



**M'Rugaru v Kinoti (Environmental and Land Originating Summons  
E011 of 2024) [2024] KEELC 13701 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13701 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2024  
CK NZILI, J  
DECEMBER 4, 2024**

**BETWEEN**

**KIUNGA M'RUGUARU ..... PLAINTIFF**

**AND**

**LUKE MWITI KINOTI ..... DEFENDANT**

**RULING**

1. The court is asked by the applicant to issue inhibition and temporary injunction orders restraining any dealings by way of sale, transfer, lease, charge or interference with his use or occupation on L.R No. Abothuguchi/Igane/1099 by the respondent his agents, servants or employees or anyone else pending hearing and determination of this suit.
2. The reasons are contained on the face of the application and in the supporting affidavit sworn by Kiunga M'Rugaru on 15.10.2024. The applicant's contention is that he has been in exclusive open, full, quiet, peaceful, notorious and uninterrupted occupation of the suit land for the last 44 years hence he disposed the defendant from use and occupation of the same.
3. The applicant avers that he has been planting seasonal crops and trees on the land alongside his family while at the same time keeping livestock therein as per attached photographs marked KM "3".
4. Similarly, the applicant avers that recently the defendant sent brokers and prospective buyers to the land registered under his name as per a green card marked KM "2", with the intention of selling the land.
5. Given the suit seeking for declaration of acquisition of the land by virtue of adverse possession, the plaintiff urges the court to preserve the land in its current status during the hearing and determination of the suit.
6. The application is opposed by a replying affidavit sworn by Luke Mwiti Kinoti the respondent on 6.11.2024 on account of misrepresentation of facts and lack of merits.



7. The respondent avers that he became the registered owner in 1996 as per a certificate of official search annexed as LKM – 01 measuring 4.09 ha, though it was averred that the defendant took vacant possession in 1996 and entrusted his brother-in-law John Kaguari Mathayo to take the possession who was leasing the land to potential third parties for ten years until Joseph Gituma became the farm manager in 2019, who was supervising its tilling and plowing as well as leasing some portions to third parties under his authority.
8. The respondent averred that though he had never erected any structures on the land he was firmly in possession and that the applicant has never been in possession of his land, let alone for the years stated.
9. The defendant averred that the plaintiff is his neighbour and it was only on 09.10.2023, that he allegedly forcefully chased away his farm manager from the land, which incident was reported both at Kathigao police post and the chiefs camp at Mwanthangathi location.
10. Again, the respondent averred that the police and the area chief advised him that they could not intervene since the matter was in court. The respondent averred that the plaintiff had around March to April 2023 called him on his cell phone making inquiries about one Gikonyo and it was only around October 2023 that a process server dropped some documents to him.
11. Further, the respondent averred that his agents went back to the land since the police and the chief did not assist him but on 22.10.2023 he was told to report to Gaitu police station which he did as per OB Attached as LMK 02, only for his agents to be chased away from the shamba on 25.10.2024. For fear of violence, the respondent avers that he advised them to stay away from the shamba and not to take the law into their own hands.
12. The respondent avers that the applicant has never been on his land the attempted violent entry took place on 19.10.2024; the application is not genuine, the photos were taken elsewhere; crops were harvested a long time ago and the applicant has his own land as per a copy of search attached as LMK – 03 for L.R No. Abothuguchi/Igane/1120 where he has a house as per Google Maps marked LMK – 04.
13. Further, the respondent averred that after analyzing the events when he was served with the court papers, the applicant alleged that he was in possession of the land as of 23.10.2024, just to mislead the court.
14. The defendant averred that he is a resident of both Meru and Nairobi counties and has another land in Meru as per Google Maps annexed as LMK – 05. He urged the court to dismiss both the appeal and the originating summons.
15. The applicant with leave filed a supplementary affidavit dated 15/11/2024. The applicant averred that his grandfather Twamwari Kinaro gathered two parcels Abothuguchi/Igane/62 & 65 during demarcation, measuring 80 acres and 113 acres respectively. The said parcels are family land and he was born and raised on parcel L.R No. 65.
16. Further, the applicant averred that he registered the 2 parcels in his name in 1970, after his grandfather bequeathed them to him. On instruction by his grandfather, he transferred parcel L.R NO. 62 to his cousin Cypriano Mburugu. He annexed a copy of the green card as KR1.
17. Again, the applicant averred that he settled on L.R No. 65 with his children where he buried his first wife in 1978. He has developed the land with his children and planted indigenous trees where some are on L.R No. 1099. The applicant further averred that in 1981 he intended to sell 20 acres to James Mwangi where they visited Ms. Kioga Mburugu & Co. Advocates for a sale agreement. He left his original title as well as his and his cousin's identity cards.



