



**Kiilu v Mwikali (Environment and Land Miscellaneous Application
E002 of 2023) [2024] KEELC 5250 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023
LG KIMANI, J
JULY 11, 2024
IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF
THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA
AND
IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION
AND
IN THE MATTER OF LAND PARCEL NUMBER IN MWINGI
TOWN, MWINGI SUB COUNTY IN KITUI COUNTY**

BETWEEN

RHODA SYOMITI KIILU PLAINTIFF

AND

MARY MWIKALI DEFENDANT

RULING

1. The Notice of Motion dated 19th January 2024 filed by the Plaintiff/Applicant seeks for the following orders:
 1. This application be certified urgent and be heard ex parte in the first instance and the court issues ex parte restraining orders restraining the defendant/respondent by herself, her agents and servants from entering into and interfering with alienating or by any other way howsoever interfering with the plaintiffs/applicant quiet possession of the parcel of land known as Mwingi/mwingi/5584 within Mwingi town which is in occupation of the plaintiff/applicant pending the hearing and determination of this application.
 2. That a temporary injunction do issue against the defendant/respondent by herself, her agents and servants and whoever else, restraining her from cultivating on the undeveloped space left



by the plaintiff/applicant putting up buildings or in any manner interfering with the suit land pending the hearing and determination of this suit.

3. That the court makes such other or further orders as the ends of justice may require.
4. That costs of this application be provided for.
2. The application is supported by the affidavit sworn by the Plaintiff/Applicant, who deposed that she is in occupation of the suit land Parcel Number Mwingi/Mwingi/5584 which she bought together with her deceased husband and they built rental properties. She stated that the defendant has trespassed on the property and blocked the plaintiff and her tenants from accessing and entering the suit land and is in the process of disposing of the suit land.
3. Since taking occupation of the suit premises in the year 1982, there has been no ownership dispute save for the succession cause involving the estate of the Respondent's deceased husband. She states that the Respondent has never occupied the suit land and the acts of trespass by her amount to eviction without due process of the law and disruption of a quiet, continuous and uninterrupted occupation and possession of the aforementioned suit land. She further states that the situation in the suit land is volatile and fluid and a breach of the peace is imminent as the respondent has caused fear by uttering words and acting in a manner likely to cause a breach of peace and that the status quo at the time of filing of the suit must be preserved pending the hearing and determination of this suit.

The Defendant/Respondent's Replying affidavit

4. The Respondent opposed the application and deposed that the Applicant is only in occupation of a 50ft by 100ft portion of the suit land in which she has some structures and that she has no objection to her occupation thereof.
5. The other portion which measures approximately 24ft by 100ft by 35ft is vacant and denies the applicant's occupation of the same and annexed photographs of the same.
6. The Respondent therefore urged the court that the status quo be maintained whereby the Applicant can continue utilizing the portion that she is in occupation of but that she should not be allowed to extend to the vacant portion of the suit land as doing so will compromise the hearing of the main suit.

The hearing of the application.

7. The Applicant was represented by Francis Syomiti Kiilu through a power of attorney filed in Court on 7th December 2023. He submitted that the respondent was in the process of taking possession of the suit land and that there must be an order of status quo to allow the application as prayed.
8. He stated that a prima facie case had been established through the sale agreement attached to the originating summons which shows that the respondent received consideration while she continued to interfere with the Applicant's occupation of the property.
9. That the Applicant will suffer injury as she depends on the property for her livelihood. He relied on the letters from the OCS, OB reports made at the police station, the chief's letters and the DCI survey report. Further due to the malicious damage done by the respondent, the applicant is unable to use the space. That she has been intimidated and threatened by hooligans in the company of the respondent's son by the name Charles Mutua.
10. The Applicant thus submitted that the balance of convenience tilts in their favour since she stands to suffer a greater inconvenience if the orders sought are not granted.



11. Mr. Muigai, Counsel for the Respondent submitted in opposition to the application, that the subject matter of the suit is a claim in adverse possession and not sale of property. As regards the undeveloped space in prayer number 2, the respondent submitted that there is nothing in that space.
12. Their submission therefore is that the applicant does not have a prima facie case. Their view is that the best option is an order that the status quo be maintained since the respondent is claiming ownership of the space as well and that there is nothing to interfere within the said space. That the respondent has no problem with the Applicant's occupation of the constructed 50 by 100 feet area of the suit property.

