



**Kangethe v Nkirote (Environment & Land Case E012 of 2022)  
[2023] KEELC 16293 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16293 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E012 OF 2022  
CK YANO, J  
MARCH 15, 2023**

**BETWEEN**

**DANPHONE KAMUNA KANGETHE ..... APPLICANT**

**AND**

**JENIFFER NKIROTE ..... RESPONDENT**

**RULING**

1. The plaintiff herein moved this Honourable court by way of a notice of motion dated September 14, 2022 which is expressed to be brought under Order 40 Rule 1 & 2 of the Civil Procedure Rules, and Section 53 A of the *Civil Procedure Act* and all enabling provisions of the law. The application seeks the following orders-;
  1. That the application be certified urgent and service of the same be dispensed with in the first instance.
  2. That the Honourable court be pleased to issue an injunction restraining the defendant whether by himself, his agents and/or servants or otherwise howsoever from entering onto, alienating, selling, charging and/or dealing with or in any manner interfering with the plaintiff's occupation, use and quiet possession of two acres of title number Abothuguchi/Makandune/786 pending the hearing and final determination of this application.
  3. That this Honourable court be pleased to issue an injunction restraining the defendant whether by himself, his agents and/or servants or otherwise howsoever from entering onto, alienating, selling, charging and/or dealing with or in any manner interfering with the plaintiff's occupation, use and quiet possession of two acres of title number LR. Abothuguchi/Makandune/786 pending the hearing and final determination of this suit.
  4. That the costs of this application be provided for.



2. The application is based on the following grounds:
  - i. That the plaintiff and his family have been cultivating the two acres of Land Reference number Abothughci/Makandune/786 since November, 1981.
  - ii. That the plaintiff entered into an agreement with Mbiriti Ruthiri (deceased) to purchase two acres of land to be hived off the suit premises.
  - iii. That the occupation has been known to the defendant and his family.
  - iv. That the occupation has been open and uninterrupted.
  - v. That the defendant intends to sell/appropriate part of the two acres subject of this suit.
  - vi. That it is just and mete that the orders sought be granted.
3. The application is supported by the affidavit of Danphone Kaumuna Kangethe the applicant, sworn on 14<sup>th</sup> September, 2022. The applicant's case is that he has been living on Land Reference number Abothuguchi/Makandune/786 (suit premises) together with his family since the month of November, 1981.
4. That the defendant is the administrator of the estate of one Mbiriti Ruthiri ("the deceased") and she is being sued in that capacity.
5. The applicant states that he came to be in occupation of the suit premises in 1981 when he entered into an agreement with Mbiriti Ruthiri ("the deceased") to purchase 2 acres of land to be hived off the suit premises.
6. The applicant avers that the purchase price was Kshs. 6000/= for the 2 acres which he duly paid and entered into possession of the land and has been in occupation ever since.
7. The applicant states that the occupation has been known to the defendant and her family and that the occupation has been open, uninterrupted and adverse.
8. It is the applicant's contention that he is entitled to the suit land by adverse possession and that he built houses on it and undertakes subsistence farming therein.
9. The applicant avers that although the defendant and his family are aware of his occupation and possession of the suit land, they have not made any efforts towards getting the applicant out of the suit premises. That it is only when a succession cause was filed that the applicant became apprehensive that his 2 acres would be taken away from him.
10. In his affidavit in support of the application, the applicant has annexed copies of certified copy of title of the land, sale agreement, a joint affidavit for a caution and photographs of developments on the land.
11. In opposing the application, the respondent filed a replying affidavit sworn by herself on 13<sup>th</sup> October, 2022 wherein she states that the said application together with the supporting affidavit is a waste of court's valuable time and an abuse of the process of the Honourable court and that in any event spurious and unmeritorious hence the same should be struck out forthwith.
12. The respondent states that it is absolutely spurious that the plaintiff entered into a sale agreement with the defendant to release the transfer upon payment of the full purchase price.
13. The respondent avers that it is similarly untrue that the plaintiff took possession and or utilization of the suit land.



