



**Shinini & another v Gachanja & another (Environment & Land Case
E001 of 2023) [2023] KEELC 20123 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E001 OF 2023
CG MBOGO, J
SEPTEMBER 28, 2023**

BETWEEN

KITIRINGA SHININI 1ST PLAINTIFF

JANET SOPIATO SHINENE 2ND PLAINTIFF

AND

DANIEL GACHANJA 1ST DEFENDANT

MOSES MOREU GACHANJA 2ND DEFENDANT

RULING

1. Before this court for determination is the notice of motion application dated May 16, 2023 filed by the defendants/applicants and which is expressed to be brought under articles 23(1), (3), 40 and 159 of *the Constitution*, section 1A and 3A of the *Civil Procedure Act* and order 40 of the *Civil Procedure Rules* seeking the following orders: -
 1. spent.
 2. That pending the hearing and determination of the suit, an order of temporary injunction does issue restraining the plaintiffs/respondents by themselves, their agents, servants and/or employees from fencing, developing and/or interfering with land parcel Narok/Sakutiek/365.
 3. That in the alternative to prayer number 2 above, status quo be maintained pending the hearing and determination of this application and suit.
 4. That the OCPD Narok Police Station does enforce the orders.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that on March 27, 2023, this court issued orders staying proceedings in MCELC No. E047 of 2022 and an injunction restraining the defendants/



applicants from evicting the plaintiffs/respondents from the suit land. However, the orders issued by this court do not give the plaintiffs/respondents any colour of right to continue fencing, utilizing, developing or interfering with land parcel Narok/Sakutiek/365 (suit land) in a manner that changes the status of the land.

3. The application was supported by the affidavit of the 1st defendant/applicant sworn on even and on behalf of the 2nd defendant/applicant. The defendants/applicants herein deposed that they are the registered proprietors of the suit land known as Narok/Sakutiek/365 transferred to them by their late father and that the said land is the subject of dispute in Narok MCELC No. E047 of 2022 where they are seeking orders against the plaintiffs/respondents.
4. They further deposed that this court issued orders on March 27, 2023 staying the proceedings before the lower court and further preventing them from evicting the plaintiffs/respondents. Further, that the plaintiffs/defendants have misinterpreted the orders to mean that they are now entitled to the land and have embarked on fencing and developing the land in a manner that changes the status of the land.
5. The application was opposed vide the replying affidavit of the 1st plaintiff/respondent sworn on June 20, 2023 and filed in court on July 3, 2023 and a further affidavit sworn on June 14, 2023 and filed in court on July 4, 2023. The 1st plaintiff/respondent deposed that on 1st February, 2023, this court issued orders which were confirmed in their favour pending the hearing and determination of the suit. Further, that together with her co-plaintiff, they have been in possession of the suit property for a period of over twelve years and their occupation is open, continuous and uninterrupted. Further, that the annexed photographs are inadmissible as they offend the admissibility of electronic evidence as no certificate has been filed or disclosed.
6. The 1st plaintiff/ respondent further deposed that the said exhibits do not meet the requisite legal threshold as the defendants/applicants have not filed a certificate as required under section 65 (8) as read with section 106 and 106 B of the *Evidence Act*. Further, that the photographs do not indicate the date when the photos were taken, the person who took the photographs and the device used.
7. That in her supporting affidavit and upon being put in occupation of the suit property in the year 2006, she developed the property including putting up structures and fencing. As such, the application as framed is bad in law, defective and does not have any justification to disturb the orders of the court pending the hearing and determination of the suit.
8. The application was canvassed by way of written submissions. On July 4, 2023 the defendants/applicants filed their written submissions dated June 29, 2023 in court. The defendants/applicants raised two issues for determination as follows: -
 1. Whether the defendants/applicants have a case for the orders sought.
 2. Whether the court should make orders as to costs.
9. On the first issue, the defendants/applicants submitted that their right to property under article 40 of *the Constitution* is being contravened by the plaintiffs/respondents and aver that it is not contested that there does not exist a valid sale agreement between the parties and neither does one exist between the principal parties in the dispute. Further, that without going to the merit of the dispute, the plaintiffs/respondents have not satisfied the threshold of obtaining land by adverse possession. They relied on the cases of *Nguruman Limited versus Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Moses C Mubia Njoroge & 2 Others versus Jane W Lesaloi & 5 others* [2014] eKLR and *Murunga Kabangi & 2 Others versus Hannab Wairimu Gitau & Another* [2019] eKLR.



