



**Kamunge & 2 others v Waweru & another (Environment & Land Case  
E001 of 2020) [2021] KEELC 4742 (KLR) (4 March 2021) (Ruling)**

Neutral citation: [2021] KEELC 4742 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE E001 OF 2020**

**YM ANGIMA, J**

**MARCH 4, 2021**

**BETWEEN**

**JOHN WAWERU KAMUNGE ..... 1<sup>ST</sup> PLAINTIFF**

**BENARD NJOROGE CHEGE ..... 2<sup>ND</sup> PLAINTIFF**

**JACOB NDEGWA KIMANI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PHILIP NGUITIKA WAWERU ..... 1<sup>ST</sup> DEFENDANT**

**MOSES MUKUNDI WAWERU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**A. Introduction**

1. By a plaint dated October 7, 2020, the plaintiffs sought the following reliefs against the defendants:
  - (a) A declaration that the defendants interest as administrators of the estate of Mary Wanja Waweru in Title No. Nyandarua/Karati/834 is extinguished in law and said property is not available for distribution as part of the estate of Mary Wanja Waweru by the defendants
  - (b) A declaration that the defendants herein cannot recover Title no Nyandarua/Karati/1834 from the plaintiffs under sections 7 and 17 of the *Limitation of Actions Act*.
  - (c) A declaration that the plaintiffs are entitled to be registered as proprietors of the individual portions of Nyandarua/Karati/1934 occupied by each of them individually.
  - (d) Costs of the suit
2. The basis of the suit was that on diverse dates between 1987 and 1992 the Plaintiffs entered and occupied various portions of the Title No Nyandarua/Karati/1834 (the suit property) and that they



had continued in uninterrupted possession thereof for periods exceeding 12 years in consequence whereof the defendants' right of recovery thereof had become extinguished by operation of law under the Limitation of Actions Act (LAA) (cap 22).

## **B. The Defendants' Response**

3. Simultaneously with the filing of the suit the plaintiffs filed a notice of motion of even date based upon order 40 of the Civil Procedure Rules, 2010, sections 1A, 1B and 3A of the Civil Procedure Act (cap 21) and all enabling provisions of the law seeking the following orders:-
  - (a)... spent
  - (b)... spent
  - (c) That pending the hearing of this suit, there be an order of temporary injunction restraining the defendants/respondents by themselves, their agents and or servants from disposing, selling, charging, distributing, dealing and or interfering with the plaintiff's/applicants' occupation and possession of the Title No. Nyandarua/Karati/1834.
  - (d) That the costs of this application be provided for.
4. The application was based upon the 10 grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1<sup>st</sup> plaintiff, John Waweru Kamunge, on behalf of all the plaintiffs. The plaintiff claimed to be "lawful owners" of the suit property which they claimed to have occupied for over 12 years.
5. The Plaintiffs further contended that even though they were entitled to the suit property, the same was ultimately registered in the name of the late Mary Wanja Waweru (the deceased) whose estate was being administered by the defendants. The plaintiffs were apprehensive that unless the injunction sought was granted, the defendants may finalize the pending succession proceedings with respect to the estate of the deceased and proceed to sell the suit property to their detriment.
6. Although the Plaintiffs were hesitant to concede that their claim was essentially a claim for adverse possession under section 38 of the LAA. They maintained that they had been advised by their advocates on record that the defendants' right to recovery of the suit property had been extinguished under sections 7 and 17 of the LAA and that they had acquired "legal rights" over the suit property capable of being registered through the instant suit.

## **C. The Defendants' Response**

7. The defendants filed a replying affidavit sworn by the 1<sup>st</sup> defendant on November 27, 2020 in opposition to the application. He stated that the deceased was registered as proprietor of the suit property in 2004 and that in 2008 she sued the defendants seeking their eviction from the suit property in Nakuru CMCC No 853 of 2008 - Mary Wanja Waweru v Jacob Ndegwa Kimani & 3 others.
8. The defendants disputed that the plaintiffs had been in continuous and uninterrupted occupation of the suit property for over 12 years and stated that their occupation was legally interrupted by the filing of the 2008 suit hence time started running afresh only upon abatement of the suit in 2014. The defendants' contention was that the plaintiff had not made out a case for adverse possession under the LAA and that they had not established a prima facie case with a probability of success at the trial.
9. The defendants further contended that the issue of distribution of the suit property was the subject of Naivasha High Court Succession Cause No. 155 of 2015 where the plaintiffs' claim had been rejected



hence they were out to use the backdoor to injunct the proceedings pending before the Succession Court. Accordingly, the defendants urged the court to dismiss the said application with costs.