Analysis and Determination

13. The Court has considered the application herein, the supporting affidavit, the affidavit opposing the application and the submissions by the parties. The application at hand is one seeking a temporary injunction restraining the respondent from interfering with the entire suit land parcel number Mwingi/mwingi/5584 within Mwingi town pending the hearing and determination of the suit herein. According to the depositions by both parties, there is a developed and undeveloped portion of the suit land. The respondent conceded the applicant's occupation of the developed portion measuring 50ft by 100 ft and has confirmed that she does not lay any claim to the said portion of land. The respondent claims the rest of the undeveloped portion of the suit land which the applicant wishes to have her restrained from interfering with by way of cultivating and putting up buildings or in any other way interfering with the same.
14. The case of *Giella v Cassman Brown & Company Limited* (1973) EA 358 is the standard test that has been relied on and which the Court will subject an application for grant of a temporary injunction. The court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction: -

“First, an applicant must show 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.”
15. The definition of a *prima facie* case was explained in the case that the Applicant cited; *Mrao Ltd. v First Americal Bank of Kenya Limited and 2 others* (2003) eKLR, where the Court of Appeal expressed thus;

“In civil cases, a *prima facie* is a case in 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. 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.”
16. As stated earlier the Respondent concedes that the Plaintiff/Applicant occupies a portion of 50 ft by 100 ft of the suit parcel of land parcel Mwingi/mwingi/5584 within Mwingi town and that she has no claim to the said portion and has not interfered with the applicant's possession of the same. The court thus directs that the status quo in relation to the said portion of the suit land be maintained and the applicant retain possession of the same pending hearing and determination of the suit herein.

Concerning the remaining portion of the suit land which the respondent claims measures 24 ft by 100 ft, the court notes that the applicant claims that her deceased husband and herself gained occupation



of the suit land by way of purchase from the respondent's deceased husband. She has attached to the affidavit supporting the originating summons a sale agreement that shows that J. Mutua Katau sold to Mr T. Kiilu Kaliu a portion of land measuring 50ft by 100ft. The court has looked at the application herein and the originating summons and noted that the applicant has not shown the total acreage of the suit parcel of land. On the other hand, the Respondent has not shown the basis on which she claims that the undeveloped portion of the suit land is over and above what the applicant's husband purchased. The question of the size of the portion of land occupied by the applicant and the existence/ occupation and size of the undeveloped portion of the suit land remains to be determined by the court at the trial of the main suit.

17. In the above circumstances, the Court is in agreement with counsel for the respondent that an order of status quo would be best in this case, since none of the parties will suffer injury if the undeveloped portion of the suit land remains unoccupied and undeveloped by both parties to this suit to preserve the land subject matter of the suit. Murithi J in *Abdullahi & 4 Others* in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows:

“In my view, an order for the Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at the interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

18. It was observed by the court in *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR that a status quo order must be specific and clear to the parties. The court observed as follows:

“Status quo” in this respect, as maintained by an injunctive or conservatory or stay order, is the then-existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by Lord Diplock in *American Cyanamid Co. v Ethicon* [1975] 1 All ER 504 at 511 “where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.....” The second or alternative order for the status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts' further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.

19. From the foregoing analysis, the court makes the following orders concerning the application dated 19th January 2024:



1. The current status quo pertaining to land parcel number Mwingi/mwingi/5584 situated within Mwingi town be maintained pending the hearing and final determination of this suit.
2. The current status quo is that the applicant will have access to and remain in occupation of the built-up portion of the suit land where she has constructed rental houses. The undeveloped portion of the suit parcel of land shall remain unoccupied and undeveloped by the parties to this suit pending the hearing and final determination of this suit.
3. The suit herein shall be heard and determined on a priority basis.
4. Each party is to bear their costs of this application.

DELIVERED, DATED AND SIGNED AT KITUI THIS 11TH DAY OF JULY 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

The ruling read in open court and virtually in the presence of-

Musyoki Court Assistant

Francis Mutua Kiilu Attorney for Rhoda Syomiti Kiilu Applicant

Muigai for the Respondent

