



Auma v Athembo (Sued as Administrator of the Estate of the late Thomas Anyango Omusi - Deceased) & another (Environment & Land Case E019 of 2022) [2022] KEELC 14966 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E019 OF 2022
E ASATI, J
NOVEMBER 24, 2022**

BETWEEN

GRACE ANYANGO AUMA APPLICANT

AND

PHILGONA ANYANGO ATHEMBO (SUED AS ADMINISTRATOR OF THE ESTATE OF THE LATE THOMAS ANYANGO OMUSI - DECEASED) 1ST RESPONDENT

DICKSON ODHIAMBO OBUNGU 2ND RESPONDENT

RULING

1. This ruling is in respect of the Notice of motion application dated August 27, 2022 brought pursuant to the provisions of order 40 rules 1 & 2 of the *Civil Procedure Rules*. The application seeks for an order of temporary injunction restraining the respondents, their agents, family, servants and/or whomever jointly and severally from transferring, disposing, or evicting the applicant and her family from land parcel known as Kisumu/muhoroni/178 (herein the suit land) pending the hearing and determination of the suit.
2. The application is based on the grounds that the applicant purchased the suit land more than 12 years ago from the 1st Defendant. that the 1st defendant has transferred the suit land in favour of the 2nd defendant who now seeks to evict the applicant and her family from the suit land. That the 1st defendant's title to the suit land was extinguished at the expiry of 12 years of the applicant's possession and occupation of the land. That the applicant has vide this suit lodged a claim for adverse possession but is exposed to eviction any time by the 2nd defendant- before the case is heard. That unless the order sought is granted the suit will be rendered nugatory.



3. The application is supported by the averments in the supporting affidavit sworn by the applicant on the 2nd August 7, 2022 and the annexures thereto
4. The 1st respondent did not respond to the application. affidavit of service sworn on September 29, 2022 by one David Elvis Ochieng, a court process server, shows that the 1st respondent was served with the application on September 29, 2022.
5. The 2nd defendant opposed the application vide the grounds containing in his replying affidavit sworn on October 14, 2022 and the annexures thereto. The 2nd respondent's case is that the applicant's husband leased the suit land from Thomas Anyango Omusi, deceased, which lease expired in October 2021. That as at the time of the alleged sale of the suit land to the plaintiff, the owner was deceased, the land was still in his (deceased's) name and letters of administration to his estate had not been taken out. That the 2nd defendant obtained title to the suit land lawfully after a lawful succession process to the estate of the deceased. That the applicant's interests over the suit land expired on October 27, 2021 by reason of expiry of the lease agreement with the deceased.
6. Directions were given that the application be canvassed by way of written submissions. In compliance to the directions, the applicant filed her written submissions dated October 29, 2022 through the firm of Bruce Odeny & Company Advocates. The 2nd respondent filed written submissions dated October 28, 2022 through the firm of Ngala Awino & Co. Advocates.
7. I have read the application, the reply thereto, the annexures to the affidavits and the submissions made. The grounds for grant of interlocutory injunction were set out in the case of *Giella vs Cassman Brown Co. Ltd* (1973) 358 . The grounds are firstly that the applicant must demonstrate a prima facie case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of probabilities. A prima facie case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank Kenya Ltd & 2 others* [2003] eKLR as follows:

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
8. On whether or not the applicant has demonstrated a prima facie case with a probability of success, the applicant's case is that she took possession of the suit land in the year 2004 and since then has been in actual, physical, open, hostile, continuous and uninterrupted possession of the suit land for a period of 15years. That she has acquired proprietary rights by adverse possession and/or prescription. That she cultivates sugar cane on the suit land. That unless the orders sought are granted, the Defendants will evict her thus rendering her claim based on adverse possession nugatory.
9. In paragraph 8 of the replying affidavit, the 2nd defendant deposes that the applicant has been using the suit land since the year 2004 to 2021 and that after he became registered owner of the suit land, he demanded for vacant possession of the same. It is not denied that the applicant is still in possession of the suit land. As to whether the applicant's presence on the suit land is pursuant to an expired lease agreement with the deceased and therefore ought to vacate or has acquired proprietary rights through adverse possession and hence ought to be declared owner are the substantive issues for determination in the Originating Summons. Prima facie, the applicant has demonstrated that she is in occupation



and that it is in the interest of justice to preserve that position pending hearing and determination of the suit.

10. The upshot is that I find the application is merited. I allow the application as follows:

- i. an order of temporary interlocutory injunction is hereby granted restraining the Respondents, their agents, family, servants and/or whomever jointly and severally from transferring, disposing, or evicting the applicant and her family from land parcel known as Kisumu/muhoroni/178 (herein the suit land) pending the hearing and determination of the suit.
- ii. Costs in the cause.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Mwangi Advocate for the Applicant/Plaintiff

No appearance for Advocate for the Respondents/Defendants

E. ASATI

JUDGE.

