



REPUBLIC OF KENYA



KENYA LAW
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**Sinko & 8 others v Olotulet (Environment and Land Appeal
E011 of 2024) [2025] KEELC 610 (KLR) (17 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E011 OF 2024
MN MWANYALE, J
FEBRUARY 17, 2025**

BETWEEN

**PAUL ORITAI OLE SINKO 1ST APPELLANT
JOHN SINKO 2ND APPELLANT
EMMANUEL KINYAMAL SINKO 3RD APPELLANT
WILLIAM SEROI 4TH APPELLANT
KIROREI OLEKASUTI 5TH APPELLANT
SAMSON LETEIPA NKOINA 6TH APPELLANT
DAVID LEDAMA NKOINA 7TH APPELLANT
JEREMIAH NKOINA 8TH APPELLANT
SEVENTH DAY ADVENTIST CHURCH OSUPUKO 9TH APPELLANT

AND
OLOSERE OLOTULET RESPONDENT**

JUDGMENT

1. The Ruling delivered on 23.04.2024 by Hon. C.W Waswa in Kilgoris SPM ELC No. E022/2024 has provoked this appeal.
2. The Appellants being dissatisfied with the said Ruling have penned 6 grounds of Appeal as herefollow;
 - i. In finding and holding that LR. No. Transmara/Osupuko/218 (herein referred to as the suit property) a subdivision of LR No. Transmara/Osupuko/94 to which title deed was issued to the respondent on 4th March 2021, the learned trial magistrate erred in law and fact contrary



to the allegations that the Appellants trespassed onto the suit property between the year 2018 and 2023.

- ii. The learned trial magistrate erred in law and fact in finding that the Appellants had trespassed onto the suit property without expert evidence availed before court since some of the Appellants are in occupation and/or possession of LR NO. Transmara/Osupuko/38 which share a common boundary with the suit property herein.
 - iii. The learned trial magistrate erred in law by presiding over a boundary dispute without the requisite jurisdiction.
 - iv. The trial magistrate misdirected himself by ignoring the evidence adduced by the Appellants on the fact that the Respondent lodged a complaint to Land Registrar Transmara sub-county against some of the Appellants regarding a boundary dispute between L.R NO. Transmara/Osupuko/94 Vs. 38 and 44 as demonstrated by the annexures to the Appellant's Replying affidavit.
 - v. The learned magistrate erred in law and fact by granting an injunction order without judiciously and/or sufficiently applying the requisite principals set out in the *Giella Vs. Cassman Brown*.
 - vi. The learned trial magistrate made the ruling dated 25th April 2024 against the documentary evidence availed in court by the Appellants herein.
3. On the strength of the above grounds the Appellants prayed that the Ruling dated 25th April 2024 be set aside and that this court be pleased to order and/or direct the maintenance of status quo currently obtaining over and in respect of the suit property pending hearing and determination of the suit before the subordinate court.
 4. Upon admission of the Appeal, directions were taken to canvass the Appeal by way of written submissions. Both parties filed their submissions.

Appellants Submission

5. The Appellants have framed two issues for determination.
 - i. Whether the Appellants have demonstrated they desene the order prayed for,
 - ii. Whether the Appellants have proved the Appeal against the Respondents.
6. The Appellants submission have been condonsed in respect of the above issues and broadly THE Appellants submit that Transmara/Osupuko/94 originally owned by the Respondent/Plaintiff before the subordinate court, measured 24.5 hectares, but after subdivisions the total acreage of the new subdivisions is now 76 Hectares, and that the said Transmara/Osupuko/04 did not share a physical boundary with Transmara/Osupuko/38 and 44 which belong to the Appellants as Transmara/Osupuko/94 was in map sheet 3 while Transmara/Osupuko/38 and 44 were in map sheet No. 5 of the Osupuko Registration Section; and there was therefore no possibility of trespass by the Appellants in the circumstance, hence the learned magistrate erred in law and in fact in issuing the injunctive order. That no ground report was filed to show that the Appellants had trespassed.

Respondent's Submission

7. The Respondent did not frame any issues for determination but crafted their submissions, submitting directly on the grounds of Appeal as contained in the Memorandum of Appeal.



8. On grounds 1 and 2, the Respondent submits that the Appellants trespassed between the years 2018 and 2023, and that the year 2021 falls in between the said years. That the Respondent is the lawful and/or legitimate owner of the suit property and he was vested with all her rights and/or interests attendant to ownership of title, thus the learned magistrate did not err to issue an injunction. In support of this limb of submissions the Respondent places reliance in the decision in the case of Kuria Kiarie and 2 Others Vs. Sammy Magera (2018) eKLR, on the proposition that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the pleading.
9. The suit property thus needed to be preserved so submits the Applicant.
10. On grounds 3 and 4 of the Memorandum of Appeal, the Respondent submits that L.R NO. Transmara/Osupuko/38 and L.R NO Transmara/Osupuko/94 (as it then was) share a boundary and the annexures at ground 4 of the grounds of Appeal refer to a dispute between parcel number 94, 37 and 38, therefore since parcel No. Transmara/Osupuko/94 is no longer in existence; hence the Respondents submits that the court had the requisite jurisdiction.
11. On grounds number 5 and 6 of the Memorandum of Appeal, on whether the injunction was issued without applying the requisite principles in *Giella vs. Cassman Brown*, the Respondent submits that the Application before the trial court subject met the threshold of a *prima facie* case, as defined in the case of *Mrao Limited vs. Fist American Bank of Kenya Limited and 2 Others*, and thus met the threshold for grant of an injunction.