#### **D. Directions on Submissions**

10. When the said application was listed for inter parties hearing on November 30, 2020 it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the plaintiffs filed their submissions on January 14, 2021 whereas the defendants filed theirs on January 20, 2021.

#### **E. The Issues for Determination**

11. The court has considered the plaintiffs' application for interim orders, the replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:-
  - a. Whether the plaintiffs have satisfied the requirements for the grant of an injunction.
  - b. Who shall bear costs of the application.

#### **F. Analysis and Determination**

##### **a. Whether the Plaintiffs have satisfied the requirements for the grant of an interim injunction**

12. The court has considered the submissions and material on record on this issue. Whereas the plaintiffs submitted that they had satisfied all the principles for the grant of an injunction, the defendants contended otherwise. The plaintiffs and the defendants relied on at least 3 cases which were common in their submissions viz *Giella v Cassman Brown & Co Ltd* [1973] EA 358; *Mrao v First American Bank of Kenya Ltd & 2 others* [2003] Klr 125 ; and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR.
13. The court has noted that although the parties correctly set down the applicable legal principles for the grant of an injunction, they applied and interpreted the facts of the case differently. In the case of *Mrao Limited V First American Bank of Kenya Ltd* (Supra) it was held, inter alia, that:-

“In civil cases, a prima facie case is a case in which on the material presented to a 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...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 the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case...”.
14. The court, of course, is not required to conduct a mini - trial on the affidavits only and it is not required to make any definitive findings on the facts in issue or matters for determination in the suit for that is the sole function of the trial court. Although the plaintiffs claim is grounded upon sections 7 and 17 of LAA and the contention that they had acquired legal rights capable of registration, they denied that their claim was based upon the doctrine of adverse possession.
15. The plaintiffs created the impression that they were merely using sections 7 and 17 of the LAA as a defensive shield only. This is a bit curious because the defendants have not sued them for recovery of the suit property thus far. The plaintiffs have also curiously sought a declaration to the effect that they



are entitled to be registered as proprietors of the individual portions of the suit property which they occupy even though that is a remedy provided for under section 38 of LAA.

16. Be that as it may, if the plaintiffs' claim is not a claim for adverse possession then the court is of the opinion that they have failed to identify and plead their case against the defendants with reasonable precision. The court is not satisfied that on the basis of the material on record that the plaintiffs have demonstrated a prima facie case against the defendants with a probability of success at the trial. They have not identified with any reasonable precision which of their legal rights have been infringed or threatened with infringement by the defendants
17. Since the court is not persuaded that the plaintiffs have satisfied the 1<sup>st</sup> principle for the grant of an injunction as set out in the case of *Giella v Cassman Brown & Co Ltd* (supra), it shall not be necessary to consider the 2<sup>nd</sup> and 3<sup>rd</sup> principles. Accordingly, the court is not inclined to grant the plaintiffs the interim order of injunction sought.
  - b. Who shall bear costs of the application
18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the defendants shall be awarded costs of the application to be borne by the plaintiffs jointly and severally.

#### **G.Conclusion and Disposal**

19. The upshot of the foregoing is that the court finds no merit in the plaintiffs' application for interim orders. accordingly, the plaintiffs' notice of motion dated October 7, 2020 is hereby dismissed with costs to the defendants.

It is so decided.

**RULING DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this 4<sup>th</sup> of March, 2021.**

**In the presence of:**

**Ms. Wangari for the Plaintiffs**

**Mr. Mutonyi for the Defendants**

**Court Assistant- Carol**

**Y.M. ANGIMA**

**JUDGE**

PARA 04.

03.2021

