



REPUBLIC OF KENYA



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**Omer v Abet (Environment and Land Appeal E052 of 2021)
[2024] KEELC 11 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 11 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E052 OF 2021
SO OKONG'O, J
JANUARY 18, 2024**

BETWEEN

JOHN OUKO OMER APPELLANT

AND

MICHAEL OKELO ABET RESPONDENT

*(An appeal from the Ruling and Order made by the Chief Magistrate's Court at Kisumu
(Hon. P. N. Gesora CM on 3rd June 2021 in Kisumu CMC ELC No.152 OF 2019))*

JUDGMENT

Background:

1. At all times material to this suit, all that parcel of land known as Kisumu/Kadero Got Nyabondo/239 measuring 5.2 hectares (hereinafter referred to only as “the suit property”) was registered in the name of Alfred Omer Rabadhi, deceased (hereinafter referred to only as “the deceased”). The deceased died in 2005. Before his death, the deceased who was the Appellant’s father transferred the suit property to the Appellant. The Appellant was registered as the owner of the suit property on 20th March 1996 and was issued with a title deed in respect thereof on the same date.
2. On 19th December 2019, the Respondent filed a suit against the Appellant in the Chief Magistrate’s Court at Kisumu namely, Kisumu CMC ELC No. 152 of 2019 (hereinafter referred to only as “the lower court”) seeking judgment for; an order compelling the Appellant to transfer to the Respondent a portion of the suit property measuring 2.1 hectares which the Respondent had purchased from the deceased, a refund of the purchase price at the current market value, a permanent injunction restraining the Appellant from interfering with the Respondent’s portion of the suit property and the costs of the suit.
3. In his plaint in the lower court, the Respondent averred that on or about 1992, the deceased sold to him a portion of the suit property measuring 2.1 hectares at a consideration of Kshs. 84,000/-. The



Respondent averred that he took possession of the said portion of the suit property, planted trees thereon, put up houses and had over the years been cultivating it. The Respondent averred that in a bid to promote peace and good relations with the deceased's family, he entered into an agreement with the Appellant in which he agreed to transfer to the Appellant his land parcel Title No. Kisumu/Kadero Got Nyabondo/2354 in exchange for the said portion of the suit property that he had purchased from the deceased. The Respondent averred that the said exchange agreement was not completed due to the failure of the Appellant to cooperate.

4. The Respondent averred that he had occupied the said portion of the suit property since 1992. The Respondent averred that in 1996, he learnt that the Appellant had secretly caused the suit property to be transferred to his name and that demands he made to the Appellant to transfer to him the portion of the suit property that he purchased from the deceased were not responded to. The Respondent averred that the Appellant had started making false allegations that the Respondent was a trespasser on the suit property and had even caused the Respondent's son who was in charge of the property to be arrested. The Respondent averred that the Appellant had gone to the said portion of the suit property that the Respondent purchased from the deceased chased away workers and ordered them to stop all activities on the property. The Respondent averred that the Appellant had threatened to sell the whole of the suit property to a third party. The Respondent averred that the Appellant intended to continue interfering with the Respondent's possession and use of the said portion of the suit property unless he was stopped by the court.
5. The Appellant filed a defence in the lower court against the Respondent's claim on 11th February 2021. The Appellant denied that the deceased sold to the Respondent a portion of the suit property measuring 2.1 hectares or at all. The Appellant averred in the alternative that if at all the deceased sold to the Respondent the said portion of the suit property, the transaction was null and void for lack of Land Control Board Consent. The Appellant denied that the Respondent took over possession of the alleged parcel of land that was sold to him by the deceased and had carried out various activities thereon. The Appellant averred that if at all the Respondent took possession and cultivated a portion of the suit property, the said portion was given to the Respondent to use temporarily free of charge since the suit property was next to the Respondent's home and was lying fallow at the material time. The Appellant denied entering into a land exchange agreement with the Respondent in a bid to promote peace and a good relationship. The Appellant also denied that the said agreement was not completed as a result of non-cooperation on his part. The Appellant averred that if at all there was such agreement, the same was entered into at the instance of the Respondent who wished to exchange his land Title No. Kisumu/ Kadero Got Nyabondo/2354 with a portion of the suit property of the same measurement. The Appellant averred that the agreement aborted because the Respondent changed his mind.
6. The Appellant denied that the Respondent had occupied the suit property from 1992. The Appellant averred that the deceased had no intention of transferring the portion of the suit property that he allegedly sold to the Respondent to the Respondent. The Appellant averred that the deceased transferred the whole of the suit property including the portion thereof claimed by the Respondent to the Appellant in 1996 during his lifetime. The Appellant averred that the said transfer was carried out lawfully. The Appellant averred that the Respondent's suit was time-barred in that although the Respondent learnt way back in 1996 that the whole of the suit property had been transferred to the Appellant by the deceased, the Respondent did not come to court until 23 years later in 2019 when he lodged the lower court suit after the expiry of the limitation period. The Appellant averred that the Respondent had no right or interest in the suit property and that if at all the Appellant entered the suit property and chased the Respondent's workers therefrom, the action was lawful since he was simply asserting his right as the proprietor of the land.



