



**Muhika v Karonjo (Environment and Land Appeal E004 of 2020)
[2023] KEELC 16555 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E004 OF 2020**

**YM ANGIMA, J
MARCH 23, 2023**

BETWEEN

FRANCIS MUTHOGA MUHIKA APPELLANT

AND

MARGARET WANGARI KARONJO RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal against the ruling and order of Hon. S. N. Mwangi (SRM) dated 14.10.2020 in Nyahururu CM ELC No. 340 of 2018 – Margaret Wangari Karonjo -v- Moses Muthoga & 2 Others. By the said ruling, the trial court granted the Respondent’s application for a temporary injunction against the Appellant and also dismissed the latter’s application for setting aside of the prior ex parte interim injunction and for stay of proceedings pending the hearing of his claim for adverse possession pending before this court.

B. Background

2. The material on record shows that vide a plaint dated 17.09.2018 the Respondent sought the following prayers against the Appellant and his co-defendants before the trial court:
 - a. A permanent injunction restraining the defendant, his agents, servants, employees, representatives and or anybody claiming through him from burying the body of Beth Nduta Muheka in the applicant’s Land Parcel Nyandarua/Ol Aragwai/994.
 - b. An eviction order against the defendant.



- c. A declaration that land parcel Nyandarua/Ol Aragwai/994 belongs to the Samwel Karonjo Muriuki the registered owner.
 - d. Costs and interest of this suit.
3. The Respondent pleaded that she was the authorized attorney of the registered owner of that suit property, Samuel Karonjo Muriuki, and that the Appellant and his co-defendants had encroached thereon on diverse dates between 2014 and 2018 without any lawful justification or excuse. It was further pleaded that the Appellant was making arrangements to bury the body of his deceased mother on the suit property without the consent or permission of the owner.
4. By a defence dated 26.10.2020 the Appellant denied the Respondent's claim in his entirety. He pleaded that the suit property originally belonged to one, Joseph Kariuki Kuria (Kuria) who was the father in law of the Respondent and that prior to his death, he had sold a portion of 2 acres to Joseph Muna from whom he bought his portion of 2 acres. The Appellant further pleaded that he took possession of the said portion in 1994 and developed it extensively during the lifetime of Kuria who never sought to evict him at any time.
5. The Appellant further pleaded that the Respondent has secretly filed a succession cause upon the demise of Kuria without informing him and 4 other purchasers who were entitled to portions of the suit property. He further pleaded that the Respondent's suit was time-barred and that he had filed a suit for adverse possession of his portion of land in Nyahururu ELC No. 14 of 2020 (OS).

C. The Interlocutory Application Before the Trial Court

6. The material on record shows that during the pendency of the suit, the Respondent filed a notice of motion dated 28.05.2020 seeking an interim injunction restraining the Appellant from trespassing, occupying, putting up houses, evicting the Respondent or in any way interfering with the suit property pending the hearing of the suit. The application was essentially based on the matters pleaded in the plaint.
7. The record further shows that vide a notice of motion dated 23.06.2020 the Appellant sought variation or setting aside of the interim injunction granted to the Respondent pending inter partes hearing and for stay of proceedings pending the hearing of his claim for adverse possession. The Appellant contended that he had been in occupation of the suit property since 1994 and that he had extensively developed it over the years without any interruption from the registered owner. He further contended that the interim orders granted to the Respondent would amount to an eviction order since he was already in occupation and had been in occupation for over 25 years.

D. The Trial Court's Decision

8. The two applications were canvassed before the trial court through written submissions. By a ruling dated 14.10.2020 the trial court allowed the Respondent's application and granted the temporary injunction sought to restrain the Appellant from, inter alia, trespassing, occupying, threatening to occupy, putting up houses, evicting the Respondent or from interfering with the suit property pending the hearing and determination of the suit. The court held that the registered owner was entitled to immediate possession of the suit property as her constitutional right to own property was protected under Article 40 of *the Constitution* of Kenya, 2020 and considered the Appellant as a mere trespasser.
9. The trial court dismissed the Appellant's prayer for variation of the interim injunction as well as the prayer for stay of proceedings. The trial court did not analyze the merits of the Appellant's prayers but was mainly concerned with the Appellant's action of filing his claim for adverse possession which



action she considered as disrespect for the trial court and an afterthought intended to defeat the course of justice. The trial court was further of the opinion that the Appellant's claim for adverse possession was defeated or diminished the moment the Respondent filed the suit before the trial court.

