



Oluoch & 2 others v Otieno (Environment & Land Case 6 of 2024) [2024] KEELC 5348 (KLR) (17 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 6 OF 2024**

M SILA, J

JULY 17, 2024

BETWEEN

FREDRICK ODHIAMBO OLUOCH 1ST APPLICANT

JOSEPH OBIERO AYIEKO 2ND APPLICANT

NICHOLAS OCHANDA AYIEKO 3RD APPLICANT

AND

JOSEPH JUMA OTIENO RESPONDENT

RULING

(Application for injunction; principles to be applied; plaintiffs holding title to the suit land and complaining that defendant has now entered the land; defendant claiming that title of the plaintiffs is fraudulent; court obligated to take that *prima facie* the one holding title is the rightful proprietor of the land; plaintiffs not having title but also being in possession of the land prior to filing suit; plaintiffs establishing a prima facie case with a probability of success and deserving the order of injunction; allegation of the defendant that title was acquired fraudulently a matter to be addressed at the hearing of the suit; application allowed)

1. The application before me is that dated 21 March 2024 filed by the plaintiffs. It is more or less an application for injunction seeking to restrain the defendant from the land parcel Kanyamkago/Kawere I/3178 (the suit land) pending the hearing and determination of this suit. This application was filed contemporaneously with the filing of the plaint wherein the applicants contend to own the suit land having purchased it in June 2004 from one Michael Ogolla and subsequently obtained registration and title to it. They plead that they have been in uninterrupted possession of the suit land since then and have been conducting farming activities. It is pleaded that around 20 March 2024 the defendant/respondent started tilling the land without their consent. In the suit, they seek orders to have the respondent permanently restrained from the land. In the supporting affidavit, the applicants have



- annexed a copy of the land sale agreement and title deed to the suit land. They point out that the respondent was a witness to the transaction and that he therefore has no basis to be on the land.
2. In his replying affidavit the respondent has deposed that he is 35 years old and has annexed a copy of his identity card to show this. He deposes that the suit land emerged from the land parcel Kanyamkago/Kawere I/461 measuring 25 Hectars and which was jointly registered in name of Michael Ogola Ogola, Samson Ogola, David Otieno Ogola (his father) and Charles Ogola who were brothers and are now deceased save for Michael Ogola Ogola. He deposes that in 2005 the original parcel of land was subdivided amongst the four brothers to bring forth the land parcels No. 3174 – 3178 with his father, David Ogola, owning the land parcel No. 3177. He deposes that the suit land (No. 3178) was assigned to Michael Ogola. He has added that Michael Ogola was diagnosed with a mental condition and has no known children or wife. He avers that the whereabouts of Michael Ogola are unknown and that on 11 March 2024 they reported him as a missing person. He states that he is the closest known family member to the said Michael Ogola. He contends that Michael Ogola only sold one acre of the suit land to the applicants and only informally licenced the other applicants to cultivate with his permission. He thus asserts that the applicants are only licensees and is surprised that they now lay claim to the entire land. He deposes that contrary to the allegations of the applicants that they have enjoyed quiet possession of the land, he has constantly been reporting the matter with relevant authorities including the African Centre for Human Rights who referred the matter to the Directorate of Criminal Investigations (DCI). He points out that the applicants have annexed four sale agreements dated 3 June 2004 and contends that Michael Ogola could not have entered into any valid sale agreement on the said date and that the agreements are forgeries. He adds that the agreements are purportedly witnessed by himself but he was not an eligible witness since he was only 15 years old at the time. He adds that the total acreages in the agreements add up to 12 acres yet the suit land is 3.68 hectares which he claims to be 9 acres. He swears that the vendor did not sign any application for consent of the Land Control Board (LCB). He continues that at the time of sale the land parcel No. 461 had not yet been subdivided and therefore all registered proprietors needed to be parties to the sale. It is therefore his position that the title of the applicants was acquired by fraud and cannot be protected.
 3. The applicants filed a supplementary affidavit sworn by Fredrick Odhiambo Oluoch. He asserts that they did purchase the suit land and that at the time of purchase they were led to believe that it measures 12 acres. He deposes that after they engaged a surveyor, it turned out that the land is 8.5 acres which led to a realignment of the purchase price to reflect the reduced acreage. He annexed copies of the agreement for this. He deposes that the allegation that the vendor has a mental condition is unsubstantiated. He stresses that they have been in occupation since purchasing the land and that the reports of the respondent started being made in 2024. He avers that the allegations of forgery are far fetched.
 4. I directed counsel to file submissions towards the application and I have taken note of the submissions of both counsel for the applicants and counsel for the respondent.
 5. This is an application for injunction and I stand guided by the principles laid down in the case of *Giella vs Cassman Brown* (1973) EA 358 wherein it was articulated that to succeed in an application for injunction, the applicant needs to demonstrate a *prima facie* case with a probability of success, show that he stands to suffer irreparable loss if the injunction is not granted, and where the court is in doubt it will decide the application on a balance of convenience.



6. In our case, the applicants have displayed a title to the suit land which is in their name. Generally, a person who has title to land is presumed to be the genuine owner of it pursuant to Section 26 of the [Land Registration Act](#) which provides as follows :

26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
7. From Section 26 (1) above, the certificate of title shall be taken by all courts as *prima facie* evidence that the person named therein is proprietor of the land and is the absolute and indefeasible owner. That title is not impeachable except for the instances laid down in Sub-sections (a) and (b). Thus, where one has title, *prima facie*, he is the legitimate owner of the land unless demonstrated otherwise. In our case, the applicants do have title to the land. Apart from having title, they have also shown that they have been the ones in possession of the suit land. Indeed, this is conceded by the respondent, who however claims that the applicants only purchased one acre and that they are in possession of the rest of the land as licencees. Thus, prior to the filing of the case, both title and possession was with the applicants. I am therefore persuaded that the plaintiffs have demonstrated a *prima facie* case with a probability of success. By being denied a chance to use their land I am persuaded that the applicants stand to suffer substantial loss. Even if I was in doubt, and I am not, the balance of convenience would still tilt in favour of the applicants. As I have pointed out, prior to this case being filed, they were the ones holding title and possession of the suit land.
8. I am aware that the respondent has contended that the title of the applicants is a fraudulent one but that is a matter that I can only go into at the hearing of the suit. The respondent will certainly have a chance to be heard on his allegations but until he proves his allegations this court must take the title of the applicants to be a good title that deserves protection.
9. From the foregoing, it is apparent that I find merit in this application and it is hereby allowed. I therefore order that pending the hearing and determination of this suit, the defendant/respondent is hereby restrained from entering, being upon, cultivating, building, or in any other way interfering with the quiet possession of the suit land by the plaintiffs. The plaintiffs will also have the costs of this application.
10. It is so ordered.

DATED AND DELIVERED THIS 17 DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

