



**Nyaga & 4 others v Wamai & 4 others (Originating Summons
E044 of 2021) [2023] KEELC 22579 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ORIGINATING SUMMONS E044 OF 2021
A KANIARU, J
NOVEMBER 22, 2023**

BETWEEN

**ANNA NGUNYI NYAGA 1ST PLAINTIFF
ISABELLA IGOKI NYAGA 2ND PLAINTIFF
ROSE NANCY MUGO 3RD PLAINTIFF
JOHN MURIUKI NYAGA 4TH PLAINTIFF
SIMON MUCHIRI 5TH PLAINTIFF**

AND

**EPAPHRAS KENNETH NGARI WAMAI 1ST DEFENDANT
JOSHUA NJIRU CHACARIA 2ND DEFENDANT
RODGERS GACEWA 3RD DEFENDANT
ANTHONY MBOGO NYAGA 4TH DEFENDANT
BETH MUKAMI 5TH DEFENDANT**

RULING

1. The application before me for determination is a Notice of Motion dated 30.11.2021 and filed on 14.12.2021 brought under a Certificate of Urgency. It is expressed to be brought under Sections 68(1) of the *Land Registration Act*, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all enabling laws. The Applicants – Anna Ngunyi Nyaga, Isabella Igoki Nyaga, Rose Nancy Mugo, John Muriuki Nyaga & Simon Muchiri – are the 1st to 5th Plaintiffs in the suit respectively while the 1st, 2nd, 3rd, 4th & 5th Respondents – Epaphras Kenneth Ngari Wamai, Joshua Njiru Chacaria, Rodgers Gacewa, Anthony Mbogo Nyaga & Beth Mukami - respectively are the 1st, 2nd, 3rd, 4th & 5th Defendant's in the suit. It



is essentially an application for orders of temporary Injunction and Inhibition, and the prayers sought are as follows:

- a. Spent
 - b. Spent
 - c. Spent
 - d. The Honourable Court be pleased to issue a temporary orders of injunction restraining the defendants/respondents whether by themselves, or their servants, agents or any other person whomsoever from doing any of the following acts that is to say evicting, demolishing the Applicants houses, selling, leasing, charging or otherwise howsoever interfering with the Applicants quiet, peaceful, actual and exclusive possession, cultivation, user development and enjoyment of Nthawa/Riandu/681 (Original title subdivided into) Nthawa/riandu/1618, Nthawa/Riandu/1619 further Sub divided into Nthawa/Riandu/5065, Nthawa/Riandu/5066 and Nthawa/Riandu/1620 pending the hearing and determination of this suit.
 - e. The Honourable court do issue an order of inhibition restraining any dealings whatsoever with Land Parcel No. Nthawa/Riandu/681 (Original title subdivided into) Nthawa/Riandu/1618, Nthawa/Riandu/1619 further Sub divided into Nthawa/Riandu/5065, Nthawa/Riandu/5066 and Nthawa/Riandu/1620 until this suit is heard and determined.
 - f. Costs be borne by the Respondents.
2. The application is premised on the grounds, interalia; that the Applicants have been in open, exclusive, continuous and uninterrupted occupation of the suit land herein since the year 1978 and that the same was irregularly transferred to the Respondents who have now been threatening to evict the Applicants. That their claim is for adverse possession and if they are evicted from the suit land, they will suffer irreparable loss and their suit rendered nugatory.
 3. The application came with a supporting affidavit and a supplementary affidavit sworn by the 1st Applicant on behalf of the other Applicants. It is deponed, interalia; that the suit land originally known as Land Parcel No. Nthawa/Riandu/681 was registered in her husband's name; that they discovered that it was irregularly transferred to John Nyaga Karaya who without any legal standing caused the same to be sub divided and registered in the names of the Respondents herein; that she got married to her husband in 1974 and in 1978 began cultivating the suit land where she has also raised her children who have also been farming on it ever since they became of age; that they have also made developments on the said land including building a semi-permanent house, planted trees, carried out subsistence farming and reared livestock (they attached photographs in evidence); that sometime in the month of August 2021 and on some other days they saw some strangers visiting the suit land. They alleged that they own the property and that they would evict them; that they are apprehensive if the orders prayed for are not issued, the land will be disposed off. They urge that if the orders are granted the Respondents will not suffer any prejudice as the Applicants are the ones who are using the said land and therefore the degree of inconvenience tilts in their favour.
 4. The Respondents responded to the application in their respective affidavits all the while denying the alleged possession and occupation of the suit lands by the Applicants. The 2nd Respondent has attached photographic evidence of the status of his land, being land parcel Nthawa/Riandu/1619, which he says is un-utilized. The 4th & 5th Respondents, who say they own land parcel Nthawa/Riandu/1620 jointly, have also attached photographic evidence of the status of their land which they say they are in