E. The Grounds of Appeal

10. Being aggrieved by the said ruling and order the Appellant filed a memorandum of appeal dated 21.10.2020 raising the following 6 grounds of appeal.
 - a. That the learned trial magistrate erred in law and in fact in granting a temporary Order of injunction in circumstances that did not warrant for such orders.
 - b. That the Learned trial magistrate erred in law and in fact in granting a temporary injunction at an interlocutory stage which orders amounted to eviction orders.
 - c. That the learned trial magistrate erred in law and in fact in failing to take into consideration the Appellant's occupation on the suit property since the year 1994 while granting the temporary injunction which was mandatory in nature.
 - d. That the learned trial magistrate erred in law and in fact in finding that the filing of a suit for adverse possession before the E.L.C Court was an afterthought/ to defeat the course of Justice and was for disrespecting the Court.
 - e. That the learned trial magistrate erred in law and in fact in delving on extraneous matters while granting an injunction and dismissing the prayer for stay of proceedings.
 - f. That the learned trial magistrate erred in law and in fact in wrongly exercising discretionary powers.
11. As a result, the Appellant sought the following reliefs in the appeal:
 - a. That the appeal be allowed.
 - b. That the ruling and order of the trial court dated 14.10.2020 be aside in its entirety.
 - c. That the Respondent's notice of motion dated 28.05.2020 be dismissed with costs and the Appellant's notice of motion dated 23.06.2020 be allowed with costs.

F. Directions on Submissions

12. When the appeal was listed for directions it was directed that the appeal shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 25.01.2023 whereas the Respondent's submissions were not on record by the time of preparation of the judgment.



G. The Applicable Legal Principles

13. The court is aware that in granting the temporary injunction in favour of the Respondent and in declining to grant a stay of proceedings pending the hearing and determination of the Appellant's claim for adverse possession, the trial court was exercising judicial discretion. However, such discretion must be exercised judicially. See *CMC Holdings Ltd -v- Nzioki* [2004] 1 KLR 173.
14. The principles which guide an appellant court in an appeal against the exercise of judicial discretion were considered in the case of *Mrao Ltd -v- First American Bank of Kenya Ltd* [2003] eKLR where it was held that:

“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence. And as was stated by this Court in the case of *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)* [1984] KLR 1 an appellate court may only interfere with the exercise of judicial discretion if satisfied either;

- (a) The judge misdirected himself on law, or
- (b) That he misapprehended the facts, or
- (c) That he took account of considerations of which he should not have taken an account, or
- (d) That he failed to take account of consideration of which he should have taken account, or
- (e) That his decision, albeit discretionary one, was plainly wrong.”

H. The Issues for Determination

15. Although the Appellant raised 6 grounds in his memorandum of appeal, the court is of the opinion that resolution of the following 3 issues shall effectively determine the appeal:
 - a. Whether the trial court erred in law in allowing the Respondent's application for a temporary injunction.
 - b. Whether the trial court erred in law in dismissing the Appellant's application dated 23.06.2020.
 - c. Who shall bear costs of the appeal.

I. Analysis and Determination

Whether the trial court erred in law in allowing the Respondent's application for a temporary injunction

16. The court has considered the material and submissions on record this issue. There is no doubt that Samuel Karonjo Muriuki was the registered proprietor of the suit property and that the Respondent had filed the suit as her attorney. It is also apparent from the material on record that the trial court correctly set out the 3 principles for the grant of an interim injunction as enunciated in the case of *Giella -v- Cassmass Brown & Co. Ltd* [1973] EA 358.



