



**Shurake & another v Ndilai (Environment & Land Case
E009 of 2022) [2023] KEELC 533 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E009 OF 2022
MN GICHERU, J
JANUARY 31, 2023**

BETWEEN

PHILIP MUNKE SHURAKE 1ST PLAINTIFF

GEOFFREY OIMERU NDILAI 2ND PLAINTIFF

AND

DAVID OLE NDILAI DEFENDANT

RULING

1. This ruling is on the notice of motion dated 2/2/2022 which seeks to restrain the defendants as follows.
 - a. Trespassing on, wasting, constructing, disrupting, alienating or otherwise interfering with L.R. Kjd/ewuaso-kedong/6964 (suit land) pending the hearing and determination of this suit.
 - b. Interfering with the register or any other records and system of registration of land relating to the suit land pending the hearing and determination of this suit.
 - c. An order of eviction against the defendant from the suit land owned by the plaintiffs with immediate effect.
2. The application is supported by an affidavit dated 2/2/2022 sworn by the Plaintiffs which has about six annexures. In addition, there are nine grounds to support the motion.

In summary, the applicants are saying that they are the registered owners of the suit land and the defendant who is their brother has occupied the land unlawfully. That is why they want him evicted therefrom.
3. The notice of motion is opposed by the respondent who has sworn a replying affidavit dated 10/5/2022 in which he says that the applicants obtained registration to the suit land fraudulently. He has



challenged such registration by filing an objection dated 3/5/2021 in High Court (Nairobi) Succession Cause No. 640 of 1988 and the case is actively proceeding in the High Court in Nairobi.

4. I have carefully considered the notice of motion in its entirety including the affidavits, the grounds and the annexures. Counsel for the parties were to file written submissions by October 10, 2022 but at the time of writing this ruling in late January, no such submissions have been received.
5. I find that the notice of motion has no merit for the following reasons.
6. Firstly, it seeks to restrain the defendant from trespassing onto the suit land yet at paragraph 5 of the plaint dated 2/2/2022 it is admitted that the defendant is already on the land and he has put up structures thereon.
7. At paragraph 6 of the same plaint it is admitted that he is in occupation while at paragraph 7 it is admitted that he has constructed thereon. If the Respondent is already in occupation of the suit land, he cannot be restrained from trespassing thereon.
8. Secondly, it is not fair or just to evict a party in possession before hearing such a party. Evicting a party in occupation at an interlocutory stage is not fair.
10. Thirdly, at paragraph 13 of the plaint, it is averred that there is no other suit pending in court between the parties. This is disputed by the respondent who deposes in his replying affidavit that Succession Cause No. 640 of 1988 is active and the order that gave the plaintiffs title to the suit land may be revoked.
11. For the above reasons, I find that that the applicants have not made out a prima facie case with a probability of success. They have not shown that they stand to suffer damages that cannot be adequately compensated with an award of damages.
12. Finally, they have not proved that the balance of convenience tilts in their favour. I therefore dismiss the Notice of motion for lack of merit.
13. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31ST DAY OF JANUARY, 2023.

M.N. GICHERU

JUDGE

