



**Gem & another v Jura & 3 others (Environment & Land Case
E002 of 2021) [2022] KEELC 2962 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2962 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E002 OF 2021**

AY KOROSS, J

MAY 26, 2022

BETWEEN

CHARLES OTIENO GEM 1ST PLAINTIFF

ERICK OKOTH OTIENO 2ND PLAINTIFF

AND

NICHOLUS OMONDI JURA 1ST DEFENDANT

MICHAEL OTIENO JURA 2ND DEFENDANT

MARIKO AJWALA JURA 3RD DEFENDANT

RICHARD OKOTH JURA 4TH DEFENDANT

RULING

1. The general background of this matter is that the Plaintiffs filed a suit against the Defendants claiming to be adverse possessors of Land Parcel number Siaya/Usigu/1120 (“the suit property”) that is registered in the defendants name. The defendants on the other hand, deny the averments in the originating summons, they hold that they are the registered proprietors of the suit property and under a counterclaim, pray that the Plaintiffs surrender vacant possession of the suit property.

The Plaintiffs’ case

2. Pursuant to the provisions of sections 7, 17, 32 and 38 of the *Limitation of Actions Act* and section 3 of the *Environment and Land Court Act* the plaintiffs filed a motion dated 21/01/ 2022 seeking several orders. Prayers 1 and 2 are spent and the main prayer pending determination are restraining orders against the defendants from evicting and alienating them from the suit property pending the hearing and determination of the suit.



3. The motion is premised on the grounds enumerated on the face of the motion and the supporting affidavit of the 1st plaintiff; Charles Otieno Gem sworn on 21/01/2022. In summary, the Plaintiffs state that they are being threatened with eviction and that the Defendants have already sold a portion of the suit property.
4. After the ruling had been reserved the plaintiffs filed a supplementary affidavit dated May 24, 2022. As it is, it is improperly on record and is hereby expunged from the court record.

The defendants' case

5. The 1st defendant filed a replying affidavit dated 21/04/2022. In it, the defendants stated that they are the registered proprietors of the suit property having inherited the same from their grandmother and that apparently, the plaintiffs built their home on the wrong parcel of land. They asserted that by a meeting attended by the parties and community members, the parties agreed that the plaintiffs were to pay a certain amount to the defendants as compensation; which they defaulted.

The plaintiffs' submissions

6. The plaintiffs filed written submissions dated 17/03/2022. They identified two issues for determination; (i) whether the Plaintiffs have established a prima facie case with a high probability of success and, (ii) whether the Plaintiffs are adverse possessors.
7. Relying on the case of *Giella V Cassman Brown* [1973] EA 358. They asserted that they have met the triple requirements under the settled law in *Giella v Cassman Brown* (Supra).
8. On the second issue, the plaintiffs contend that they qualify for a declaration that they have acquired the suit property by adverse possession. They relied on the cases of *Wambugu v Njuguna* [1983] KLR, *Mbira v Gachubi* [2002] IEALR 137 and *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR.

The defendants' submissions

9. The defendants filed written submissions dated 21/04/2022. They identified several issues for determination; (i) whether the plaintiffs are the legal proprietors of the suit property (ii) whether the plaintiffs have acquired the suit property by adverse possession and, (iii) whether the plaintiffs are entitled to the reliefs sought and who should bear costs.
10. The defendants contended that for one to be granted a temporary injunction, they must prove that they have a prima facie case that they will suffer irreparable damages and if there is any doubt as to the two, the matter will be settled on a balance of convenience.
11. As espoused by the case of *Mrao v First American Bank of Kenya Limited* [2003] eKLR, the Defendants state that the Plaintiffs have not established a prima facie case. In addition, they state that the Plaintiffs will not suffer irreparable damages if the orders sought are not awarded. Lastly, they aver that the balance of convenience tilts in their favour as they are the proprietors of the suit property.

Analysis and determination

12. I have carefully considered the motion, grounds in support, supporting affidavit and the defendant's replying affidavit and parties' rival submissions and the two issues falling for determination are: (i) whether the plaintiffs have met the threshold for the grant of a temporary injunction and, (ii) who shall bear costs of this motion.

I will proceed to analyze the legal and jurisprudential framework on the issues.



13. The court is donated with powers to grant temporary injunctions under section 63 (c) and (e) of the [Civil Procedure Act](#) and it is analogous to order 40 rule 1 of the [Civil Procedure Rules](#). This section 63 (c) and (e) states as follows;

“in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed; grant a temporary injunction...and make such other interlocutory orders as may appear to be just and convenient.”

