



**Muhari v Gakure (Legal Representative of the Late Geoffrey Gakure Kabaki) & 2 others
(Environment & Land Case E013 of 2022) [2023] KEELC 18963 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E013 OF 2022**

**YM ANGIMA, J
JULY 20, 2023**

BETWEEN

JESSEE KARIUKI MUHARI PLAINTIFF

AND

**PENINAH WAMBUI GAKURE (LEGAL REPRESENTATIVE OF THE LATE
GEOFFREY GAKURE KABAKI) 1ST DEFENDANT**

JEREMIAH MUUTI MUGI 2ND DEFENDANT

THE LAND REGISTRAR NYANDARUA 3RD DEFENDANT

RULING

A. Introduction

1. By an originating summons dated 18.07.2022 and amended on 18.01.2023 based upon Section 38 of the *Limitation of Actions Act* (Cap. 22), Order 37 rule 7 of the *Civil Procedure Rules*, 2010, (the Rules) the Plaintiff sought determination of various questions relating to his claim for adverse possession of Title No. Nyandarua/Ol Kalou Salient/522 (the suit property) measuring approximately 42 acres.
2. The Plaintiff pleaded that he had been in continuous, open, exclusive and uninterrupted possession and occupation of the suit property for over 52 years hence he had acquired a beneficial interest therein on account of the doctrine of adverse possession. He further pleaded that he had developed the suit property over the years by constructing a cattle shed, houses for his sheep, a pit latrine and planting trees thereon among other developments.

B. The Plaintiff's Instant Application

3. Simultaneously with the filing of the originating summons, the Plaintiff filed a notice of motion dated 18.07.2022 and amended on 18.01.2023 based upon order 40 rules 1 & 3 of the Rules and Sections 63(e) and 3A of the *Civil Procedure Act* (Cap. 21), seeking the following orders:



- a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to order that the 3rd respondent herein does produce a copy of abstract of title for all that parcel of land known as Nyandarua/Ol Kalou Salient/525.
 - d. That the honourable court be pleased to issue inhibition and temporary orders of injunction barring and restraining the Defendants/respondents their agents, servants or assigns from evicting, selling, leasing charging or in any way whatsoever interfering with the Plaintiff/applicant's peaceful and quiet possession and development over Nyandarua/Ol Kalou Salient/525 hereinafter the suit land, pending hearing and determination of this suit.
 - e. That the OCS Ol Kalou Police Station to provide security during execution of the orders as prayed (b) and (d) above.
 - f. The costs of this application be provided for.
4. The said application was based on essentially the same grounds as set out in the originating summons. It was contended that there was a pending suit between the 1st and 2nd Defendants before court over ownership of the suit property whose determination may prejudice his beneficial rights over the suit property or result in his eviction. The Plaintiff further stated that although he had requested the 3rd Defendant to furnish him with a copy of the extract of title, the latter has refused to supply the same without lawful justification or excuse.

C. The 1st Defendant's Response

5. The 1st Defendant filed a replying affidavit sworn by Nancy Leah Wadia Kabaki on 16.05.2023. She stated that she was one of the administrators of the estate of the late Geoffrey Gakure Kabaki (the deceased) who was the legitimate owner of the suit property. It was contended that the Plaintiff had no cause of action against the estate of the deceased since she was simply a caretaker on the suit property with the permission of the deceased.
6. It was contended that the Plaintiff had in a letter dated 04.08.2016 to the Location Chief admitted that he was a caretaker of the deceased on the suit property and his occupation was solely for the purpose of taking care of the land. The 1st Defendant further stated that all material times before the wrongful acquisition of the suit property by the 2nd Defendant, the same was registered in the name of Settlement Fund Trustees (SFT) until 02.08.2015 hence the Plaintiff's claim for adverse possession was untenable. It was therefore contended that the Plaintiff had not satisfied the requirements for the grant of the temporary injunction and other orders sought in the application.

D. The 2nd Defendant's Response

7. The 2nd Defendant filed a replying affidavit sworn on 11.05.2013 in opposition to the application. He stated he was the registered proprietor of the suit property by virtue of an allotment by the Director of Land Adjudication and Settlement in 2015. He stated that he took possession of the suit property in 2015 and only allowed the Plaintiff to occupy a permanent improvement which was on the suit property to enable him (the Plaintiff) undertake construction on his own parcel of land at Ol Kalou being Title No. Nyandrua/Ol Kalou Salient/1117.
8. The 2nd Defendant further stated he was the one cultivating the suit property and that the Plaintiff had no developments thereon since he was there as a licensee. It was the 2nd Defendant's case that the Plaintiff's claim for adverse possession was misconceived and that he had not satisfied the conditions for



the grant of an interim injunction in the circumstances. The court was consequently urged to dismiss the application with costs.

E. The 3rd Defendant's Response

9. The 3rd Defendant filed a replying affidavit sworn by W.N. Muguro in opposition to the application. It was stated that the suit property was registered in the name of the 2nd Defendant but a restriction was placed against the title at the instance of the advocates for the deceased. It was further stated that there was no basis for the issuance of a court order compelling the registrar to furnish the Plaintiff with an extract of title since he had not demonstrated that he had followed the prescribed procedure for seeking the same. In particular, it was contended that the Plaintiff had failed to make the relevant application and pay the requisite fee as stipulated under Section 7(2) of the [Land Registration Act, 2012](#).

