



**Olendo v Odhiambo (Environment & Land Case E003 of 2024)  
[2024] KEELC 4166 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4166 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E003 OF 2024**

**AY KOROSS, J**

**MAY 23, 2024**

**BETWEEN**

**THOMAS OMONDI OLENDO ..... PLAINTIFF**

**AND**

**MAURICE ODUOR ODHIAMBO ..... DEFENDANT**

**RULING**

1. This ruling seeks to determine the notice of motion dated 14/02/2024 that is filed by the plaintiff and he seeks several reliefs from this court some of which are spent and the substantive prayers for determination are: -
  - a. A temporary injunction be issued against the defendant, his agents, and or servants from entering encroaching, and or in any manner interfering with the plaintiff's use and occupation of land parcel no. South Ugenya/Rangala/556 pending hearing and determination of the suit.
  - b. The OCS Ugunja Police Station does oversee the compliance of the orders herein.
  - c. Costs of the motion be in the cause.
2. The motion is supported by the grounds set out on the body thereof and significantly, the plaintiff states that upon confirmation of the grant of letters of administration on 27/04/2022, ½ of land parcel no. South Ugenya/ Rangala/556 (disputed portion) was vested in him. This notwithstanding, the respondent has encroached on it and started cultivating it.
3. Additionally, he filed a supporting affidavit deposed on 14/02/2024 in which he restates the grounds in support of the motion and avers he and the defendant are descendants of the previous registered



owner Marsiana Anyango Nyaboro (Marsiana) whose estate he succeeded as a son. He contends the defendant is Marsiana's grandson.

4. It is his averment the defendant has failed to heed his request to desist from trespassing onto the disputed portion and the defendant has even threatened to physically harm him. It is his argument the defendant's actions has caused him irreparable loss and damage.
5. After the matter was reserved for ruling, the defendant's counsel M/s. Barasa Moses Ouma filed a notice of preliminary objection (PO) dated 29/04/2024. Considering the right to fair hearing which is a fundamental right and the plaintiff has not been given an opportunity to be heard on it, this court declines to consider it at this instance.
6. I must mention a glimpse of the PO demonstrates it raises matters of facts concerning the existence of probate proceedings in Ukwala PM's Court Succession Cause no. 75 of 2020 and states that South Ugenya/ Rangala/556 (suit property) is located in Ochiko Wange village.
7. Back to the motion, despite directions on the plaintiff to argue his case by written submissions, none was filed. I have carefully considered the motion, its grounds, and affidavit in support thereof, and the issues arising for resolution are whether the motion is merited and (ii) what orders should this court issue including an order as to costs. These two issues shall be addressed together.
8. Grounded on the *Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act*, the plaintiff ostensibly invoked this court's jurisdiction. Unquestionably, the plaintiff erroneously relied on the wrong provision and I say so for good reason as shall be demonstrated shortly.
9. In claims under the *Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act*, the Business Premises Rent Tribunal has original jurisdiction and by Section 15 thereof, a party can appeal to this court. Moreover, the pleadings do not exemplify the existence of a tenant-landlord relationship between the parties. What is in contention is a land dispute.
10. The provisions of law that the plaintiff should have invoked are Section 63 (e) of the *Civil Procedure Act* and Order 40 Rule 1 of the *Civil Procedure Rules*. Nonetheless, by the provision of Order 51 Rule 10 of the mentioned Rules, this court considers the plaintiff's oversight a technical error that cannot defeat the motion.
11. This Order 40 Rule 1 confers this court with jurisdiction to grant an injunctive relief by stating as follows: -

“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.”



12. Although this court exercises discretion in considering applications for injunctive relief, this court exercises judicious discretion which is exercised based on the law, reason and evidence. An applicant has to meet the threshold of the 3 tests which are inter alia, establish a prima facie; demonstrate irreparable injury, and that the balance of convenience tilts in his favour.
13. These principles were well settled in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 which were similarly restated in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR in the following manner: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

14. When determining an interlocutory application such as the one before this court, the court has to be careful and not prejudice a party by making conclusive findings of fact or law on substantive issues that are the preserve of trial as was stated by Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002.
15. The 1<sup>st</sup> test to establish is whether the plaintiff has a prima facie case and the definition of the term was defined by the Court of Appeal decision of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR which stated: -

“In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but



the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

16. In the instant case, the plaintiff averred that by a confirmed grant he was the owner of the disputed land. However, he did not tender a copy of the grant to this court to substantiate his assertion. Most importantly, it is noted by Section 26 of the [Land Registration Act](#), the courts prima facie deem the registered owner as the proprietor of the land.
17. This court anxiously scrutinized the plaintiff's entire pleadings and there is no shred of documentary evidence such as a title deed, official search, or green card that to the very least could shed light on the existence of the suit property or if at all it exists, the relationship between it, the alleged confirmed grant, and the parties herein.
18. On that premise, I find the plaintiff has not met the 1<sup>st</sup> test. In the circumstances and having not met the 1<sup>st</sup> hurdle, it is the considered view of this court that it would be superfluous to consider the other 2 tests.
19. For the findings and reasons herein stated above, I ultimately find the notice of motion dated 14/02/2024 is unmerited and it is hereby dismissed with costs being in the cause. Matter to be mentioned before the Deputy Registrar for pretrial directions on 17/07/2024.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 23<sup>RD</sup> DAY OF MAY 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**23/5/2024**

**Ruling delivered virtually through Microsoft Teams Video**

**Conferencing Platform in the Presence of:**

Plaintiff - present

Mr. Moses Barasa for the respondent/defendant

Court assistant: Ishmael Orwa