10. The defendants/applicants further submitted that the plaintiffs/respondents are erecting fences and utilizing the property that will permanently alter the state of the suit land and this constitutes irreparable damage to the property that cannot be cured by monetary compensation. Further, that unless this court grants injunction orders, the plaintiffs/respondents will have an unfair advantage and shall continue to interfere with the suit land. Reliance was placed in the cases of *Paul Gitonga Wanjau versus Gathuthi Tea Factory Company Limited & 2 Others* [2016] eKLR, *Niaz Mohammed Jan Mohammed versus Commissioner for Lands & 4 Others* [1996] eKLR and *Olympic Sports House Limited versus School Equipment Centre Limited* [2012] eKLR.
11. On the second issue, the defendants/applicants submitted that the instant application is mature, well-conceived and full of merit and that the actions of the plaintiffs/respondents have singularly occasioned its need and they are thus entitled to costs.
12. On September 18, 2023, the plaintiffs/respondents filed their written submissions of even date. The plaintiffs/respondents submitted that their claim is based on adverse possession which they took possession in the year 2006 and have extensively developed the same for a period in excess of twelve years. Further, that the photographs annexed to the application have no evidentiary value in law as it was held in the case of *County Assembly of Kisumu & Others versus Kisumu County Assembly Service Board & 6 Others* [2015] eKLR.
13. The plaintiffs/respondents further submitted that in the instant case, the defendants/applicants have not proved that the suit land is in danger of being damaged, wasted or alienated in any manner and in any case, erecting a perimeter fence secures the boundaries of the suit property to protect against encroachment and trespass. Further, that no irreparable harm will be suffered by the erection of a perimeter fence given the fact that the defendants/applicants do not reside on the said land. The plaintiffs/respondents relied on the cases of American *Cyanamid Company versus Ethicom Limited* (1975) ALL AER 504, *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* [2018] eKLR and *Virginia Edith Wambui versus Joash Ochieng Ougo*, Civil Appeal no. 3 of 1987.
14. In conclusion, the plaintiff/respondents submitted that if the court was to decide on a balance of convenience, the same would tilt in maintaining status quo which status is that the plaintiffs/respondents are in possession and the perimeter fence erected long before filing of the suit.
15. I have carefully analysed and considered the application, the replies thereof and the written submissions filed by both parties and the issue for determination is whether the defendants/applicants are entitled to injunction orders pending the hearing and determination of the suit.
16. The requirements for the grant of an interlocutory injunction was set out in the case of *Giella versus Cassman Brown & Co. Ltd* [1973] EA 358 where it was stated:

“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 (E.a. Industries Vs. Trufoods [1972] E.A. 420.)”



17. A prima facie case was described in the case of *Mrao Ltd versus First American Bank of Kenya Ltd & others* Civil Appeal No. 39 of 2002, as:

“In civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

18. On whether the defendants/applicants have established a prima facie case with a probability of success, it is not in dispute that they are the registered owner of the suit land as evidenced by the copy of the title deed annexed to the application. The plaintiffs/respondents on the other hand are claiming ownership by way of adverse possession. It should also be noted that prior to the filing of the instant application, the plaintiffs/applicants had filed an application dated January 30, 2023 wherein they obtained orders staying proceedings in Narok MCELC No. E047 of 2022. This court also issued orders of temporary injunction restraining the defendants/applicants from evicting the plaintiffs/respondents.
19. The present application appears to have been precipitated by the new developments on the suit land being construction of a perimeter fence which the defendants/applicants argued that the dealings of the suit land by the plaintiffs/respondents will alter the status of the same to their disadvantage. In support thereof, the defendants/applicants annexed photographs of land showing erection of a fence.
20. The plaintiffs/respondents on the other hand argued that the photographs have no evidentiary value to this court for lack of a certificate producing electronic evidence. Interestingly, the plaintiffs/respondents have in their written submissions admitted to erection of the perimeter fence and advanced their reasons to prevention of encroachment and trespass. In other words, the defendants/respondents though opposing the application have admitted to such developments.
21. This court’s duty at this juncture is not to determine the issues raised in the application i.e. adverse possession which has been adversely mentioned but to determine whether the orders sought in the application based on what is before it, ought to be granted. As stated above, the defendants/applicants are the registered owner of the suit land and considering the claim against their title is on adverse possession which needs to be proven during trial, it is not difficult to find that they have a prima facie case.
22. The plaintiffs/respondents on the other hand deposed that they have been in occupation of the suit land since the year 2006 and have extensively developed the same. However, no evidence was tendered before this court to support the allegations. The photographs made available by the defendants/applicants shows land that is bear with no construction either temporary or permanent on the suit land.
23. While it would be easy to say that the defendants/applicants have a prima facie case because they are the registered owners, it would not be equally easy to say that damages would not be an adequate remedy or otherwise. However, I am persuaded that the erection of the perimeter fence has the potential effect of altering the status of the suit land and I find it in the interest of both parties, that whereas the defendants/applicants are restrained from evicting the plaintiffs/respondents, the plaintiffs/respondents have no colour of right in further developing the suit land to alter its status.
24. The upshot of the foregoing is that I find merit in the instant application and the same is allowed in terms of prayer 2 and 4 to the extent that the pending the hearing and determination of the suit herein, the plaintiffs/respondents are restrained either by themselves, their, agents, servants and/or employees from fencing and developing land parcel known as Narok/Sakutiek/365. In addition, the OCPD Narok is directed to ensure compliance of the orders.

Costs to be in the cause. It is so ordered.



DATED, SIGNED & DELIVERED VIA EMAIL THIS 28TH DAY OF SEPTEMBER, 2023.

HON. MBOGO C.G.

JUDGE

