



**Cherere v Wandarwa & another (Environment & Land Case  
18 of 2020) [2023] KEELC 18756 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18756 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 18 OF 2020  
LN GACHERU, J  
JULY 13, 2023**

**BETWEEN**

**BENSON MWANGI CHERERE ..... APPLICANT**

**AND**

**CHARLES FRANCIS KIMINDIRI WANDARWA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN MURAYA KAMURI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Plaintiff/Applicant herein Benson Mwangi Cherere, brought this Notice of Motion Application dated 18<sup>th</sup> April 2023, and sought for the following orders;
  - a. This honourable Court do issue an injunction against the Respondents or their servants or agents against any way interfering with the suit property Loc.7/Gakoigo/975, either by alienating, disposing or interfering with the Applicant's occupation until this application is heard and determined and thereafter till this suit is heard and determined.
  - b. The status quo in land parcel Loc.7/Gakoigo/975, be maintained.
  - c. Any transfer or alienation that may have been made in land parcel Loc.7/Gakoigo/975, during the subsistence of this suit be cancelled and land be restored to Loc.7/Gakoigo/975.
  - d. Any other orders this Court may deem fit to grant.
2. The said Application is premised on the following grounds and the annexed Affidavit of the Plaintiff/Applicant;
  - a. The suit property is in danger of being wasted damaged and alienated by the Respondents.



- b. The Respondents intends to remove and or dispose the suit property affording reasonable probability that the Applicant will be obstructed in executing any decree that may be passed against the Respondents.
  - c. The Respondents sole aim is to defeat and frustrate execution of any decree issued against them.
  - d. The Applicant shall suffer irreparable loss if orders sought are not granted.
  - e. Case being for adverse possession, the said possession overrides any registration.
  - f. That this suit shall be rendered nurgatory.
3. In his Supporting Affidavit, the Plaintiff/Applicant Benson Cherere Mwangi, averred that he had sued the 1<sup>st</sup> Respondent in ELC No. 152 of 2014, at Nyeri High Court, but then the 1<sup>st</sup> Defendant/Respondent changed ownership of the suit property to alter the nature of the suit. However, the said suit was struck out. That he was not deterred and he filed this instant Suit so that he could get justice. He further averred that he had acquired the suit land Loc.7/Gakoigo/975, by way of adverse possession, and that he has always been in occupation of the same. It was by his contention that he was surprised on 30<sup>th</sup> March 2023, when he saw people in his said land who claimed that they were there to survey the suit land.
  4. That when he informed the area chief, he told him that he was not aware of the said survey and demarcation. He further averred that he was surprised when he carried out a search and discovered that his land had been demarcated into eleven plots being Loc.7/Gakoigo/5779- Loc.7/Gakoigo/5789. He annexed a copy of the said search as annexure BC1.
  5. He claimed that the Respondents sole claim is to defeat justice as previously exhibited. It was his further contention that it is only fair and just to preserve the said property because if not done, the suit will be rendered nurgatory. He urged the Court to prevent any further subdivision or destruction of the suit property by ordering the restoration of the suit property to its original form, until the suit is heard and determined. Further, that the Defendants/Respondents subdivided the land with the aim of frustrating him. He contended that the rights of the Defendant/Respondents were extinguished once he obtained the overriding interests on the suit land Loc.7/Gakoigo/5779. He also urged the Court to protect his interests from being destroyed and/or diluted or trampled upon, before the suit is heard.
  6. The Application is opposed *vide* the Replying Affidavit of Stephen Muraya Kamuri, the 2<sup>nd</sup> Defendant herein. He averred that the Plaintiff/Applicant has not brought the suit in good faith. He further averred that the suit property was transferred to him in the year 2014, and that time against him for a claim of adverse possession has not lapsed.
  7. He also claimed that he did not know the Plaintiff and to his knowledge the Plaintiff/Applicant has never set foot on the suit land. That the Plaintiff/Applicant had never planted the alleged trees on the said land. He contended that he does not live near the suit land, as lives in Thika and if the Plaintiff/Applicant has been on the suit land, it is without his knowledge and if he is utilizing the said land, then the Applicant is a trespasser.
  8. He also contended that he has occasionally visited the suit land and he confirmed that the land is furrow. It was his contention that the only time someone tried to gain possession of the suit land was sometime in November 2022, when the said person dug a pit latrine in a portion of land but it has no door. He admitted that the suit land has been subdivided into eleven portions and that the Plaintiff/Applicant did not object to the said subdivisions. Further that the Plaintiff has no valid sale agreement between himself and the 1<sup>st</sup> Defendant.



