



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC No. E002 OF 2021 (OS)**

**PENINAH MORAA MOSE.....PLAINTIFF**

**VERSUS**

**PRISCILA MUTHURI KABURO.....1<sup>ST</sup> DEFENDANT**

**THE NAKURU COUNTY LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of Notice of Motion dated 19<sup>th</sup> February 2021, an application through which the plaintiff seeks the following orders:

1. *[Spent]*

2. *[Spent]*

3. *The Hon court be pleased to grant orders of temporary injunction restraining the defendants/respondents either by himself, agents, servants and or anyone claiming under the defendants/respondents from entering upon, re-entering, trespassing onto, laying a claim to, building on, constructing on, cultivating, harvesting gravel, soil and or stones, interfering with and/or in any other manner whatsoever dealing with the parcel LR No. SHAWA GICHEKA BLOCK 4/113 and or any portion thereof pending the hearing and determination of this originating summons.*

4. *The OCS Menengai Police Station and or any police officer do ensure compliance of this court orders.*

5. *Costs of this application be borne by the defendants/respondents.*

6. *Such further and/or order be made as the Hon. Court may deem fit.*

2. The application is supported by an affidavit sworn by Peninah Moraa Mose. She deposed that on 18<sup>th</sup> February, 2021 the 1<sup>st</sup> defendant and her agents/servants descended on the suit property and flattened houses thereby evicting her and her family without notice or a court order. She annexed a photograph said to be depicting the said demolitions and a title for Shawa Gicheha Block 4/113 in the name of the 1<sup>st</sup> defendant. She went on to state that she has been in occupation of the suit property for the last twenty (20) years and that the 1<sup>st</sup> defendant's actions will alter the texture of the suit property. She added that her, her animals and her children have been rendered homeless and that the 1<sup>st</sup> defendant's action will occasion her irreparable loss since she entirely depends on the proceeds from the suit land. She therefore urged the court to grant the orders sought.

3. The 1<sup>st</sup> defendant opposed the application through a replying affidavit in which she deposed that the plaintiff herein is not the current occupier of the land as the person she allowed to stay on the suit property is her sister Pamela Kemunto who stayed there from around 2015. That the plaintiff has always been and still is a resident of Nyamira County and has never lived, depended on or raised her children in the suit property.

4. The 1<sup>st</sup> defendant deposed further that she was married to the plaintiff's brother Simon Mose Kengere who later passed away in November 2016 and that she purchased the suit property in the year 2004 and did not develop or farm it for about 3 years. She annexed a copy of a sale agreement and title deed. She added that around the year 2007, together with her late husband, they decided to farm the land for about 5 years until 2012 when the plaintiff's son Duke Kengere requested to also farm it. Duke farmed until he moved to Kitale and the land remained bare until sometime in 2015 when they allowed the applicant's sister, Pamela Kemunto to till it and to put up semi-permanent mud house.

5. The 1<sup>st</sup> defendant went on to state that they stayed harmoniously until the year 2019 when she notified Pamela Kemunto of her intention to

use the land but she could not vacate owing to the COVID-19 pandemic. She concluded by stating that the orders sought aim to deprive her of her proprietary rights over the suit property and urged the court to dismiss the application with costs.

6. The 1<sup>st</sup> defendant also filed a notice of preliminary objection on the grounds that the plaintiff lacks the *locus standi*, “is short of proper parties pursuant to Order 1 of the Civil Procedure Rules” and that the application is fatally defective in form, incompetent and an abuse of the court process.

7. The 2<sup>nd</sup> defendant did not file any response and opted not to participate in the hearing of the application. The applicant filed written submissions while the 1<sup>st</sup> defendant elected not to file any submissions and relied on her replying affidavit.

8. The plaintiff submitted that the 1<sup>st</sup> defendant has not denied the fact that the plaintiff’s family are in occupation and were allowed to put up a semi-permanent house which the 1<sup>st</sup> defendant has since demolished. She further submitted that the allegation by the 1<sup>st</sup> defendant that she bought the suit property is full of falsehoods and that the annexed sale agreement was executed by only two people without witnesses thus rendering it suspect and or an afterthought. She relied on the cases of **Giella v Cassman Brown [1973] EA.358** and **TNK vs JKN [2020] eKLR** and urged the court to allow the application as prayed.

9. No submissions were advanced by any party on the preliminary objection. Nevertheless, as ordered on 12<sup>th</sup> May 2021, the preliminary objection is deemed incorporated into the 1<sup>st</sup> defendant’s response to the application.

10. I have considered the application, the affidavits and the submissions. The plaintiff seeks an interlocutory injunction. The principles while considering such an application have been settled since **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. The Court of Appeal reiterated and clarified them in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**. Such an applicant must establish a *prima facie* case with a probability of success. Even if she succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

11. Additionally, applications for interlocutory injunction before this court are impacted by **Paragraph 32 of Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation Of, And Title to Land and Proceedings in Other Courts (Gazette Notice No. 5178 of 2014)** which provides:

***During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.***

12. It is apparent that the plaintiff and the 1<sup>st</sup> defendant have close family ties: the plaintiff is the 1<sup>st</sup> defendant’s sister-in-law. The plaintiff claims to have become entitled to the suit property by way of adverse possession. Whether or not the ingredients of adverse possession exist is a matter to be established through evidence at the trial. Suffice it to note that the 1<sup>st</sup> defendant acknowledges that the plaintiff has been in possession. Whether such possession meets the criteria necessary to sustain a claim for adverse possession is a matter to be determined at trial.

13. I also note the plaintiff’s claims that there exists an agreement that the 1<sup>st</sup> defendant’s holds the suit property in trust for the wider family pending subdivision. The dispute is essentially a family dispute. Parties ought to explore amicable options of resolving it. Pending such resolution either through settlement or through trial, there is need to preserve the suit property by ensuring that there is no further disposition.

14. In view of the family relations between the parties, I do not consider it appropriate to grant a wide-acting injunction of the sort sought by the plaintiff. Adequate preservation of the suit property can be attained through an order of inhibition, in terms of **Paragraph 32 of Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation Of, And Title to Land and Proceedings in Other Courts (Gazette Notice No. 5178 of 2014)** as read with **Section 68 of the Land Registration Act**. I note that the copy of title that was exhibited describes the suit property as Shawa Gicheha Block 4/113. The order of inhibition will be in respect of that specific title.

15. In the result, I make the following orders:

**a) Pending the hearing and determination of this suit, an inhibition be registered against the parcel of land known as Shawa Gicheha Block 4/113.**

**b) Costs of Notice of Motion dated 19<sup>th</sup> February 2021 shall be in the cause.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered through Microsoft Teams video link in the presence of:

No appearance for the plaintiff/applicant

No appearance for the 1<sup>st</sup> defendant/respondent

No appearance for the 2<sup>nd</sup> defendant/respondent

Court Assistant: E. Juma