



**Murage v Wanjau & another (Environment & Land Case
17 of 2020) [2021] KEELC 4739 (KLR) (27 May 2021) (Ruling)**

Neutral citation: [2021] KEELC 4739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 17 OF 2020**

**YM ANGIMA, J
MAY 27, 2021**

BETWEEN

SOLOMON MITHAMO MURAGE PLAINTIFF

AND

MILKA MUKAMI WANJAU 1ST DEFENDANT

PAUL MAINA WANJAU 2ND DEFENDANT

RULING

1. By an originating summons dated 13th July, 2020 grounded upon Section 38 of the *Limitation of Actions Act* (Cap. 22), Order 37 Rule 7 of the Civil Procedure Rules, 2010 (the Rules), and all enabling provisions of the law, the Plaintiff sought determination of various questions relating to his claim for adverse possession. In a nutshell, the Plaintiff contended that he had acquired Title No. Nyandarua/Kiriita/Shauri Block 1 Leshau Pondo/520 (parcel 520) currently registered in the name of the Defendants through adverse possession.
2. The Plaintiff contended that he had been in possession and occupation of Parcel 520 since 1974 without interruption from any quarters. It was further contended that the Plaintiff and his family members had built houses and settled on the said property for a period exceeding 12 years hence the Defendants' right of recovery had been extinguished under the law.

B. The Plaintiff's Application

3. Simultaneously with the filing of the originating summons the Plaintiff filed a notice of motion of even date expressed to be based upon Sections 1A,1B & 3A of the *Civil Procedure Act* (Cap. 21), Order 40 rules 1,2 & 3 and Order 51 Rules 1 & 3 of the Rules and all enabling provisions of the law seeking an interim injunction restraining the Defendants from trespassing upon, advertising for sale, transferring, leasing, alienating, interfering or dealing with parcel 520 pending the hearing and determination of



the originating summons. The Plaintiff also sought an order for the OCS Ndaragwa Police Station to enforce the order once issued.

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 13th July, 2020. It was contended that the Plaintiff and his family had been in continuous occupation of Parcel 520 since 1974 but the Defendants had obtained title thereto through dubious means and had taken steps to advertise it for sale. However, it was never contended that the Plaintiff shall suffer any irreparable loss or damage unless the order sought was granted.

C. The Defendants' Response

5. The Defendants filed a replying affidavit sworn by the 2nd Defendant, Paul Maina Wanjau, on 4th August, 2020 in opposition to the said application. It was contended that the Defendants were the registered proprietors of the suit property. It was denied that the Plaintiff has ever occupied parcel 520. It was contended that the Plaintiff was in occupation of an adjacent parcel 521 which belonged to his late father.
6. The Defendants further contended that the occupants of parcel 521 had on several occasions interfered with the boundary and beacons of parcel 520 with the consequence that the transgression was reported to the concerned authorities for resolution. The Defendants contended that the photographs annexed to the originating summons depicted developments on the Plaintiff's parcel no 521 and not parcel 520 as claimed by the Plaintiff. The Defendants, therefore, prayed for dismissal of the Plaintiff's application with costs.

D. Directions on Submissions

7. When the application was first listed for hearing on 20th July, 2020, it was directed that it shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. However, the record shows that the Plaintiff filed his submissions on 2nd December, 2020 whereas the Defendants filed theirs on 21st January, 2021.

E. The Issues for Determination

8. The court has perused the Plaintiff's notice of motion dated 13th July, 2020, the Defendants' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - (a) Whether the Plaintiff has satisfied the requirements for the grant of an interim injunction.
 - (b) Who shall bear costs of the application.

F. Analysis and Determination

(a) Whether the Plaintiff has satisfied the requirements for the grant of an interim injunction

9. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff contended that he had satisfied all the requirements for the grant of an injunction, the Defendants contended otherwise. The Plaintiff relied upon the case of *Giela v Cassman Brown & Co Ltd* [1973] EA 358 in support of his application whereas the Defendants relied on the same authority as well as other authorities on adverse possession.



10. The principles for the grant of an interim injunction were summarized in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 as follows:-
 - (a) First, an applicant must demonstrate a prima facie case with a probability of success at the trial.
 - (b) Second, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.
 - (c) If the court is in doubt on the second principle, it shall decide the case on a balance of convenience.
11. The court is aware that at this interlocutory stage, it is not required to investigate or make any definitive findings on disputed factual matters. The question as to whether or not the Plaintiff has established the elements of adverse possession is exclusively reserved for the trial court. However, the court is obliged at this interlocutory stage to satisfy itself that the Plaintiff has made out a prima facie case with a probability of success at the trial.
12. Although the Plaintiff annexed some photographs to his originating summons claiming that they depicted developments on parcel 520, the Defendants swore a replying affidavit in which they stated that those developments were actually on parcel 521 which belonged to the Plaintiff's father. The court has noted from the record that that Plaintiff did not file any further or supplementary affidavit to controvert the Defendant's contention. The court has further noted that the Plaintiff's photographs are not accompanied by any certificate stating where and by whom they were taken.
13. There is some serious doubt, on the basis of the material on record, whether or not the Plaintiff has actually been in possession of parcel 520 as opposed to parcel 521. The Plaintiff did not respond at all to the Defendants' allegations that the occupants of parcel 521 had tampered or interfered with the boundaries and beacons of parcel 520 and that the matter was reported to the Deputy County Commissioner for resolution. It was the duty of the Plaintiff to establish the issue of possession and occupation of parcel 520 and the court is of the opinion that he has failed to discharge that duty.
14. The court is further of the opinion that the Plaintiff has not demonstrated the nature and extent of irreparable loss, if any, he shall suffer in the absence of an injunction. The court has noted from his supporting affidavit that there is no averment that he shall otherwise suffer irreparable loss should the orders sought be denied.
15. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal considered the nature of irreparable loss as follows:

“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 facie, the nature and extent of the injury. 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 of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
16. The court is thus not satisfied that the Plaintiff has satisfied the second requirement for the grant of an interlocutory injunction. He has failed to demonstrate that he shall otherwise suffer irreparable loss



which cannot be adequately compensated by award of damages in the absence of an injunction. In the premises, the court is not inclined to grant the interim order sought by the Plaintiff.

b. Who shall bear costs of the application

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the Defendants shall be awarded costs of the application.

G. Conclusion and Disposal

18. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for interim orders. Accordingly, the Plaintiff's notice of motion dated 13th July, 2020 is hereby dismissed with costs to the Defendants. It is so ordered.

It is so decided.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 27TH DAY OF MAY 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of :

Ms. Wanjiru Muriithi for Defendants

No appearance for the Plaintiff

C/A- Carol

Y. M. ANGIMA

JUDGE

