



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE NO. 8 OF 2021
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ASCERTAINMENT OF OWNERSHIP OF THE LAND COMPRISED IN TITLE NO. KIMININI/MATUNDA BLOCK 4/NYAMIRA/67

BETWEEN

AGNES NYANG'ANYI OMWAMBA.....APPLICANT/PLAINTIFF

VERSUS

SAMUEL BOSIRE NYARUNA.....RESPONDENT/DEFENDANT

RULING

(On Grant of Temporary Injunction)

1. This is a ruling on a Notice of Motion dated **08/11/2021**, brought under Certificate of Urgency. Both the Application and Certificate were dated the same day but filed on **09/11/2021**. The application was brought under **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act** and **Order 40 Rules 1, 2, 3 and 4** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The Motion sought Orders, inter-alia:

a) ...spent

b) **THAT a temporary injunction be issued against the Respondent/Defendant, his agents, servants and all those claiming under him from entering, taking over, evicting, subdividing, leasing, selling, transferring or in any way interfering with land parcel No. Kiminini/Matunda Block 4/Nyamira/67 pending the hearing and determination of this Application and pending hearing and determination of the main suit.**

c) ...spent

d) **THAT costs be provided for.**

2. The grounds upon which the application was premised were that the Applicant was in possession of the suit land since 1980 and that on **06/03/2007** the Respondent obtained secretly a title deed in his name. Further that **on 22/10/2021** the Respondent and some people claiming to be directors of Nyamira Farm held that the land belonged to the Respondent and that the Applicant was only entitled to **3 points (sic)**. As a result, the Applicant faced eviction. Therefore, she prayed that the application be granted and that the Applicant would not be prejudiced in any way since he has never been on the parcel of land.

3. In her supporting Affidavit sworn on the same date as that of the Application, she repeated the contents of the grounds. However, she added depositions on how the land was first allocated to her uncle, one Zacharia Bogonko, in the **1970s** by Nyamira Cooperative Society and then passed over to her. Upon that happening she paid all the loans thereto. She annexed copies of the receipts evidencing the payments she referred to. To her she had been in exclusive possession of the land all along. She discovered that the Respondent had obtained a title deed to her land secretly in **2007** after suing her in vide **Kitale HCCC. No. 164** of **2007** which case he never prosecuted and it was dismissed in **2015** for want of prosecution. She annexed to her Affidavit a copy of the Plaintiff in that suit. She then annexed an extract of title to the parcel of land to show that the Respondent was the registered owner.

4. Her further deposition was that from **06/03/2007** she acquired possession of the land adversely by as stipulated in the law, having been in possession of the land all along up to as at **06/03/2019**. She then swore that she had carried out a lot of developments on the land but the farm

directors had decided that the land was not hers and evidenced that by annexing to the Affidavit proceedings of the decision by the Farm Directors. She prayed for the orders in the Application.

5. The Application was opposed through an Affidavit sworn by the Respondent on **23/11/2021**. He deponed that he was a stranger to the allegations that the Applicant had been in possession of the land since **17/04/1980**. He stated further that he was the absolute owner of the subject parcel of land and the Applicant was a trespasser thereon and he annexed to his Affidavit copies of the title deed and green card and marked them as **SBN 1 (a) and 1 (b)**. To him, in the year **1982** one Dickson Barongo Masese requested him to be utilising the land and he permitted him. Then in **2006** when he wanted to take over the parcel he discovered that the Applicant was occupying it. After that, the said Dickson Masereti disclosed to him that the Applicant was his sister.

6. He deponed further that at that time, the Applicant requested him to give her time to vacate the land and he did but in **2007** he gave her notice to vacate but she refused. That was when he sued her vide the Kitale High Court suit alluded to by the Plaintiff. However, due to post-election violence, he could not prosecute the case and it was dismissed as stated by the Applicant. He then deponed that there was no privity of contract between him and the Applicant and she had neither been his licensee nor had he ever given consent to her through the land control board to own his land.

7. He then stated on oath about the origin of the land. He stated that the late Zacharia Bogonko Raro (Nyarunda) now deceased was his nephew. The deceased had the share of the land in the Nyamira Farm and under the direction of the Respondent's late father, he transferred the land to him. He annexed to the Affidavit a copy of the share Certificate issued to him by Nyamira Farmers Cooperative Society to show that his name replaced that of the initial owner (NB: it shows hand-crossings and insertion of his name by hand but not countersigned). He then deponed that the late Zacharia Nyarunda never sued him that he had wrongfully taken land from him and that the said Zacharia Nyarunda had bought the share of the land on behalf of his (Respondent's) late father through the late father's money, and the land was subsequently transferred to him.

8. He repeated that the said Dickson Masereti never informed him that he invited his sister to stay on the land. He deponed further that the developments on the land by the Applicant were made with her full knowledge that he had not sold to her the land and she did so without his consent. He then contended that between **November 2007** and the **year 2015** time was running hence a five-year period could not support a claim for adverse possession. He then urged the Court to find that the suit was premature. Lastly, he prayed for the dismissal of the Application with costs to him.

9. In a Further Affidavit sworn on **06/12/2021**, in answer to the response given by Samuel Bosire as captured above, the Applicant deponed that her application was in good faith and that the principle of adverse possession was that she be in peaceful continuous occupation of the land for a period of 12 years which she had been. She then discounted the applicability of both the doctrine of privity of contract and application of land control board in a claim for adverse possession. She stated that she was neither a trespasser and neither did time not stop running from **2007 to 2016** just because of the suit that was filed and eventually dismissed nor starting running in **2016** after the dismissal. She then stated that the suit was not premature and that since the Court did not make a determination of the rights of the parties in the *High Court* suit dismissed time continued to run.