17. The only issue for consideration is whether or not the trial court correctly applied those principles to the facts of the case before her. Whereas it is correct to state that the Respondent had demonstrated a prima facie case with a probability of success by reason of being the attorney of the registered owner of the suit property, there was absolutely no evidence on record to demonstrate that the Respondent stood to suffer any irreparable harm or loss which could not adequately be compensated by an award of damages. A bare allegation by a party that he shall suffer “irreparable loss” without demonstrating what kind of loss it is and why it cannot be compensated by an award of damage is not sufficient to demonstrate irreparable loss as known to law.
18. In the case of *Nguruman Ltd -v- Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal described irreparable loss as follows:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
19. The trial court did not also consider the third principle on balance of convenience. There was abundance evidence on record to demonstrate that the Appellant had been in occupation of a portion of the suit property for over 20 years. There was evidence that he had developed the suit property as shown in the photographs tendered before the trial court. He had planted crops and trees on that portion of land. He also had structures thereon. If the trial court had considered all the relevant circumstances, it would have found that the balance of convenience did not favour the Respondent but the Appellant who was in possession.
20. However, the most fundamental error on the part of the trial court was the granting of a temporary injunction against a party who was already in actual occupation and possession of the suit property purporting to restrain him from “trespassing”, “occupying”, “threatening to occupy” the same property he had occupied for many years. According to paragraph 6 of the Respondent’s plaint, she pleaded that the Appellant allegedly entered the suit property in 2014, that is, about six (6) years prior to the filing of the suit. It has been held that a prohibitory injunction is forward looking and it cannot prevent things which have already happened. The only effective way of removing the Appellant from the suit property was through an eviction order and, indeed, the Respondent’s second prayer in the plaint was an eviction order.
21. The court is satisfied on the basis of the material on record that the trial court misdirected itself and failed to take into account all the relevant considerations in granting the Respondent’s application for a temporary injunction. The trial court was also clearly wrong in the exercise of its judicial discretion in granting an injunction purporting to restrain a person in possession from trespassing, occupying, or threatening to occupy the suit property. Such an order clearly amounted to an eviction order which could only be granted after trial of the action. Accordingly, the court is inclined to interfere with the trial court’s order and to set aside the injunction granted against the Appellant.



Whether the trial court erred in law in dismissing the Appellant's application dated 23.06.2022

22. The court has considered the material and submissions on record on this issue. The Appellant's said application sought two substantive orders. First, it sought a variation or setting aside of the interim injunction which was in force pending the hearing of the Respondent's application for the reason that it amounted to an eviction of the Appellant who was in occupation at all material times. Second, the Appellant sought a stay of proceedings pending the hearing and determination of his claim for adverse possession before this court.

23. The trial court summarily dismissed the application without analyzing it on merit. The court did not even consider the principles applicable to an application for stay of proceedings. The trial court was upset by the Appellant's action of filing his claim before this court and was unduly dismissive of the Appellant's claim for adverse possession. This is apparent from the ruling whereby the trial court stated that:

“This is not only disrespecting the court but fact remains that the said originating summons and the said suit before the judge is forthwith (sic) an afterthought and he wishes to defeat the course of justice in this case by running to the judge. Although the issue of adverse possession is to be decided by the High Court, the unshaken fact and law remains that the claim for adverse possession diminishes or is stopped as soon as a suit is filed in court against a party claiming defence of adverse possession. In this instant case, the claim for adverse possession evidently was by law stopped on 17th September, 2018 when the suit was filed and again it is evidence (sic) the 1st defendant ran to the judge with the originating summons on 24th June, 2020, almost two (2) years after his claim for adverse possession was stopped by the law.”

24. In the end, the trial court dismissed the Appellant's application in the following terms:

“As such, the 1st defendant cannot benefit from his afterthought and utter ignorance of the law and try to defeat this current suit by seeking for the setting aside of the injunctive orders and also for stay of proceedings before this court pending the orders of the judge in the afterthought originating summons...”

