



**Archdiocese of Kisumu Trustees v Odero (Environment & Land Case E007 of 2024) [2024] KEELC 13797 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13797 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E007 OF 2024  
AY KOROSS, J  
DECEMBER 11, 2024**

**BETWEEN**

**ARCHDIOCESE OF KISUMU TRUSTEES ..... PLAINTIFF**

**AND**

**SILAS GWADA ODERO ..... DEFENDANT**

**RULING**

1. This ruling seeks to determine the notice of motion dated 3/05/2024 that the plaintiff filed. It seeks several reliefs from this court some of which are spent and the residual prayers for determination are: -
  - a. Pending hearing and determination of the suit, a temporary injunction be issued restraining the defendant, his agents, servants, nominees, or any such persons from entering, tilling, selling or dissipating the plaintiff's land parcel no. Siaya/Nyandiwa/398.
  - b. The officer in charge of the Siaya area be and is hereby ordered to ensure compliance with the orders of this court.
  - c. Costs of the suit be borne by the defendant.
  - d. The court does grant any further orders as may be necessary to give effect to the foregoing orders.
2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit sworn by Rev. Fr. Vincent Ouma Odundo on the instant date.
3. The deponent described himself as the vicar-general of the Archdiocese of Kisumu and stated he was conversant with the matters in dispute.
4. In a brief summation of the grounds and depositions, it is his position the plaintiff is the registered owner of Siaya/Nyandiwa/398 (suit property). He alleges sometime in December 2023, the defendant



without permission entered the suit property and inhabited one of the plaintiff's permanent structures and has declined to vacate.

5. Thus, according to him, the defendant's actions have denied the plaintiff the right to occupation and quiet use of the suit property.

#### **Defendant's case**

6. By the law firm of M/s. Juliet Kokeyo & Co. Advocates, the defendant Silas Gwada Odera filed a replying affidavit deposed on 16/06/2024 together with annexures attached thereto.
7. He contends that he is the son of Joakim Odera (Joakim) who at one time was the registered owner of the suit property, nevertheless, it was fraudulently transferred to John Okelo Odongo (John) who ostensibly transferred it to the plaintiff sometimes on 4/08/1992. He alleges Joakim died on 8/04/1991.
8. He asserts the plaintiff has not explained how he acquired title to the suit property and in his view, the plaintiff was the trespasser and not him. According to him, he is in possession. He urged the court to dismiss the motion.

#### **Plaintiff's rebuttal**

9. In refutation of the defendant's assertions, Rev. Fr. Vincent Ouma Odundo filed a further affidavit that he swore on 5/05/2024 in which he avers at the time of purchase of the suit property, John was the registered owner thereof.
10. He asserts in the transaction; the plaintiff was represented by Fr. John Nijhuise (deceased) and due diligence was carried out.
11. He contends the plaintiff has been in occupation since 1992 and has extensively developed the suit property and the plaintiff lacks locus standi as he is neither Joakim's legal representative nor administrator. Further, he alleges the defendant's claims ceased to exist upon transfer of the suit property to John.

#### **Parties' submissions**

12. As directed by the court, both parties filed written submissions. The plaintiff's law firm on record Ms. N.A. Owino & Co. Advocates filed written submissions dated 4/07/2024 in which counsel identifies one issue for determination; whether the motion has met the threshold for the grant of the orders of temporary injunction. Counsel submits on the settled principles of adverse possession.
13. In response, the defendant's counsel recognizes the issues falling for resolution as whether the plaintiff has established a prima facie case, will the plaintiff suffer an irreparable loss that cannot be compensated by an award of damages, and lastly, if in doubt, whether the motion should be determined on a balance of convenience.
14. It is noted the plaintiff's counsel could not contain herself and waded into the merits of the case and on this basis, some of her line of arguments will be disregarded.
15. It is worth reckoning that when faced with interlocutory applications such as this one which concerns the preservation of the substratum of the suit, the court's mandate at this stage is restricted to probing and appraising the facts and evidence that are before it and determine if the plaintiff has met the legal threshold to warrant the grant of the orders sought.



