



**Mburu v Gacheru & 4 others (Environment & Land Case  
E017 of 2022) [2023] KEELC 16968 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16968 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE E017 OF 2022**

**YM ANGIMA, J  
APRIL 27, 2023**

**BETWEEN**

**NAOMI WAMBUI MBURU ..... PLAINTIFF**

**AND**

**GRACE NJOKI GACHERU ..... 1<sup>ST</sup> DEFENDANT**

**DAVID IRUNGU ..... 2<sup>ND</sup> DEFENDANT**

**JOHN GACHERU ..... 3<sup>RD</sup> DEFENDANT**

**MAINA KIMANI ..... 4<sup>TH</sup> DEFENDANT**

**STANLEY MWANGI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a plaint dated June 27, 2022 and filed on August 8, 2022 the Plaintiff sought the following reliefs against the Defendants:
  - (a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Nyandarua/ Turasha/444 (“the suit property”).
  - (b) A declaration that the Defendants whether by themselves or their servants or otherwise however are wrongfully in occupation of the suit property and are accordingly, trespassers on the same.
  - (c) A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.
  - (d) An order for eviction against the Defendants.



- (e) General damages for trespass.
  - (f) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
  - (g) Any such other or further relief as this Honourable Court may deem appropriate.
2. The Plaintiff pleaded that she was the registered proprietor of the suit property which she obtained through succession proceedings in Naivasha High Court Succession Cause No 1 of 2018 – *In the matter of the estate of Charles Mburu Shadrack* (the Succession Cause). She further pleaded that sometime in 1990 the Defendants encroached upon and occupied the suit property without any lawful justification or excuse with the consequence that she suffered loss and damage particulars whereof were pleaded in the body of the plaint.
  3. By their defence and counterclaim, the Defendants denied liability for the Plaintiff's claim and prayed for its dismissal. By their defence, the Defendants pleaded that by various sale agreements made between the Plaintiff's late husband, Charles Mburu Shadrack (Mburu) and the late husband of the 1<sup>st</sup> Defendant, Mwangi Macharia Alias Ayub Kimani Mwangi (Mwangi), the former sold the suit property to the latter for valuable consideration between 1989 and 1998. It was further pleaded that Mwangi had paid the full purchase price for the suit property and that Mburu had signed a transfer form and obtained consent to transfer from the relevant Land Control Board (LCB) but he died before the transfer could be effected.
  4. The Defendants further pleaded that they took possession of the suit property in 1990 during the lifetime of Mburu who never sought to evict them. The Defendants further pleaded that, in any event, the Plaintiff's right to recovery of the suit property had been extinguished by operation of law under the *Limitation of Actions Act* (Cap 22) hence the suit was untenable.
  5. By their counterclaim, the Defendants reiterated the contents of the defence and pleaded that they had been in open, continuous, exclusive and uninterrupted occupation of the suit property since 1990 and that the late Mwangi was buried thereon. The Defendants pleaded that they had acquired the suit property through adverse possession and that the Plaintiff had obtained registration thereof in the succession cause through concealment of material facts.
  6. As a consequence, the Defendants sought the following reliefs against the Plaintiffs in their counterclaim:
    - (a) A declaration that the title of Naomi Wambui Mburu to land parcel number Nyandarua/Turasha/444 (suit land) measuring approximately 15 acres or thereabouts has been extinguished by the Plaintiffs in the counterclaim on account of adverse possession thereof for a period in excess of twelve 12 years in terms of the *Limitations of Actions Act*.
    - (b) The Land Registrar be directed to execute the necessary documents to effect transfer of the whole suit land from the Defendant in the counterclaim to the Plaintiffs in the counterclaim.
    - (c) The costs of the suit and counterclaim be awarded to the Plaintiffs in the counterclaim.