- full occupation and utilization of. The 1st Respondent on the other hand says he purchased his parcel of land, being no. Nthawa/Riandu/1618, for valuable consideration in the year 2009 and that at the time of purchase it was vacant. He denies any occupation or possession of his parcel of land by the Applicants.
5. The application was canvassed through written submissions. The applicants submissions were filed on 13.12.2022. They gave a background to the application, mainly reiterating the case as set out in their Affidavit and maintained the position that they had demonstrated the principles for granting an order of temporary injunction as set out in the celebrated case of *Giella v Cassman Brown & Co. Ltd* 1973 E.A 358. They urged that should the orders sought not be granted they will be rendered landless, their property destroyed, and that the substance of the main suit will be defeated. They cited the cases of *Airland Tours & Travel Ltd v National Industrial Credit Bank* Nrb HCCC No. 1234 of 2002 as cited in *Michael Gitere & Another v Kenya Commercial Bank Ltd* [2018] eKLR, Indian Supreme Court decision in *Ravinder Kaur Grewal & Ors v Manjit Kaur & Ors, Ishwar Singh v University of Delhi, Hutching Biemer Ltd v Barclays Bank of Kenya Ltd & 2 others* [2006] eKLR.
 6. The 1st Respondent filed his submissions on 05.05.2023. He was still of the position that the Applicants have not been in possession or occupation of his parcel of land for more than twelve years as alleged, which parcel of land he says is registered in his name. He also submitted that the Applicants do not state the particular parcels, among the suit parcels of land they individually occupy or cultivate or that they claim entitlement to by adverse possession. It is his submission that the Applicants have not established a prima facie case against him as they have never occupied his suit land for a period of twelve years. Therefore according to him they cannot lay claim to it by way of adverse possession. He also submits that they have not demonstrated that they will suffer irreparable loss if the orders sought are not granted or any prejudice that they will suffer. He submitted also that the Applicants have not established any grounds for issuance of order of inhibition and he urged that the application be dismissed with costs to the Respondents.
 7. The 2nd to 5th Respondents filed their submissions jointly on 19.09.2023. It was their submission that the pleadings as filed by the Applicants so far do not establish a prima facie case with probability of success. The said that in a claim for adverse possession, an applicant must prove occupation for over twelve years that is open, notorious and continuous. They further submit that the Applicants case does not meet the threshold of a prima facie case as was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002. They submit also that 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. They said that the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
 8. It is further their submission that there is no doubt that no tribunal would grant the orders sought by the Applicants without calling for more evidence and therefore the material produced by the applicants is insufficient and does not prove the existence of a right that has been infringed or is likely to be infringed. It is also their submission that the Applicants have not demonstrated what harm they stand to suffer if the orders sought are not granted as there is no material placed before court proving alleged extensive development on the suit property. That also to the contrary it is the Respondents who stand to suffer if the application is allowed as the orders sought will totally limit them from utilizing their land, which a right guaranteed by law. Further, it was their submission that the Applicants having failed to prove a prima facie case and the possibility to suffer irreparable harm, the balance of convenience therefore favours them as the Respondents. They further cite the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2016] eKLR to support their position.



