



Nyamwanga v Alfredy & 4 others (Environment & Land Petition E003 of 2024) [2024] KEELC 5695 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION E003 OF 2024
GMA ONGONDO, J
JULY 23, 2024**

BETWEEN

LIANDER ODERO NYAMWANGA PETITIONER

AND

OPERE JOHN ALFREDY 1ST RESPONDENT

GRACE ACHIENG ONGORO 2ND RESPONDENT

**THE LAND ADJUDICATION OFFICER HOMA BAY SUB
COUNTY 3RD RESPONDENT**

THE LAND REGISTRAR HOMA BAY COUNTY 4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This matter is for a ruling in respect of an application by way of Notice of motion dated 21st March 2024 brought under, inter alia, Articles 40 and 162 (2)(b) of *the Constitution* of Kenya, 2010, Rules 3, 19 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and Section 3 of the *Environment and Land Court Act* by the petitioner/applicant, Liander Odero Nyamwanga through M/s AK Advocates LLP seeking the following orders;
 - a. Moot
 - b. Moot
 - c. That the Honourable court be pleased to grant interim orders of injunction restraining and/or barring the respondent from undertaking, continuing and/or proceeding with the construction of permanent buildings and/or erecting any other structures on land parcel



number Kanyada/Kanyango/ Kalanya/3792 (the suit land herein) pending the hearing and determination of this application and this suit.

- d. That the Honourable court be pleased to grant interim orders of injunction restraining and/ or barring the second respondent from selling, charging, leasing and transferring the suit land pending the hearing and determination of this application and of this suit.
 - e. That the Honourable court be further pleased to direct the third and fourth respondents to visit the suit land alongside the Homa Bay County Surveyor to measure and determine the actual and exact acreage of the suit land and further file a report thereof to this court.
 - f. That costs of the application be provided for.
2. The application is founded upon fifteen grounds and anchored on a further affidavit dated 16th June 2024 as well as the supporting affidavit of seventy paragraphs sworn on 21st March 2024 by the applicant, alongside the annexed documents marked as LON-1 to LON-11 which include; a copy of the adjudication record for the suit land, a copy of the objection proceedings, a copy of the green card, copies of the adjudication proceedings lodged by Cassian Juma Nyanjwa, a copy letter addressed to the 4th respondent, copies of the objection, a copy of letter dated 2nd March 2000 from the Minister, a copy of the green card, a copy of the certificate of official search in respect to the suit land, copies of photographs and a copy of the petition lodged herein.
 3. Briefly, the applicant laments that he is the owner of the suit land, having been registered as such during land adjudication process. That the 2nd respondent began putting up permanent buildings thereon in the year 2023 and is further defacing the same. That he has a prima facie case with high probability of success. That further, he stands to suffer substantial loss and harm if the orders sought herein are not granted. He averred that no prejudice will be suffered by the 2nd respondent if the orders sought herein are granted.
 4. By a Replying Affidavit sworn on 31st May 2024, the 1st respondent through Phiona Ogoi and Company Advocates, opposed the application. He averred that he purchased the suit land measuring 40 feet by 100 feet in area by way of a sale agreement dated 7th June 1993 from the applicant. That the applicant previously instituted a suit at the Chief Magistrate's court Homa Bay, to wit, Environment and Land Case No. 10 of 2023, between the same parties but wherein the applicant furnished a different set of facts from those indicated in the instant petition. That in any case, the cause of action arose almost thirty years ago thus, the applicant is guilty of laches. That thus, the instant application lacks merit and ought to be dismissed with costs.
 5. The 2nd respondent, through Robert Ochieng Advocates, opposed the application by way of a Replying Affidavit sworn on 30th May 2024 and reiterated that the applicant had previously filed suit at the Chief Magistrate's Court. She emphasized that she is a bona fide purchaser for value without notice and urged the court to dismiss the instant application with costs.
 6. The 3rd respondent through the Hon. Attorney General (the 5th respondent), opposed the application vide a Replying Affidavit dated 23rd May 2024 and sworn by Toromo Kipruto. He averred that the applicant is not the legal owner of the suit land. That the applicant first sold a portion of the suit land to one John Onditi Ogwang who lodged an objection and was issued with a new parcel number upon subdivision. That thereafter, the applicant sold the entire remainder of the suit land to the 1st respondent herein who later disposed of the same to one Cassian Juma Nyanjwa.
 7. At paragraphs 10 and 13 thereof, the 3rd respondent indicated that the applicant has initiated another suit at the Chief Magistrate's court Homa Bay, to wit, Environment and Land Case No. 10 of 2023



against the respondents herein, over the suit land. That further, the petitioner's claim is time barred pursuant to Sections 7, 9 and 26 of the *Limitation of Actions Act* and the instant petition has been lodged to circumvent the same since an objection in that respect was raised in the lower court.

