



REPUBLIC OF KENYA



**Owino v Ogonda & another (Environment & Land Case E023 of 2022)
[2023] KEELC 15808 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT & LAND CASE E023 OF 2022
AY KOROSS, J
FEBRUARY 23, 2023**

BETWEEN

CHARLES OTIENO OWINO PLAINTIFF

AND

GEOFRY MURABULA OGONDA 1ST DEFENDANT

MICHAEL OWINO OGUTU 2ND DEFENDANT

RULING

1. Pursuant to the provisions of Section 68 of the *Land Registration Act*, sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*, the plaintiff filed a notice of motion dated 5/12/2022 under certificate of urgency against the defendants in which he sought the following reliefs:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the suit, there be an order of temporary injunction restraining the defendants herein either by themselves, their agents, employees, relatives and/or any other person deriving authority from them from, entering, constructing on, alienating, cultivating, or in any manner interfering with the plaintiff's quiet possession, ownership and occupation of land parcel no. North Ugenya/Sega/350;
 - d. That this honourable court do issue an inhibition order restricting registration of any transfer and/or dealing on land parcel no. North Ugenya/Sega/350; and
 - e. That costs of the application be in the suit.



2. The motion is premised on the grounds enumerated on the face of the motion and on the affidavit deposed by the plaintiff Charles Otieno Owino dated 5/12/2022.
3. The plaintiff deposed inter alia; the 2nd defendant was the registered owner of land parcel number North Ugenya/Sega/350 (hereinafter ‘the suit property’) having acquired it from the 1st defendant; the purchase took place while he was in occupation and possession; his occupation had been peaceful and uninterrupted for a period of over 12 years; other persons who were not the defendants occupied other portions of the suit property; chances were high the suit property would be disposed of to his detriment and it would be in the interests of justice if the suit property was preserved.
4. The defendants did not file any documents in opposition to the motion. This notwithstanding, the motion has to be subjected to merit evaluation anchored on the law and legal principles.
5. Mr. Omollo, counsel for the plaintiff, did not file written submissions as directed by the court. If at all they will be filed, this court will consider them as having been filed out of time.

Analysis and determination

6. Having carefully considered the plaintiff’s motion, this court is of the considered view the issues falling for determination are: -
 - a. Whether the plaintiff has met the criteria to warrant issuance of a temporary injunction order.
 - b. Whether an inhibition order should issue.
 - c. What about costs.

a. Whether the plaintiff has met the criteria to warrant issuance of a temporary injunction order.

7. My authority to award an order of temporary injunction emanates from section 63 (c) and (e) of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules. This section 63 (c) and (e) provide as follows:-

‘In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

- (a)
- (b)
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
- (d)
- (e) make such other interlocutory orders as may appear to the court to be just and convenient.’

8. While Order 40(1) (a) and (b) of the Civil Procedure Rules provides: -

‘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.’ Emphasis added.
9. The case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* Civil Appeal Number 39 of 2002 reminds this court that its authority in an application for interlocutory injunction is discretionary and such discretion must be exercised judiciously. As is the position, judicial discretion has to be exercised on the basis of law and evidence.
10. This court is also guided by the principles that were laid out in the classical case of *Giella v Cassman Brown & another* [1973] EA 358 (See also *Nguruman Limited v Jan Blonde Nielsen & 2 others* [2014] eKLR) which settled the principles as follows;
- ‘Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.’
11. Having addressed the law. I will now turn to the facts of this case.
12. On the 1st principle, the plaintiff had to demonstrate that he had established a prima facie case with probability of success. In other words, it is the condition which, on analysis of the facts presented by a party before the court, the court is persuaded the opposite party has committed acts which he had not satisfactorily convinced the court as to why he acted in a certain manner failure to which, the court will arrive at a finding that the adverse party intends to or has infringed on the rights of such an applicant: in this case the plaintiff.
13. From the documents adduced before this court more so the green card of the suit property, the 2nd defendant is the registered proprietor of the suit property having acquired it from the 1st defendant on or before 16/6/2021. The plaintiff’s claim is founded on adverse possession. He tendered photographs before this court which showed structures and crops. Whether the structures and crops are on the suit will have to await the outcome of the main suit.
14. The plaintiff averred that he and his family had been in occupation and possession of the suit property for a period of over 12 years. In my considered view, the alleged occupation for over a period of 12 years demonstrated the plaintiff had an interest over the suit property. On this condition, I find that the plaintiff has established a prima facie case with probability of success.
15. On the 2nd principle, the plaintiff had to demonstrate he would suffer irreparable harm that could otherwise not be compensated by an award of damages. The plaintiff’s alleged occupancy of the suit property for a period of over 12 years, peacefully and without interruption was not rebutted by the defendants. Taking into consideration the claim is grounded on adverse possession and there is grave danger that the defendants may interfere with the plaintiff’s alleged interests over the suit property by disposing it off, I am satisfied and find that in the event the plaintiff succeeds in his claim, he may suffer irreparable harm that cannot be compensated by an award of damages.



16. On the 3rd condition, the plaintiff is allegedly in occupation of the suit property. The plaintiff tendered photographs to this court which allegedly depict his occupancy and possession of it. It is my finding that the inconvenience caused to the plaintiff would be greater than that which would be occasioned to the defendants if an injunction was not granted but the plaintiff ultimately succeeds. Ombwayo J in Pius *Kipchirchir Kogo v Franklin Kimeli Tenai* [2018] eKLR expressed himself thus;

‘Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them is greater than that which may be caused to the defendants. if the inconvenience is equal, it is the plaintiff who suffers.’

17. The plaintiff has met the threshold for the grant of the equitable remedy of injunction which is pertinent in maintaining the status quo pending the determination of the issues raised in the originating summons.

b) Whether an order of inhibition should issue

18. As rightfully posited by counsel, inhibition is anchored on section 68(1) of the *Land Registration Act* which reads thus: -

‘The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.’

19. This provision of law leaves the discretion for issuance of an order for inhibition to a court. However, such discretion has to be exercised judiciously, in good faith, for a proper purpose and consider all pertinent factors that are reasonable in the circumstances of the case.

20. Bearing in mind the plaintiff’s claim is on adverse possession and he has met the threshold to warrant the grant of an injunction and for purposes of preserving the suit property, it is the humble opinion of this court that it has satisfied itself there is good reason for issuance of an order of inhibition pending the determination of the main suit.

21. Ultimately, it is my eventual finding the motion is merited. I allow the motion. Costs shall abide the outcome of the main suit. I hereby issue the following disposal orders;

- a. There be an order of temporary injunction which shall remain in force for a period of one year only restraining the defendants either by themselves, their agents, employees, relatives and/or any other person deriving authority from them from, entering, constructing on, alienating, cultivating, or in any manner interfering with the plaintiff’s quiet possession, ownership and occupation of land parcel no. North Ugenya/Sega/ 350.
- b. An order for inhibition, restricting the registration of any disposition in the register of the land parcel no. North Ugenya/Sega/350 until this suit is heard and determined.
- c. Costs shall abide the outcome of the main suit.
- d. The originating summons shall be personally served upon the defendants within 21 days hereof and a return of service shall be filed.
- e. The suit shall be mentioned before the Deputy Registrar for pretrial directions on 24/4/2023.

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF FEBRUARY 2023.

HON. A. Y. KOROSS



JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the Presence of :

N/A for the parties.

Court assistant: Ishmael Orwa

