



**Ooko v Mbugua & another (Environment & Land Case
E034 of 2021) [2022] KEELC 2912 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E034 OF 2021**

**SO OKONG'O, J
JUNE 28, 2022**

BETWEEN

ALBERT OKOTH OOKO PLAINTIFF

AND

MOSES MBUGUA 1ST DEFENDANT

LOISE NDUTA MBUGUA 2ND DEFENDANT

RULING

1. What is before me is the Plaintiff's Notice of Motion application dated 3rd February 2021 seeking a temporary injunction restraining the defendants, by themselves or through their agents, servants, employees, representatives and any other person claiming under them from trespassing into, demolishing, erecting illegal structures, fencing, disposing of or otherwise interfering with the plaintiff's buildings and structures thereon, ownership, quiet and peaceful occupation and enjoyment of all that parcel of land known as L.R No. 27/13 situated at Kasarani, Nairobi (hereinafter referred to as "the suit property") pending the hearing and determination of this suit or further orders by the court and that the enforcement of the orders if granted be supervised by the OCS Kasarani Police Station. The plaintiff has sought a further order that the defendants be declared trespassers on the suit property and the plaintiff the rightful and legal owner thereof. The application is brought on the grounds set out on the face thereof and on the affidavit of the plaintiff sworn on 3rd February 2021.
2. The plaintiff has averred that he is the licensee, beneficial owner and/or occupier of the suit property. The plaintiff has averred that he was allocated the suit property that was an open space by the Provincial Administration through the then area Chief of Roysambu Location, Kasarani Division, Nairobi in 2000 and that he had lived on the suit property since then without any interruption. The plaintiff has averred that the defendants have entered the suit property without his consent or reasonable cause. The plaintiff has averred that the defendants have illegally forced him out of the suit property, locked the doors of the house he occupies on the suit property together with the gate thereby denying him



access to the property. The plaintiff has averred that since he has occupied the suit property since 2000, he has acquired the same by adverse possession. The plaintiff has averred that the suit property is his only place of residence and is where he derives his livelihood. The plaintiff has averred that he is likely to suffer irreparable harm unless the orders sought are granted by the court. The plaintiff has averred that prior to the encroachment complained of, the defendants have never claimed the suit property for over 20 years that he has been in occupation thereof. The plaintiff has averred that the defendants have been laying a claim to the plaintiff's structures on the suit property.

3. In his supporting affidavit, the plaintiff has averred that the defendants started interfering with his occupation of the suit property in 2019 when he was served with a demand letter to vacate the suit property which he had developed and occupied since 2000. The plaintiff has averred that in May 2019 a group of people came to the suit property and demanded that he vacates the suit property immediately. The plaintiff has averred that he reported the incident to the area Chief. The plaintiff has averred that he has all along been pursuing registration of the suit property in his name and that the searches he carried out did not show that the property is owned by the defendants. The plaintiff has averred that the defendants are land grabbers who are ill bent on dispossessing him of the suit property using unorthodox means.
4. The application is opposed by the defendants through a replying affidavit sworn by the 2nd defendant, Loice Nduta Mbugua on 14th February 2022. The defendants have averred that none of them own the suit property. The defendants have averred that the suit property is owned by Samuel Githegi Mbugua and Grace Muthoni Githegi. The defendants have averred that the 2nd defendant obtained authority from the said registered owners of the suit property to put up structures thereon for rental purposes and that the plaintiff was one of her first tenants in the houses that she put up on the suit property. The defendants have averred that the plaintiff has been a tenant on the suit property together with other tenants. The defendants have stated that the plaintiff was a tenant of the 2nd defendant from 2003 until August 2021.
5. The defendants have averred that the plaintiff used to pay rent like the other tenants on the suit property until May 2019 when the plaintiff filed a suit against them in the lower court namely, CMCC No. 3966 of 2019 seeking injunctive orders. The defendants have averred that upon filing the said suit, the plaintiff stopped paying rent to the defendants. The defendants have averred that in January 2019, the defendants served the plaintiff with a notice to vacate the suit property when the plaintiff started putting up illegal structures on the suit property in breach of his tenancy agreement. The defendants have averred that the plaintiff vacated the suit property in August 2021 and that his room had already been let to another tenant. The defendants have averred that the issue of adverse possession cannot be determined in this suit. The defendants have averred that they have been wrongly joined in this suit and that they would move the court at the appropriate time for their names to be struck out of the suit. The defendants have contended that the orders sought if issued would be in vain since they are not the right parties who should have been sued. The defendants have contended that the plaintiff's application is frivolous, vexatious and amounts to an abuse of the process of the court.
6. The application was heard by way of written submissions. The plaintiff filed his submissions dated 14th March 2022 while the defendants filed submissions dated 11th April 2022. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants' replying affidavit. Finally, I have considered the submissions on record. The plaintiff is seeking a temporary injunction pending the hearing of the suit. There is also a prayer for declaratory reliefs. I am of the view that the prayer for a declaration that the plaintiff is the lawful owner of the suit property and that the defendants are trespassers thereon is premature. These are some of



