



**Mukudi & 3 others v Makokha & another (Being sued as the rep
of the Estate of Wycliffe Makokha) (Environment & Land Case
E002 of 2023) [2023] KEELC 21275 (KLR) (7 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E002 OF 2023**

**BN OLAO, J
NOVEMBER 7, 2023**

BETWEEN

**MICHAEL NYONGESA MUKUDI 1ST APPLICANT
MATHEW ODUORY MUKUDI 2ND APPLICANT
JAPHETH WAFULA OWINO 3RD APPLICANT
JOHN KENNEDY ODUORY 4TH APPLICANT**

AND

**JANE OTIENO MAKOKHA 1ST RESPONDENT
LINUS NAKHABI MAKOKHA 2ND RESPONDENT
BEING SUED AS THE REP OF THE ESTATE OF WYCLIFFE MAKOKHA**

RULING

1. Machael Nyongesa Mukudi, Mathew Oduory Mukudi, Japheth Wafula Owino And John Kennedy Oduory (the 1st, 2nd, 3rd and 4th Applicants respectively), by their Originating Summons dated 18th July 2023, impleaded Jane Otieno Makokha and Linus Nakhabi Makokha (the 1st and 2nd Respondents respectively and sued as the legal representative of the Estate of Wycliffe Makokha) seeking the following substantive orders against them with respect to the land parcel No Bukhayo/Matayos/1149 (the suit land):
 1. That the Respondents right over the land parcel No Bukhayo/Matayos/1149 got extinguished by adverse possession.
 2. That the Respondents be perpetually barred from taking, transferring and sub-dividing the land parcel No Bukhayo/Matayos/1149.



3. That the Respondents be ordered to execute all the relevant documents to facilitate the transfer of the 6 acres from the above parcel into the names of the Applicants.
4. That the Respondents do surrender the title deed of the land parcel No Bukhayo/Matayos/1149 to the Applicants and in default, the production of the said title deed be dispensed with by the Land Registrar Busia.

Simultaneously with that Originating Summons, the Applicants also filed a Notice of Motion of the same date and premised under the provisions of Sections 1A & 3A of the *Civil Procedure Act*, Order 40 Rule 1 of the *Civil Procedure Rules* and Article 152 (2) of *the Constitution* seeking the following orders:

1. Spent
 2. Spent
 3. A permanent injunction be granted restraining the Respondents whether by themselves, their employees, agents, workers and/or servants from interfering with the Applicants occupation of 6 acres out of the land parcel No Bukhayo/Matayos/1149 pending the hearing and determination of this suit.
 4. That the Officer Commanding Bumala Police Station [OCS] do assist in effecting this order.
 5. That costs of this application be in the cause.
2. That application is predicated on the grounds set out therein and is also supported by the affidavit of the 1st Applicant.
 3. The gravamen of the application is that the Applicants were born on the suit land where they have resided on 6 acres for over 12 years and therefore claim it by way of adverse possession. The Respondents having obtained Letters of Administration in respect of the Estate of the original owners are now in the process of sub-dividing the suit land and have threatened not to recognize the Applicants existence. The Applicants stand to suffer great irreparable loss having built houses, planted crops on the 6 acres and even buried their parents thereon. It is in the interest of justice that the application be allowed.
 4. Annexed to the application are the following documents:
 1. Green Card for the land parcel No Bukhayo/Matayos/1149.
 2. Letter dated 23rd June 2021 from the Assistant Chief Murende Sub-location addressed to whom it may concern.
 3. Photography of houses.When the application was placed before me on 21st July 2023, I certified it as urgent and directed that it be canvassed by way of written submission to be filed on or before 1st August 2023.
5. The application is opposed and the Respondents have filed grounds of opposition raising the following:
 1. The application is made in bad faith and is without merit.
 2. The properties in dispute are yet to be administered and are registered in the name of the deceased.
 3. The application is frivolous, vexatious and ought to be dismissed with costs.



6. Submissions have been filed both by the Applicants acting in person and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Respondents.
7. I have considered the application, the grounds of opposition and the submissions.
8. An application for temporary injunction such as this one, (the Applicants erroneously sought a permanent injunction), is to be determined in accordance with the principles set out in the case of *Giella -v- Cassman Brown & Co Ltd* 1973 E.A. 358. These are:
 1. The Applicant must show the existence of a prima facie case with a probability of success at the trial.
 2. An order of temporary injunction will not normally be granted unless the Applicant demonstrates that he might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages.
 3. If in doubt, the Court will determine the application on the balance of convenience.
9. A *prima facie* case as was stated in the case of *Mrao Ltd -v- First American Bank Of Kenya Ltd & 2 Others* 2003 KLR 125;

“... 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.”

The Court in the case of *Nguruman Ltd -v- Jan Bonde Nielsen & Others* C.a. Civil Appeal No 77 of 2012 [2014 eKLR] adopted the above definition and went on to add that:

“The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant’s case is more likely than not to ultimately succeed.”

Finally, as was held in the case of *Films Rover International Ltd -v- Cannon Films Sales LTD* 1986 3 ALL E.R 772, a Court considering such an application should take the course that appears to bear the lower risk of injustice should it turn out to have been wrong.

10. I am guided by the above precedents among others.



11. The Applicants through the 1st Applicants affidavit sworn on their behalf, have averred, inter alia, that they and their family members were born on the suit land where they have continued to reside for over 12 years. They not only have homes thereon but their parents have been buried on the 6 acres which they claim.
12. Those averments have not been rebutted through any replying affidavit. Instead, the Respondents filed grounds of opposition which, in any event, do not raise any issues of law. Rather, they raise issues of facts that the application is bad in faith, without merit, is frivolous, vexatious and that the suit land is still registered in the name of the deceased. Grounds of opposition must address issues of law only but not facts.
13. Further, the Applicants having filed a supporting affidavit through the 1st Applicant, those averments could only properly be rebutted through a replying affidavit. That was reiterated by the Court in the case of Daniel Kibet Mutai & Others -v- Attorney General C.a. Civil Appeal No 95 of 2016 [2019 eKLR] where it said:

“The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the Respondents either through an affidavit in response or through cross-examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred evidence. In other words, are the facts averred in the affidavits sufficient to prove the appellants’ claims? Emphasis mine.

14. The Applicants have averred to factual matters which remain un-controverted. These include the fact that they were born and lived on the suit land for over 12 years. That, in my view, is sufficient to establish a prima facie case.
15. They have also deposed, again without response, that they have houses on the suit land where their parents are buried and if the same is sub-divided and alienated, they may be rendered homeless. That is injury which I consider to be incapable of being adequately compensated with an award of damages.
16. If there was any doubt, which I do not entertain on the material before me, I would determine the application on the balance of convenience. The convenience favours the Applicants.
17. Besides, I am persuaded that the lower risk of injustice will be served by allowing the application rather than dismissing it.
18. The up-shot of all the above is that the Notice of Motion dated 18th July 2023 is allowed in the following terms:
 1. An order of temporary injunction is hereby issued restraining the Respondents whether by themselves, their agents, employees, workers, servants or any other persons acting through them from interfering with the portion of the suit land measuring 6 acres pending the hearing and disposal of this suit.
 2. Should there be any resistance on the part of the Respondents in complying this order, the Officer Commanding Bumala Police Station shall be at liberty, upon a request by the Applicants, to ensure compliance thereof.



3. The Applicants should ensure that this suit is heard and determined within the next 12 months or the temporary injunction will lapse unless otherwise extended by this Court.
4. The Applicants shall serve the Originating Summons and all other documents upon the Respondents within 7 days of the delivery of this ruling.
5. The Respondents must file and serve their responses and any other documents in reply to the Originating Summons within 15 days from the date of service upon them of the Originating Summons and relevant documents.
6. The matter shall thereafter be placed before the Deputy Registrar for pre-trial on 5th December 2023 for taking a hearing date once compliance has been confirmed.
7. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED TO THE RESPONDENTS' COUNSEL ON THIS 7TH DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

