



**Mwangi v Kinuthia & another (Environment & Land Case
E022 of 2022) [2023] KEELC 16570 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E022 OF 2022**

**YM ANGIMA, J
MARCH 28, 2023**

BETWEEN

DANIEL KAMAU MWANGI APPLICANT

AND

FRANCIS LENNIE GATERI KINUTHIA 1ST RESPONDENT

JOSEPH WAINAINA KINUTHIA 2ND RESPONDENT

RULING

A. Introduction

1. By an originating summons dated December 1, 2022 expressed to be based upon Section 7 of the *Limitation of Actions Act* (cap 22), Order 37 rule 7 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law, the Applicant sought an order for adverse possession of Title Nos. Nyandarua/Mkungu/2853 – 2860 (the suit properties) measuring about 0.3881 ha which were said to be subdivisions of Title No Nyandarua/Mkungu/6 (Parcel 6).
2. The Applicant contended that he had been in open, continuous and uninterrupted possession of the suit properties for a period exceeding the statutory minimum of 12 years and that he had extensively developed the same by planting trees and crops and by putting up temporary structures thereon. He further pleaded that he was born and brought up on the suit properties and that his late father and two siblings were buried thereon.

B. The Applicants' Instant Application

3. Simultaneously with the filing of the originating summons the Applicant filed a notice of motion dated December 1, 2022 grounded upon Sections 1A, 1B & 3A of the *Civil Procedure Act* (cap 21), Order 40 rules 1, 2, 3, 4 & 5 and Order 51 rule 1 of the *Civil Procedure Rules, 2010*, and all the enabling provisions of the law seeking the following orders:



- a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of this suit, this honourable court be pleased to issue a conservation order, preserving the suit portions of land, LR Nyandarua/Mkungi/2853 to 2860 and the rest of the larger portion which formed part of the original LR Nyandarua/Mkungi/6 from being wasted and/or disposed of.
 - d. That the Officer Commanding Station, Ndunyu Njeru Police Station to ensure compliance with the orders of court.
 - e. Spent;
 - f. That the costs of this application be provided for.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant, Daniel Kamau Mwangi, on December 1, 2022 and the exhibits thereto. The Applicant essentially relied upon the same grounds set out in the originating summons and contended that he had been in occupation of the suit properties for over 40 years and that the Respondents who were said to be the administrators of the registered owner of the suit properties had recently threatened to evict him therefrom without providing him with alternative land. The Applicant further contended that the Respondents had recently stationed their employees on the suit properties who had started causing damage to his trees and fences hence the suit and application.
5. The Applicant further contended that he stood to suffer irreparable injury should he be evicted from the suit property during the pendency of the suit. He consequently prayed that his application should be allowed.

C. The Respondent's Response

6. The Respondents did not file any response to the application despite being accorded an opportunity to do so.

D. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. By the time of preparation of the ruling, however, none of the parties had filed submissions.

E. The Issues for Determination

8. The court has considered the Applicant's notice of motion dated December 1, 2022, the replying affidavit in opposition thereto and the material on record. The Court is of the opinion that the following issues arise for determination herein:
- a. Whether the Applicant has made out a case for the grant of a conservation order or preservation order.
 - b. Whether the OCS Ndunyu Njeru Police Station should be ordered to ensure compliance with the said orders, if granted.
 - c. Who shall bear costs of the application.



F. Analysis and Determination

Whether the Applicant has made out a case for the grant of a conservation order of preservation order

9. The court has considered the material on record on this issue. The court finds the instant application to be strange in a number of respects. First, whereas the Applicant claims that he was threatened with eviction and was apprehensive that he might be evicted from the suit properties, he did not seek any restraining injunction to prevent his eviction. Second, although there is no allegation in either the originating summons or the notice of motion that the Respondents intended to alienate or dispose of the suit properties, he has sought a preservation order and conservation order to preserve the suit properties pending the hearing and determination of the suit. Third, although the Applicant's claim for adverse possession is confined to the 8 subdivisions constituting the suit properties, he is also seeking an order for preservation of the rest of the larger portion which formed part of parcel 6.
10. It is evident from the material on record that the defendant did not file any replying affidavit in opposition to the said application, at least none was on record by the time of preparation of the ruling. The court is thus of the opinion that the Applicant's factual foundation of his application has not been controverted. In spite of that, however, the Applicant is still obliged to demonstrate that he is entitled to the orders of preservation or conservation sought. It is evident from the material on record that the Applicant is essentially concerned with the preservation of the substratum of the suit, that is, the 8 parcels of land he claims to have acquired through adverse possession.
11. The court is of the opinion that it is empowered to preserve any property in dispute which may be in danger of being wasted, damaged or alienated during the pendency of a suit. The court is satisfied that in the circumstances of this case it is necessary to preserve the 8 suit properties pending the hearing of the Applicant's claim for adverse possession. In the case of *Shivabhai Patel v Manibhai Patel* [1957] EA 907 it was held that the court has a duty to preserve property which may be in issue pending resolution of the dispute. Accordingly, the court is inclined to grant a preservation order in the nature of an order of inhibition under Section 68 of the [Land Registration Act, 2012](#) to preserve the 8 properties pending the hearing and determination of the suit. However, the order shall not extend to the larger block of Parcel 6.

Whether the OCS Ndunyu Njeru Police Station should be ordered to ensure compliance with the said order

12. The court is of the opinion that an OCS of a Police Station is not a competent person to ensure compliance with a preservation order made pursuant to Section 68 of the [Land Registration Act, 2012](#). Such an order should be directed to the Land Registrar – Nyandarua County for registration and compliance.

Who shall bear costs of the application

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court has noted that the application was not opposed. The court is further aware that the main suit is pending hearing. Accordingly, the court is of the opinion that costs of the application should be costs in the cause.



G. Conclusion and Disposal Orders:

14. The upshot of the foregoing is that the Applicant's application dated December 1, 2022 is hereby allowed in the following terms only:
- a. An order of inhibition be and is hereby granted to prevent any dealings with parcel Nos Nyandarua/Mkungu/2853 – 2860 pending the hearing and determination of the suit or until further orders of the court.
 - b. The Land Registrar – Nyandarua County shall ensure compliance with the said order until conclusion of the suit or further orders of the court.
 - c. Costs of the application shall be in the cause.
 - d. This suit shall be mentioned on June 5, 2023 for pre-trial directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 28TH DAY OF MARCH, 2023.

In the presence of:

Ms. Gladys Wanjiru for the Applicant

N/A for the 1st and 2nd Respondents

C/A - Carol

Y. M. ANGIMA

JUDGE

