



REPUBLIC OF KENYA



Okumu v Olwege & another (Enviromental and Land Originating Summons E008 of 2024) [2024] KEELC 14036 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14036 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2024
GMA ONGONDO, J
DECEMBER 16, 2024**

BETWEEN

PETER JUMA OKUMU PLAINTIFF

AND

MICHAEL ODHIAMBO OLWEGE 1ST DEFENDANT

MAURICE JUMA OBURA 2ND DEFENDANT

RULING

1. This ruling is in respect of the three applications namely; the plaintiff's application dated 12th August 2024, the defendants' application dated 14th August 2024 and the plaintiff's application dated 18th September 2024 and filed herein on diverse dates (1st, 2nd and 3rd applications respectively).
2. The Notice of Motion application dated 12th August 2024 (the 1st application herein) was originated under Order 40 Rule 1(a) of the Civil Procedure Rules, 2010, by the plaintiff through M/s Nancy Nyarige and Company Advocates, seeking the orders infra:
 - a. Moot
 - b. Moot
 - c. The Honourable court be pleased to make a conservatory order in the nature of a temporary injunction restraining the defendants, their employees, servants and/or agents and/or assigns, next-of-kin from entering into, taking possession of, selling and/or disposing, alienating, cultivating on, constructing on, developing or in any other manner whatsoever interfering with the plaintiff's quiet possession of the suit land parcel numbers Kabondo/ Kodhoch East/1905 and 1907 measuring 5.0 hectares until this matter is heard and finalized or until further orders of this honourable court.



- d. The OCS Othoro Police Station, ensure the compliance of the orders issued by this honourable court.
 - e. The costs of this suit be provided for in favour of the plaintiff.
3. The application is anchored on the applicant's supporting affidavit of fourteen paragraphs sworn on 12th August 2024, by Peter Juma Okumu, alongside the annexed documents marked as PJO-1 to 3 which are; photographs, copies of the green card in respect to the suit parcels of land and photographs. Further, the same is founded on eleven grounds including:
 - a. The plaintiff is in possession of portions covering both suit parcels of land, having entered into the said land and taken possession of the subject land in the year 2003, established his home thereon together with his family and cultivating the remaining land.
 - b. The plaintiff is in possession of portions covering both suit parcels of land for a period of 21 years, a fact well known by the defendants and their family who reside within the same location.
 - c. Despite having knowledge of the fact that the plaintiff had taken possession of the suit land, been in possession and cultivation of the same for 21 years, the defendants have had the suit parcels of land registered in their names on the 29th December 2023 and 14th February 2024 respectively.
 - d. The defendants have today entered the suit parcel, began cutting trees planted and growing thereon belonging to the plaintiff, started digging holes surrounding the plaintiff's home and that of his son claiming that they want to take over the land.
 - e. The defendants intend further to forcefully and unlawfully take over the plaintiff's land since they want to fence it off and deny the plaintiff his rights to freely enter into and exit the suit parcels of land without the consent, authority and/or sufferance of the plaintiff and without due consideration of his accrued rights thereto.
 - f. Unless the application herewith is heard as a matter of urgency and the orders sought therein issue, the plaintiff will suffer irreparable loss and the defendants will go ahead to fence off the plaintiff's homestead and that of his son making it impossible to access his home or to freely enter and exit his home.
 - g. That the defendants' actions are illegal and being done with impunity without following due procedures of the law; if allowed to continue with the said acts this suit will be rendered nugatory and justice will not be met hence the urgency.
 - h. The application has been brought in good faith and without undue delay.
4. Briefly, the applicant laments that he has been possession of portions covering both suit parcels of land since 2003 and has established his home thereon together with his family and cultivating the remaining land. That despite being aware of the plaintiff's possession thereof, the defendants caused the suit parcels of land to be registered in their names on the 29th December 2023 and 14th February 2024 respectively. That the defendants have since entered the suit parcels, cut down trees planted and growing thereon belonging to the plaintiff and dug holes surrounding the plaintiff's home and that of his son claiming that they want to take over the land. That unless the orders sought herein issue, the plaintiff will suffer irreparable loss. That the defendants' actions will render the suit nugatory and justice will not be met. That further, the instant application has been brought in good faith and without undue delay.



