



Muriakiara v Ngugi (Environmental and Land Originating Summons E009 of 2023 & Environment & Land Case E11B of 2024 (Consolidated)) [2024] KEELC 6645 (KLR) (7 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6645 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023
& ENVIRONMENT & LAND CASE E11B OF 2024 (CONSOLIDATED)**

JG KEMEL, J

OCTOBER 7, 2024

BETWEEN

PETER NGUGI MURIAKIARA PLAINTIFF

AND

IRENE WANJIKU NGUGI DEFENDANT

RULING

1. This Ruling is in respect of two Applications dated 19/10/2023 and 11/12/2023 filed by the Plaintiff and Defendant respectively.

Plaintiff's Application dated 19/10/2023

2. Peter Ngugi Muriakiara, the Plaintiff craves for Orders THAT;
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of this Summons or such period as this Honorable Court shall determine, an injunction be issued by this Honorable Court restraining the Defendant/Respondent from removing, evicting, disposing and/or interfering with the Plaintiff/Applicant's occupation of the parcel of land; Title Number Dagoretti/Kinoo/2530.
 - d. An order of injunction be and is hereby issued restraining the Defendant/Respondent by herself, her servants, and to agents from evicting, destroying, disposing or in any way entering and or interfering with the properties on the parcel of land Title Number Dagoretti/ Kinoo/2530 and from alienating or transferring or in any way dispossessing the Plaintiff/ Applicant of the suit property until this application and suit are heard and determined.



- e. This Honorable Court be pleased to make such other orders as may appear to this Court to be just and convenient.
 - f. The costs of this Application be awarded to the Plaintiff/Applicant.
3. The gist of the Application is that the Plaintiff is facing eminent eviction from the land known as Title Number Dagoretti/Kinoo/2530 (hereinafter the suit land) despite his claims of occupation since 2009 hence the plea of Adverse possession. That the suit land, which measures approx. 0.101Ha, is registered in the Defendant's name and the Plaintiff has been in open, continuous, notorious and uninterrupted occupation hence the Application.
 4. In his Supporting Affidavit of even date, the Plaintiff annexed PNM1- copy of the Defendant's title deed; PNM2 – copies of photos showing rental houses he has constructed on the suit land and averred that by virtue of his occupation since 2009, he has established a prima case in his favor to justify the order sought. Numerous case laws were also cited in the Affidavit to support his averments.
 5. Irene Wanjiku Ngugi, the Defendant filed her extensive Replying Affidavit sworn on 9/12/2023. She deposed that she is the registered owner of the suit land as per copies of her Title deed and official search annexed as IW1 & IW2. That she is also the proprietor of the developments on the suit land known as Elma Apartments having acquired the suit land in 2005 and denied the Plaintiff's claims of constructing any houses thereat. She avowed that she made an informal verbal arrangement with her parents i.e. the Plaintiff and the late Florence Ngugi allowing them to oversee and manage the suit property on her behalf since she is domiciled abroad. That despite her overseas domicile, the Defendant frequently travels to Kenya to inspect the suit property and together with her parents, they hold a joint account at Family Bank for collecting the rental proceeds. See annexures IW-11 & IW-12.
 6. The Defendant further deposed that the relationship between her and the Plaintiff deteriorated sometime in September 2003 prompting her to revoke the Plaintiff's authority to manage the suit land and appointed agents to act on her behalf according to annexure 1W-14 & 1W-15. Refuting the Plaintiff's allegations of adversely occupying the suit land, the Defendant swore that his occupation was solely as her manager and agent with her express permission. That indeed the Plaintiff conceded as much in his Replying Affidavit dated 8/11/2023 filed in Nairobi ELC Case No. E138 of 2023; Irene Wanjiku Ngugi v Peter Ngugi Muriakiara (hereinafter referred to as the Nairobi suit). That the Plaintiff's true residence is at a property known as Dagoretti/Kinoo/3976 since 1986 and therefore his claims of occupying the suit land are untrue and urged the Court to dismiss the Application with costs.
 7. On 29/4/2024 directions were taken to canvass the Application by way of written submissions.
 8. The Plaintiff through the firm of Kithi & Co. Advocates filed submissions dated 30/5/2024.
 9. He drew a singular issue for determination which is whether the Plaintiff has satisfied the conditions for grant of Injunction. Citing Order 40 Rule 1 of the Civil Procedure Rules and the celebrated case of Giella v Cassman Brown & Company Ltd [1973] EA 58, the Plaintiff submitted that he has established a prima facie case with a probability of success. That he moved into the suit land in 2009, fenced it and went ahead to develop it to his exclusive benefit. That the Defendant never protested his occupation until 22/9/2023 when she threatened the Plaintiff with eviction.
 10. On irreparable loss, the Plaintiff contended that the eminent eviction he is facing cannot be compensated by an award of damages as he will be divested of his rights over the suit property. Last but not least the Plaintiff implored the Court to exercise the balance of convenience in his favor noting that the Defendant is domiciled abroad to protect the Plaintiff's proprietary interests. Reliance was placed on the case of Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Others [2016] eKLR.