Analysis and Determination

10. The parties filed written submissions as directed by the Court. I have considered the Application, the affidavits in support and opposition to it and all the annexures thereto and the submissions on record. I have also considered the law and case law relied on by the parties. I find two issues for determination in this matter. They are:

1. Whether the Applicant satisfied the principles grant of a temporary injunction;

2. Who to bear the costs of the Application and what orders to issue.

11. The Applicant cited a number of provisions of the Civil Procedure Act to support her Application. Learned counsel for the Applicant did not submit on any of them to indicate to the Court their relevance to the Application. She did not comment even on the relevant ones to show how they applied to the facts in the instant Application. Learned counsel for the Respondent did not do so either. I have indicated many times before, in decisions in other matters, that where there are clear provisions for bringing an application, there is no need to cite others which are redundant, for the same of it. I wish to humbly advice learned counsel representing parties in this matter and any other who may do so in a party before me in time to come, that once he or she cites a provision of law he/she should submit on or explain its relevance to the Application. I will not take time discussing the irrelevance of the ones which were inapplicable. However, as I determine the Application, I will apply the facts herein to the relevant ones which I will thereby highlight.

12. Before delving into the merits or otherwise of the Application, it is important that I indicate at this point that the remedy for injunction being an equitable remedy is a discretionary to any court. The discretion must be exercised judiciously. This is what every court should bear in mind, and there is an abundance of authorities that support that position. For instance, in the case of **of Kahoho v Secretary General, EACJ Application No. 5 of 2012** it was stated as much. Also, in **Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR** <http://kenyalaw.org/caselaw/cases/view/118862> Munyao J. stated about it as follows: "... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously." In **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR**, the Court of Appeal repeated the same position and went on to state that it means that it is done "... without caprice or whim and on sound reasoning." Similar views have been held in **Butt v Rent Restriction Tribunal [1982] KLR 417** (Court of Appeal), **Felix Mochiemo Oindi v Gutonya Newton Mbogo [2018] eKLR** (High Court), **Bruce Joseph Bockle v Coquero Limited [2017] eKLR** (Court of Appeal), **United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A 898** (Court of Appeal), and many others.

a. Whether the Applicant satisfied the principles grant of a temporary injunction

13. In order for a party to succeed in an application for a temporary injunction, he/she has to pass the test that was set out in the case of **Giella -vs- Cassman Brown [1973] EA 358**. The test has three limbs to be satisfied. These are:

- (a) **Whether the applicant has established a prima facie case**
- (b) **Whether the he or she would suffer irreparable loss that may not be compensated by damages and**
- (c) **That if the court is in doubt, it may rule on a balance of convenience.**

14. These were restated recently in *Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu [2017] eKLR* (<http://kenyalaw.org/caselaw/cases/view/146386/>). It is clear to me what both a prima facie case and irreparable harm mean. Suffice it to say that a prima facie case is a situation which, based on the set of the facts of the case of a party before it, the Court is convinced that the adverse party has committed acts which he ought to give reasons for having so acted absent of which it will make a finding that he infringed or is about to infringe the rights of the party before it. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*, the Court of Appeal stated that “...it is a 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. In regard to irreparable harm, it means that the result of the actions of the adverse party of left unattended to by a Court order halting them will be such that the other party is not likely to be compensated by damages. Put differently, the payment of money in form of damages will not put the injured party back into the position he should have been had the actions of the adverse party not taken place. Thus, it is not enough to should a prima facie case. The applicant must demonstrate that the effect of the actions of the Respondent is so grievous that when all is said and done, he will not be in the same position as he was originally. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR* my brother judge stated that irreparable harm means that “...the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

16. That said, I noticed that in the instant Application, both parties dwelt more on giving the merits of their cases rather than sticking to those of the interlocutory Application. I will not touch on the merits of the suit at this point. Nevertheless, from the facts of the instant case, it is common ground that the Respondent has title to the parcel of land in question. It is also not in dispute that the Applicant has been in occupation for a time which goes far back beyond 2006 when the Respondent deponed he discovered she was on his parcel of land. To be precise, to her, she has been there since 17/04/1980. Actually, the Court wondered why the Applicant kept insisting on limiting the period of stay on the land to counting it to begin from 2007 when title is said to have been issued and not from 17/04/1980 when, according to **paragraph 4** of her Affidavit she took possession of the suit land. Again, it was stated in common that the Applicant has put some developments on the land but the Respondent contended that she did so knowing the land not to be hers. Lastly, it is a fact that the Applicant is the one using the parcel of land, and the Respondent is not. These facts lead this Court to find that the Applicant has made out a prima facie case and that if the actions of the Respondent are not halted by way of injunction she is likely to suffer irreparable loss in the sense that she would be evicted and lose the opportunity of continuing to use the land while the suit proceeds and her properties are likely to be destroyed and put in such a position as would not be restored to the state they are in. The totality of the matter is that the Application is merited. It meets the test in the *Giella v Cassman* case (supra).

b) Who to bear the costs of the Application and what orders to issue

17. I have come to the conclusion that the Application dated 08/11/2021 has merits. I therefore grant **Prayer No. (2)** of the Application [which prayer I listed above as **(b)**] except that it shall me modified by deleting the phrase “... and determination of this Application...”. **The Applicant shall have the costs of the Application.**

18. For purposes of monitoring the progress of the suit, each party is hereby directed to index, bind and paginate its bundle of documents to rely on at the hearing, and exchange them within the **next thirty (30)** days. The timelines should be strictly complied with. The Originating Summons shall be mentioned on 27/04/2021 for confirmation of compliance and taking of further directions.

Orders accordingly.

Dated, signed and delivered at Kitale via electronic mail on this 2nd day of March, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE