



**Wanzala v Ngira (Environment & Land Case E005 of 2023)
[2023] KEELC 20301 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E005 OF 2023
BN OLAO, J
OCTOBER 3, 2023**

BETWEEN

ROSELINE AJUMA WANZALA PLAINTIFF

AND

PASCAL OMEDO NGIRA DEFENDANT

RULING

1. Roseline Ajuma Wanzala (the Plaintiff) has approached this Court vide her Originating Summons dated August 15, 2023 (although the Court stamp shows it was filed a day earlier on August 14, 2023). She seeks the main order against Pascal Omedo Ngira (the Defendant), that she has acquired by adverse possession a portion of land measuring 0.047 hectares out of the land parcel No Bunyala/Bulemia/3493.
2. Simultaneously with the said Originating Summons, the Plaintiff filed a Notice of Motion seeking the following orders:
 1. Spent
 2. Spent
 3. A conservatory order be issued in terms of a temporary injunction restraining the Defendant whether by himself, his servants, agents or employees from invading, trespassing, alienating, inhabiting, disposing, dealing and/or converting all that un-surveyed portion of land measuring approximately 0.047 hectares in Bunyala/Bulemia/3493 pending the hearing and determination of this suit.
 4. The office of Busia County Survey to carry out survey with a view to mapping the actual area, size and/or boundaries of the un-surveyed portion of land measuring approximately 0.047 hectares to be hived off from land registered as Bunyala/Bulemia/3493 which is in occupation



by the Plaintiff and prepare a report and file the same in Court before the Court can issue further directions in this matter.

5. The OCS Port Victoria Police Station Budalangi Busia County do assist to enforce compliance of the Court order.
6. Costs of this application be provided for.
3. The application which is the subject of this ruling is premised on the provisions of Order 40 and 50 of the Civil Procedure Rules as well as Sections 1, 1A and 3A of the Civil Procedure Act.
4. The crux of the application which is based on the grounds set out therein and supported by the Plaintiff's affidavit dated August 15, 2023 is that the Plaintiff has been in un-interrupted possession of a portion of land measuring 0.047 hectares out of the land parcel No Bunyala/Bulemia/3493 (the suit land) having purchased the same vide a sale agreement on April 28, 2001. However, the Defendant now wants to sell a portion of the suit land which the Plaintiff occupies and is entitled to by way of adverse possession thus necessitating this application.
5. Annexed to the application are the following documents:
 1. Copy of acknowledgement slip dated July 18, 2001 for various payments.
 2. Receipt from Olweny & Associates Surveyors dated June 25, 2001 for Kshs 10,000 being survey fees.
 3. Receipt from Olweny & Associates Surveyors for Kshs 5,000 being payment for survey and physical planning.
 4. Copy of title deed whose particulars are not legible at all including the land number and owner.
 5. Certificate of official search for the land parcel No Bunyala/Bulemia/3496.
 6. Photographs of houses and trees.
 7. Acknowledgment slip dated August 30, 2003.
6. Notwithstanding the directions issued by Cherono J that the Defendant files his response within 14 days of service, and although there is an affidavit by Martin Omulama dated September 26, 2023 confirming service of the application on the Defendant on September 9, 2023, there is no response to the same.
7. Further, when the matter came up before me today-as directed by Cherono J in his orders issued on the August 24, 2023, neither of the parties attended Court. However, the Plaintiff's counsel Omulama Mainga Advocates had filed their submissions on September 26, 2023. The application is therefore not opposed.
8. I have considered the application un-opposed as it is, and the submissions by counsel.
9. The Plaintiff has pleaded that she has been in occupation of a portion of land measuring 0.047 hectares out of the suit land for now over 19 years. That she has developed the land by building houses thereon yet the Defendant has now started cultivating it and has threatened to evict her. Faced with the threat of eviction, the Plaintiff has paid the Defendant a sum of Kshs 30,000.
10. The threshold for the grant of an order of temporary injunction was set out in the case of *Giella -v- Cassman Brown & Company Ltd* 1973 EA 358. The Court set out the principles as follows:
 1. The Applicant must show a *prima facie* case with a probability of success.



2. The Court will not normally grant such an order unless it is shown that the Applicant might suffer irreparable loss which would not adequately be compensated by an award of damages.
3. If in doubt, the Court will determine the application on a balance of convenience.

A *prima facie* case, as was set out in *Mrao Ltd -V- First Assurance Bank Of Kenya Ltd & Others* CA Civil Appeal No 39 of 2002 2003 eKLR:

“... is a case 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.”

11. The Plaintiff's case as per her supporting affidavit is that she has been in quiet, peaceful and undisturbed possession of an un-surveyed portion of the suit land for over 19 years. That has not been rebutted as there is no reply to the application. A person in occupation of land is one in whose favour a Court considering such an application must rule especially in such a case where the occupation has not been challenged. A *prima facie* case has been established. Whether the orders sought in adverse possession will be allowed is a matter for trial.
12. On the issue of irreparable damage, the Plaintiff has averred in paragraph 11 of her affidavit that she was in the process of completing her two bedroom house when the Defendant trespassed onto the suit land and denied having received any purchase price. If the Defendant takes over the suit land as he has threatened to do, the Plaintiff will no doubt suffer irreparable damage including, but not limited to, being rendered homeless. This is a case where an order of temporary injunction is merited.
13. If I was in doubt, which I am not, I would consider the balance of convenience to be in favour of the Plaintiff. That prayer is hereby allowed.
14. With regard to prayers No 4 and 5, this Court cannot at this stage direct the Busia County Surveyor to carry out any survey and map out the size and boundaries of the portion of land in dispute. That is something that the Plaintiff ought to have done earlier or which the parties can pursue even as the case proceeds.
15. On the issue of the Officer Commanding Police Station [OCS Port Victoria Police] being directed to assist in the enforcement of this order, there is nothing to suggest that the enforcement of the order of temporary injunction has been resisted. And should there be any threat from the Defendant, the Plaintiff has a right to seek security from the nearest Police Station. Section 14 (1) of the *National Police Service Act* obliges the Police to maintain law and order while protecting life and property. That is a statutory duty and therefore the Police do not need to be prompted to do so.
16. Ultimately therefore and having considered the Notice of Motion dated August 15, 2023, I allow it in the following terms:
 1. An order of temporary injunction is hereby issued restraining the Defendant whether by himself his servants, agents, employees or any other person(s) acting through him from invading, trespassing, alienating, inhabiting, disposing, dealing with and/or converting the un-surveyed portion of land measuring approximately 0.047 hectares out of the land parcel No Bunyala/Bulemia/3493 pending the hearing and determination of this suit or any other further orders.
 2. The Defendant shall within 14 days of the delivery of this ruling file and serve his response to the Originating Summons and any other relevant documents.



3. The matter shall thereafter be listed for pre-trial before the Deputy Registrar on October 16, 2023 to confirm compliance and take a date for further direction or hearing before me.
4. The Plaintiff to ensure that this matter is heard and determined within 12 months from today otherwise the temporary order of injunction will lapse unless otherwise directed by the Court.
5. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 3RD DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

As the Defendant has not filed any response, the Plaintiff's counsel shall serve him with this ruling within 7 days of delivery.

BOAZ N. OLAO

JUDGE