9. That the purported sale amounted to intermeddling which is a criminal offence and that the plaintiff should not benefit from his Criminal actions. Further that the Plaintiffs has not met the threshold for claim of adverse possession and therefore the Plaintiff/Applicant has no Proprietary Interest on the suit land and he urged the Court to dismiss the instant application.
10. The Applicant filed a Supplementary Affidavit on 5<sup>th</sup> June 2023, and he averred that the 2<sup>nd</sup> Respondent lied to Court by stating that the Applicant is a stranger to him and that he has not been in occupation of the suit property. He annexed photograph of his homestead which were marked annexed BCMI. He further alleged that the said homestead is on Loc.7/Gakoigo/975 and that he has been farming thereon for his livelihood as shown on annexure BCM2. He urged the Court to preserve the suit property so that this suit is not rendered nugatory.
11. The Application was canvassed by way of written submissions.
13. The Applicant through the Law Firm of Kimwere Josphat & Co. Advocates filed his written submissions dated 2<sup>nd</sup> June 2023, and submitted that he has established all the three conditions for grant of injunction set out in the case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, being that;
  1. Establish a *prima facie* case with probability of success.
  2. An injunction will not normally be granted unless the Applicant demonstrates that he will suffer irreparable injury that cannot adequately be compensated by an award of damages.
  3. If in doubt, the Court will determine the Application on the balance of convenience.
14. On whether the Applicant established a prima facie case with probability of success, it was submitted that the Applicant has been in occupation of the suit land for a period exceeding 12 years. That he has built his homestead and has been carrying farming activities as from 14<sup>th</sup> October 2001. That the Respondents have never resided on the suit land, but they have subdivided the said land, and which subdivisions is only on the paper but not on the ground.
15. On whether the suit will be rendered nugatory if the orders are not granted, it was submitted that the Applicant's claim is for adverse possession over land parcel No. Loc.7/Gakoigo/1975, and that he has been on the suit land for over 12 years. That if the suit is disposed before the hearing of the suit, the Applicant will suffer irreparable damages and the suit will be rendered nugatory.
16. On whether the Applicant can be compensated by damages, the Applicant relied on the case of *Panari Enterprises vs Lijoodi & 2 Others* (2014) eKLR, where the Court held;

Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right..."
17. It was submitted that the suit land has been a source of livelihood for the Applicant and if alienated, he will lose that livelihood and that loss cannot be compensated by way of damages.
18. On whether the balance of convenience tilts in favour of the Applicant, it was submitted that since the Applicant has been in occupation of the suit land openly, without secrecy and without the permission of the Respondents' then for the purposes of preserving the suit land, he should be allowed to continue with the said occupation and thus the balance of convenience tilts in his favour. The Applicant urged the Court to allow his application.



