



**Lusala v Ambani (Environment & Land Case 88 of 2019)  
[2023] KEELC 19817 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19817 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 88 OF 2019  
DO OHUNGO, J  
SEPTEMBER 18, 2023**

**BETWEEN**

**PAUL KIVISU LUSALA ..... PLAINTIFF**

**AND**

**ROBAI KAVAI AMBANI ..... DEFENDANT**

**RULING**

1. Litigation in this matter was commenced by the plaintiff through Originating Summons dated 19<sup>th</sup> July 2019, wherein he averred that he had become entitled to the parcel of land known as Kakamega/Viyalo/300 through adverse possession. The matter proceeded for hearing and judgment was delivered in favour of the plaintiff on 24<sup>th</sup> June 2020. The said judgment was however set aside by consent on 2<sup>nd</sup> March 2023.
2. Subsequently, the defendant filed Notice of Motion dated 29<sup>th</sup> March 2023, seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That an order of temporary injunction be issued restraining the defendants/respondents, their agents, servants from entering, trespassing and or doing any act or carrying out any activity that may be detrimental to any part of that parcel of land known as Kakamega/Viyalo/300 pending hearing of the suit.
  - d. That costs of this application be awarded to the applicant.
3. The application is supported by an affidavit sworn by the defendant/applicant. He deposed that the plaintiff had ploughed the suit property after delivery of the judgment and planted crops on it. The



plaintiff opposed the application through a replying affidavit in which he deposed that he has been in use and occupation of the suit property since 1998 hence his claim for adverse possession.

4. At the hearing of the application, counsel for the applicant argued that the applicant is the registered proprietor of the suit property and that following the setting aside of the judgment, the plaintiff has no basis being on the suit property. In response, counsel for the plaintiff argued that this being a claim for adverse possession, the issues raised in the application by the defendant can only be determined through trial of the suit and that an injunction will be detrimental to the plaintiff.
5. I have considered the application, the affidavits, and the submissions. This being an application for an interlocutory injunction, the principles applicable are that the applicant must establish a prima facie case with a probability of success. Even if he succeeds 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. All these conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. See *Giella -vs- Cassman Brown & Co Ltd* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR.
6. The applicant concedes that as of the date of filing the application, the respondent was in possession and remains in possession and use of the suit property. Needless to state, whether the possession amounts to adverse possession is a matter for determination at trial. The injunction sought seems to be primarily aimed at discontinuing the plaintiff's possession at this interlocutory stage. I agree with the plaintiff that such an approach will be detrimental to him since it will amount to prematurely determining the case. I am not persuaded that the applicant has demonstrated any prima facie case to warrant granting the injunction sought. It follows therefore that I need not enquire into the other limbs as to adequacy of damages and balance of convenience.
7. In view of the foregoing, I find no merit in Notice of Motion dated 29<sup>th</sup> March 2023 and I therefore dismiss it with costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