7. Some months after filing the suit in the lower court, the Respondent applied to the lower court by way of a Notice of Motion dated 18th September 2020 for a temporary injunction restraining the Appellant from interfering with his possession and/or cultivation of the suit property pending the hearing and determination of the lower court suit. The application that was supported by the affidavit of the Respondent sworn on 18th September 2020 was brought on several grounds. In summary, the Respondent averred that he was a bona fide purchaser of the suit property which he had cultivated for several years. The Respondent averred that the Appellant was interfering with his cultivation of the suit property by threatening his life with a gun. The Respondent averred that the Appellant had refused to transfer to him the suit property as earlier agreed and that the Appellant's acts complained of amounted to trespass. The Respondent averred that he would suffer irreparable loss and damage if the order sought was not granted. In his affidavit in support of the application, the Respondent reiterated the contents of the plaint. The Respondent averred that the Applicant wanted to use force to evict him from the suit property. The Respondent averred that it would serve the interest of justice if the order sought was granted.
8. The Respondent's application in the lower court was opposed by the Appellant through a replying affidavit sworn on 26th November 2020. In his affidavit, the Appellant reiterated the contents of his defence. The Appellant denied that his deceased father sold a portion of the suit property to the Respondent. The Appellant averred that the deceased transferred to him the suit property in 1996 before he died in 2005 and at no time did he inform him that he (the deceased) had sold a portion of the suit property to the Respondent. The Appellant averred that in the early 1990s, the deceased had allowed the Respondent to use a portion of the suit property for cultivation since the property was next to the Respondent's home and was fallow. The Appellant averred that the said arrangement between the deceased and the Respondent did not amount to a sale of the property to the Respondent and that explained why the deceased never subdivided and transferred the portion of the suit property being claimed by the Respondent to the Respondent.
9. The Appellant averred that the Respondent's claim that the deceased had sold to him a portion of the suit property started after the death of the deceased and that when he was asked to produce the agreement of sale between him and the deceased, and evidence of the payment he claimed to have made to the deceased, none came forth. The Appellant averred that when he demanded that the Respondent vacate the suit property, the Respondent pleaded with him to be allowed to give him his parcel of land Title No. Kisumu/Kadero Got Nyabondo/2354(Plot No. 2354) measuring 0.22 hectares in exchange for a portion of the suit property of the same measurement. The Appellant averred that the Respondent gave him the original title deed for Plot No. 2354 and possession of the property and he allowed the Respondent to remain in possession of the portion of the suit property that he was occupying.
10. The Appellant averred that after that agreement, the Respondent forcefully dispossessed the Appellant of Plot No. 2354 that he had exchanged with the portion of the suit property that he was occupying. The Appellant averred that an attempt to resolve the dispute failed as a result of which it was agreed that the Appellant would return the original title deed for Plot No. 2354 to the Respondent and the Respondent would vacate the suit property. The Appellant averred that the Respondent had not heeded to his demand to vacate the suit property. The Appellant reiterated that the purported agreement of sale between the Respondent and the deceased which the Respondent sought to enforce was void for want of the Land Control Board Consent. The Appellant averred that an injunction could not be issued to protect rights arising from an illegal contract. The Appellant averred that any damage that the Respondent could suffer was quantifiable and he could be compensated in respect thereof by



the Appellant. The Appellant averred that a proper case had not been established to warrant the grant of the orders sought by the Respondent.