19. On their part, the Respondents filed their written submissions dated 6<sup>th</sup> June 2023, through the Law Firm of Mwaniki Warima & Co. Advocates. They relied on the case of *Giella vs Cassman, Brown (supra)* which set out the principles to be considered in an application for injunction.
20. They also relied on Order 40 Rule 1 & 2 of the [Civil Procedure Rules](#), which provides for situations when an injunction can be granted.
21. It was submitted that the averments by the Applicant are totally untrue as she has not been in occupation or utilization of the subject land. It was further submitted that the Court should not come to the aid of the Applicant as he has come to Court with dirty hands. The Respondents further submitted that the suit land has been subdivided into eleven resultants parcels of land and they have new numbers and the original land No. Loc.7/Gakoigo/975, does not exist.
22. Further that the Applicant was well aware of the said subdivision and he did not raise any objection and he was also aware that the 2<sup>nd</sup> Respondent is the absolute registered owner of the suit property. It was also submitted that the Applicant has never been in occupation and utilization of any portion of the subject land and that the only structure on the subject land is a pit latrine which was constructed in November 2022, and which is without a door.
23. It was also submitted that the Applicant has not made a *prima facie* case with probability of success to warrant grant of the orders of injunction. Further that the Applicant has come to Court with unclean hands and has not met the threshold for grant of injunctive orders.
24. From the available evidence, the Applicant filed this Originating Summons on 10<sup>th</sup> August 2020, and sought for a declaration that he has acquired the suit property herein Loc.7/Gakoigo/975, by virtue of adverse possession. Prior to filing this suit, the Applicant had filed ELC No. 152 of 2014 at Nyeri High Court, which was later transferred to Murang'a ELC in 2017. He had sought for similar orders that he be declared to have acquired the suit land Loc.7/Gakoigo/975, by adverse possession and that the Defendants right over the said suit has been extinguished. The said Murang'a ELC No. 234 of 2017, was struck out on 15<sup>th</sup> November 2018, for being incompetent.
25. This application for injunction was filed on 19<sup>th</sup> April 2023. That was almost a period of 3 years after the instant Originating Summons was filed.
26. The Applicant has alleged that the suit property is in danger of being damaged and alienated before the suit is heard and determined. That the suit property has been demarcated into various plots as stated in Para 7 of the Supporting Affidavit. The copy of search BCI indicates that title Loc.7/Gakoigo/975, has been closed on subdivision. The new subdivisions were given as 5779 – 5789. However, the search does not indicate when the subdivision was done.
27. The 2<sup>nd</sup> Respondent has admitted that he has subdivided the suit land into eleven subdivisions. The 2<sup>nd</sup> Respondent did not indicate when the said subdivision was done.
28. It is evident that the suit property was transferred to Stephen Muraya Kamuri the 2<sup>nd</sup> Respondent herein on 26<sup>th</sup> June 2014. That is during the pendency of Nyeri ELC No. 154 of 2014. The Applicant did not apply for injunctive orders then.
29. It is evident that injunctions are sought for when there is immediate danger to property. That is what is provided for by Order 40 Rule 1 of the [Civil Procedure Rules](#) which provides;

“Where in any suit it is proved by affidavit or otherwise—



- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders
30. The Applicant needed to establish that the suit property is in danger of being alienated, wasted or being disposed of by the Respondents herein.
  31. As the Court pointed out, the 2<sup>nd</sup> Respondent became the registered owner of the suit property in the year 2014.
  33. The Applicant did not seek to injunct him then. The suit herein was filed in August 2020. The Applicant did not file the instant application then. Though the Applicant has averred that the suit property has been subdivided, it is not clear when the said subdivision was done. Were the subdivisions done in the near past or just immediate or just have been in existence for long. The Applicant had the duty to avail all the relevant evidence to answer the above questions but he failed to do so.
  34. See the case of *Noormohammed Janmohammed...Vs... Kassam Ali Virji Madbam* (1953) 20 LRK 8, where the Court held;
 

"To justify temporary injuctions, there must be evidence of immediate danger to property by sale or other disposition".
  35. The Applicant has not availed any evidence that the Respondents intends to sell and/or alienate to suit property. Therefore, the Court finds that the Applicant has not met the most important threshold for grant of injunctive orders – evidence of immediate danger to property.
  36. On the 2<sup>nd</sup> limbs of *Giella vs Cassman* case, that if injunction is not granted the Applicant will suffer irreparable damage which cannot be compensated by an award of damages, it is evident that the subject herein is land, which can be quantified in monetary terms and awarded to the Applicant. It is also not clear whether the Applicant has been in occupation of the suit land since 2001. His earlier suit was struck out in 2018, and he filed this instant suit in 2020. If there was immediate danger in 2018, Applicant should have filed the relevant application or taken relevant action.
  37. On the balance of convenience, the Court finds that it tilts in favour of preserving the status quo. The status quo is that the 2<sup>nd</sup> Respondent is the registered owner of the suit property and he will remain so until the suit is heard and determined. However, the 2<sup>nd</sup> Respondent should not alienate and/or dispose off the resultant subdivisions until this suit is heard and determined. This is a 2020 matter and it should be set down for hearing expeditiously.
  38. The upshot of the foregoing is that the Applicant's Notice of Motion Application dated 18<sup>th</sup> March 2023, is found not merited. The said application is dismissed entirely save for an order that the 2<sup>nd</sup> Respondent should not alienate, sale, dispose off and or charge the resultant subdivisions herein until this suit is heard and determined, which hearing should be done expeditiously.
  39. It is so ordered.



**DATED,SIGNED AND DELIVEREDVIRTUALLY AT MURANG'A THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**L. GACHERU**

**JUDGE**

**Delivered online in the presence of; -**

Mr Kimwere for the Applicant

M/s Waititu for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Joel Njonjo – Court Assistant

**L. GACHERU**

**JUDGE**

**13/7/2023**

