



**Warui v Wanjohi & another (Environment & Land Case
E002 of 2022) [2023] KEELC 19210 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E002 OF 2022**

**JO OLOLA, J
JULY 28, 2023**

BETWEEN

CHRISTOPHER MUCHOMBA WARUI APPLICANT

AND

JENNIFER NJERI WANJOHI 1ST RESPONDENT

FRANCIS WACHIRA MAINA 2ND RESPONDENT

RULING

1. By the Notice of Motion dated November 25, 2022, Christopher Muchomba Warui (the Applicant) prays for an order of temporary injunction to issue restraining the Respondents by themselves, their agents and/or servants from occupying, destroying, erecting structures, selling, disposing, charging and/or in any manner interfering with the Applicant's quiet possession of a portion of land measuring 1.5 acres comprised in LR No Konyu/Baricho/2388.
2. The application is supported by an Affidavit sworn by the Applicant on November 25, 2022 and a Further one sworn on January 13, 2023 and is premised on the grounds that:
 - (a) The Applicant has been in occupation and developed 1.5 acres of the portion of land known as LR No Konyu/Baricho/2388 since November, 1995;
 - (b) On November 20, 2022, the Applicant learnt that the 2nd Respondent has been registered as proprietor of the whole parcel of land under circumstances that are unknown to the Applicant; and
 - (c) That by virtue of his open and exclusive possession of the said 1.5 acres portion, the Applicant's rights have crystallised.



3. Jennifer Njeri Wanjohi (the 1st Respondent) is opposed to the application. In her Replying Affidavit sworn and filed herein on December 19, 2022, the 1st Respondent avers that she knows the Applicant as he has continually engaged them in multiple litigations concerning the original suit land known as Konyu/Baricho/154 and the resultant sub-divisions since the year 1995.
4. The 1st Respondent denies that the Applicant has been in occupation of her land or any part of Konyu/Baricho/2388 as alleged or at all. She asserts that she became the registered proprietor of the land in 1995 and have been in continuous occupation of the same until she transferred it to the 2nd Respondent.
5. The Respondent avers that the Applicant has been in occupation of another parcel of land that was transferred to him by the said Abraham Mbuthia. The 1st Respondent states that as she transferred her parcel of land to the 2nd Respondent, they invited a Surveyor and the Applicant to mark the boundaries of the land and to point out beacons after which the 2nd Respondent took possession and fenced off his land.
6. Francis Wachira Maina (the 2nd Respondent) is equally opposed to the grant of the orders sought by the Applicant. In his Replying Affidavit sworn on 21st December 2022, the 2nd Respondent avers that he acquired the parcel of land known as Konyu/Baricho/2388 by way of purchase from the 1st Respondent.
7. The 2nd Respondent asserts that prior to the sale transaction, the 1st Respondent did avail to himself a title deed for the suit property and that he made enquiries and carried out due diligence and found no adverse claims to the title. The 2nd Respondent further avers that he thereafter inspected the suit land and was satisfied that there were no encumbrances or inhibitions thereon and further that there were no third parties in occupation of the land.
8. The 2nd Respondent avers that upon conclusion of the transaction, he was issued with a title deed for the suit property on 2nd September 2022 and took physical possession thereof by erecting a fence and a dwelling house thereon.
9. The 2nd Respondent denied that the Applicant occupies a portion of the land measuring 1.5 acres as alleged or at all. Upon being served with the suit papers herein, the 2nd Respondent came to learn that the Applicant is the registered proprietor of LR No Konyu/Baricho/2389 and 2341. The parcel No Konyu/Baricho/2389 was subsequently sub-divided into LR Nos. Konyu/Baricho/4677 and 4678 with Konyu/Baricho/4677 sharing a common boundary with the suit property herein. The 2nd Respondent denies having encroached on any of the parcels of land registered in the Applicant's name.
10. I have carefully perused and considered the Plaintiff's application as well as the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
11. By this application before me, the Applicant prays for an order of injunction restraining the Respondents from dealing in any manner whatsoever with a portion of land measuring some 1.5 acres comprised in the parcel of land known as LR No Konyu/Baricho/2388. It is the Applicant's case that he has been in occupation of and has developed the said portion of land ever since he bought the same from one Abraham Mbuthia Muriithi on November 8, 1995.
12. The Applicant asserts that despite his open and exclusive possession of the said 1.5 acres portion of the land, sometime in November 2022, he came to learn that the 2nd Respondent had been registered as the proprietor of the entire parcel of land under circumstances that were unknown to him. It is



his case that the purported change of ownership from the previously registered proprietor to the 2nd Respondent is fraudulent and that the same is meant to deprive him of his entitlements thereto.

13. The conditions for consideration in granting an interlocutory order of injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358 where the Court expressed itself thus:

"First, an applicant must show a *prima facie* case with a 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."

14. As to what would amount to a *prima facie* case in a matter such as this, the Court of Appeal offered guidance as follows in *Mrao Limited v First American Bank of Kenya & 2 others* (2003) KLR 125:

"... a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

15. In support of his case, the Applicant has annexed a copy of a Sale Agreement executed between himself as the purchaser and one Abraham Mbutia Muriithi on November 8, 1995. In addition, the Applicant has annexed a Certificate of Official Search dated December 21, 2020 indicating that before execution of the Sale Agreement, the said Abraham Mbutia Muriithi had become the registered proprietor of the suit property on May 23, 1995. It is on that basis that the Applicant contends that the registration of the 2nd Respondent as the proprietor of the suit property was fraudulent.
16. From the material placed before the Court however, it was apparent that the sale transaction between the Applicant and the said Abraham Mbutia Muriithi had run into some headwinds and that many years after the agreement was executed, the portion of land measuring 1.5 acres was never transferred to the Applicant.
17. From a perusal of the Applicant's Further Affidavit, it was apparent that the circumstances under which the said Abraham Mbutia Muriithi came to be registered as the proprietor of the suit land were themselves suspect as the vendor was accused of intermeddling with the estate of his then deceased father. Both the Applicant and the vendor were charged with fraud at the Karatina Law Courts and even though the Applicant was acquitted, the vendor was found guilty and was convicted accordingly for fraud.
18. In the Affidavit filed in support of the application, the Applicant has attached the death Certificate for the vendor indicating that he passed away on 19th September, 2009. He does not however care to disclose the reasons he failed to address his claim against the vendor for all that period.
19. Indeed while the Applicant purports that the suit property was fraudulently transferred from the name of the said vendor to the 2nd Respondent, it was apparent that the Applicant was aware that at some point in time, the suit property was registered in the name of the 1st Respondent. That explains why the main suit herein is premised on a claim of adverse possession from both Respondents. Such a claim would not arise if the 1st Respondent was not at one point in time the proprietor of the said parcel of land.



20. From the material placed before the Court, the 1st Respondent became the registered proprietor of the suit property in the year 1998 as revealed from an abstract of the title attached to her Replying Affidavit. That position only changed with the registration of the 2nd Respondent as the proprietor on August 31, 2022.
21. Arising from that position, I was not persuaded that the Applicant had made out a *prima facie* case with a probability of success. His application dated November 25, 2022 is without merit and must fail. It is dismissed with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 28TH JULY, 2023.**

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J. O. OLOLA

JUDGE

In the presence of:

Ms Mwangi holding brief for Kiminda for the Applicant

Mr. Kibicho holding brief for Nderi for the 1st Respondent

Mr. Muthigani for the 2nd Respondent

Court assistant - Kendi