Issues for Determination

12. Upon an indepth review of the Record of Appeal and the submissions by the rival parties, the sole issue for determination is whether the Appeal is merited?

Analysis and Determination

13. This being a first Appeal the duty of this court was stated in the case of *Sielle vs Associated Motor Boat Co. Ltd and Others* (1968) EA 123 where the court held *inter alia* "...An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect..."
14. Guided by the above principles, the court proceeds to evaluate the evidence before the trial court, bearing in mind that this is an appeal against an interlocutory application and that the matter is yet to be decided on its merits.
15. At page 32 of the Record of Appeal the Respondent who was the Plaintiff and Applicant in the Lower Court, exhibited the title in respect of Transmara/Osupuko/218 the said title is registered in his name and measures about 2.8 Hectares and appears on Registry map sheet No. 5. Both the Appellant and the Respondent had annexed a mutation form in respect of Transmara/Osupuko/94 whose subdivision gave rise to Transmara/Osupuko/218 *inter alia*, the subject of the suit property. This mutation from appears at pages 39 of the Record of Appeal as well as at page 102 of the Record of Appeal. In both mutations the title of Transmara/Osupuko/218 and the mutation from giving rise to the subdivision, the registry map sheet is map sheet 5.
16. The Respondents on their part claim ownership of Transmara/Osupuko/44 and 38. Transmara/Osupuko/44 measuring 24.0 Ha appears in Registry Map Sheet Nos. 2, 3 and 5, while Transmara/Osupuko/38 measuring 42 Ha, also appears in Map Sheet Number 5, 3 and 2 on Map Sheet No.



- 5, as indicted in the mutation form appearing at page 103 of the Record of Appeal, Transmara/Osupuko/94, as it then has a common boundary with Transmara/Osupuko/38; but has no common boundary with Transmara/Osupuko/44.
17. At page 102 of the Record of Appeal Transmara/Osupuko/94 as it was measured 24.5 Hectares, but the subdivisions made thereat all total to 76.05 Hectares which seems inconsistent with the original acreage.
 18. Did the Applicant establish a prima facie case for grant of temporary injunction before the trial court. He presented a copy of a title in respect of Transmara/Osupuko/218, which entitled him to protection of the rights and interests conferred thereto under Section 24, 25 and 26 of the Land Registration Act.
 19. However, the Appellant challenged the validity of the title given that the acreages from the original title were way less than acreage on the subdivided portions, hence calling for a rebuttal from the applicant on whether the title of the Applicant should stand.
 20. In *Mrao Limited vs First American Bank of Kenya Ltd and Others* (2003) KLR the Court of Appeal stated that a prima facie is one “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 part so as to call for an explanation or rebuttal from the latter.”
 21. In the said case the court further stated “a prima facie case is more than an arguable case. It is not sufficient to raise issues. 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.”
 22. The Appellants herein challenged the title acquired by the plaintiff in terms of the subdivisions having more acreage than the original mother title, and the exhibited beneficial interests of occupation as sons of the registered owners of Transmara/Osupuko/38 and Transmara/Osupuko/44 registered in 1976 while Transmara/Osupuko/284 was registered in 2021, and they also exhibited reports of boundary disputes which are pending resolution before the Land Registrar as appearing on pages 112, 113 of the Record of Appeal.
 23. The court finds on the material placed before the trial court it that the Respondent did not establish a prima facie case, and having not established a prima facie case, the court is not obligated to interrogate the other two principles in *Giella vs. Cassman Brown Ltd* as was held in the case of *Kenya Commercial Finance Company Ltd vs Afraha Education Society* 2001 EA. 86 where the court held “...if a prima facie case is not established then irreparable injury and balance of convenient need no consideration...”
 24. The court thus finds that the Appeal is merited on that score alone and allows the same.
 25. The orders commending itself to the court in view of the fact that the Appeal is in respect of an interlocutory application is that an order of maintenance of the status quo obtaining on the ground and on the register of Transmara/Osupuko/218 as at the time of filing of Kilgoris SPM ELC E002/2024.
 26. For avoidance of doubt the status quo order issued herein is not meant to facilitate eviction of any party and/or invasion by any party.
 27. Costs of the appeal shall abide by the outcome of the pending case before the trial court i.e Kilgoris SPMCC No. E022/2024.

DATED AND DELIVERED AT KILGORIS THIS 17TH DAY OF FEBRUARY 2025



HON. M.N. MWANYALE

JUDGE

In the presence of:

Ms. Mireri for Respondent

Mr. Ayienda for the Appellant

C/A Emmanuel/Sylvia

