



**Omwega v Ogutu & another (Originating Summons 2 of 2023)
[2023] KEELC 18972 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ORIGINATING SUMMONS 2 OF 2023**

**M SILA, J
JULY 27, 2023**

BETWEEN

RACHEL NYAMUSI OMWEGA APPLICANT

AND

HENRY NYABUTO OGUTU 1ST RESPONDENT

MARGARET GESARE NYABUTO 2ND RESPONDENT

RULING

(Application for injunction; principles to be applied; applicant filing suit for adverse possession and seeking an injunction pending hearing of suit; prima facie case; not clear in the Originating Summons what land is being claimed as two different parcel numbers are indicated; no evidence from a surveyor or land valuer to demonstrate what land the applicant is in occupation of; applicant attaching only photographs but photographs can be of any land; court not persuaded that a prima facie case has been established and application dismissed)

1. This suit was commenced through an Originating Summons that was filed on March 10, 2023. The applicant seeks a declaration that she has acquired, through adverse possession, title to the land parcel Wanjare/Bogiakumu/9597 (the suit land). In the supporting affidavit, he avers that he is the registered owner of the land parcel Wanjare/Bogiakumu/1394 which she inherited from her late husband, one Johnson Maragia Omwega. This land shares a common boundary with a land parcel Wanjare/Bogiakumu/1385 which was owned by the 1st respondent. It is said that the 1st respondent subdivided this land parcel No 1385 into four portions and one of the products is the suit land. The applicant contends that from time immemorial she has been in continuous, open, uninterrupted use, cultivation, and possession of a portion measuring 176 feet by 35 feet lower side, and 176 feet by 28 feet of the upper side. She avers to have planted crops and that there are mature trees on the said portion. She has annexed photos of mature trees. She claims that on the basis thereof, she has acquired title by way of adverse possession.



2. Together with the Originating Summons, the applicant filed an application for injunction, seeking to restrain the respondents from the land pending hearing and determination of the suit. It is that application that is the subject of this ruling.
3. The respondent filed appearance through counsel, but no replying affidavit has been filed to the Originating Summons and no reply has been filed to this application. I will therefore consider the application based on the material supplied by the applicant.
4. What is before me is an application for injunction and the principles upon which such applications are determined were settled in the case of *Giella v Cassman Brown* (1973) EA 358. In essence, one needs to demonstrate a *prima facie* case with a probability of success, demonstrate that she will suffer irreparable injury if the injunction is not granted, and finally, where the court is in doubt, it will decide the application on a balance of convenience.
5. So, has the applicant demonstrated a *prima facie* case with a probability of success? I am not persuaded. First, it is not even clear what land the applicant is claiming. In her pleadings, what I see as the orders sought are for the land parcel Wanjare/Bogiakumu/9597, but what is attached as an extract of title is a register to the land parcel Wanjare/Bogiakumu/9579. Even the supporting affidavit sometimes mentions parcel No 9597 and at times parcel No 9579. The applicant needs to be clear on what land she is claiming. Secondly, there is nothing before me to inform me with precision what land the applicant occupies, if at all. I would have expected the applicant to come with a surveyor's or valuer's report which would demonstrate to court the land that the applicant is in actual occupation of. Without such evidence, the court cannot know exactly what land an applicant occupies and in fact, it leaves it too open, so that a litigant can claim to occupy any land and show no proof of it, which can make court make orders that are unjust. All that the applicant has attached are photographs, but these photographs do not tell me what parcel of land they are for. One can take photographs of any land and claim it to be the land in dispute. I am afraid that mere photographs are not sufficient in such a case. Based on these two reasons, I am not persuaded that the applicant has demonstrated a *prima facie* case with a probability of success.
6. Having not demonstrated a *prima facie* case with a probability of success, this court is unable to grant the order of injunction sought. The result is that this application is dismissed and the applicant will need to prove her case without the benefit of an order of injunction. I make no orders as to costs as the respondent did not bother opposing the application.
7. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 27 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