18. Subsequently, the intended buyer lost interest in buying the 20 acres. He averred that due to his illiteracy, he could not tell which title deed was given back to him. Only for him to realize in 2021 after the buyer's children demanded their father's land, that his land was subdivided into L.R No. 1095 & 1096 where L.R No. 1095 was registered to James Mwangi, L.R No. 1096 to his cousin Cypriano and later subdivided into L.R no's 1099 and 1100. Subsequently, L.R No. 1099 was transferred to Stephen Ndung'u by Cypriano and then to the respondent. He annexed the copies of green cards for parcels L.R No. 65, 1096 & 1099 as KR 2-4.
19. The applicant therefore averred that it is not true that the respondent took possession of the land in 1996. He denied knowing Josphat Gituma or Joel Kiugu or chasing away anyone from the suit land since he was in occupation
20. A party seeking the temporary injunction has to establish a prima facie case with a probability of success at the hearing prove that he will suffer irreparable loss and damage if the orders are not granted and lastly; show that the balance of convenience tilts in favour of granting the orders sought. See *Giella vs Cassman Brown* (1973) E.A 358. A prima facie case is established where a tribunal directs the mind on the material before it would make a finding that a right has been infringed to call for a rebuttal from the opposite side. See *Mrao Ltd vs First American Bank of (K) & others* (2003) KLR 123 and *Nguruman Ltd vs Jan Bonde Nielsen & others* (2014) eKLR. Irreparable injury means that which is substantial and unable to be adequately remedied by way of damages. In *Joseph Siro Mosioma vs Housing Finance of Company of Kenya & others* (2008) eKLR the court observed that the damage was not an automated remedy in deciding whether to grant an injunction or not and damages cannot be substituted for the loss which is occasioned by a clear breach of the law and further that a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.
21. Balance of convenience is defined as where if the injunction is not granted and the suit is ultimately decided in favour of a plaintiff, the inconvenience caused to him would be greater than that caused to the defendant if an injunction is granted and the suit is ultimately dismissed. See *Chebii Kipkoech vs Barnabas Tuitoek Bargoria & another* (2019) eKLR.
22. In *Paul Gitonga Wanjau vs Gathuthis Tea Co. Ltd & others* (2016) eKLR, the court held that where any doubt exists as to the applicant's rights, or if the right is not disputed but its violation is denied the court in determining whether an interlocutory injunction should be granted taking into consideration the balance of convenience to the parties and the nature of the injury which the respondent, on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and on the other hand, might sustain if the injunction was refused and he should turn out to be right. The court said that it would make a determination as to which party would suffer greater harm with the outcome of the motion.
23. The court further said that if the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favor of granting an injunction by seeking to maintain the status quo in determining where the balance of convenience lies.
24. In this suit what the applicant is seeking is to be declared entitled by adverse possession of the whole of the suit land for his alleged exclusive, open, peaceful and uninterrupted use of the suit land for over 44 years other than uncertified photos which have no verification of when and where they were taken the applicants has not brought any material to show when the developments started if he has reported any crop damage to the suit land and lastly, the reasons why he did not file the suit immediately the defence became the registered owner in 1996.



25. The complaint by the applicant is that the respondent has sent prospective buyers or brokers to the land. It is not clear when they were sent is not clear. Any danger to the land. Evidence that the plaintiff placed a caution to the title to the land is lacking. In *Robert Mugo was Karanja vs Ecobank (K) Ltd & another* (2019) eKLR the court observed that under Order 40 Rule 1 of the Civil Procedure Rules, a party has to prove that any property in dispute in the suit is in danger of being wasted or damaged or alienated by any party to the suit or wrongly sold in execution of a decree or the defendant threatens or intends to remove or dispose of the property.
26. In determining an application for a temporary injunction, a court is not required to make any conclusive or definitive findings of fact or law, which may interfere with the trial. See *Airland Tours & Travel Ltd vs NIC Bank Ltd Milimani HCC No. 1234 of 2002* and *Lucy Nungari Ngigi & others vs NBK Ltd & another NRB H.C Civil case No. 517 of 2014*.
27. A remedy of a temporary injunction is equitable in nature to be issued in appropriate cases to protect the legal and equitable right of a party in litigation which is being violated.
28. It is the applicant who has to surmount the three pillars of injunction in a sequential manner. See *Nguruman Ltd vs Jan Bonde Nielsen & others* (supra). The legal burden is on the applicant to show that in the absence of a temporary injunction he will suffer irreparable loss and damage and the lesser evil is to be granted the injunction to preserve the suit property. The standard of proof is on a balance of probability that is to say to convince the court that on the face of it, the applicant's case more likely than not will ultimately succeed.
29. Further, where the inconvenience is equal the plaintiff must show that the comparative mischief from the inconvenience is likely to arise from withholding the injunction.
30. The injunction will be greater than what is likely to arise from not granting it. See *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR.
31. The respondent has raised serious issues on when the entry by the applicant took place, the nature of the occupation, if it has been peaceful, open, uninterrupted and peaceful and issues of forceful entry and occupation are before the police for investigations. Without making definitive findings of fact and the laws I find that the applicant's right is yet to be established to be protected by way of inhibition and temporary injunctive orders. The applicant has failed to prove irreparable damage. The balance of convenience tilts in favour of declining to issue the injunction. The application is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4<sup>TH</sup> DECEMBER, 2024**

In presence of

C.A Kananu

Plaintiff

Mwirigi Kaburu for plaintiff/applicant

**HON. C K NZILI**

**JUDGE**

