



**Muturi & another v Kariuki (Environment & Land Case
E003 of 2021) [2022] KEELC 155 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E003 OF 2021**

**JO OLOLA, J
JUNE 16, 2022**

BETWEEN

BERNARD MWANGI MUTURI 1ST APPLICANT

WACHIRA MUTURI 2ND APPLICANT

AND

WILSON WAMBUGU KARIUKI RESPONDENT

RULING

1. By the Notice of Motion dated 10th June, 2021 as filed herein on June 16, 2021, Bernard Mwangi Muturi and Wachira Muturi (the Applicants) urge this Court to issue interim orders of injunction restraining Wilson Wambugu Kariuki (the Respondent) from in any manner whatsoever interfering with the parcel of land known as Aguthi/Gathaiti/166 pending the hearing and final determination of this suit.
2. The application is supported by an Affidavit sworn by the 1st Applicant Bernard Mwangi Muturi and is based on the grounds:
 - (i) That the Respondent has threatened and is in actual preparation of cultivating the suit property in readiness for planting Coffee bushes;
 - (ii) That the Respondent has no interest on the suit property and the intended actions are unlawful;
 - (iii) That the Respondent is guilty of wasting the suit property by cutting down mature trees; and
 - (iv) That it is in the interest of justice that he suit herein be preserved pending the hearing herein.
3. Wilson Wambugu Kariuki (the Respondent) is opposed to the application. In his Replying Affidavit sworn and filed herein on September 15, 2015, he avers that he commenced this suit though the



Originating Summons dated June 10, 2021 seeking to be declared the owner of the suit land by way of adverse possession having been in open, peaceful and uninterrupted possession thereof since 1967.

4. The Respondent asserts, that the Applicants are the sons of one Muturi Kihihu from whom he acquired the land by way of sale in 1967 and that the Applicants became registered as proprietors of the land on 1 January 2, 1981 but have never utilized or occupied the land.
5. The Respondent further asserts that it is true that he is preparing to cultivate the suit property as he has been doing through the years.
6. I have carefully perused and considered the application and the response thereto. I have similarly considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.
7. The two Applicants herein are the Respondents in the Originating Summons herein dated May 19, 2021 wherein the Respondent seeks to be declared to have become entitled to the parcel of land known as Aguthi/Gathaiti/166 by adverse possession. By the present application before me, the Applicants assert that the Respondent is now clearing the land in readiness to plant coffee bushes and they urge the Court to restrain him from dealing with the suit land in any manner whatsoever.
8. Order 40 Rule 1 of the [Civil Procedure Rules](#) pursuant to which the application is brought provides as follows:

“Where in any suit it is proved by affidavit or otherwise:

- (a) That any property in dispute in a suit is in danger of being wasted damaged or alienated by any Party to the suit or wrongly sold in execution of a decree; or
- (b) That the Defendant threatens to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit;

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

9. The conditions for consideration for the grant of such an injunction were long settled in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 where the court held that:

“First, an applicant must establish 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.”

10. As to what would amount to a prima facie case in a matter such as this, the Court of Appeal fashioned a definition in [Mrao Limited v First American Bank of Kenya Limited & 2 others](#) [2003] eKLR where the court observed as follows:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case which on the material presented to the Court, a tribunal properly directing itself will



conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

11. In the matter before me, the Applicants assert that the suit property initially belonged to their father the late Muturi Kihihu and that following his death they obtained letters of administration and acquired the property by way of transmission. It is further their case that the Respondent in the application had been appointed by their late father as a caretaker of the suit property with clear directions not to plant any perennial crops or build structures on the land.
12. While at Paragraph 5 of the Supporting Affidavit the Applicants state that they have annexed a copy of a certificate of the grant issued to themselves, I was unable to find any such annexure. From the Respondent's Replying Affidavit, it was however apparent that the father of the Applicants passed away a long time ago in 1975 and that the Applicants became registered proprietors of the land in 1981.
13. From the Applicants pleadings, it was also apparent that during all that time, they were not using the land and that the same was under the control of the Respondent. That much is clear at Paragraphs 7 and 8 of the Supporting Affidavit in which the Applicants aver as follows:
 7. That the Applicant has never occupied the suit property as he has his own land some 400 metres away separated by 3 other pieces of land;
 8. That in fact the Respondent only leases the portions of the suit property to other persons who grow subsistence crops."
14. I was unable to see how the Respondent could be leasing portions of the land if he was not exercising some control over the same. The Respondent indeed confirms at Paragraph 21 of his Replying Affidavit that he has been leasing portions of the land to other people for many years. He has even annexed an affidavit of one Francis Ngunjiri Thuo who swears that he has leased the land from the Respondent since the year 1990.
15. Arising from the foregoing I was unable to see how the Applicants can now claim that the property which has all along been under the use and control of the Respondent was in danger of being wasted or alienated by the mere fact that the Respondent intends to plant Coffee bushes thereon.
16. Through out their pleadings, the Applicants have not shown that they have ever used or been in occupation and/or control of the suit property. It was therefore clear to me that it is the Respondent who stands to be prejudiced and to suffer loss if orders of injunction were to issue herein.
17. In the circumstances I did not find any merit in the Motion dated 10th June, 2021. It is dismissed with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16TH DAY OF JUNE, 2022.

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court assistant – Ndung'u



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J. O. OLOLA
JUDGE

