



REPUBLIC OF KENYA



**Ngari v Nthiga & another (Enviromental and Land Originating Summons  
E007 of 2021) [2024] KEELC 1737 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 1737 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2021  
A KANIARU, J  
JANUARY 31, 2024**

**BETWEEN**

**MURIITHI M NGARI ..... APPLICANT**

**AND**

**PAUL NYAGA NTHIGA ..... 1<sup>ST</sup> RESPONDENT**

**BONIFACE MUGO KATHENDU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before me for determination is a Notice of Motion application dated 04.08.2022 and filed on 05.08.2022 brought under a Certificate of Urgency. It is expressed to be brought under Order 40 Rule 1,3,4 (1) and 5 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling laws. The Applicant – Muriithi M. Ngari is the Applicant in the main suit whereas the 1<sup>st</sup> and 2<sup>nd</sup> Respondents – Paul Nyaga Nthiga & Boniface Mugo Kathendu are the Respondents therein. It is essentially an application for orders of Temporary Injunction and Caution on the suit land, and the prayers sought are as follows:
  - i. Spent
  - ii. Spent
  - iii. The Honourable Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents and/or servants from proceeding with the intended sale, transfer, alienation or otherwise interfering or dealing with the property known as Embu Municipality/1485 and Embu Municipality/1423 pending the ruling and determination of this suit.
  - iv. The Honourable court be pleased to grant orders for the Applicant to place Caution/Caveat in the properties namely Embu Municipality/1485 and Embu Municipality/1423.



- v. The costs of this application be provided for.
- vi. The Honourable court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.
2. The application is premised on the grounds set out on the face of it and on the supporting affidavit sworn on 04.08.2022 by the Applicant inter alia; that he operates a carpentry shop at the suit premises belonging to the Respondents since the year 1988 and that recently he was visited by strangers who informed him that they wanted to view the property with the aim of purchasing the same; that they informed him that they had been sent by the Respondents and that the suit property is on sale; that the said suit property is currently registered under the name of the 1<sup>st</sup> Respondent's father and that unless the Applicant is allowed to put a restriction on the property the same may be disposed hence frustrating the suit herein; that his attempt to have a caution placed on the titles has been futile as the Ministry of lands have requested for a court order. He is seeking ultimately title to the suit lands on the grounds that he has acquired the same by way of adverse possession.
3. The Respondents responded to the application in their respective affidavits all the while denying that they intend to dispose the suit properties; they urge that the Applicant has not demonstrated who the alleged strangers who went to view the property were or when they visited the same; the 1<sup>st</sup> Respondent is of the position that the court lacks jurisdiction to grant Order 4 as sought in the application pursuant to Section 71 of the [Land Registration Act](#) (2012) and that the Applicant has not furnished any evidence of his purported attempt to lodge a Caution on the suit land; they depose that the said application should be dismissed with costs.
4. The application was canvassed through written submissions. The applicant's submissions were filed on 15.03.2023. He submitted that Section 63 (e) of the [Civil Procedure Act](#) empowers the court to make such interlocutory orders as may appear to the court to be just and convenient in order to prevent the ends of justice from being defeated; that the court has jurisdiction to allow him to place a temporary caution on the suit property; that he has met the requirements for the grant of an injunction as he has enumerated several grounds in justifying his interest in the suit property; that failure to restrain the respondents from dealing with the suit property might render this suit an academic exercise as they may dispose the property as they possess the title to the same; that he has been in active possession of the suit properties since 1988 and has lived there in an open, continuous, exclusive, uninterrupted and adverse occupation of and use of the suit property; that the balance of convenience tilts in his favour for the reason that he stands to suffer more if the Respondents interfere with the suit properties; that the Respondent will not suffer any prejudice as they are not in occupation of the suit properties; he urges that the application be allowed with costs.
- He cited the cases of *Giella v Cassman Brown* (1973) EA, *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR, *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others* (2016) eKLR, *Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 others* (2008) eKLR, *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* (2016) eKLR among others to support his position.
5. The 1<sup>st</sup> Respondent filed his submissions on 23.05.2023 whereas the 2<sup>nd</sup> Respondent filed his submissions on 21.09.2023. The 1<sup>st</sup> Respondent submitted that the suit herein is incompetent as it is not based on an enforceable cause of action; that the suit land herein is government land as he is only a lessee from the government and bears a Certificate of lease and not a title deed as urged by the Applicant; that orders of adverse possession cannot be granted as against government land according to Section 41 of the [Limitation of Actions Act](#); that the Applicant has failed to meet the requirements for the grant of a temporary injunction. The 2<sup>nd</sup> Respondent took a similar position that the Applicant



