



Buore v Oluoch (Sued as the Personal Representative of the Estate of Erick Okoth Onguru - Deceased) (Environment and Land Appeal E001 of 2024) [2025] KEELC 635 (KLR) (17 February 2025) (Judgment)

Neutral citation: [2025] KEELC 635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E001 OF 2024
SO OKONG'O, J
FEBRUARY 17, 2025**

BETWEEN

ISAAC BUORE APPELLANT

AND

WILKISTER AKINYI OLUOCH (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ERICK OKOTH ONGURU - DECEASED) RESPONDENT

(An appeal from the Ruling and Orders made by the Chief Magistrate's Court at Kisumu (Hon.Douglas Ogoti CM on 14th December 2023 in Kisumu CMC ELC No.E132 OF 2023)

JUDGMENT

Background

1. At all times material to this suit, all that parcel of land known as L.R No. Kisumu Municipality/Block 10/601 (Maisonette No. 43) Winam Square Court, Grace Ogot Estate, Milimani, Kisumu County (hereinafter referred to only as “the suit property”) was said to be registered in the name of Erick Okoth Onguru, deceased (hereinafter referred to only as “the deceased”). The Respondent is the widow and the administrator of the estate of the deceased who died on 19th March 2023. The suit property was charged to Standard Chartered Bank Limited by the deceased to secure a loan that was advanced to the deceased.
2. Through a plaint dated 5th October 2023, the Respondent filed a suit in the Chief Magistrate’s Court at Kisumu against the Appellant namely, Kisumu CMC ELC No. E132 of 2023 (hereinafter referred to as “the lower court”). The Respondent averred that after the death of the deceased, she went to the suit property to inspect the same in early August 2023 as the widow of the deceased and found the suit property in occupation of trespassers who refused to identify themselves but who claimed that the



- suit property had been leased to them by the Appellant. The Respondent averred that she contacted the Appellant through the telephone number that was given to her by the said trespassers and the Appellant confirmed that he was the one who gave the trespassers possession of the suit property. The Respondent averred that the Appellant claimed that the property was no longer owned by the deceased and that the property was owned by he and another person he did not name.
3. The Respondent averred that after her engagement with the Appellant, she conducted a search on the suit property on 14th August 2023 which showed that as at that date, the suit property was still registered in the name of the deceased and that the same was also still charged to Standard Chartered Bank Limited. The Respondent sought judgment against the Appellant for; a declaration that the deceased was the absolute proprietor of the suit property, a permanent injunction restraining the Appellant from interfering howsoever with the Respondent's peaceful and quiet ownership of the suit property, and general and exemplary damages.
 4. Together with the plaint, the Respondent filed an application in the lower court by way of a Notice of Motion dated 5th October 2023 seeking a temporary injunction restraining the Appellant from howsoever interfering with the Respondent's peaceful and quiet ownership, title and/or interest in the suit property pending the hearing and determination of the suit. The application was supported by the affidavit of the Respondent in which she reiterated the contents of the plaint which I have highlighted above. The Respondent's application was placed before Hon. D.Ogoti on 5th October 2023 for directions who upon considering the application, gave an ex parte order of injunction restraining the Appellant from interfering with the Respondent's peaceful and quiet ownership, title and/or interest in the suit property and directed that the application be served upon the Appellant for mention on 1st November 2023 for directions.
 5. The application and the order were served upon the Appellant who appointed a firm of advocates to act for him in the matter. The Appellant filed a replying affidavit sworn on 15th November 2023 in opposition to the application. The Appellant averred that he did not own the suit property and as such could not have leased it to the occupants thereof. The Appellant averred that even if he knew the owner of the suit property, he had no obligation to share the information with the Respondent who was a stranger to him. The Appellant averred that the Respondent had not demonstrated that she had any interest in the suit property. The Appellant averred without prejudice that between June and September 2023 he had been engaged to supervise repair works that were being undertaken on the suit property when a lady by the name Rehema Pete came and demanded that the occupants of the suit property vacate since the property belonged to her sister. The Appellant averred that he informed Rehema Pete that the suit property had been sold by public auction in 2022 and provided her with the details of the auction. The Appellant averred that it was after that that the Respondent who claimed to be the owner of the suit property called him. The Appellant averred that the application was malicious and was meant to intimidate and harass him. The Appellant also filed a defence dated 15th November 2023 in which he denied the Respondent's claim in its entirety.
 6. The Respondent filed another application before the lower through a Notice of Motion dated 9th November 2023 in which she sought; an order that pending the hearing of the application, the Appellant should be arrested and brought to court to show cause why he should not furnish security for his appearance before the court, an order that the O.C.S Kisumu Central Police Station does supervise and provide security for the removal and/or eviction of all the occupants of the suit property and to hand over vacant possession of the property to the Respondent or her representative, an order that the Appellant be cited for contempt of court for disobeying the orders made by the lower court on 5th October 2023, and an order that the Appellant be committed and detained in civil jail for a period not exceeding 6 months for contempt of the said orders.



