



REPUBLIC OF KENYA



Agot & another v Awino; Land Registrar, Bondo (Interested Party) (Environment & Land Case E004 of 2023) [2023] KEELC 17519 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E004 OF 2023**

AY KOROSS, J

MAY 18, 2023

BETWEEN

JANE ADHIAMBO AGOT 1ST PLAINTIFF

CHARLES AKONGO JURA 2ND PLAINTIFF

AND

LUCIA ADHIAMBO AWINO DEFENDANT

AND

THE LAND REGISTRAR, BONDO INTERESTED PARTY

RULING

Plaintiffs Case And Submissions

1. Citing Sections 7, 17, 32 and 38 of the [Limitation of Actions Act](#), Section 3 of the [Environment and Land Court Act](#), Section 63 (c) of the [Civil Procedure Act](#) and Order 40 Rule 1 of the [Civil Procedure Rules](#), the plaintiffs filed a notice of motion dated February 9, 2023 against the defendant in which they sought the following reliefs:
 - a. Spent;
 - b. Spent;
 - c. Pending hearing and determination of the suit, this honourable court do issue an order directing the defendant, her servants or agents or any other person claiming under her from evicting, alienating or dispossessing the plaintiffs from South Sakwa/Barkowino/186 or in any other way interfering with the plaintiffs' quiet possession thereof; and
 - d. Costs of the application be provided for.



2. The motion was founded on the grounds set out on its face and on the supporting affidavit deposed on February 9, 2023 by the 1st plaintiff Jane Adhiambo Agot.
3. In summary, she had been living on South Sakwa/Barkowino/186 (hereinafter referred to as “the suit property”) since 1989 and had built her house on it and made a living out of it. The defendant intended to evict her and or demolish her house in a bid to frustrate her claim.
4. As directed by the court, the plaintiffs’ counsel Owenga Ombuya & Company Advocates filed their written submissions dated February 20, 2023. Counsel outlined two issues for determination;
 - (a) whether plaintiffs had established a prima facie case with chances of success and,
 - (b) whether the plaintiffs qualified for adverse possession.
5. On the 1st issue, counsel reiterated the averments made in the 1st plaintiff’s affidavit and submitted the threshold for grant of temporary injunction was enunciated in the case of *Giella vs. Cassman Brown & Company* [1973] EA 358.
6. It settled the principles that applicants must establish a prima facie case with probability of success, demonstrate they would suffer irreparable injury if the orders sought were not granted and if the court was in doubt, it could decide the case on a balance of convenience.
7. On the 2nd issue, counsel addressed the merits of the plaintiffs’ case.

Defendant’s case and submissions.

8. Despite service, the defendant never filed a response to the motion or filed written submissions. Notwithstanding the motion was unopposed, the plaintiffs’ motion has to be subjected to merit evaluation based on settled principles and provisions of law.

Analysis and determination

9. I have carefully considered the pleadings and submissions. Being guided by the provisions of law and precedents relied upon, the only issue falling for determination was whether the motion was merited. This court will refrain from addressing the merits of the plaintiffs’ case.
10. The legal framework for interlocutory injunctions is governed by Section 63 (c) and (e) of the *Civil Procedure Act* and Order 40 Rule 1 of the *Civil Procedure Rules*. The purpose of interlocutory injunctions is to preserve the subject matter of a suit.
11. 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. And as is the position, judicial discretion has to be exercised on the basis of law and evidence.
12. For one to succeed, one has to meet not one but all the principles of temporary injunctions in a sequential manner. The principles are separate and distinct and inter alia they are establishing a prima facie case with a probability of success, proof one will suffer irreparable injury which would not be adequately compensated by an award of damages and if in doubt, the court will decide the matter on a balance of convenience.
13. On the 1st principle, the plaintiffs had to demonstrate that they had established a prima facie case with probability of success. The plaintiffs’ claim was founded on adverse possession. They tendered a photograph before this court which showed the structure of a house and a lady standing outside it.



14. The title document to the suit property was never tendered to this court. Similarly, too, its certificate of official search or greencard was not submitted. The originating summons has in some instances made references to land parcel no. Sakwa/Barkowino/186 which is a distinct parcel of land from the suit property.
15. A certificate of title would have established the existence and proprietorship of the suit property. [See *Ernest Wesonga Kweyu vs. Kweyu Omuto* CA Civil Appeal No. 8 of 1990].
16. At this juncture, the court is uncertain which property the plaintiffs claim is addressed against. It is not clear if the property exists or if at all the defendant is its proprietor. In the circumstances, I am not satisfied the plaintiffs have established a prima facie case with probability of success.
17. As the plaintiffs have failed to meet the threshold of the 1st test, I need not say more on the other tests.
18. Ultimately, it is my eventual finding the motion is not merited. Costs shall abide the outcome of the main suit. I hereby issue the following disposal orders;
 - a. The application dated February 9, 2023 is hereby dismissed.
 - b. Costs shall abide the outcome of the main suit.
 - c. The originating summons shall be personally served upon the defendant within 21 days hereof and a return of service shall be filed.
 - d. Suit shall be mentioned before the Deputy Registrar for pretrial directions on July 12, 2023.
19. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 18TH DAY OF MAY 2023.

HON. A. Y. KOROSS

JUDGE

MAY 18, 2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

M/s Owenga for the plaintiffs

Defendant

Court assistant: Ishmael Orwa