9. I have considered the application, the responses made to it and the rival submissions. The issue for determination is whether the Applicants are entitled to an order of temporary injunction and inhibition as against the Respondents.
10. 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.”
11. 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”
12. In another case of *Jan Bonde Nielsen v Nguruman Limited & 2 others* [2016] eKLR 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. 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”.
13. The Applicants main contention is that land parcel no. Nthawa/Riandu/681 was originally registered to the 1st Applicant’s husband in 1978. That the same was irregularly transferred to another party who subdivided the same into Nthawa/Riandu/1618, Nthawa/Riandu/1619, Nthawa/Riandu/5065, Nthawa/Riandu/5066 and Nthawa/Riandu/1620 and who also transferred the same to the Respondents. They say that they have lived on the suit land since 1978 without any interruption from the Respondents and therefore they have become entitled to the same by way of adverse possession. It is their case that they are at the risk of being evicted if the court does not issue orders of injunction restraining the Respondents from evicting them. The Respondents deny that the Applicants occupy their parcels of land and say that without such occupation they cannot evict them.
14. As set out above, the Applicants have a duty to demonstrate that they are at the risk of their rights being violated or that the rights have been violated necessitating the intervention of this court. Their occupation of the suit lands has been challenged by the Respondents and I am inclined to agree



with them that, being that there are five parcels of land individually owned by the Respondents, the Applicants have not demonstrated which of the said parcels of land they are in occupation of or have been developing. The photographic evidence they produced only shows a semi –permanent house that has been built but it is not clear on which parcel of land among the five it has been built on. It is therefore not clear from whom the threats of eviction have been coming from and from which land parcel they are being evicted. Further, it is also not clear whether the Applicants are seeking to challenge the registration of the Respondents as the proprietors of the suit parcels of land which would mean that the titles were not legally acquired or whether they are claiming to have acquired title to the said parcels by way of adverse possession, which would mean that the Respondents are lawfully holding the titles. On this basis, I find that the Applicants have not demonstrated that they have a prima facie case with probability of success.

15. The Applicants also have a duty to demonstrate that should the orders sought not be granted, they stand to suffer irreparable loss and damage that cannot be compensated with damages. In my opinion, the Applicants have not demonstrated what loss they stand to suffer should the orders sought not be granted. As said above, there is no evidence of the Applicants being evicted from the said land.
16. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the temporary injunction, against the hardship to be borne by the Respondents by granting the same. It is not in dispute that the Respondents are the registered proprietors of the suit parcels of land and being the registered proprietors, their rights are protected by law under Section 26 of the [Land Registration Act](#) which protects their title from challenge except on special circumstances. Should the orders of injunction be issued against them, they stand to be prevented from utilizing their land thus violating their rights of ownership. This therefore tilts the balance of inconvenience in their favour. Ultimately, I find that the Applicants have not made out a case for issuance of orders of temporary injunction as against the Respondents and therefore I deny the same.
17. Further, while considering an application for orders of inhibition, Makau J (as he then was) In the case of [Japhet Kaimenyi M'ndatho v M'ndatho M'bwiria](#) [2012] eKLR cited in Nrb ELC No. 383 of 2012 [Rosemary Wanjiku Njigi v Nancy Munjiru Ngigi](#) outlined the conditions that an applicant must satisfy in an application for orders of inhibition.

“In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-

- a) That the suit property is at the 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 arguable case.”
18. In this particular case the Applicants have not demonstrated that the suit parcels of land are at the risk of being disposed, alienated or transferred as no evidence of the same has been tendered. Without any evidence of that, the prayers for orders of inhibition must also fail.
 19. In the end, I find no merit in the Notice of Motion before me dated 30.11.2021 and I therefore dismiss the same.
 20. Costs to be in the cause.



RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22ND DAY OF NOVEMBER, 2023.

In the presence of;

Plaintiffs/ Applicants - present

Court Assistant - Leadys

Ms Njage for Joe Kathungu for 1st defendant

Kimanzi for 2nd to 5th defendant

Ms Mukami for Kiniti for plaintiffs**

A.K. KANIARU

JUDGE

22.11.2023