11. In rebuttal, the Defendant through Wahome Gikonyo & Co. Advocates filed submissions dated 14/5/2024.
12. Denying existence of a prima facie case in the Plaintiff's favor, the Defendant highlighted that by the Plaintiff's own admission there was an operative license between the parties and as such no prescriptive rights accrued in his favor. That the Plaintiff's true residence is not on the suit land but elsewhere as deponed in her Replying Affidavit.
13. On irreparable injury, the Defendant was categorical that none has been established by the Plaintiff to warrant injunctive orders. That the Plaintiff's irreparable injury is imagined and speculative at best and therefore the burden of proof to that end, has not been discharged. In a similar breathe, she submitted that the balance of convenience tilts in her favor as the registered owner of the suit land.
14. The sole issue for determination is whether the Plaintiff has satisfied the threshold for granting a temporary injunction.
15. The relevant law on temporary injunction is stipulated in Order 40 rule 1 of the Civil Procedure Rules that; -

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

16. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* [1973] E.A 358. This position has been reiterated in numerous decisions from Kenyan Courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No.77 of 2012 [2014] eKLR where the Court of Appeal held that;

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.”



17. Consequently, the Plaintiff ought to, first, establish a prima facie case. In the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR in which the Court of Appeal gave a determination on a prima facie case. The Court stated that:

“... in civil cases, it is a case in which, on the material presented to the Court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
18. Later on the same Court in the case of *Moses C. Muhia Njoroge & 2 Others v Jane W. Lesaloi and 5 Others* [2014]eKLR, defined prima facie in the following terms;

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
19. It is evident therefore that it is not enough for a party to merely state that it has a prima facie case. That alone will not bring it within the ambit of a prima facie case as required by law. See the case of *Stek Cosmetics Limited v Family Bank Limited & Another* [2020] eKLR. The Plaintiff bears the burden of proving a prima facie case in his favor. The Plaintiff must show that his right is being violated or is likely to be violated by the Defendant which would shift the burden onto the Defendant to explain or rebut the Plaintiff's claim.
20. The parties herein are father and daughter respectively. The Plaintiff admits that the suit land belongs to his daughter the Defendant, and a copy of the title deed has been produced by both of them.
21. The Plaintiff submitted that he has established prima facie against the Defendant by virtue of his uninterrupted occupation of the suit land since 2009. The Defendant refutes this allegation and maintains that the Plaintiff alongside her late mother were acting as managers of her property and all was well until the relation ship between her and the Plaintiff deteriorated in September 2023. In his Supporting Affidavit, the Plaintiff annexed photos showing Elma Apartments which he admits are rental houses. This position resonates with the Defendant's assertion in her Replying Affidavit that the developments on the suit land is Elma Apartments with a schedule of tenants annexed as IW-3 as at August 2023. No evidence was tendered to show the alleged entry and occupation of the suit land by the Plaintiff since 2009. The Defendant contends that the Plaintiff's true residence is on another parcel of land namely Dagoretti/Kinoo/3976 – see annexures 1W-18. The Plaintiff has not controverted this position.
22. Accordingly, it is my view that the Plaintiff has not, based on the material before Court, established a prima facie case in his favor to warrant injunctive reliefs as prayed. It is trite that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. This position was echoed by the Court of Appeal in the case of *Nguruman supra* and later in *Moses Kibiego Yator v Eco-Bank Kenya Limited & 2 Others* [2019] eKLR.
23. However, to allay any doubt, on irreparable harm, the Plaintiff was emphatic that if he is evicted from the suit land, his proprietary rights as vested in law will be extinguished and thus he cannot be compensated by way of damages. Again, no evidence of any threats was annexed in the Application to support this averment.
24. Lastly on the requirement of balance of convenience, the Plaintiff highlighted that having been in occupation of the suit land to the exclusion of the Defendant, the Court ought to be persuaded to rule



in his favor. Having reached the above conclusion on prima facie case and irreparable harm, there is no doubt in the Court's mind as to where the balance of convenience lies.