## **B. The Plaintiff's Instant Application**

7. Simultaneously with the filing of the suit the Plaintiff filed a notice of motion dated June 27, 2022 under Order 40 rule 1, Order 50 rule 1 of the *Civil Procedure Rules, 2010* and Sections 1A, 1B & 3A of the *Civil Procedure Act* (Cap 21) seeking the following orders:
- (a) Spent;
  - (b) That pending the hearing and determination of this application and suit this honourable court be pleased to issue orders of temporary injunction restraining the Respondents by themselves or persons claiming authority under them from accessing, entering, remaining thereon and/or interfering with the Applicant's occupation, possession and use of the property known as Nyandarua/Turasha/444.
  - (c) That costs of this application be borne by the Respondents jointly and severally.
8. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on June 27, 2022 and the exhibits thereto. The application was essentially based on the same grounds as those pleaded in the plaint. The Plaintiff contended that the late Mburu had never sold the suit property to Mwangi and that the Defendants had forged some sale agreements in order to wrongfully deprive her of the suit property. It was the Plaintiff's case that she had demonstrated a prima facie case with a probability of success at the trial and that she stood to suffer irreparable loss and damage unless the injunction sought was granted.

## **C. The Defendants' Response**

9. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on November 3, 2022 on her own behalf and on behalf of her co-Defendants in opposition to the application. The Defendants opposed the application upon, inter alia, the following grounds:
- a. That the application was brought in bad faith and was an abuse of the court process.
  - b. That the late Mburu had sold the suit property to the late Mwangi by a sale agreement dated 1989 and further agreements dated 1991 and 1993.
  - c. That the late Mwangi and his family took possession and settled on the suit property in 1990.
  - d. That the late Mburu had signed a transfer form and application for consent of the LCB during his lifetime and had even handed the original title deed for the suit property to the late Mwangi.
  - e. That the Defendants had extensively developed the suit property for over 30 years by constructing permanent houses, planting trees and undertaking farming activities thereon.
  - f. That the Plaintiff had obtained orders in her favour in the succession cause through concealment of material facts since she was aware of the sale and the Defendants' occupation all along.



- g. That the effect of the interim orders sought would be eviction of the Defendants from the suit property at the interlocutory stage.
  - h. That the Plaintiff had not come to court with clean hands and that she had failed to satisfy the requirements for granting an interim injunction.
10. The Defendants also filed a supplementary affidavit sworn by the 1<sup>st</sup> Defendant on December 6, 2022 in which she exhibited English translations of the various agreements allegedly made between the late Mburu and the late Mwangi.

#### **D. Directions on Submissions**

11. When the application was listed for inter partes hearing it was directed that the same 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 Plaintiff's submissions were filed on December 13, 2022 whereas the Defendants' submissions were filed on January 27, 2023.

#### **E. The Issues for Determination**

12. The court has considered the Plaintiff's notice of motion dated June 27, 2022, the Defendants' replying affidavit in opposition thereto as well as the Defendants' supplementary affidavit. The court is of the opinion that the following issues arise for determination herein:
- a. Whether the Plaintiff has satisfied the requirements for the grant of a temporary injunction.
  - b. Who shall bear costs of the application.

#### **F. Analysis and Determination**

##### **a. Whether the plaintiff has satisfied the requirements for the grant of a temporary injunction**

13. The court has considered the material and submissions on record on this issue. The Plaintiff submitted that she had satisfied all the principles for the grant of a temporary injunction as set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358, *Mrao Limited v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [-2014] eKLR among other cases. The Plaintiff emphasized that she was the legally registered proprietor of the suit property and as such entitled to the injunctive orders sought.
14. The Defendants, on the other hand, submitted that the Plaintiff had failed to satisfy any of the principles for the grant of a temporary injunction and relied on the 3 authorities cited by the Plaintiff among other authorities. The Defendants submitted that their occupation of the suit property was not unlawful but was based upon the sale agreements entered into between the late Mburu and the late Mwangi. They submitted that the late Mburu had even handed over the original title deed and signed a transfer form and application for LCB consent with a view to transferring the suit property to the late Mwangi.
15. The Defendants further submitted that the Plaintiff had failed to demonstrate what irreparable loss or damage, if any, she stood to suffer in the absence of an injunction since they (the Defendants) had been in occupation of the suit property since 1990 during the lifetime of the original owner. They further submitted that the interim order as framed was effectively and eviction order which can only be granted upon a full hearing of the suit. They also contended that on the basis of the material on



record the balance of convenience lied in their favour since they had been in uninterrupted occupation since 1990 and had extensively developed the suit property.

