



REPUBLIC OF KENYA



Redeemed Gospel Church-Kwale v Nganga (Environment & Land Case E002 of 2022) [2022] KEELC 14542 (KLR) (5 September 2022) (Ruling)

Neutral citation: [2022] KEELC 14542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E002 OF 2022**

AE DENA, J

SEPTEMBER 5, 2022

BETWEEN

REDEEMED GOSPEL CHURCH-KWALE PLAINTIFF

AND

NORMAN NJUGUNA NGANGA DEFENDANT

RULING

The Application

1. This suit is commenced by way of originating summons by the Redeemed Gospel Church Kwale (respondent) against one Norman Njuguna Nganga (applicant) who has brought the notice of motion application dated 3/3/2022 seeking the following verbatim orders;
 - a. That a temporary injunction be issued restraining the respondent, its employees, agents, servants and/or assigns or any other person claiming under them from further alienating, developing, destroying and or interfering with all that piece of land known as LR No 5007/82 Kwale pending the hearing and determination of this application.
 - b. That the respondents, its employees, agents and or servants and any other person claiming under the respondent be evicted forthwith and deliver vacant possession of LR No 5007/82 Kwale to the Applicant
 - c. That in the alternative, a mandatory injunction be issued compelling the respondent, its employees, agent and or servants and any other person claiming under the respondent to vacate LR No 5007/82 Kwale.
 - d. That the orders of this honourable court be supervised and or enforced by the OCS Kwale Police Station
 - e. That costs of this application be borne by the respondent



2. The application is supported by grounds on its face and the affidavit of Margaret Wambui Njuguna as done of the applicant pursuant to a power of attorney dated 17/12/2020. It is averred that the applicant is the registered owner and proprietor of all the land known as LR No 5007/82 Kwale (suit property) which was allotted to him *vide* allotment letter no 42973/295 dated 8/10/1976. That at the time of allotment, the suit property was unsurveyed and had been captured as plot no 1 Kwale. The applicant states that *vide* a letter dated 8/10/2020 he submitted a deed plan of the suit property to the land office to facilitate survey and subsequent issuance of a title. That on 8/1/2021 he applied for registration of a lease of the suit property and was issued with a lease on 19/1/2021 followed by a certificate of title on 21/7/2021. It is averred that the respondents, its servants, agents employees and persons claiming under them have since trespassed and are illegally occupying the suit property and have put up structures thereon.
3. The deponent states that a letter of allotment does not confer rights of ownership but is merely a conditional offer of the land to the allottee subject to the allottee satisfying the terms and conditions of the allotment. That an allotment can also be cancelled or revoked before the title to the land is processed and issued in the name of the allottee. It is only after one has adhered to the requirements set out in the latter of allotment and is subsequently registered and issued with title that one acquires an absolute and indefeasible proprietary interest in the land.
4. It is averred that adverse possession can only run against the title of a registered proprietor. That in the present case the applicant was first registered as proprietor of the suit land on 12/7/2021. That the respondent's illegal occupation and trespass on the suit property has hampered development as potential investors have shunned the property. It is stated that sections 25 and 26 of the [Land Registration Act](#) stipulates that title of land is *prima facie* evidence that the registered proprietor is the indefeasible owner to the same. The applicant seeks that the respondent is evicted from the land and the instant application is allowed.

The Response

5. In response to the application, the respondent filed grounds of opposition dated 26/4/2022. It is stated that the application is brought in bad faith, misconceived, vexatious and an abuse of the court process. That the same has no merit as it is geared towards delaying the quick settlement of this suit which is based on the doctrine of adverse possession. That allowing the application is equivalent to determining the main suit which will be prejudicial to the plaintiff. The respondent seeks that the application is dismissed.

Applicants Submissions

6. The applicants submissions were filed on 26/05/2022. Counsel for the applicant cited several authorities including [Virginia Njoka Versus Joel Nalban Ouma & Another](#) [2003] eKLR that affirmed the principle for grant of a mandatory injunction at interlocutory stage as spelt out in the [Halsbury law England](#) vol 24, that the said orders should only be granted in the clearest of cases. On whether the case is clear enough to enable the court issue the orders sought at this stage, it was contended that from the pleadings filed by the parties the case is not only crystal clear but simple warranting the grant of the orders sought. That the core of the controversy herein is adverse possession of registered land. Referring to the Court of Appeal holding in the case of [Wambugu Versus Njuguna](#) [1983] KLR 172 it is emphasised that the owner of the land must have lost his right to the land by being dispossessed or by having discontinued his possession. That section 38 of the [Limitation of Actions Act](#) provides that where one claims entitlement to land by adverse possession, they apply to have the land registered in their names in the place of the then registered proprietor of the land. It is submitted that the respondent



is a trespasser on the suit property and ought to be evicted. The court is urged to find the application merited and to allow the same with costs.

Respondents Submissions

7. The respondent's submissions were filed before court on 14/6/2022 where it is submitted with regard to the prayer for temporary injunction that the applicant has not adduced any evidence to demonstrate that the respondent was alienating or interfering with the suit property. That the respondents claim being premised upon the doctrine of adverse possession, it is preposterous to bar them from the land. That the prayer of injunction should fail given that the respondent has been on the suit property for the past twenty years and even has its office on the suit property.
8. On the prayer for eviction, it is submitted that evicting the plaintiff without giving them an opportunity to ventilate their case will be a miscarriage of justice. Reliance is placed on the holding in *Patrick Nthiwa Kyalo Versus Mutua Katumo Nduuti* [2022] eKLR. In relation to the orders of mandatory injunction sought it is urged that the applicant has not specified the special circumstances warranting the grant of the orders and therefore his claim must fail.

