



**Luvate v Amimo (Environment and Land Appeal 8 of 2023)
[2024] KEELC 12 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 12 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 8 OF 2023**

E ASATI, J

JANUARY 18, 2024

BETWEEN

MARTHA M'MBAYI LUVATE APPELLANT

AND

NAFTALI AMIMO RESPONDENT

*(Being an Appeal from the Ruling delivered on 8/6/2023 by the
Hon S. Ongeri, SRM at Vihiga in MCL & E Case No. 12 of 2023)*

JUDGMENT

1. The Appellant is the Defendant and the Respondent the Plaintiff in an on-going case namely; Vihiga SPM MCE & L Case No. 12 Of 2022(OS) (herein referred to as the suit).
2. The Record of Appeal shows that the Respondent filed an application vide the Notice of Motion dated 10th November 2022 in the suit seeking for an order of temporary injunction restraining the Appellant and her agents from in any way interfering with the Respondent's quiet possession and use and/or doing any act that is inconsistent with the applicant's rights over land parcel known as Nyang'ori/kapsotik/452 pending the hearing and determination of the suit.
3. The record further shows that the application was opposed vide the Grounds of Opposition dated 30th November 2022 and Replying Affidavit sworn by the Appellant on the same date.
4. The application was heard by the trial court and vide its ruling delivered on 8th June, 2023, the court allowed the application and issued an order of temporary injunction restraining the Appellant and her agents from in any way dealing with or developing and/or interfering with the Applicant's quiet possession, use and/or doing in any act that is inconsistent with the Applicant's rights over the property pending the hearing and determination of the suit.
5. Aggrieved by the ruling, the Appellant filed the present appeal on the grounds that: -



- a) the learned Magistrate erred in law when he granted a temporary injunction against the appellant, a registered proprietor of the suit land yet he had correctly stated that a title holder should have superior rights.
 - b) the learned Magistrate erred in both law and fact when he failed to consider the fact that the Respondent has never been in actual physical possession of the subject land and that the only house which is sitting on the suit land belongs to the appellant who is in actual possession of the land.
 - c) the learned Magistrate erred in law and fact when he totally disregarded the appellant's evidence in opposition of the application for temporary injunction as contained in the appellant's responses to the application.
 - d) the learned Magistrate was totally misdirected when he overlooked the fact that the Respondent had not presented any evidence whatsoever to challenge the appellant's proprietorship.
 - e) the court erred when it made a conclusion that the balance of convenience tilted in favour of the Respondent yet the evidence on record clearly showed that the Respondent has never stayed in the suit land and in fact the appellant was the one who was in actual physical possession of the subject land.
 - f) the learned Magistrate was totally wrong when he held that to disallow an application for temporary injunction would have the consequences similar to an eviction from the suit parcel when it was apparent that the Respondent was not staying in the suit land and has never been in quiet possession of the suit land.
6. The Appellant sought for orders that the appeal be allowed, the orders dated 8th June, 2023 be set aside and be replaced with orders dismissing the application for injunction in the lower court dated 10th November, 2022.
 7. Directions were taken by consent on 12th October, 2023 that the appeal be canvassed by way of written submissions pursuant to which written submissions dated 14th November 2023 were filed by the firm of Luvayi F. & Co advocates on behalf of the appellant and 20th November 2023 by the firm of Olucheli & Company Advocates on behalf of the Respondent.
 8. The sole issue for determination in this appeal is whether or not the trial court erred in granting the order of temporary injunction in the circumstances of the case.
 9. The grounds that were advanced by the Respondent in support of the application for injunction in the lower court were that he bought the suit land and had been in occupation thereof since the year 1996. That the Appellant had trespassed onto the land on 5th November 2022 and denied the Respondent the chance to utilize the land. To the application, the Respondent had attached a copy of land sale agreement and photographs of structures that the Appellant had started to put up on the suit land.
 10. The Appellant's response to the application was that the Respondent had never had actual physical possession of the suit land. That the Respondent and his wife reside on parcel no. Nyang'ori/kapsotik/453 and not on the suit land. That she is the absolute registered owner of the suit land and has possession thereof after acquiring proprietorship on 4th August 2022 through a succession process. That when she acquired proprietorship of the land, no one was living thereon. The Appellant further contended that she would be greatly prejudiced if an injunction was to be issued against her.



11. In this appeal it has been submitted on behalf of the Appellant, that certificate of title to land is conclusive evidence of proprietorship hence the appellant who is the registered owner of the suit land should have superior rights. That the trial court made a grave mistake when it failed to consider that the Appellant was not only the registered proprietor of the suit land but also the person in possession thereof.
12. Counsel submitted further that the orders of the court issued on 8th June, 2023 are contrary to both Constitutional and Statutorily prescribed rights of a proprietor which rights cannot be defeated. That the trial court disregarded both the evidence and submissions of the Appellant. That there can never be a prima facie case in adverse possession suits when the Applicant never occupied the subject land and that where prima facie case is not established the irreparable injury and balance of convenience need no consideration.
13. Counsel submitted further that the Appellant having acquired proprietorship on 4th August, 2022 it cannot be said that the Respondent had acquired land adversely against her. That he who comes to equity must come with clean hands. That the Respondent had lied that he had lived on the subject land since 1996 yet it was evident that he had never been in actual possession of the land. That hence the court's discretion could not be exercised in favour of the Respondent.
14. On behalf of the Respondent, it was submitted that the main issue for determination is whether the appeal is merited. Counsel submitted that for an order of temporary injunction to be granted one had to satisfy the conditions as laid down in the case of *Giella vs Cassman Brown* (1973)EA 385. That the Respondent in the present case satisfied all the conditions for grant of temporary injunction. That the question of the rightful owner is yet to be determined in the main suit. That the Respondent had been enjoying the actual and quiet possession of the suit land until the appellant trespassed thereunto. That there is no evidence that the Appellant has been in occupation of the suit property.
15. I have considered the Memorandum of Appeal, the entire record of appeal and the submissions made. This is an interlocutory appeal as the main suit is yet to be heard. The main suit as the record of appeal shows involves a claim of adverse possession. While the Appellant claims rights to the suit land by reason of being the title holder, the Respondent claims rights to the land by way of adverse possession. It is not disputed that the Appellant became registered proprietor of the suit land in the month of August 2022 about three months to the filing of the suit. The Respondent claims to have had possession of the suit land since 1996. Though the Appellant claims to have been in possession of the suit land, there is no evidence to show this and for how long she had had possession. In paragraph 16 of the Replying Affidavit the Appellant had stated that when she commenced the succession proceedings no one was living on the parcel.
16. Although indeed certificate of title is prima facie evidence of proprietorship, such title is subject to other rights particularly overriding interests under section 28 of the [Land Registration Act](#). The Respondent's claim is based on such overriding interest namely adverse possession. Whether indeed the overriding interest exists is a matter to be tried in the main hearing.
17. The core consideration of the trial court as is clear from the record was preservation of the status quo pending hearing of the suit. It is in the best interest of both parties that the status quo be maintained and the suit be heard expeditiously so as to conclusively determine the rights of the parties.
18. I find that the trial court was justified in granting the orders that it did. I find no reason to interfere with the ruling. The appeal therefore fails and is hereby dismissed. As the suit is still pending hearing and determination, each party to bear own costs of the appeal.

Orders accordingly.



JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 18TH DAY OF JANUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

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JUDGE.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Luvayi for the Appellant

Olucheli for the Respondent.