5. Notably, the defendants/respondents did not oppose the application.
6. By the 2nd application, the defendants, through M/s Aluoch Odera and Nyauke Advocates, have sought the orders that:
 - a. Spent
 - b. The Court be pleased to vacate its interim orders issued to the plaintiff/respondent herein on the 12th August 2024.
 - c. Upon vacating its orders, this court be pleased to make a further finding that the filling of this Originating Summons by the plaintiff/respondent before this court constitutes abuse of court process and subsequently strike out the main originating summons herein with costs to the applicants.
7. The application is anchored on the supporting affidavit sworn on even date by Michael Odhiambo Olwenge (the first defendant herein) who deponed that the plaintiff herein obtained interim orders before this court by concealing material facts since he failed to disclose that there is a suit at Oyugis Senior Principal Magistrate's Court Environment and Land Case No. E041 of 2024, between the parties herein and that the plaintiff has lodged a counter-claim in that suit. That further the plaintiff's counsel in this suit is also on record in the Oyugis matter.
8. The application was opposed by the plaintiff through a Replying Affidavit and a Supplementary Affidavit, both dated 18th September 2024. He admitted that there exists a suit at Oyugis between himself and the 1st defendant herein. He, however, contended that the subordinate court lacks the pecuniary jurisdiction to entertain the suit and that he has lodged a Preliminary Objection to that effect. Further, he stated that whereas the suit in Oyugis involves a single parcel of land, to wit, Kabondo/ Kodhoch East/1905, the suit filed in this court involves two parcels of land Kabondo/ Kodhoch East/1905 and 1907 and two defendants. That the application dated 12th August 2024 is undefended hence, ought to be allowed as prayed.
9. The 3rd application was originated under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya as read with Order 51 of the Civil Procedure Rules, 2010, by the plaintiff through Counsel, seeking the orders infra:
 - a. The Honourable Court be pleased to order the respondents to appear before it and show cause why they cannot be cited for abuse of court process or contempt of court.
 - b. The Honourable Court to thereafter hold the respondents in contempt of court orders issued by this Honourable Court on the 12th August 2024 and commit the respondents to civil jail.
 - c. The Honourable Court do direct the OCS Othoro Police Station to enforce the orders issued on the 12th August 2024 and any other subsequent orders.
 - d. The costs of this application be ordered in favour of the appellant (I think Counsel meant applicant).
10. The application is based on ten grounds and a Supporting Affidavit sworn on even date by the plaintiff wherein he deponed that the respondents/defendants herein had on 16th August 2024 and 31st August 2024 willfully disregarded the orders of this court issued on 12th August 2024, although the same was served upon them through their counsel on record. That the defendants have blocked the plaintiff's access road leading to the river, fenced off the plaintiff's plantations and together with their agents, have



- moved to the disputed portions of the suit and constructed a mabati house thereon which is occupied by their agent. That the defendants' agents intimidate and create fear upon the plaintiff and his family.
11. As noted in paragraph 2(c) hereinabove, in the 1st application herein, the plaintiff sought among other orders, a conservatory order in the nature of a temporary injunction restraining the defendants, their employees, servants and/or agents and/or assigns, next-of-kin from entering into, taking possession of, selling and/or disposing, alienating, cultivating on, constructing on, developing or in any other manner whatsoever interfering with the plaintiff's quiet possession of the suit parcels of land until this matter is heard and finalized or until further orders of this honourable court.
 12. In that regard, this Court in its Ruling of even date directed that there be an order of status quo prevailing over the suit parcels of land as at the time of lodging the instant suit together with the motion pending the hearing and determination of the motion. The Court further directed thus:

“...In particular, the defendants/respondents shall not sell, charge, transfer, sub divide, alienate, dispose of, fence off or in any manner develop the suit parcels of land and that they shall not disturb or block the plaintiff/applicant's quiet possession and occupation of the suit parcels of land pending the outcome of the motion...”
 13. Parties filed their respective submissions in respect to the applications. In particular, the plaintiff's counsel filed submissions dated 18th September 2024 and 4th November 2024 while the defendants' counsel filed submissions dated 15th August 2024, 21st August 2024 and 7th October 2024. The same have been taken into consideration herein.
 14. In the foregone, the issue for determination is whether the three applications are meritorious?
 15. The plaintiff laments that the defendants have disregarded the court orders issued on 12th August 2024 and through the 3rd application herein has sought an order directing the respondents to appear before this court and show cause why they cannot be cited for abuse of court process or contempt of court.
 16. Besides, it has come to the attention of this Court that there exists another suit at Oyugis Senior Principal Magistrate's Court Environment and Land Case No. E041 of 2024, between the parties herein and that the plaintiff has lodged a counter-claim in that suit. Notably, the plaintiff has not denied the existence of the suit in Oyugis Law Courts but avers that the subordinate court lacks the pecuniary jurisdiction to entertain the suit and that he has lodged a Preliminary Objection to that effect.
 17. Further, the plaintiff stated that whereas the suit in Oyugis involves a single parcel of land, to wit, Kabondo/ Kodhoch East/1905, the suit filed in this court involves two parcels of land Kabondo/ Kodhoch East/1905 and 1907 and two defendants. That the application dated 12th August 2024 is undefended hence, ought to be allowed as prayed.
 18. Section 6 of [Civil Procedure Act](#), Chapter 21 Laws of Kenya provides for the sub-judice doctrine as follows:

“...No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..”
 19. I have perused the pleadings filed in Oyugis Senior Principal Magistrate's Court Environment and Land Case No. E041 of 2024 annexed to the plaintiff's Replying Affidavit dated 18th September 2024



and marked as PJO-1 and PJO-2. I note that the parties in that suit are the plaintiff and the 1st defendant herein. Also, the suit land therein is Land Parcel No. Kabondo/Kodhoch/1905, which is one of the suit parcels of land in this suit. The plaintiff in that suit (the 1st defendant herein) is seeking an order of eviction against the defendant from the suit land as well as costs. Clearly, the issues in dispute here are also directly and substantially in issue in that suit.

20. The rationale behind sub-judice is to prevent a situation of having conflicting orders emanating from two or more different courts over the same subject matter; see Kenya National Commission on Human Rights –vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) eKLR.
21. Section 11 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that a suit ought to be instituted in the court of the lowest grade competent to try it. Therefore, this court cannot make a determination on the issues raised herein, until the subordinate court makes a finding on the same, including the Preliminary Objection pending before Oyugis Senior Principal Magistrate’s Court Environment and Land Case No. E041 of 2024. Any party who shall be aggrieved by the decision of the subordinate court shall be at liberty to file an appeal before this court pursuant to Section 13(4) of the *Environment and Land Court Act*, 2015 (2011).
22. One of the national values and principles of good governance provided under Article 10(2)(c) of *the Constitution* of Kenya, 2010 is transparency. It is noteworthy that in the 1st application, the plaintiff concealed material facts. In particular, the plaintiff failed to disclose the existence of Oyugis Senior Principal Magistrate’s Court Environment and Land Case No. E041 of 2024, thus deliberately misleading this Honourable court.
23. Accordingly, the 1st and 3rd applications, hereby fail.
24. In the interest of justice and pursuant to, inter alia, Sections 3 and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, I hereby set aside the orders of this Court issued on the 12th August 2024.
25. In the foregone, I hereby find the 2nd application dated 14th August 2024 and instituted by the defendants herein merited. The same is hereby allowed with no order as to costs.
26. Further, the Originating Summons dated 12th August 2024 is hereby struck out with no order as to costs.
27. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 16TH DAY OF DECEMBER 2024.

G.M.A ONG’ONDO

JUDGE

Present

N. Nyarige, Learned Counsel for the plaintiff

S. Nyauke, Learned Counsel for the defendants

T. Luanga, Court Assistant

