



Ochieno (Suing as legal representative to the Estate of Ochieno Aswama Namukobe) and his own behalf v Waithera & 2 others (Environment & Land Case E026 of 2022) [2023] KEELC 16082 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E026 OF 2022
BN OLAO, J
FEBRUARY 23, 2023**

BETWEEN

SOLOMON WANDERA OCHIENO (SUING AS LEGAL REPRESENTATIVE TO THE ESTATE OF OCHIENO ASWAMA NAMUKOBE) AND HIS OWN BEHALF APPLICANT

AND

ESTHER WAITHERA 1ST RESPONDENT

LAND REGISTRAR, BUSIA COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. Articles 159 (2) (d) of the *Constitution* provides that:

“Justice shall be administered without undue regard to procedural technicalities.”

In the case of *D t. Dobie & Company (kenya) Ltd -v- Joseph Mbaria Muchina & Another* 1980 eKLR Madan J a (as he then was) had this to say about the power of striking out pleadings:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”



And whereas Courts are now guided by the overriding objectives under Sections 1A and 1B of the Civil Procedure Act, in order to achieve the just, expeditious proportionate and affordable resolution of disputes before it, it must also be remembered, as was stated in *Mradura Suresh Kantaria v Suresh Nanalal Kantaria* C a Civil Appeal No 277 of 2005 that:

“The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation.”

I have taken the liberty to refer to those provisions and precedents deliberately because at some point, the plaintiff herein and his counsel will have to re-consider their pleadings.

2. The plaintiff has approached this Court vide his Originating Summons dated November 9, 2022 seeking orders, *inter alia*, that the 1st defendant’s title to the land parcel No Bukhayo/bugengi/5158 (suit land) is illegal, fraudulent and should be cancelled yet at the same time, he seeks an order that he has been in quiet peaceful, lawful and uninterrupted occupation of the suit land. Those remedies have not been sought in the alternative. I am not sure that a party can challenge the authenticity of a title and at the same time, seek an order that he is entitled to the same title by way of adverse possession which the plaintiff herein appears to be doing. At this stage however, and guided by the decision in *D t Dobie & Company (kenya) Ltd -v- Joseph Mbaria Muchina (supra)*, I will not say more with regard to the plaintiff’s Originating Summons.
3. Simultaneously with the said Originating Summons, the plaintiff filed a Notice of Motion under Order 40 Rule 1 of the Civil Procedure Rules seeking the following orders:
 - a. Spent
 - b. Spent
 - c. An order of injunction be and is hereby issued restraining the 1st defendant whether by herself, her agents, relatives, workers and/or servants from evicting, trespassing or doing any activities on L r No Bukhayo/bugengi/5158 pending the hearing and determination of this suit.
 - d. That the costs be provided for.
4. The gravamen of the application which is predicated on the grounds therein and supported by the affidavit of the plaintiff is that the suit land is family land yet one Mwangi alleges to have given the plaintiff’s father one Ochieno Aswama Namukobe (the deceased) Kshs27,000 as a loan and retained his title to the suit land. That the said Mwangi later transferred the suit land to her daughter the 1st defendant who has now served the plaintiff with an eviction orders. That the suit land is trust land which could not have been sold without the consent of the plaintiff’s family.
5. Annexed to the supporting affidavit are the following documents:
 1. Limited Grant of Letters of Administration *Ad Litem* issued to the plaintiff in respect to the Estate of Ochieno Aswama Namukobe Alias Oswama.
 2. Letter dated November 2, 2001 from the Assistant Chief Esikulu Sub-location Addressed To The District Land Registrar Busia.
 3. A demand letter dated October 28, 2022 from Odhiambo B f o Advocate addressed to the plaintiff to vacate the suit land.
 4. Register for the land parcels No Bukhayo/bugengi/37 And Bukhayo/bugengi/1158.