Analysis and Determination

9. Before going into the issues for determination in the instant application and which are mainly whether the applicant should be granted both the temporary and mandatory orders of injunction sought, this court will refrain at this juncture from delving into the merits and demerits of the claim for adverse possession. It is clear that the same forms the basis of the main suit before this court. The parties will fully be heard on the evidence tendered to enable the court conclusively determine the suit. However, what is before court at this interlocutory stage is the application for injunction and this is where focus should be directed.
10. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides: -
 - a. "Where in any suit it is proved by affidavit or otherwise—
 - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev 2012] Civil Procedure cap 21 [Subsidiary] C17 – 165;
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."
11. The conditions for consideration further in granting an injunction are now well settled in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

 - a. establish his case only at a *prima facie* level,
 - b. demonstrate irreparable injury if a temporary injunction is not granted, and



- c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
- d. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd V Afraba Education Society* [2001] Vol 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

12. On establishment of a *prima facie* case, it is the plaintiff/respondents case that they have been in occupation of the suit property for over 20 years. That the same houses their church offices and form part of their parking lot. In order to get a clear picture of the extend of actual occupation by the plaintiff, I had the benefit of perusing the affidavit in support of the originating summons herein, wherein it is stated that the plaintiff has been in physical occupation and possession of the suit property which measures 0.0465Ha. That during such occupation, the owners of the suit property have never been known until of recent times when it was found out that the land is registered in the names of Norman Njuguna Nganga the defendant/applicant. The applicant on the other hand states that he is the registered owner of the land having been allotted the same way back in the year 1976 culminating into his registration as proprietor as highlighted elsewhere in this ruling.
13. A copy of the title to the suit property is annexed to the applicant's pleadings to confirm his registration as the proprietor of the suit property. It is also clear that he has not been in occupation of the same. From the photos annexed in the pleadings, the respondents have set up structures on the suit property. A *prima facie* case has been established as to the ownership of the suit property, however I will be hesitant in pronouncing myself on the issue of trespass as alleged by the applicant. It is noteworthy that the respondent's occupation of the suit property has not been subject of any dispute between the parties until this particular time when the claim for adverse possession has been filed.
14. On whether the plaintiff stands to suffer irreparable loss, I will be guided by the following holding in [Nguruman Limited case](#) (supra)

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable



remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

15. The evidence tendered before court shows that it is the respondent who has been in use and occupation of the suit land. The applicant has not led the court to the evidence that their continued use and occupation of the same has led to any amount of loss on his part. As earlier stated a dispute between the parties herein has only come into play after the originating summons subject of this suit was filed. The applicant has not demonstrated previous attempts to have the applicant move out of the land or the intention to have the land put into any developments for their benefit. Evidently the second test has not been proved by the applicant.
16. In *Chebii Kipkoech vs Barnabas Tuitoek Bargarioria & Another* [2019] eKLR, the court held; -

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”

I have already rendered myself on the two grounds for threshold of the orders sought. It is the plaintiff/respondent who is in use and occupation of the land and has made developments on the same as evidenced by the photographs attached to the pleadings. It is imperative that the balance of convenience automatically tilts towards the plaintiffs. I am further guided by the Court of Appeal dictum in *Esso Kenya Limited vs Mark Makwata Okiya* Civil Appeal No. 69 of 1991:

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the *status quo* of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the *status quo* should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.



17. The court has looked at the nature of the prayers sought by the applicant; the court is perfectly within its rights to make orders that would effectually give meaningful relief to any party aggrieved. In doing so, the court is also keen on preservation of the substratum of the subject matter and to prevent prejudice between parties pending the hearing and determination of the main suit. In exercise of its inherent and general jurisdiction as granted by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of court, the court is inclined to order the *status quo* in this matter be maintained pending the hearing and determination of the originating summons. The court in doing so associates with the following recent holdings of the courts; -

TSS Spinning & Weaving; Company Ltd Vs Nic Bank Limited & another [2020] e KLR, which espoused the purpose of a *status quo* order as follows:

“In essence therefore, a *status quo* order is meant to preserve the subject matter as it is/existed, as at the day of making the order. *Status quo* is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”

18. In Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another [2020] e KLR, the purpose of a *status quo* order was explained as follows:

..... By maintaining the *status quo*, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

19. The upshot of the foregoing is that I find the applicant has not proved to the required standard that injunctive and mandatory orders together with those of eviction suffice in the present application. The following orders shall issue to dispose of the application.
20. The *status quo* obtaining from the date of this ruling shall be maintained and there shall be no alienation or further development of the suit property pending the hearing and determination of the suit. Costs shall follow the event.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 5TH DAY OF SEPTEMBER, 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Munyoki H/B for Mr. Kabiario for the Plaintiff/ Respondent

N/A for the Defendant/Applicant

Mr. Denis Mwakina- Court Assistant.