16. It is evident from the material on record that the suit property originally belonged to the Plaintiff's husband, the late Mburu who apparently died on May 1, 2006. There is some evidence that the late Mwangi and the Defendants took possession of the suit property in the 1990s during the lifetime of the late Mburu. The Plaintiff pleaded in paragraph 10 of the plaint that the Defendants took occupation of the suit property in 1990s. She also made a sworn statement to that effect in paragraph 5 of her supporting affidavit. The Defendants also swore in their replying affidavit that they took occupation of the suit property in 1990 during the lifetime of the late Mburu.
17. The material on record also indicates that the Plaintiff was registered as proprietor of the suit property on the basis of the succession cause in which the Defendants do not appear to have participated. If the Defendants' occupation since 1990 was without lawful justification or excuse then why didn't the late Mburu take action for their removal during his lifetime? The other question which begs an answer is why neither the late Mburu nor the Plaintiff reported the alleged forgery of various sale agreements to the Directorate of Criminal Investigations for investigation and further action. Be that as it may, the court is satisfied that the alleged sale of the suit property by the late Mburu to the late Mwangi is an issue worthy of adjudication at the trial of the suit. Moreover, the Defendants have counterclaimed for adverse possession of the suit property under the *Limitation of Actions Act* which issue is also worthy of adjudication at the trial. In the premises, the court is not satisfied that the Plaintiff has made out a prima facie case with a probability of success as required by law. The Plaintiff shall, however, be at liberty to prove her pleaded case at the trial.
18. The court has also considered the material on record on the second principle of irreparable loss. Apart from a bare statement by the Plaintiff that she stood to suffer irreparable loss and injury in the absence of an injunction, there was absolutely no evidence tendered before court to demonstrate the nature and extent of the alleged loss. It was not demonstrated that the alleged loss was incapable of monetary quantification.
19. In the case of *Nguruman Limited v Jan Bonde Nielson & 2 Others (supra)*, the Court of Appeal described irreparable injury 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 face, 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.”
20. Since the Plaintiff has failed to demonstrate the first two principles for the grant of a temporary injunction, it is not necessary to consider the third principle on balance of convenience. However, even if the court were to consider it, it is obvious from the material on record that the Defendants have been in occupation of the suit property for a considerable period of time in consequence whereof they have developed the suit property by constructing houses and other structures thereon. The court is thus of the opinion that the Defendants stand to suffer greater hardship by granting the injunction that the Plaintiff may suffer by denying it.



21. Finally, there is a stronger reason why the Plaintiff’s application for a temporary injunction ought to fail. There is adequate material on record to demonstrate that the Defendants are the ones in occupation of the suit property and that they have been in occupation for many years. In fact, both sides are in agreement that such occupation dates back to the 1990s. In her application for a temporary order, the Plaintiff has purported to seek a temporary injunction to restrain the Defendants from, inter alia, accessing, entering, remaining, or interfering with the suit property. So, if the Defendants have been in occupation since the 1990s, how can they be restrained from accessing, entering or remaining on the suit property without evicting them from the property? It has been held that a restraining injunction is forward looking and it cannot stop or prevent what has already taken place. See Stanley Kirui v Westlands Pride Limited [2013] eKLR and Joseph Musyoki Mwanja v Musyoki Nzivu [2021] eKLR.

**Who shall bear costs of the application**

22. 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). In the case of Giella –vs- Cassman Brown & Co Ltd (*supra*) it was held that the appropriate order to make on costs in an application for an injunction is for costs in the cause where the application is allowed and costs against the Applicant where it is dismissed. In the circumstances, the court shall dismiss the Plaintiff’s application with costs.

**G. Conclusion and Disposal Order**

23. The upshot of the foregoing is that the court finds no merit in the Plaintiff’s application for interim orders. Consequently, the court makes the following orders for disposal of the application:

- (a) The Plaintiff’s notice of motion dated June 27, 2022 is hereby dismissed with costs to the Defendants.
- (b) The suit is hereby fixed for pre-trial directions on May 31, 2023.

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU THIS 27<sup>TH</sup> DAY OF APRIL, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

**Mr. Wanjohi for the Plaintiff**

**Mr. Ndegwa for the Defendants**

**C/A - Carol**

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**Y. M. ANGIMA**

**JUDGE**

