



REPUBLIC OF KENYA



KENYA LAW
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**Gavala v Atonya (Environment & Land Case E006 of 2022)
[2022] KEELC 14916 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE E006 OF 2022**

E ASATI, J

NOVEMBER 17, 2022

BETWEEN

SIMEON GAVALA APPLICANT

AND

PATRICK ATONYA DEFENDANT

RULING

1. This ruling is in respect of the applicant’s notice of motion application dated October 27, 2022. It is an application seeking for orders of temporary injunction and prohibition pending hearing and determination of the suit. The application is stated to be brought pursuant to the provisions of order 40 rules 1 and 2 of the *Civil Procedure Rules*, sections 1, 3 and 3A of the *Civil Procedure Act* and article 159 of *the Constitution* of Kenya 2010.
2. The grounds upon which the application is brought are that: -
 - i. The applicant bought the suit land from the mother of the respondent in the year 1976
 - ii. The applicant and his family has been in occupation and use of the suit land for a period of over 12 years with the full knowledge of the Respondent to date
 - iii. The respondent transmitted the suit land into his name and is threatening to dispose, evict and demolish the applicant’s developments
 - iv. The applicant has no other place to call home except the suit land
 - v. Unless a prohibitory order is placed on the register of the suit land, the Respondent may cause adverse transactions to be registered to defeat the applicant’s interests
 - vi. The respondent has alternative land where he has settled his family



3. The application is supported by the averments in the supporting affidavit sworn by the applicant on October 27, 2022.
4. In response to the application, the Respondent filed notice of appointment of Advocates dated 8/11/2022 and a notice of preliminary objection of even date. The grounds of the preliminary objection are that the suit is res judicata to Hamisi Succession Cause No. 139 of 2019 and Vihiga Misc. ELC E002 of 2022(O.S), that the court has no jurisdiction to handle the matter and that the suit is vexatious and an abuse of the court process as the suit was filed after the applicant lost in both the succession cause No. 139 of 2022 and the ELC Misc. Application No. E002 of 2022(O.S).
5. On 8/11/2022 when the matter came up for hearing of the application interpartes court directed that the same be heard on 10/11/2022 and that the respondent be served. On 10/11/2022 there was no attendance by the respondent. An affidavit of Service sworn by Daniel Chegenye Chitwah Advocate on November 9, 2022 showed that the respondent was served with hearing notice for 10/11/2022 vide the email address provided. However, as the court retired to write the ruling, the defendant filed written submissions and replying affidavit dated 14/11/2022.
6. The applicant's case is that he bought the suit land in 1976 and constructed his home and settled thereon. That since then he has had occupation and use of the suit land to date to the knowledge of the respondent. That the respondent has now transmitted the suit land into his name through a succession cause and is threatening to dispose of the suit land. The applicant therefore seeks orders of temporary injunction restraining the respondent's actions pending the hearing and determination of the suit.
7. The respondent's case is that the applicant's case is res judicata and hence cannot be the basis for grant of the orders sought. I have read the respondent's submissions, the replying affidavit and annexures thereto. My finding is that the case is not res judicata. Adverse possession which is the subject matter herein was not canvassed in Hamisi Succession Cause No. 139 of 2019. Vihiga Pmc Misc ELC Appl. No E002 of 2022 was a miscellaneous application seeking removal of a restriction placed on the suit land. Substantive issues of adverse possession or ownership of the land were not decided on.
8. The grounds for grant of interlocutory injunction were set out in the case of *Giella vs Cassman Brown Co. Ltd* (1973) 358 that the applicant must establish a prima facie case with a probability of success, 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.”

The applicant's claim is based on adverse possession, that he and his family has had his home on the suit land to date. That if the respondent is not restrained the applicant may suffer irreparable loss. The balance of convenience, in my view tilts in favour of maintaining the status quo as described by the applicant pending hearing and determination of the suit.

9. A part from the temporary injunction, the applicant prays for an order prohibiting registration of transactions on the register of the suit land. A prohibition is an order that protects the status quo of the register in respect of the suit land pending the occurrence of an event or for a specified period. It is the applicant's case that the suit land is now registered in the name of the Respondent. Without



any restraining orders, there is no guarantee that by the end of the trial the same status quo will still be obtaining in respect of the register of the suit land. In the case of *Dorcas Muthoni & 2 others ... Vs... Michael Ireri Ngari* (2016) e KLR, the court held that: -

"An order of inhibition issued under section 68 of the *Land Registration Act* is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed of. The court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial."

10. In the premises, I find that the application is merited. I allow the application in the following terms:
- a. An order of temporary injunction is hereby issued restraining the Respondent from interfering with the applicant's occupation and use of LR No. Kakamega/mudete/563 pending hearing and determination of the suit herein.
 - b. A prohibitory order is hereby issued prohibiting the registration of any transactions on the register in respect of LR No. Kakamega/mudete/563 pending hearing of the suit herein
 - c. Costs of the application to the applicant.

Orders accordingly.

RULING DATED AND SIGNED IN OPEN COURT AT KISUMU THIS 17TH DAY OF NOVEMBER, 2022.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Chitwah Advocate for the Applicant.

Lugano Advocate for the Respondent.

E. ASATI

JUDGE.