11. The Respondent's application in the lower court was heard by way of written submissions. The lower court considered the application, the response thereto and the submissions by the advocates for the parties and delivered a ruling on 3rd June 2021. The lower court found that there was some form of an agreement between the Appellant's deceased father and the Respondent concerning the suit property. The court stated that the agreement could have been that of sale of a portion of the suit property as claimed by the Respondent or for temporary use of a portion of the suit property as claimed by the Appellant. The lower court noted that the Appellant's mother acknowledged the existence of an agreement for the sale of a portion of the suit property between the deceased and the Respondent. The court stated that this acknowledgement by the Appellant's mother of the existence of the agreement of sale of a portion of the suit property between the deceased and the Respondent considered together with the exchange of land agreement between the Appellant and the Respondent led the court to the conclusion that the Respondent had established a *prima facie case* against the Appellant to warrant the grant of a temporary injunction. The lower court having reached that conclusion allowed the Respondent's application for a temporary injunction as prayed together with costs.

The Appeal to This Court

12. The Appellant was dissatisfied with the ruling of the lower court and filed the present appeal on 2nd July 2021. In his Memorandum of Appeal, the Appellant challenged the decision of the lower court on the following grounds;
 1. The trial magistrate erred in law by granting the Respondent a temporary order of injunction contrary to the applicable principles.
 2. The trial magistrate erred in law by finding that the Respondent had established a *prima facie case* warranting the grant of a temporary injunction when the contrary was true.
 3. The trial magistrate erred in law by failing to find that the Respondent having failed to produce a written agreement between the Respondent and the Appellant's deceased father in respect of the suit property, no suit could be brought by the Respondent based on the said agreement.
 4. The trial magistrate erred in law and fact by failing to find and hold that the suit property was agricultural land and as such the Respondent's suit offended the provisions of Section 6 of the [Land Control Act](#), Chapter 302 Laws of Kenya.
 5. The trial magistrate erred in law by granting a temporary injunction in furtherance of a void transaction.
 6. The trial magistrate erred in law and fact by failing to find and hold that the Respondent's cause of action if any was time-barred.
13. The Appellant urged the court to allow the appeal, and set aside and/or vary the ruling of the lower court dated 3rd June 2021. The Appellant also prayed for the costs of the appeal and the lower court application dated 18th September 2020.

The Submissions by The Parties

14. The appeal was argued by way of written submissions. The Appellant filed his submissions on 3rd May 2023 while the Respondent filed his submissions on 12th October 2022. In his submissions, the Appellant reiterated the submission that he made in the lower court. In summary, the Appellant



submitted that the Respondent did not satisfy the conditions for granting a temporary injunction. The Appellant submitted that the Respondent did not establish a *prima facie case* against the Appellant and that that ground alone was sufficient to dispose of his application. The Appellant submitted that the Respondent did not produce before the court a copy of the agreement of sale allegedly made between him and the deceased in 1992. The Appellant submitted further that in any event, the suit property was agricultural land and as such was subject to the [Land Control Act](#), Chapter 302 Laws of Kenya. The Appellant submitted that since no consent of the Land Control Board was obtained in respect of the alleged sale of the suit property by the deceased to the Respondent, the agreement of sale was void for all intents and purposes and was unenforceable.

15. The Appellant submitted further that the purported agreement of sale between the deceased and the Respondent was made in 1992 and that it was not until 2019 that the Respondent sought to enforce it. The Appellant submitted that the Respondent's suit was time-barred and as such unsustainable. The Appellant submitted further that although the Respondent sought to enforce the purported agreement against him, he was neither a party to the agreement nor an administrator of the estate of his deceased father with whom the Respondent purportedly entered into the alleged agreement of sale of the suit property. The Appellant submitted the Respondent having failed to establish a *prima facie case*, the lower court was not obliged to consider whether or not the Respondent would have suffered irreparable injury if the injunction sought was not granted. The Appellant submitted that even if that condition was considered, the evidence before the court showed that the possible loss to the Respondent was quantifiable and could be compensated in damages by the Appellant. The Appellant urged the court to find that the lower court erred in law and fact in granting a temporary injunction to the Respondent. The Appellant prayed that the appeal be allowed.
16. In his submissions in reply, the Respondent submitted that the Appellant's appeal was baseless and lacked merit. The Respondent submitted that the temporary injunction was lawfully granted and as such the Appellant had not demonstrated the existence of any valid basis for setting aside the order by the lower court. The Respondent submitted that he demonstrated that he had a *prima facie case* against the Appellant. The Respondent submitted that the Appellant's appeal was a waste of the court's time and an abuse of the court process. The Respondent urged the court to dismiss the appeal.

