taking of actual possession of said portions of land.
20. The Applicants have produced the purported Agreements For Sale executed between themselves and the Respondents as well as photos of the various agricultural activities and even a graveyard within the portions they occupy.
21. The Respondent on the other hand has denied the validity of the purported Agreements For Sale between Applicants and himself.
22. In fact, the Respondent has deemed such purported Agreements For Sale with the Applicants to be forgeries which are now subject of investigation by the Directorate of Criminal Investigations.
23. Further to that, the Respondent has denied the Applicants occupation on the original LR.No. Transmara/kimintet C/68 and/or the subsequent LR.No. Transmara/kimintet C/186 and Transmara/kimintet C/187.
24. The Respondent is of the considered view that if indeed the Applicants were within any portion of the property known as LR.No. Transmara/kimintet C/69, they would have been recognised during the sub-division process and captured in the resultant mutation.
25. Clearly from the facts hereinabove, the Honourable Court is of the considered opinion that there exists a dispute between the Applicants and the Respondent as to ownership of various portions of land originally within LR.No. Transmara/kimintet C/69 and subsequently LR.No. Transmara/kimintet C/186 and Transmara/kimintet C/187.
26. This dispute is one that requires various facts to be determined and subsequently thereafter the legal ownership of the Applicants and/or Respondent reaffirmed.
27. Consequently, based on this finding, this Honourable Court is satisfied that the Applicants have established a prima facie case as required by law.



28. The second ingredient for consideration is that of substantial loss or irreparable loss if the injunction is not issued as prayed.
29. According to the Applicants, upon purchase of the various portions of land on the original LR.No.transmara/kimintet C/69, they took possession and have been occupying the same either through farming activities or residing on the said portion.
30. The 1<sup>st</sup> and 2<sup>nd</sup> Applicant in particular pleaded that the portions they occupy were full of bushes at the point of purchase but have cleared the same and planted crops and constructed a dam.
31. The 3<sup>rd</sup> Applicant stated that he actually resides on the said portion he purchased and has been buried his deceased daughter on the said portion.
32. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants produced a number of pictures of the crops on the ground as well as the water dam that is on the portions they purchased.
33. Similarly, the 3<sup>rd</sup> Applicant produced photos of the homestead and a burial site for the deceased daughter thereof.
34. The Respondent in his Replying Affidavit had denied the occupation of the Applicants in toto.
35. The Respondent specifically pointed out that the houses contained in the pictures produced by the Applicants did not belong to them but third parties.
36. Section 107 of the [Evidence Act](#), Cap 80 requires that whoever alleges a fact must prove the same.
37. The Respondent was under a duty to place evidence either by way of an affidavit from the third parties whose houses were photographed to deny that they belong to the Applicants.
38. Similarly, the Respondent has a duty to place before the Honourable Court any evidence by way of an affidavit or photographs to show that indeed the Applicants do not reside on any portion of the properties known as LR No. Transmara/kimintet C/186 and Transmara/kimintetC C/187.
39. Unfortunately, no such evidence was placed before this Honourable Court by the Respondent which would have challenged and/or disputed the photographs placed by the Applicants.
40. Consequently therefore, the Honourable Court is of the considered view that indeed the Applicants occupy portions of the Respondent's properties known as LR.NO.Transmara/kimintet C/186 and Transmara/kimintet C/187 thereof.
41. Having arrived at this determination, the next aspect is what damage will be caused to the Applicants if indeed the Respondent evicts and/or disposes off the said properties known as LR.No. Transmara/kimintet C/186 and Transmara/kimintet C/187.
42. The act of either evicting and/or disposing off the said properties known as LR.No.Transmara/kimintet C/186 and Transmara/kimintet C/187 by the Respondent would mean that the Applicants would loose actual possession and/or dispossessed of their ownership rights thereof.
43. The loss of actual possession and/or dispossession of their ownership rights is in the Honourable Court's view substantial as it disrupts their day-to-day livelihoods and/or possibly legal rights over the said portions of land on the properties known as LR.No. transmara/kimintet C/186 and Transmara/kimintet C/187.



44. In essence therefore, this Honourable Court is of the considered view that indeed, the Applicants stand to suffer substantial loss if not irreparable loss in the event this Honourable Court does not issue a temporary injunction to the possible threats by the Respondent.
45. The last ingredient is to the effect that in the event the Court is in doubt of the second ingredient, then it should decide on the probabilities of convenience.
46. However, this Honourable Court has made its determination as regards the second ingredient and is not in doubt.

**Conclusion.**

47. In conclusion thereof, this Honourable Court hereby makes the following Orders in determination of the Notice of Motion Application dated 25.09.2023; -
  - a. The notice of motion application dated 25.09.2023 is merited.
  - b. Pending the hearing and determination of the originating summons dated 26.09.2023, the respondent, his agents, assignees, employees and/or any other person acting on his behalf be and is hereby restrained by way of prohibitory injunction from selling, leasing, charging, transferring, evicting and or otherwise interfering with the applicants quite occupation and enjoyment of the portions they are in occupation within the properties known as lr.no.transmara/kimintet c/186 and transmara/kimintet c/187.
  - c. The costs of this application will abide the outcome of the substantive originating summons.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 22<sup>ND</sup> JANUARY 2024.**

**EMMANUEL.M.WASHE**

**JUDGE**

In the presence of:

Court Assistant: Ngeno

Advocate for the appellant: Ms. Kithinji for 1<sup>st</sup> – 3<sup>rd</sup>

Appellant

Advocate for the respondent: Mr. Shira for Respondent