25. In the interest of justice, the Court is guided by the proviso to Order 40 of the Civil Procedure Rules above that empowers this Court to make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit. The Court is of the view that to preserve the substratum of the suit status quo be maintained.

Defendant's Application dated 11/12/2023

26. Irene Wanjiku Ngugi the Defendant for prays for Orders THAT;
- a. Spent.
 - b. This Honorable Court be pleased to review Order No. 3 of its orders issued on 23rd October 2023 by deleting the phrase "...in line with Prayer No. 2 of the Notice of Motion..." appearing therein and issuing the following revised order:

“ THAT in the meantime, status quo orders are ordered (with the status quo as at 23rd October 2023 being that the Defendant is the registered proprietor of the suit property and that the Plaintiff is not in actual occupation of the suit property) pending the hearing and determination of the motion interpartes”.
 - c. The Originating Summons dated 19th October 2023 be forthwith struck out as an abuse of the Court process, and the corresponding suit herein also be dismissed with costs to the Defendant.
 - d. This Honorable Court be pleased to find and hold that false, misleading and perjurious averments were made in the Affidavits sworn by Peter Ngugi Muriakiara on 19th October 2023.
 - e. Notice be issued to Peter Ngugi Muriakiara to show cause why he should not be convicted of the offence of perjury.
 - f. This Honorable Court be pleased to refer Peter Ngugi Muriakiara to the Office of the Director of Public Prosecutions for investigation and preferably of charges relating to the offence of making contradictory statements.
 - g. The costs of this application be borne by the Plaintiff.
27. The application is premised on the grounds on the face of it. The Defendant maintains she is the registered owner of the suit land and accuses the Plaintiff of recanting his position averred in his Replying Affidavit sworn on 8/11/2023 in the Nairobi ELC suit. That in light of his contradictory averments, it is not in doubt that the Plaintiff presence on the suit land has been with the Defendant's consent and permission. That the Plaintiff's suit is an abuse of Court process and based on falsehoods that this Court ought not entertain; that the Plaintiff is guilty of perjury in view of his inconsistent depositions; the Plaintiff is wantonly enjoying status quo orders which were obtained by concealment of material facts and that the status quo orders are in vain since the Plaintiff has never lived on the suit land and therefore the claim of eminent eviction does not suffice.
28. The Application is supported by the Affidavit of even date sworn by the Defendant. Reiterating the above grounds and largely her position in the Replying Affidavit dated 11/12/2023, the Defendant annexed copies of her title deed, official search, the Replying Affidavit in the Nairobi suit and Court order dated 2/11/2023 as IW-1, IW-2, IW-3 and IW-4 respectively. She beseeched the Court to allow her Application as prayed.



29. The Plaintiff filed his Replying Affidavit dated 12/3/2024. Relying on his Supporting Affidavit dated 19/10/2023, he maintained that he has adversely occupied the suit land since 2009 and there is no contradiction on his part in light of his Replying Affidavit in the Nairobi suit. That alongside his late wife, the Plaintiff secured funding to facilitate developments on the suit land without the Defendant's contribution. He dismissed any perjury claims against him and insisted his averments herein and in the Nairobi suit are all true. That the Plaintiff and his late wife have been in control of the suit land developments and collect rent as shown by copies of tenancy agreements marked as PNM. He defended the status quo orders as fairly issued based on the information he provided before Court and opposed their variance.
30. In a rejoinder, the Defendant swore a supplementary affidavit on 7/5/2024. She vehemently denied the Plaintiff's claim of 'moving' into the suit land and funding the developments on the suit land. That the Plaintiff's and the late Defendant's late mother administration of the suit land was purely with the Defendant's express permission. That the three of them are co-signatories of the Family Bank joint account where rent is paid into and the Defendant has access to it as shown by copy of the visa card issued to her.
31. The Application was disposed by way of submissions.
32. Highlighting the role of status quo orders, the Defendant submitted that the orders herein were issued ex parte without her rendition of facts concerning occupation of the suit land. That having demonstrated that the Plaintiff's true residence is on another parcel of land and not the suit land, then the Court is properly moved to review its Orders as provided under Order 45 Rule of the Civil Procedure Rules. That the Defendant has elucidated sufficient reasons for the Court to relook into the status quo issued in terms of Prayer no. 2 of the Plaintiff's Notice of Motion.
33. On whether the Plaintiff's averments in the Nairobi suit renders the instant Originating Summons an abuse of Court process, the Defendant answered in the affirmative. That the Plaintiff's adverse possession claim is unfounded having expressly admitted that his occupation on the suit land was by the Defendant's consent.
34. In addition the Defendant argued that the Plaintiff is guilty of perjury by willfully tendering a false statement contrary to Section 108 of the Penal Code. She urged the Court to impose appropriate sanctions to that end.
35. The sole issue for determination is whether the Application is merited addressed as follows.