Analysis and Determination

17. The Appellant's application before the lower court was brought under Order 40 Rule 1 of the [Civil Procedure Rules](#) which provides 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.”
18. The power given to the court under Order 40 Rule 1 of the [Civil Procedure Rules](#) to grant a temporary injunction is discretionary. It is well settled that an injunction is an equitable remedy and as such the



same is granted at the discretion of the court. In *Patriotic Guards Ltd v. James Kipchirchir Sambu* [2018]eKLR the court stated as follows:

" It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

19. The Respondent's application before the lower court was for a temporary injunction against the Appellant pending the hearing and determination of the lower court suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are well settled. As was stated in the case of *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, an applicant for an interlocutory injunction must show a *prima facie case* with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal adopted the definition of a *prima facie case* that was given in *Mrao Limited v. First American Bank of Kenya Limited & 2 Others* [2003]eKLR and went further to state as follows:

" The party on whom the burden of proving a *prima facie case* lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...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 threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide 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 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."

20. What I need to determine in the appeal before me is whether the lower court exercised its discretion properly when it granted a temporary injunction against the Appellant in favour of the Respondent. I have carefully perused the record of appeal which contains the application that was before the lower court, the response to the application by the Appellant, the submissions made before the lower court, the ruling of the lower court the subject of this appeal, and the grounds of appeal put forward by the Appellant. I have also considered the submissions of counsels together with the authorities cited in support thereof. In *Mbogo v. Shah* [1968] EA. 93 the court stated as follows at page 94:

" I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

21. I am persuaded by the Appellant that the lower court exercised its discretion wrongly. The lower court while acknowledging the principles upon which applications for a temporary injunction are



determined failed to apply the said principles to the case that was before it, and even where some of the principles were applied, the court failed to gauge whether the principles had been satisfied. The Respondent's case in the lower court was that he entered into an agreement for the sale of a portion of the suit property measuring 2.1 hectares with the Appellant's deceased father in 1992 and that the deceased died in 2005 before transferring the said portion of the suit property to him. The Respondent contended that the Appellant who got registered as the owner of the suit property in 1996 was interfering with his occupation of the suit property and was threatening him with forceful eviction from the property. The Appellant raised several defences to the Respondent's claim which I have highlighted above. The Respondent did not place before the lower court evidence of the alleged agreement that he entered into with the deceased in 1992. There was also no evidence of payment of the alleged purchase price of Kshs. 84,000/-. The Respondent did not also establish before the lower court that he had a defence to the Appellant's contention that; the purported agreement of sale was void for want of consent of the Land Control Board and that his suit that was brought 23 years after the date of the execution of the agreement was time-barred. I agree with the Appellant that on the material that was before the lower court, the Respondent failed to establish a *prima facie case* against the Appellant with a probability of success. It is also worth noting that the Appellant was not a party to the agreement that the Respondent sought to enforce against him neither was he the administrator of the estate of his deceased father. The reliefs sought against him for specific performance of the said agreement could not therefore be granted by the court. Due to the foregoing, it is my finding that there was no basis upon which the lower court could find that the Respondent had established a *prima facie case* against the Respondent.

22. In its ruling, the lower court considered only the first condition that must be satisfied before a temporary injunction is granted. The court considered only the issue whether the Respondent had established a *prima facie case*. Once the court made a finding that a *prima facie case* was established, the court concluded that that was sufficient to grant a temporary injunction. That was a misdirection on the part of the court. The court had to proceed to consider whether the Respondent would suffer irreparable injury if the injunction sought was not granted. If the court had considered this issue, I believe that from the reliefs that were sought by the Respondent, it would have concluded that possible loss to the Respondent could be quantified and the Respondent compensated in damages if he was successful at the trial of the main suit.
23. Due to the foregoing, it is my finding that in granting a temporary injunction to the Respondent who had not satisfied the conditions for granting such an injunction, the lower court exercised its discretion wrongly. I therefore have no alternative but to interfere with its exercise of discretion.

Conclusion

24. In the final analysis and for the foregoing reasons, I find merit in the Appellant's appeal. The appeal is allowed. The ruling made and orders issued by the lower court (Hon. P. N. Gesora) on 3rd June 2021 are set aside and substituted with an order dismissing the Respondent's Notice of Motion application in the lower court dated 18th September 2020. The Appellant shall have the costs of this appeal and the lower court application.

DELIVERED AND DATED AT KISUMU ON THIS 18TH DAY OF JANUARY 2024

S. OKONG'O

JUDGE