7. The application that was supported by the affidavit of the Respondent dated 9th November 2023 was brought on the grounds that the court issued an order on 5th October 2023 restraining the Appellant from interfering with the peaceful and quiet ownership of the suit property by the Respondent which order was duly served upon the Appellant who appeared in court in person on 1st November 2023 in response thereto. The Respondent averred that when the Appellant appeared in court on 1st November 2023, he admitted that he had not complied with the court order of 5th October 2023 and was directed by the court to ensure immediate compliance. The Respondent averred that she went to the suit property on 4th November 2023 to take vacant possession of the property but was told by a tenant in the premises that the Appellant had directed that she should not be allowed into the premises. The Respondent averred that failure by the Appellant to give her vacant possession of the suit property amounted to contempt of the orders of the court made on 5th October 2023 and that the court's intervention was necessary for the enforcement of the order.
8. The Appellant filed a replying affidavit dated 29th November 2023 in opposition to the application dated 9th November 2023. In his affidavit, the Appellant averred that since he was not the owner of the suit property, agent of the owner or a care taker of the property, he was not in a position to evict the tenants who were in occupation of the property. The Appellant averred that his role or involvement with the suit property ended when the repairs he was supervising on the property were completed. The Appellant averred that he had provided the Respondent with sufficient information that would have enabled her to find out and obtain the particulars of the person to whom the suit property was sold at the auction that was undertaken by Standard Chartered Bank Limited. The Appellant averred that it was the new owner of the suit property who could ensure that the court order was complied with. The Appellant averred that he had no power to prevent the Respondent from accessing the suit property as he was neither an owner or a co-owner of the suit property. The Respondent termed the Appellant's application frivolous, vexatious and scandalous.
9. The Respondent filed a supplementary affidavit sworn on 7th December 2023 in which she stated that she had demonstrated her interest in the suit property. The Respondent reiterated that she had been denied access to the suit property on the instructions of the Appellant. The Respondent averred that the Appellant was either the alleged auction purchaser of the suit property or an agent of the alleged purchaser. The Respondent averred that there was no evidence that the suit property was sold at a public auction.
10. The Respondent's applications dated 5th October 2023 and 9th November 2023 were heard in the lower court by way of written submissions. In a ruling delivered on 14th December 2023, the court found that the Respondent had satisfied the conditions for granting a temporary injunction and granted the same as prayed in the application dated 5th October 2023. With regard to the application dated 9th November 2023, the lower court granted prayer 2 thereof which was to the effect that the Appellant was ordered to deposit security for his appearance in court in the sum of Kshs. 100,000/- within 30 days.

The appeal to this court

11. The Appellant was dissatisfied with the ruling of the lower court and filed the present appeal on 12th January 2024. In his Memorandum of Appeal, the Appellant challenged the decision of the lower court on the following main grounds;
 1. The trial magistrate erred in law by granting to the Respondent a temporary order of injunction against the Appellant.
 2. The trial magistrate was biased against the Appellant.



3. The trial magistrate erred in shifting the burden of ensuring that the Respondent sued the right party to the Appellant.
 4. The trial magistrate erred in law and fact in ordering the Appellant to deposit in court security for his appearance in the sum of Kshs. 100,000/-.
 5. The trial magistrate erred in ignoring the Appellant's submissions and in not finding that the Respondent's claim against the Appellant was misconceived, bad in law and amounted to an abuse of the court process.
12. The Appellant urged the court to allow the appeal, set aside the ruling of the lower court made on 14th December 2023, find that the Respondent sued a wrong party, and dismiss the Respondent's suit with costs. The Appellant also prayed for the costs of the appeal.
 13. The submissions by the parties
 14. The appeal was argued by way of written submissions. The Appellant filed submissions dated 5th April 2024 while the Respondent filed submissions dated 2th July 2024.

Analysis and determination

15. I have considered the pleadings that were filed by the parties in the lower court, the two applications that were filed by the Respondent and the response thereto by the Appellant, the submissions made by the parties in the lower court, the ruling of the court and the grounds of appeal put forward against the ruling. Finally, I have considered the submissions made before this court by the parties in support of and in opposition to the appeal. In my view, the appeal raises only two issues which I need to determine, namely, whether the lower court erred in issuing a temporary injunction against the Appellant in favour of the Respondent, and whether the lower court erred in ordering the Appellant to deposit in court a sum of Kshs. 100,000/- as security for his appearance. I will consider the two issues one after the other starting with the first one.
16. The Respondent's application for injunction before the lower court dated 5th October 2023 was brought principally under Order 40 Rules 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.”
17. The power given to the court under Order 40 Rule 1 of the Civil Procedure Rules is discretionary. 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."

