



**Omukuba & another v Okutoyi (Environment & Land Case
E002 of 2022) [2022] KEELC 15134 (KLR) (5 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E002 OF 2022
DO OHUNGO, J
DECEMBER 5, 2022**

BETWEEN

ABEDNEGO OYIENGO OMUKUBA 1ST PLAINTIFF

JONATHAN NANDWA OMUKUBA 2ND PLAINTIFF

AND

JENNIFER OKUTOYI DEFENDANT

RULING

1. The plaintiffs moved the court through Originating Summons dated 3rd March 2022, claiming to have become entitled to the parcel of land known as Kisa/Wambulishe/727 through adverse possession. Contemporaneously with the Originating Summons, they filed Notice of Motion dated 3rd March 2022, which is the subject of this ruling.
2. The following orders are sought in the application:
 1. [Spent]
 2. [Spent]
 3. That pending the hearing and determination of the originating (sic) filed herewith inter-parties this Honourable Court be pleased to issue a temporary injunction restraining the Respondent either by herself, her agents, servants, personal representative and or any other person claiming under her from offering for sale, selling, alienating or in any other manner humanly possible interfering with the already constructed buildings and/ or farm produce on the parcel of land known as Kisa/Wambulishe/727.
 4. That the costs of this application be in the cause.



3. The application is supported by the affidavit sworn by Jonathan Nandwa Omukuba, the second plaintiff, who deposed that the parcels of land known as Kisa/Wambulishe/727 (the suit property) and Kisa/Wambulishe/1089 were first registered in the name of Frank Odede Matendeche (deceased) who was the defendant/respondent's husband around 1972 and that the deceased was the brother of the late Gideon Omukuba Matendeche who is the father of the applicants herein. He further deposed that at the time of the death of the deceased the entire family of the late Ms Sellah Were were living together in the same compound and that after the deceased's demise, the respondent walked out of the suit property in protest swearing that she would not return to the suit property and that she was fed up with the family of her late husband. That the respondent went to settle on Kisa/Wambulishe/1089 which was roughly 5 kilometres away from the suit property.
4. He further deposed that in or about 1973, the applicants began to till the suit property without seeking permission from the respondent who was the direct beneficiary thereof and that in 2000 or thereabouts the first applicant put up his home on the suit property and subsequently constructed a permanent house thereon. That sometime later, the second applicant also constructed a permanent house on the suit property and that the applicants have been living on the suit property together with their respective family members from 1973 up to the date of the affidavit with the respondent's knowledge. He went on to depose that whereas the respondent knew about the applicants' occupation of the suit property, she never raised any issue and that some time at the beginning of the year 2022, the respondent went to the suit property with someone who purported to view the land for purposes of purchasing it. That the applicants also learnt that the respondent had secretly begun the process of registering the property in her name following a confirmed grant in the respondent's name.
5. In response to the application, a replying affidavit sworn by the defendant/respondent was filed. She deposed that she is the widow of the deceased who died on 16th June 1973 and that her deceased husband was survived by three children namely, Pamela Were Odede, Dorcus Olumala Odede and Charles Nyasiri Matendeche. That before the deceased's demise, the deceased was the registered owner of the suit property and that the applicants are her nephews. That even after the demise of the deceased, she continued to be in the suit property to the date of her affidavit.
6. The respondent further deposed that after the deceased's death, she petitioned for letters of administration in Butere SPMC Succession Cause No. 24 OF 2017 and that a confirmed grant of letters of administration in respect of the deceased's estate was issued to the deceased's children and her. That subsequently, she proceeded with the transmission of the title of the suit property and that the suit property is currently registered in the deceased's beneficiaries' names. She added that she has been in occupation of the suit property and that at no point have the applicants ever occupied it. That instead, the applicants are in occupation of Kisa/Wambulishe/726 which shares a common boundary with the suit property.
7. The application was canvassed through submissions. The applicants filed their submissions on 13th June 2022. The respondent relied entirely on the replying affidavit and did not file any submissions. I have considered the application, the affidavits, and the submissions. The issue that arises for determination is whether the orders sought should issue.
8. The principles that guide the court when considering an application for an interlocutory injunction are settled. They were enunciated in the case of *Giella -vs- Cassman Brown & Co. Ltd* [1973] E.A 358 and reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. The net effect of those two decisions is that the applicants must establish a prima facie case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate



compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience.

9. The applicants' claim in the originating summons is one of adverse possession in respect of the parcel of land known as Kisa/Wambulisho/727. It is a mandatory requirement of Order 37 rule 7 (1) and (2) of the Civil Procedure Rules that a litigant seeking a declaration that he has become entitled to land by way of adverse possession annexes a certified extract of the title in respect of the suit property. The rule provides as follows:
 - (1) The application under Section 38 of the Limitation of Actions Act shall be made by originating summons.
 - (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
10. The applicants did not comply with the mandatory requirement of Order 37 rule 7 (1) and (2) of the Civil Procedure Rules. On the other hand, the respondent annexed a copy of a certificate of search as of 8th February 2022 which suggests that she is registered as proprietor of the suit property jointly with her children Pamela Were Odede, Dorcus Olumala Odede and Charles Nyasiri Matendeche. The children have not been joined as defendants in the Originating Summons. Owing to non-compliance with Order 37 rule 7 (1) and (2) of the Civil Procedure Rules, it is not clear, from the plaintiff's perspective, both the identity of the land in respect of which adverse possession is claimed and its registered proprietors. In those circumstances, I am not persuaded that a prima facie case has been established. That being so, I need not enquire into the other limbs of the test in the Giella case.
11. In the result, Notice of Motion dated 3rd March 2022 is devoid of merit and I therefore dismiss it. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF DECEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Otsyeno holding brief for Ms Nyongesa for the plaintiffs/applicants

Ms Ashitsa for the defendant/respondent

Court Assistant: E. Juma