14. The respondent states that the truth of the matter is that the suit land belonged to one Mbirithi Ruthiri (deceased) who died way back in the year 1984 and left behind beneficiaries who were utilizing the said suit land and are still utilizing the same to date. A copy of the official search is annexed.
15. The respondent avers that the applicant had cited the respondent in Githongo Miscellaneous Succession Cause No. 5 of 2019 claiming the respondent's family had declined to file a succession cause yet he had allegedly bought land from the deceased and she annexed a copy of the citation.
16. The respondent states that on 1<sup>st</sup> April, 2019, the citees among them being the respondent herein, responded to the said citation vide a replying affidavit sworn on 28<sup>th</sup> March, 2019 stating that they had taken steps to file succession proceedings. The said replying affidavit has been annexed.
17. The respondent further states that on the 10<sup>th</sup> May 2019 the citees were granted 45 days to file the substantive succession cause and a copy of the proceedings of 10<sup>th</sup> May 2019 have been annexed.
18. The respondent avers that the citation was closed on 26<sup>th</sup> July, 2019 after the citees informed the court at Githongo that they had filed Githongo Succession Cause no. 33 of 2019. A copy of the proceedings have also been annexed.
19. The respondent further avers that the said succession proceedings were filed since Mbirithi Ruthiri (deceased) died intestate and the beneficiaries of his estate wanted to be authorized to share the estate of the deceased appropriately.
20. The respondent states that the said succession cause was finalized on 19<sup>th</sup> May 2021 and grant confirmed to the beneficiaries. However, the administrator of the estate died on 30<sup>th</sup> May 2021 before fully administering the deceased estate and as a result the grant was rectified to have the matter determined once and for all. A copy of the rectified grant has been annexed.
21. The respondent avers that the Githongo succession Cause No. 33 of 2019 was fully heard and determined on merit and all beneficiaries have since acquired their respective portions of land and has annexed a copy of the green card marked "JN – 7."
22. The respondent further avers that the plaintiff/applicant was well aware of Githongo succession Cause No. 33 of 2019 and if indeed he had purchased land from Mbirithi Ruthiri (deceased) as alleged he should have protested against the same.
23. The respondent states that the plaintiff has not proffered any explanation as to why to date he has not obtained title documents to the suit land despite the alleged sale agreement having been executed in 1981 and Mbirithi Ruthiri (deceased) died in 1984.
24. The respondent further states that it is apparent that the alleged sale agreement (if any) between the plaintiff and the deceased has been voided by failure of the parties to seek consent of the Land Control Board within six months as prescribed by law.
25. The Respondent pointed out that the plaintiff has not annexed to this application evidence of payment of purchase price and application for consent of the Land Control Board and further alleged that the sale agreement annexed by the plaintiff is not legible.
26. The respondent further states that it is absurd for the plaintiff to bring this suit approximately 40 years since the alleged sale agreement was executed without any sufficient explanation before this Honourable court.



27. The respondent avers that the applicant also proceeded to file Githongo ELC Case No. E005 of 2022 which was struck out on July 1, 2022 for reason that the suit was time barred under section 7 of Limitation of Actions Act and a copy of the ruling marked JN – 8 has been annexed.
28. The respondent further contends that she is advised by her advocate that one cannot claim adverse possession if he alleged to have purchased the subject land.
29. The respondent states that the instant application is a waste of court’s time and resources considering that LR. No. Abothuguchi/Makandune/786 is no longer in existence for reasons that the same was subdivided to the beneficiaries as per the rectified certificate of grant and new titles issued.
30. The respondent states that in light of the foregoing, the prayers sought in the instant application cannot issue because the subject matter of the application L.r No. Abothuguchi/Makandune/786 does not exist and order issued will be issued in vain, adding that the instant application is defective, bad in law and the same should be dismissed with costs to the defendant/respondent.
31. The application was canvassed by way of written submissions which were duly filed by the parties through their respective advocates.
32. I have considered the application herein, the response thereto and the submissions filed. There is only one issue to be determined and that is whether the applicant is entitled to the orders of temporary injunction as sought.
33. The issue that the court must decide is whether the applicant has met the threshold for an order of injunction. What comes to mind in such an application for injunction is the celebrated case of *Giella v Cassman Brown* [1973] E.A 358 at P. 360 where it was stated that-;  

“First, an applicant must show a prima facie case with 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.”
34. The applicant in his supporting affidavit is laying claim to the suit property based on adverse possession. For adverse possession to crystallize, one has to demonstrate that he/she is in occupation of the suit property and that he/she has been in occupation of the same for not less than twelve (12) years. The applicant has stated he has lived on the suit property for over 40 years since 1981. The applicant has also deponed that he came to be in occupation of the suit land pursuant to a sale agreement entered in the year 1981 between him and Mbirithi Ruthiri (deceased).
35. From the material on record, it is apparent that there have been disputes over the suit property including Githongo PMC succession Cause No. 33 of 2019 and Githongo ELC case No. E005 of 2022. The respondent has exhibited a ruling dated July 1, 2022 in Githongo ELC case No. E005 of 2022 in which the applicant’s suit was struck out for being time barred under section 7 of the Limitation of Actions Act. The respondent has also exhibited a rectified certificate of confirmation of grant in succession cause No. 33 of 2019 showing that the suit land LR No. Abothuguchi/Makandune/786 was shared out among the beneficiaries of the late Mbirithi Ruthiri (deceased) and the said title closed and new titles issues. The issue of whether or not the applicant acquired the suit property by adverse possession can only be ascertained after the trial.



36. From the material on record, I find that the applicant has not established a prima facie case with a probability of success. This is so because it is apparent that the title now claimed by the applicant is no longer in existence. Secondly, the applicant has not demonstrated that he stands to suffer irreparable harm not compensable in damages. The applicant accuses the respondent of intending to sell part of the two acres subject of the suit, but has not shown any evidence in support of that allegation. In my view, at the end of the trial, and if the applicant's case succeeds, an order for vacant possession can still be issued. The balance of convenience, if I had doubt, tilts in favour of the respondent who has judgments in her favour in the said previous cases. The upshot is that the notice of motion dated 14<sup>th</sup> September, 2022 is without merit and the same is dismissed with costs to the respondent.
37. It is so ordered.

**Dated, signed and delivered at Meru this 15<sup>th</sup> Day of March, 2023**

**In the presence of**

**Court Assistant – Kibagendi**

**Ms Otieno for defendant/respondent**

**No appearance for plaintiff/applicant**

**C.K YANO**

**JUDGE**

