



REPUBLIC OF KENYA



**Ngurukuthi v Mario (Environment & Land Case E031 of 2022)
[2023] KEELC 22558 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E031 OF 2022
A KANIARU, J
NOVEMBER 30, 2023**

BETWEEN

HENRY NYAGA NGURUKUTHI APPLICANT

AND

SAFERA WEGOKI MARIO RESPONDENT

RULING

1. I am called upon to make a determination on a Notice of Motion dated 02.08.2021 and filed on 12.08.2021 brought under a Certificate of Urgency. It is expressed to be brought under Section 68(1) of the *Land Registration Act* 2012, Order 40 rule 1(a) of the *Civil Procedure Rules*. The applicant – Henry Nyaga Ngurukuthi – is the Plaintiff in the suit while the Respondent – Safera Wegoki Mario is the Defendant. It is essentially an application for temporary injunction and the prayers sought are as follows:
 1. Spent
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 3. That the Honourable Court be pleased to issue an order of injunction restraining the Respondent, her agents and or servants from forcefully evicting the Applicant from land parcel No. Mbeti/Kiamuringa/292 pending the hearing and determination of the main suit herein.
 4. That this Honourable court be pleased to issue an order of inhibition against any dealings in respect of land parcel No. Mbeti/Kiamuringa/292 pending the hearing and determination of the main suit herein.
 5. That the costs of this application be provided.
2. The application is premised on the grounds set out in it and the Supporting Affidavit sworn by the said Henry Nyaga Ngurukuthi on 02.08.2021. He stated interalia; that he has been in uninterrupted



occupation and cultivation of land parcel No. Mbeti/Kiamuringa/292 (the suit land) continuously for over 50 years, which land was purchased by his late father from the Respondent's late husband. He attached photographic evidence of the developments he has allegedly made; that his late father took possession of the said land but the same was not transferred to him before the parties died; that on 10.05.2015 the Applicant and the Respondent entered into a consent to share the said land parcel Mbeti/Kiamuringa/292 in equal shares when the deceased estate was to be distributed in a succession case before Siakago Law Courts; that they agreed to share the survey fees for the subdivision and the Applicant paid Kshs. 38,000/- as agreed.

3. He deponed further that to his surprise, the Respondent ignored the said consent and left him out as a beneficiary of his half share in the distribution of the suit land. He applied for revocation of grant and for the court to consider him as a beneficiary but his application was declined; that the Respondent has caused herself to be registered through transmission as the owner of the said parcel of land and that she intends to sell the same to 3rd parties who have come to inspect it severally. He allegedly stands to be evicted unless the court grants the orders sought and that having lived and developed the suit land continuously without interruption for over 52 years, he has acquired lawful title by way of prescription or adverse possession.
4. The application was responded to vide a replying affidavit by the Respondent dated 17.03.2021. She denied the Applicants alleged occupation of the suit land. She also challenged the photographic evidence made available by the Applicants of the developments he has made on the suit land and alleged that the said developments were on an adjacent piece of land belonging to someone else. She denied having threatened to evict the respondent as she says he is not in occupation of the suit land. She is of the view that the application herein is *res judicata* since a similar application was made in the succession cause No. 165 of 2016 where the Applicant was claiming a portion of the suit land on the premise of an agreement allegedly entered into between his late father and the Respondents deceased husband. She urges that the application be dismissed.
5. The application was canvassed through written submissions. The applicant's submissions were filed on 01/11/2022 whereas the Respondents submissions were filed on 25.05.2023.
6. I have considered the application, the responses made to it, and the rival submissions. I find the issue for determination is whether the application has merit.
7. Before proceeding on the analysis of the application, the Respondent claims that the Applicant's Notice of motion is *res-judicata* since the Applicant had made a similar application in the Succession Cause No. 165 of 2016 which was dismissed. She has not attached a copy of the said application but has annexed a copy of the court's ruling. From the same, I have gathered that the Applicant had made an application for an interlocutory injunction pending the hearing and determination of his application for revocation of grant. The court heard the application. However it was not persuaded to grant the said order and in its ruling issued on 07.07.2021 it dismissed the same. I do not agree with the Respondent that the application herein is *res-judicata*. In my view that court order issued then was deemed spent the moment the application for revocation of grant was heard and determined. This is because the order had been sought for that specific period. The orders sought herein cannot therefore be said to be *res-judicata* as the Applicant has brought a fresh application for a different period and which is also based on a different cause of action.



8. The principles which guide the court when considering an application for a temporary injunction were set out in the case of *Giella v Cassman Brown* [1973] EA 358 where the court set out three conditions that ought to be met for grant of a temporary injunction. 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.”

9. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, described a prima facie case as:

“In civil cases, 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”

10. The Applicant claims to have been at all material times in occupation of the suit land. He says he has also cultivated it since the year 1966 to date. It is his case that his father purchased the same from the Respondents husband and that they both died before the said land could be transferred to his father’s name. He has attached photographic evidence of the developments he has made throughout the years on the said land though the same has come under challenge by the Respondent. His fear is that the Respondent having been registered as the proprietor of the suit land, she might dispose of the same to other parties, which would cause him to be evicted from the land. I am not persuaded that there has been any real threat of eviction. This application was filed in August 2021 which is roughly two years ago. The court did not issue any interim orders of injunction or any preservative orders then, yet to date there is no evidence of eviction. The Applicant is also merely speculating that the Respondent might dispose of the suit land as no demonstration of the same has been shown. In my view, the Applicant has not been able to demonstrate that he has a prima facie case with probability of success.

11. In making this finding, I am guided by the case of *Jan Bonde Nielsen v Nguruman Limited & 2 others* [2016] eKLR where the court of appeal stated as follows;

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damages that may result from the invasion. (Emphasis mine) We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put, on a preponderance of probabilities”.

12. Having found that the Applicant has not established a prima facie case, the other two limbs cannot succeed and therefore I need not consider them.



13. The Applicant had also made a prayer for an order of inhibition against any dealings in respect of the suit land. It is noteworthy that neither of the parties bothered to address the same in their submissions. It was the duty of the Applicant, since he is the party seeking the orders, to demonstrate why he is entitled to the same. He failed to do so. So I will equally not address it.
14. The upshot of the above is I find no merit in the application dated 02.08.2021 and I therefore dismiss the same.
15. Costs to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF NOVEMBER, 2023.

A.K. KANIARU

JUDGE

In the presence of Njeru Ithiga for Plaintiff/Applicant and Njage Njeru for Andande for Defendant/Respondent.

Interpretation: English/Kiswahili