6. The application is opposed and Esther WaitherA the 1st defendant herein has filed a replying affidavit dated January 17, 2023 in which she has deposed, *inter alia*, that she is the registered proprietor of the suit land having purchased the same From The Plaintiff's Late Father Ochieno Aswama Namukobe on April 19, 2001 at a consideration of Kshs.27,000. That at the time of the said transaction, the deceased was accompanied by his 2nd wife, her daughter and a witness one Charles Omondi. That the deceased executed all the transfer documents and the title deed to the suit land was issued in the name of the 1st defendant. Meanwhile, the deceased relocated to Uganda but his first wife who is the mother to the plaintiff decided to remain on the suit land. That the plaintiff's brother one Peter Ochieno had offered to refund the Kshs.27,000 plus Kshs.3,000 making a total of Kshs.30,000. That in 2009, the 1st defendant and her father had a meeting with the plaintiff's family when it was suggested that the 1st defendant should surrender a portion of the suit land to the 1st wife of the deceased since she was not involved in the sale agreement and although the 1st defendant agreed to the proposal, the plaintiff declined. That in 2011, the plaintiff attacked the 1st defendant's father when he tried to cultivate the suit land. That the plaintiff has never denied that his late father sold the suit land to the 1st defendant.
7. Annexed to the replying affidavit are the following documents:
 1. Copy of title deed to the land parcel No Bukhayo/bugengi/5158.
 2. Copy of sale agreement between Ochieno Aswama Namukobe And Esther Waithera Mwangi dated April 19, 2001.
 3. Application for consent of the Land Control Board.
 4. Minutes of meeting held on October 25, 2022 at the Assistant Chief's Office Esikulu.
 5. Mutation Form.
 6. Certificate of search.
8. When the application was placed before me on November 10, 2022, I directed that it be canvassed by way of written submissions to be filed on or before December 15, 2022. However, that order was not complied with and it was not until January 19, 2023 that the 1st defendant filed a replying affidavit. Only the plaintiff's counsel Mr Masiga Instructed By The Firm Of Masiga, Wainaina & Associates Filed Submissions. The 1st Defendant's Counsel Mr Odhiambo appears not to have filed any submissions even after an extension of time was granted.
9. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Mr Masiga.
10. The conditions for the grant of a temporary injunction will normally be determined as was set out in the case of *Giella v Cassman Brown & Co Ltd* 1973 E A 358. That is:
 1. The Applicant must show a *prima facie* case with a probability of success at the trial.
 2. Secondly, such an order will not normally be granted unless the Court is satisfied that the Applicant might otherwise suffer irreparable injury which will not adequately be compensated by an award of damages.
 3. If in doubt, the Court will determine the application on a balance of convenience.



A *prima facie* case, as was held in *Mrao v First American Bank Of Kenya Ltd & Two Others* C a Civil Appeal No 39 Of 2002 [2003 eKLR].

“..... 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 as to call for an explanation or rebuttal from the latter.”

In the case of *Nguruman Ltd v Jan Bonde Nielsen & Others* C a Civil Appeal No 77 Of 2012 [2014 eKLR], the Court of Appeal added:

“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. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.” Emphasis mine.

Finally, as was held in *Films Rover International Ltd v Cannon Films Sale Ltd* 1986 3 All E r 772, a court considering such an application should always consider taking the course that appears to carry the lower risk of injustice.

11. Guided by all the above, the following facts are not in dispute:

1. The 1st defendant is the registered proprietor of the suit land and holds the title deed thereto issued on April 19, 2001.
2. The plaintiff and his family are currently in possession and occupation of the suit land.
3. The suit land was previously registered in the name of the plaintiff's deceased father Ochieno Aswama Namukhobe since February 5, 1998.

As the registered proprietor of the suit land, the 1st defendant is, *prima facie*, the absolute and indefeasible owner thereof. But that title is under challenge by the plaintiff who is in occupation. The rights of a party in possession and occupation of land are equitable rights which are binding by the land – *Mwangi & Another v Mwangi* 1986 Klr 328. The plaintiff has annexed to his supporting affidavit a copy of letter dated October 28, 2022 addressed to him by the 1st defendant's counsel giving him notice to vacate the suit land within 30 days. I am persuaded that not only has the plaintiff demonstrated a *prima facie* case but also, if he and his family are evicted from land which previously belonged to the deceased, the ensuing damage will not be compensable by an award of damages. If I was in any doubt, I would determine the application in favour of the plaintiff. That is really the lower risk of injustice in the circumstances of this case. The application for temporary injunction is, in my view, well merited.

12. Before I make final disposal orders in this application, I wish to point out two issues:



1. The sale agreement dated April 19, 2001 was executed at this Court and signed by a Magistrate. This is confirmed by the 1st defendant in paragraph 9 of her affidavit dated January 17, 2023 and filed in response to the Originating Summons in which she has deposed that “the said transaction with (sic) took place within Busia Law Courts premises.” Indeed it is signed by a Magistrate and bears the Court Seal. The pitfalls inherent in that practice are obvious and I need not say more.
 2. Secondly, and on a better note, it is clear from the evidence that this is a matter which could be amicably resolved. At least the 1st defendant has deposed to the efforts she has made in that regard. I encourage the parties to start that conversation again with the assistance of both counsel.
13. The upshot of all the above is that the Notice of Motion dated November 9, 2022 is allowed in the following terms:
1. An order of temporary injunction is hereby issued restraining the 1st defendant whether by herself, her agents, relatives, workers or servants from evicting the plaintiff and his family or trespassing on the land parcel No Bukhayo/bugengi/5158 pending the hearing and determination of this suit.
 2. The parties shall ensure that this suit is heard and determined within 12 months from the date of this ruling or else the injunction shall lapse unless otherwise extended by this Court.
 3. Costs shall be in the cause.
4. Finally, and most importantly, the plaintiff and the 1st defendant together with their counsel shall appear in Court on March 9, 2023 at 9 am so that we can initiate an amicable settlement.

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF FEBRUARY 2023 IN BUSIA ELC BY WAY OF ELECTRONIC MAIL.

BOAZ N OLAO

JUDGE

23RD FEBRUARY 2023