16. Therefore, upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider each of the counsel's arguments on the particular issue and also bear in mind the judicial precedents that they have both relied upon to buttress their respective arguments.

### **Issues for determination.**

17. I have carefully considered the motion, its grounds, affidavits, and parties' rival submissions. In cognition, the following issues arise for determination: -
- a. Whether the plaintiff has met the legal threshold to warrant the grant of injunctive orders.
  - b. What orders should be issued?

### **Analysis and Determination**

18. These two issues shall be handled together. Order 40 Rule 1 of the Civil Procedure Rules confers this court with jurisdiction to grant an injunctive relief by stating as follows: -

“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.”

19. Although this court exercises discretion in considering applications for injunctive relief, it exercises judicious discretion based on the law and evidence. An applicant has to meet the threshold of the 3 tests which are inter alia, establish a prima facie case; demonstrate irreparable injury, and that the balance of convenience tilts in its favour.

20. As rightfully submitted by both counsels, the principles for the grant of temporary injunction were well settled in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 which were similarly restated in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR in the following words: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”



21. When determining an interlocutory application such as the one before this court, the court has to be careful not to prejudice a party by making conclusive findings of fact or law on substantive issues that are the preserve of trial as was stated by Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002.*
22. The 1<sup>st</sup> test to establish is whether the plaintiff has a prima facie case and the definition of the term was defined by the Court of Appeal decision of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR which has been relied upon by both counsels. In this decision, the court stated: -
 

“In civil cases a prima facie case is a case in 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 party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.”
23. On this issue, the plaintiff’s counsel submits the plaintiff has established a prima facie case because the plaintiff is the registered owner and has tendered documents to substantiate how it acquired the suit property.
24. On the contrary, the defendant’s counsel submits because of how the plaintiff acquired the suit property is wanting, the suit is vexatious and an abuse of the court process.
25. In my humble view, the defendant’s arguments are premature and these are evidential matters that have to be tested by a formal hearing of this case. At this stage in time, the court’s mandate is restricted.
26. As the alleged registered owner of the suit property, one cannot say the plaintiff’s suit is frivolous or an abuse of the court process because, by Section 26 of the *Land Registration Act*, courts prima facie deem the registered owner as the absolute and indefeasible owner.
27. The plaintiff has availed a green card of the suit property which shows it is its registered owner. Nevertheless, even if the plaintiff appears to have a prima facie case, there is a challenge as the defendant is allegedly in occupation of the suit property.
28. Both parties are in consensus the defendant is in possession. It is uncertain if it is in the whole or part of the suit property but the question that suffices is whether the court can injunct what has already happened.
29. The answer to this is the negative and this position has been upheld in a line of court decisions. This court adopts the court’s rendition in Stanley Kirui v. Westlands Pride Limited (2013) eKLR which stated: -
 

“...the court cannot injunct what has already happened. I will be guided by the findings in case of Mavoloni company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997 (1997) LLR 5086, where the court held that “an injunction cannot be granted once the event intended to be injuncted has been overtaken by events.” Similar findings were held in the case of Esso Kenya Ltd Vs Mark Makwata Kiya, Civil Appeal No. 69 of 1991 where it was stated “an injunction cannot issue to restrain an event that has taken place.”
30. On the premises, I find the plaintiff has not met the 1<sup>st</sup> test. In the circumstances and having not met the 1<sup>st</sup> hurdle, it is the considered view of this court that it would be superfluous to consider the other 2 tests.



31. For the findings and reasons herein stated above and in addressing the issue (b), I ultimately find the notice of motion dated 3/05/2024 unmerited and it is hereby dismissed with costs being in the cause. Matter to be mentioned before the Deputy Registrar for pretrial directions on 4/03/2025.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 11<sup>TH</sup> DAY OF DECEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**11/12/2024**

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Miss. Marucha for the plaintiff

Miss. Kokeyo for the defendants

Court assistant: Mr. Ishmael Orwa.