the substantive reliefs sought by the plaintiff in his plaint. The court cannot grant the same in this interlocutory application.

7. With regard to the prayer for injunction, the principles upon which the court exercises its discretion in applications for a temporary injunction are well settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and went further to state 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 an urgent necessity to prevent the irreparable damage that may result from the invasion. ...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 threatened with violation...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. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

8. From the evidence before me, I am not satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. According to the plaint, the plaintiff is claiming the suit property by adverse possession. The plaintiff has claimed that he has occupied the suit property without interruption since 2000 when the same was allocated to him by the Provincial Administration. An adverse possession claim can only be made against the registered proprietors of land. It is common ground that the defendants are not the registered proprietors of the suit property. From the evidence placed before the court by the defendants, the suit property is owned by Samuel Githegi Mbugua and Grace Muthoni Githegi who are said to be the 1st defendant’s parents and the 2nd defendant’s parent’s in law. It is against Samuel Githegi Mbugua and Grace Muthoni Githegi that the plaintiff should have brought his adverse possession claim. An adverse possession claim mounted by the plaintiff against the defendants is a non-starter in the circumstances.
9. Even if it is assumed for argument’s sake that the defendants were the registered owners of the suit property and as such the plaintiff’s adverse possession claim is properly before the court, the plaintiff has not placed any evidence before the court in proof of his alleged occupation of the suit property since 2000. The plaintiff who claims to have been allocated the suit property by the Provincial Administration has placed no evidence before the court in proof of the alleged allocation. The plaintiff has not challenged the evidence placed before the court by the defendants showing that the plaintiff was a tenant of the defendants from 2003. The plaintiff has also not challenged the evidence before the court which shows that he was paying rent to the defendants. I have also noted from the material placed before the court that the plaintiff has made several attempts to be registered as the owner of the suit property as of right. I wonder why the plaintiff would be pursuing an adverse possession claim if he owns the property as of right. The plaintiff’s adverse possession claim has therefore not been established.



10. Even if the court was to assume further that the plaintiff's claim is for trespass, I am not satisfied that trespass has been established. The plaintiff has not proved his interest in the suit property. In the absence of evidence that the plaintiff has any proprietorship interest in the suit property, he cannot maintain an action for trespass.
11. Due to the foregoing it is my finding that the plaintiff has not established a prima facie case with a probability of success against the defendants. I am also not satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted. From the evidence before the court that has not been rebutted by the plaintiff, the plaintiff is no longer in possession of the suit property and the premises that were previously occupied by the plaintiff have been let to another tenant. I am not persuaded that the plaintiff who vacated the suit property in August 2021 would suffer irreparable harm if the injunction sought is not granted.
12. Having found that the plaintiff has failed to establish a prima facie case and that he stands to suffer irreparable harm if the injunction is not granted, it is not necessary for me to consider whether the balance of convenience would favour granting the orders sought. The application fails and is for dismissal.
13. In conclusion, the Notice of Motion application dated 3rd February 2021 is dismissed with costs to the defendants.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2022

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams Video Conferencing platform in the presence of;

The Plaintiff present in person

Ms. Oluoch h/b for Mr. Ngure for the Defendants

Ms. C. Nyokabi-Court Assistant