Review of interim Orders

36. The Defendant has contested the nature of interim Orders herein issued on 23/10/2023. The Orders which were issued in terms of Prayer No. 2 of the Plaintiff's motion granted temporary injunction against the Defendant pending the interpartes hearing of the Application.
37. The power to review orders is anchored in statute under Section 80 of the *Civil Procedure Act* and augmented by Order 45 of the Civil Procedure Rules. For such orders to issue, an Applicant must prove that there is discovery of new or important matter or evidence, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was made or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons.
38. Without delving into the merits of this prayer, it is notable that the interim order was meant to subsist until the interpartes hearing of the Application which has now taken place. In other words, that order



would cease to have effect once the Plaintiff's application was heard inter partes. The Order is therefore strictly speaking spent.

Striking out of the Originating Summons

39. The Defendant argued that the Originating Summons dated 19/10/2023 ought to be struck out for being an abuse of Court process. That the Plaintiff's claims of occupying the suit land are untrue and in bad faith since his role as a manager was purely with the Defendant's permissions. That therefore a claim of adverse possession as pleaded in the Originating Summons cannot stand hence the invitation for the Court strike out the Originating Summons. Denying the aforesaid permissions, the Plaintiff was adamant in his Replying Affidavit that he has satisfied the ingredients for adverse possession and as such his Originating Summons is merited.
40. It is trite that the draconian jurisdiction of striking out a suit must be used sparingly and in the clearest of cases. The Court of Appeal in *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR observed that it is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. That the rules of natural justice require that the Court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be.
41. Order 2 rule 15 of the Civil Procedure Rules provides;
- “ 15. Striking out pleadings [Order 2, rule 15.]
- (1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—
- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.”
42. Bullen & Leake & Jacobs Precedents of Pleadings [12th Edition] contain the following exposition on what constitutes a scandalous, frivolous or vexatious pleading: “A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”



43. In *Muchanga Investment Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR, the Court of Appeal adopted the following exposition by the Court of Appeal of South Africa in *Beinosi Wiyley* 1973 SA 721 [SCA] at Page 734 F-G on what constitutes an abuse of the process of the Court:

“What constitutes an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse process”. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective.”

44. A glean of the impugned Originating Summons raises a plea of adverse possession. Such a claim cannot, on the face of it, be said as not to raise a reasonable cause of action and/or scandalous, frivolous or vexatious to call for its striking out. It is trite that he who alleges must prove and therefore the Plaintiff will bear the burden to prove his case at the opportune time and the Court will pronounce itself accordingly.

45. Applying the principles in the decisions cited above to the present circumstances and the application before this Court, the conclusion I come to, is that the prayer lacks merit and is disallowed.

The offence of perjury

46. The Defendant asks this Court to find the Plaintiff guilty of perjury on the basis of his averments in the Nairobi suit and the contents of his Supporting Affidavit in his Application. The gist of the depositions is that the Plaintiff on one hand admits the Defendant’s consent to manage the suit land yet claims adverse possession herein. The Nairobi suit was transferred to this Court and renumbered Thika ELCLC 11B of 2024 and later consolidated with this suit on 29/4/2024.

47. The jurisdiction of this Court is provided under Article 162(2)(b) of *the Constitution* of Kenya relates to the environment and the use and occupation of, and title to, land as further elaborated in Section 13 of the *Environment and Land Court Act*. The offence of perjury is a criminal offence under Section 108 of the Penal Code and therefore falls outside the jurisdiction of this Court.

48. The upshot of the forgoing is that the Application is bereft of merit.

49. Final Orders for disposal

- a. The Plaintiff’s Notice of Motion dated 19/10/2023 is allowed in terms of maintaining status quo.
- b. The Defendant’s Notice of Motion dated 11/12/2023 is unmerited. It is dismissed.
- c. The parties being related the commendable order is for each party to bear their own costs.

50. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Katana HB Kithi for Plaintiff



Gikonyo for Defendant

Court Assistants – Phyllis

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