18. The Respondent's application before the lower court sought 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 a temporary 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."

19. What I need to determine is whether the lower court exercised its discretion properly when it granted a temporary injunction in favour of the Respondent against the Appellant. In *Mbogo v. Shah* [1968] E. A. 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."

20. I am not persuaded by the Appellant that the lower court exercised its discretion wrongly. The Respondent placed before the lower court evidence showing that the suit property was still registered in the name of the Respondent's deceased husband, Erick Okoth Onguru as at 14th August 2023. Although the Appellant produced evidence showing that the suit property had been put up for sale by public auction on 12th December 2022, there was no evidence that the suit property was sold at the auction. The only evidence of ownership of the suit property was the certificate of official search dated 14th August 2023 produced by the Respondent which showed that the deceased was the owner of the suit property.
21. The Respondent's suit before the lower court was based on trespass. The Respondent claimed that the Appellant trespassed on the suit property and rented the same out to third parties without the



permission of the deceased's estate. The name of the Appellant was given to the Respondent by the persons who were found in occupation of the suit property. They did not only give the name but also the Appellant's telephone number through which he was contacted by the Respondent. The Appellant did not deny unequivocally that he did not lease, rent out or put those who were in occupation of the suit property in possession. In my view, the Appellant was very evasive in his response. Instead of telling the court whether he knew those who were in occupation of the suit property and whether he was the one who had put them in possession, his response was that, "I do not own the property referred to herein and therefore could not have leased it to anyone as landlord..." The Appellant who stated on oath but "without prejudice" that the suit property had been sold by public auction in 2022 and that he had supervised some repairs which were being carried out in the suit property which ended in September 2023 less than a month before the suit was filed stated that "even if I knew the owner of the suit property I do not owe the Plaintiff such information...". Having regard to the manner in which the Appellant responded to the Respondent's application, the lower court was justified in its conclusion that the Appellant was not candid with the court and that he was hiding some information. In the absence of clear evidence rebutting the Respondent's claim that those occupying the suit property were given possession by the Appellant, I cannot fault the lower court for its finding that a prima facie case of trespass had been made against the Appellant. There is no doubt that there was a likelihood of the Respondent suffering irreparable harm unless the injunction sought was granted. The trespassers who were on the suit property illegally had prevented the Respondent from accessing the property. The Appellant had admitted having supervised some repairs on the suit property which according to the Respondent were unauthorised and as such amounted to wasting the suit property. The activities of the occupants of the suit property could not be ascertained by the Respondent. Acts of waste that were being committed on the suit property by the trespassers would have continued if not stopped by the court. There was a likelihood that the damage that was being caused to the suit property was irreparable. This in my view was a case in which even if the court were in doubt, the balance of convenience would have favoured the granting a temporary injunction. For the foregoing reasons, it is my finding that the lower court did not err in granting an order of a temporary injunction against the Appellant.

22. The Respondent's application dated 9th November 2023 was brought under Order 40 Rule 3 of the Civil Procedure Rules which provides as follows:

3.

- (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
- (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.
- (3) An application under this rule shall be made by notice of motion in the same suit."

23. From my reading of the Respondent's application, the Respondent sought the committal of the Appellant to jail for disobeying the ex parte order of a temporary injunction that was made on 5th October 2023. The Appellant appeared in court in person on 1st November 2023 upon being served with the injunction application and asked the court for time to get an advocate to represent him. The Appellant thereafter appointed an advocate to act for him who is still on record. My



understanding of the Respondent's lower court application is that security was required to ensure that the Appellant appeared at the hearing of the contempt application. I agree with the Appellant that the Appellant having appeared in court in person and through counsel, and having responded to the contempt application, the order made against him for security for his appearance at the hearing of the contempt application was uncalled for and was not based on any law or rule. Since the Appellant had already appeared and responded to the application, the lower court should have proceeded to hear the contempt application which is pending determination in the lower court. It is my finding therefore that the lower court erred in ordering the Appellant to deposit in court as security for his appearance the sum of Kshs. 100,000/-.

Conclusion

24. In the final analysis and for the foregoing reasons, the Appellant's appeal succeeds in part. Part of the ruling and order made by the lower court (Hon. Douglas Ogoti) on 14th December 2023 requiring the Appellant to deposit in court as security for his appearance the sum of Kshs. 100,000/- within 30 days are set aside. The lower court shall proceed to determine the Respondent's application dated 9th November 2023 without requiring security for the Appellant's appearance. Each party shall bear its costs of the appeal.

DELIVERED AND DATED AT KISUMU ON THIS 17TH DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Rautta S. C for the Appellant

Mr. Onyango for the Respondent

Ms. J.Omondi-Court Assistant