14. Before considering the merits of the motion, I wish to point one anomaly, the plaintiffs have moved the court under the wrong provisions of law. The proper provision is order 40 rule 1 of the [Civil Procedure Rules](#). This oversight is however curable by article 159 of [the Constitution](#) which provides that courts shall undertake substantive justice without undue regard to procedural technicalities.

15. The Court of Appeal judges in the case of [Margaret Njoki Migwi v Barclays Bank of Kenya Ltd](#) [2016] eKLR remind us the competence of the courts in exercising its discretionary powers in granting temporary injunctions. Such discretion is judicial; bearing in mind that judicial discretion has to be exercised on the basis of law and evidence.

16. The case of [Giella vs Cassman](#) (Supra) has long settled the principles that have guided courts in determining whether or not an applicant has met the threshold to warrant the grant of a temporary injunction. Have the plaintiffs met the threshold? In answering this question, this court shall sequentially juxtapose the principles of [Giella vs Cassman](#) (Supra) against the facts of this case.

17. On the 1st limb, have the plaintiffs established a prima facie case with probability of success at the intended trial? In the case of [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] eKLR the Court of Appeal defined a prima facie case to mean a genuine and arguable case based on the material presented before the court.

18. In establishing whether the plaintiffs have established a prima facie case, this court is alive that it has to restrain itself from making pre-emptive assertions which may have a bearing on the pending suit where the plaintiffs are constitutionally entitled to have a fair hearing (See the Supreme Court of Kenya decision in [Deynes Muriithi & 4 others v Law Society of Kenya & another](#) [2016] eKLR).

19. It is common amongst the parties that the plaintiffs have constructed on a portion of the suit property. From the court records, the plaintiffs have availed photographs of these alleged structures and I am satisfied that the plaintiffs have presented an arguable case. The plaintiffs succeed on the 1st ground.

20. While briefly addressing the two other residual limbs, this court shall bear in mind the Court of Appeal decision in [Naftali Ruthi Kinyua v Patrick Thuita Gachure & another](#) [2015] eKLR which stated with approval the case of [American Cyanamid vs Ethicon Limited](#) [1975] AC 396 where Lord Diplock specified thus;

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

21. On the 2nd limb, the plaintiffs have to demonstrate that irreparable injury will occur to them if the injunction is not granted and there is no other remedy open to them by which they will protect themselves from the consequences of the apprehended injury.

22. Ordinarily, the onus is on the plaintiffs to prove that they will suffer irreparable harm and they must demonstrate the nature and extent of such injury. The injury must not be speculative, it must be actual and significant; that cannot be compensated by an award of damages. The plaintiffs contend that they



have heavily invested on the suit properties by constructing on it, ploughing it and raising their families on it and in the humble view of this court, they cannot be compensated by damages. The plaintiffs succeed on this limb.

23. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR Ombwayo J, defined the concept of balance of convenience as thus;

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed” .

24. The plaintiffs contend that they have resided on the suit properties for close to 27 years and if an injunction is not granted and the suit is eventually awarded in their favour, they will be highly prejudiced. The balance of convenience tilts in the plaintiffs’ favour.

25. It is my finding that the plaintiff’s motion dated 21/01/2022 is merited and because it is trite law that costs follow the event, costs shall be in the cause. Ultimately, I make the following disposal orders: -

- a. That pending the hearing and determination of the suit herein, the defendants, their agents and/or servants be and are hereby restrained from evicting or alienating the plaintiffs from land parcel number Siaya/Usigu/1120 or in any way disposing and or transferring the said parcel of land.
- b. The defendants do file a list of documents containing certified copies of the registers for Land Parcel Numbers Siaya/Usigu/1120, 1252 and 3443.
- c. The plaintiffs shall fully comply with the provisions of order 11, of the *Civil Procedure Rules*, within 21 days of delivery of this ruling and the defendants shall comply with order 11, of the *Civil Procedure Rules* within 21 days after the period stipulated for compliance by the Plaintiffs.
- d. Parties shall appear before the Deputy Registrar for pretrial directions on 6/07/2022.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF MAY 2022.

HON. A. Y. KOROSS

JUDGE

26/5/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing

Platform in the Presence of:

N/A for the plaintiffs

N/A for the defendant

Court assistant: Ishmael Orwa