25. As indicated earlier, the trial court erred in granting a temporary injunction in the first place and erred further in failing to objectively and judiciously consider the Appellant's application for variation and setting aside of the injunction. The trial court did not consider the Appellant's plea that having been in possession of the suit property for several years and having undertaken developments thereon, the injunction order was in effect an eviction order. A prohibitory injunction could not effectively undo what had taken place in the past. See *Mwakaki Investment Co. Ltd -v- David Gikaria & 3 Others* [2021] eKLR.

26. The factors to be considered in an application for stay of proceedings were summarized by Ringera J (as he then was) in the case of *Global Tours and Travels Ltd Milimani* Winding up Cause No. 43 of 2000 as follows:

“As I understand the law, whether or not to grant a stay of proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay, the court



should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

27. Similarly, in the case of *Ezekiel Mule Musembi -v- H Young and Company (EA) Ltd* [2019] eKLR Odunga J considered the rationale of the court’s power to order stay of proceedings as follows:

“The jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and the defendant were to succeed it would have rendered the appeal nugatory. In such applications the court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the plaintiff succeeds. Obviously, the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account ...”

28. It is evident from the plaint filed before the trial court that the Respondent was seeking to assert the proprietary rights of the registered owner of the land by seeking an eviction order and a permanent injunction among other reliefs against the Appellant. On the other hand, the Appellant pleaded in his defence that the action was statute-barred and that he had filed a claim for adverse possession of the 2 acres in his occupation. In the originating summons the Appellant contended that he had been openly in continuous, exclusive and uninterrupted possession of 2 acres out of the suit property for over 26 years. As a result, he pleaded that he had become entitled to be registered as proprietor of the said portion of land on account of adverse possession since the Respondent’s right of recovery had been extinguished by operation of law under the *Limitation of Actions Act* (Cap. 22).
29. The court is of the opinion that the Appellant’s claim for adverse possession and the Respondent’s claim for recovery of the suit property were mutually exclusive. The Appellant could only succeed in his claim if the Respondent’s claim for recovery of the suit property was statute barred and the Respondent could only succeed if her claim for recovery was not statute barred under the *Limitation of Actions Act*. So, if the two claims were to proceed simultaneously before two different courts there would be a real danger of the courts reaching different and contradictory judgments.
30. The court is of the opinion that this was a fit case for the grant of a stay of proceedings before the trial court to await a determination of the Appellant’s claim for adverse possession before this court. It would be a waste of the scarce judicial resources available for the trial court to proceed with the Respondent’s claim for recovery of the suit only for the superior court to allow the claim adverse possession and render the proceedings before the trial court superfluous. In the premises, the trial court did not exercise its discretion judiciously. It would appear that the trial court was unduly aggrieved by what it considered ‘disrespect’ by the Appellant in filing his claim for adverse possession during the pendency of the suit before it in consequence whereof it did not consider the prayer for stay in a dispassionate manner. The court, therefore, agrees with the Appellant’s submissions that the trial court erred in law in dismissing his application dated 23.06.2022 by failing to take into account all the relevant principles and factors in determining the application.



Who shall bear costs of the appeal

31. 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 finds no good reason why the successful party should be deprived of his costs. Accordingly, the court is inclined to award the Appellant costs of the appeal.

J. Conclusion and Disposal Orders

32. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. Accordingly, the appeal is hereby allowed in the following terms:
- a. The appeal be and is hereby allowed.
 - b. The orders of the trial court made on 14.10.2020 in Nyahururu CM ELC No. 340 of 2018 – Margaret Wangari Karonjo -v- Moses Muthoga & 2 Others are hereby set aside in their entirety.
 - c. The Respondent's notice of motion dated 28.05.22020 be and is hereby dismissed whereas the Appellant's notice of motion dated 23.06.2020 is hereby allowed. Costs of both applications shall be in the cause pending before the trial court.
 - d. The Appellant is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 23RD DAY OF MARCH, 2023.

In the presence of:

Ms. Wanjiru Muriithi for the Appellant

N/A for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