had not met the requirements for the grant of a temporary injunction and urged that the application be dismissed.

6. I have considered the application, the responses made to it and the rival submissions. The issue for determination is whether the Applicants is entitled to an order of temporary injunction and registration of caution as against the suit lands.
7. The principles which guide the court when considering an application for a temporary injunction were set out in the case of *Giella v Cassman Brown* [1973] EA 358 where the court set out three conditions that ought to be met for grant of a temporary injunction. It was stated:

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

8. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002, described a *prima facie* case as:

“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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

9. In another case of *Jan Bonde Nielsen v Nguruman Limited & 2 others* [2016] eKLR the court of appeal stated as follows;

“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 urgent necessity to prevent the irreparable damages 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”.

10. The Applicant’s main contention is that he has been in occupation of the suit lands herein being Embu/Municipality/1485 and 1423 from 1988 where he operates his business known as Mureithi’s Furniture. He says that having occupied the suit lands since 1988 openly and without any interruption from the Respondents he has become entitled to the same by way of adverse possession. Occupation is one of the main ingredients of a claim for adverse possession, the Applicants occupation on the suit land has not been denied by the Respondents. In fact the Respondents admit that they have made several attempts to have the Applicant evicted from the suit lands in vain. The issue on whether the said occupation has been uninterrupted for the statutory period of 12 years to enable the Applicant make out a case for adverse possession is a matter that this court cannot make a determination on at this particular stage, this can only be done during trial after hearing all the parties on their case. From



the foregoing and on a balance of probability, I am persuaded that the Applicant has demonstrated a *prima facie* case with probability of success.

11. The Applicant also has a duty to demonstrate that should the orders sought not be granted, he stands to suffer irreparable loss and damage that cannot be compensated with damages. It is not in dispute that the Applicant operates his business on the suit lands which is said to have been ongoing for sometime, should he successfully be evicted he stands to potentially lose his business which to me amounts to irreparable loss.
12. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the temporary injunction, against the hardship to be borne by the Respondents by granting the same. The balance of convenience tilts in favour of the Applicant in this case as has been observed above, he is currently in occupation of the suit premises where he is running a business. In my view, it would be in the interest of justice for the maintenance of status quo until the suit herein is finally heard and determined.
13. Further, the Applicant has made an application for the court to grant orders for him to place a Caution/ Caveat in the properties namely Embu Municipality/1485 and Embu Municipality/1423.  
On lodging of cautions, Section 71 of the [Land Registration Act](#) provides that:  
71. (1) A person who—
  - (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
  - (b) is entitled to a licence; or
  - (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.Sub Section 71(4) provides that
  - (4) The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act. (5) Subject to this section, the caution shall be registered in the appropriate register.
14. The above provisions give the Land Registrar the power to register cautions as well as the power to accept and or reject the same. Since the act of registering a caution is administrative, I agree with the Respondents that the Applicant should have sought for orders of judicial review if indeed the Land Registrar declined to register a caution over the suit lands as this is the remedy available to him in law. This court therefore has no power to issue the orders sought by the Applicant in the manner that he is seeking them.
15. The upshot of the foregoing is that I allow the Notice of Motion application dated 04.08.2022 in terms of prayer no (3) only. Costs to be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**A.K. KANIARU**

**JUDGE**

**01.2024**