8. Hearing of the application proceeded by way of written submissions. The applicant's counsel filed submissions dated 15th June 2024 and submitted that the applicant has established a prima facie case and stands to suffer irreparable harm if the orders sought herein are not granted. That therefore, the balance of convenience tilts in favour of the applicant. Reliance was placed on various authoritative pronouncements, including the case of *Giella -vs- Cassman Brown & Co. Ltd. (1973) EA 358* and *Nguruman Limited -vs- Jan Bonde Nielsen and 2 others (2014) eKLR*, to buttress the submissions.
9. The 2nd respondent's counsel filed submissions dated 17th July 2024 and submitted that the instant petition aims to circumvent the provisions in the *Limitation of Actions Act*, since the cause of action accrued 30 years ago. That the matter had previously been filed at the lower court but was withdrawn when a preliminary objection was raised. That the 2nd respondent has constructed a home on the suit land and is bound to suffer irreparable injury if the orders sought in the application are granted. That the application has not met the conditions for grant of an interim order of injunction. Thus, counsel urged the court to dismiss the application with costs to the 2nd respondent. To fortify the submissions, counsel relied on the locus classicus case of *Giella and Nguruman Limited (all supra)*, among others.
10. The 3rd to 5th respondents' submissions dated 13th June 2024 were filed by Maryanne Omondi, Litigation Counsel for the Hon. Attorney General. Learned Counsel submitted that the applicant had not established a prima facie case to warrant grant of temporary injunctive orders. That the applicant is not the legal owner of the suit land, since he sold the same to the 1st respondent herein. That the applicant stands to suffer no injury or harm but, in the event that he does, damages will be an adequate remedy. That the application has not met the threshold for grant of the orders sought. To reinforce the submissions, counsel relied on the case of *King Investment Management Co. Ltd. -vs- RivatexEast Africa Limited (2020) eKLR* and *Nguruman Limited (supra)*, among others.
11. In the foregone, the following issues fall for determination;
 - i. Whether the applicant has met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit.
 - ii. Who shall bear the costs of the application?
12. I have anxiously read the application, supporting and further affidavits, replying affidavits and their accompanying annexures. I have also considered and weighed the rival submissions in this application as regards the grant of orders of temporary injunction and also taken into consideration the judicial decisions cited and attached to the same.
13. So, has the applicant met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit?
14. Order 40 of the Civil Procedure Rules, 2010 provides for temporary injunction and temporary orders. It is within the discretion of the court to grant temporary injunctive relief and the guiding principles thereof were laid down in the celebrated *Giella* case (*supra*) and reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited -vs- Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR* where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable



injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

15. On whether the applicant has shown that he has a prima facie case with a probability of success, the Court of Appeal in *Mrao -vs- First American Bank of Kenya Limited & 2 Others* [2003] eKLR defined a prima facie case as one which on the material presented in 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 respondent.
16. In the present application, the applicant has averred that his right to property under Article 40 of *the Constitution* of Kenya, 2010 is being violated or is likely to be violated by the respondents. This shifts the burden onto the respondents to explain or rebut the applicant’s claim. Thus, it is my considered view that the applicant has satisfied this requirement.
17. Regarding the second and third requirements, the applicant contends that he stands to suffer irreparable harm that cannot be adequately compensated by way of damages if the prayers sought herein are not granted. That therefore, the balance of convenience tilts in his favour.
18. Nonetheless, I am not persuaded by the applicant’s assertion in the application. It is crystal clear that the 2nd respondent is in possession of the suit land and has constructed a home thereon. Therefore, I am of the considered view that the balance of convenience does not tilt in favour of the applicant.
19. Besides, I note that there has been inordinate delay in lodging the instant application and petition, which delay has not been explained.
20. In the foregone, I hereby find that the present application has failed to meet the threshold for grant of the orders sought. However, in the interest of justice, I hereby direct that status quo be maintained on the suit land pending the hearing and determination of the petition.
21. Afortiori, the instant application hereby substantially fails, save for prayer 5 and as indicated in paragraph 1(e) hereinabove. Thus, the Land Adjudication Officer Homa Bay Sub County, the Land Registrar Homa Bay County and the Land Surveyor Homa Bay County are hereby directed to visit the suit land to measure and determine the actual and exact acreage of the same and file their Reports in court within 60 days from this date.
22. Each party to bear their own costs of this Application.
23. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JULY 2024.

G.M.A ONGONDO

JUDGE

In the Presence of: -

Mr. A.O Ogutu for Petitioner/Applicant

Mr. Robert Ochieng for Bunde 1st respondent and No appearance for other respondents.

Petitioner/applicant-Present



Mr. T.Luanga, Court Assistant.