F. Directions on Submissions

10. When the application was listed for inter partes hearing it was directed that it shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record, however, shows that none of the parties had filed submissions by the time of preparation of the ruling.

G. Issues for Determination

11. The court has considered the Plaintiff's notice of motion dated 18.07.2022 and amended on 18.01.2023, the replying affidavits filed by the Defendants as well as the material on record. The court is of the opinion that the following issues arise for determination:
 - a. Whether the Plaintiff has demonstrated a case for the grant of orders of inhibition and injunction.
 - b. Whether the Plaintiff has demonstrated a case for an order compelling the 3rd Defendant to issue him with an extract of title.
 - c. Who shall bear costs of the application.

H. Analysis and Determination

- a. Whether the Plaintiff has made out a case for the grant of orders of inhibition and injunction
12. It is evident from the material on record that the Plaintiff's suit concerns a claim for adverse possession of the suit property. The court is aware that one of the critical elements of adverse possession is the dispossession of the true owner of the land for at least 12 years. See [Chevron \(K\) Ltd -vs- Harrison Charo Wa Shutu](#) [2016] eKLR. The material on record shows that the suit property was first registered on 16.08.1985 in the name of SFT but was registered to the 2nd Defendant on 05.08.2015.
13. It has been held that the period during which the SFT was the registered owner is not to be taken into account in the computation of the statutory period of 12 years. In the premises, time for purposes of Section 38 of the [Limitation of Actions Act](#) can only be reckoned with effect from 05.08.2015 when the suit property was registered in the name of the 2nd Defendant. It is obvious that the period falls far short of the 12 years required by the law. Consequently, the court is not satisfied that the Plaintiff has made out a prima facie case with a probability of success at the trial within the meaning of the principles enunciated in the case of *Giella -vs- Cassman Brown & Co. Ltd* [1973] EA 358. It would,



therefore, follow that there is no need for consideration of the other two principles for the grant of an interim injunction.

14. As regards the prayer for an order of inhibition the court has noted that the Plaintiff has not alleged that the suit property is at risk of being alienated. It has not been demonstrated that the Plaintiff's suit shall be rendered nugatory unless such order is granted. The factors to be considered in an application for an order of inhibition were considered in the case of *Joseph Mumita Kipees (Suing as legal representative of the estate of Moses Kisento) –vs- Nteri Merik Obo Kipaita & 2 Others* [2014] eKLR as follows:

“The Applicant has alleged that the 1st Defendant intends to sell the suit land. There is no evidence of that allegation. Under Section 68(1) of the *Land Registration Act*, the court has power to grant inhibition orders against a suit land restricting registration of any dealing with the suit land for a particular period or until the occurrence of a particular event. The courts have severally held that in an application for orders of inhibition the applicant has to satisfy the court that:

- a. That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.
- b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
- c. That the applicant has an arguable case.

15. The court is far from satisfied that the Plaintiff has satisfied the threshold for the grant of an order of inhibition under Section 68(1) of the *Land Registration Act*. There is no evidence on record to demonstrate that the suit property is in danger of being alienated or disposed of. There is also no material on record indicating that the Plaintiff has an arguable case with a reasonable probability of success at the trial. Consequently, the court is not inclined to grant the order of inhibition sought.

- b. Whether the Plaintiff has made out a case for an order compelling the 3rd Defendant to issue him with an extract of title

16. The Plaintiff contended that he had been denied an extract of the title to the suit property by the 3rd Defendant despite request. He stated that his advocates wrote a letter dated 02.06.2022 requesting for the extract but the registrar declined to oblige without any lawful justification or excuse. The registrar, on the other hand, contended that the Plaintiff did not follow due process in seeking the extract of title as stipulated under Section 7(2) of the *Land Registration Act*, 2012.

17. The said section stipulates as follows:

“The Registrar shall upon payment of prescribed fee, make information in the land registry accessible to any person.”

18. It is apparent from a perusal of the said section that the registrar is not obligated to supply an extract of title or other information until the concerned applicant has made payment of the prescribed fee. In this case, there is no evidence of payment of any fee as required by the Act. The Plaintiff's advocates merely made an undertaking to pay. An undertaking is merely a promise to do something in the future and not a mode of payment. The court is thus of the opinion that the Plaintiff has failed to demonstrate that his request for an extract of title complied with the applicable law and that his request was declined without any lawful justification.



- b. Who shall bear costs of the application
19. 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). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigants who opposed the application should not be awarded costs of the application. Accordingly, the 1st – 3rd Defendants shall be awarded costs of the application.
- b. Conclusion and Disposal Orders
20. The upshot of the foregoing is that the court finds no merit whatsoever 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 18.07.2022 and amended on 18.01.2023 is hereby dismissed in its entirety with costs to the 1st – 3rd Defendants.
- b. The suit shall be mentioned on 05.10.2023 for pre-trial directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 20TH DAY OF JULY, 2023.

In the presence of:

N/A for the Plaintiff

Mr. Wainaina for the 2nd Defendant

N/A for the 1st Defendant

N/A for the 3rd Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

