



**Kanyua & 3 others v Kimendi (Environmental and Land Originating Summons
E002 of 2023) [2024] KEELC 1112 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**

CK YANO, J

FEBRUARY 29, 2024

BETWEEN

PHILIPHINA KANYUA 1ST APPLICANT

PAULINA KABURU 2ND APPLICANT

CATHERINE KABIRU 3RD APPLICANT

JEDIDA KANGARIA 4TH APPLICANT

AND

MOSES MURIITHI KIMENDI RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 14TH December 2022 by the Applicants seeking an order of injunction restraining the Respondent either by himself, his agents, workmen or any other person claiming through him from entering into or doing any act that interferes with the applicants' use and possession of LR. S. Tharaka/Tunyai 'A'/777 and an order of inhibition to issue inhibiting the registration of any dealing on the said land pending the hearing and determination of this suit. The application is brought under section 68(1) of the *Land Registration Act*, order 40 (1) and (4) and order 51 of the *Civil Procedure Rules*. The application is supported by the affidavit of Philipina Kanyua dated 14th December 2022 and a further affidavit dated 28th November 2023, and is premised on the grounds in the face of the motion.
2. The Applicants' case is that they have been in exclusive possession of the suit land for over 12 years and have developed it over the years to the exclusion of the respondent. That the respondent has moved to the Land Registrar, Tharaka to remove the caution that had been placed against the land by the 1st Applicant in the year 2006. That the Land Registrar has threatened to remove the caution unless there is a court order. The Applicants are apprehensive that if the said caution is removed, the respondent may proceed to sell the land to third parties and expose the Applicants to eviction, and the applicants



will suffer irreparable loss and damage. That it is in the interest of justice that the subject matter be preserved pending the determination of the suit.

3. The Respondent has opposed the application through a replying affidavit sworn on 5th October 2023 and a notice of preliminary objection of even date. In a nutshell, it is the Respondent's contention that the application is res judicata and filed contrary to Section 7 of the *Civil Procedure Act* and therefore the court lacks jurisdiction to grant the orders sought. That the application is premature, bad in law and a non-starter and an abuse of the court process and ought to be struck out with costs to the Respondent.
4. The respondent deposed that he is the registered owner of the property and was issued with title deed on 15th November, 1993. A copy of the title deed marked "MMK 1" has been annexed. The Respondent avers he is aware of the cradle of this matter which originates from a series of transactions between his late father Stephen Kamendi and the late Runcwe Ncundu Maiga alias Rugwe Ncundu, the Applicants' late father who was the legal and beneficial owner of the suit property at the onset. A copy of the green card marked "MMK 2" has been annexed. That vide a series of transactions, the land was illegally sold to various parties concurrently, which led to proceedings in Meru High Court Civil Case No. 61 of 1993. Copies of the Land purchase agreements marked "MMK 3 (a) to (i)" have been annexed.
5. The Respondent has further deposed that he took over the matter as legal and personal representative of the estate of his late father after he passed on and by consent agreement dated 24th March 1993 and filed in court on 26th March, 1993, the consent was adopted as a judgment of the court on 15th April 1993 and the matter marked as conclusively determined and settled and that file closed. A copy of the said consent agreement marked "MMK 4" has been annexed. The respondent states that he immediately visited the land in an effort to fence and develop it, but has received resistance from the applicants herein. That the 1st applicant lodged a caution in the year 2006 claiming licensee interest, which the respondent denies. He accuses the applicants of trespass.
6. The respondent states that he has been dealing with the land as its legal owner by for example seeking compensation from Kenya Power and Lighting Company Limited for a proposed power line that they wanted to erect across the land. The respondent also states that he wrote to the 1st Applicant and the Land Registrar to remove the caution, but when the same was not adhered to, the respondent filed Marimanti PMC ELC Case No. e20 of 2021 against the 1st applicant. Copies of the letters, search, summons, Affidavit of Service and request for judgment in the said case, application for removal of caution among other documents have been annexed. The respondent avers that he has been subjected to anguish and mental distress and if the orders sought are granted, he will continue to suffer irreparable loss due to the trespass and/or encroachment and believes the application is a non-starter, incompetent and abuse of the court process and devoid of merit and prays that the same be dismissed with costs.
7. I invited counsel to file written submissions which they did and which I have read and taken into account. The issues for determination is whether the orders of injunction and inhibition should issue in favour of the applicants.
8. The conditions for the grant of temporary injunctions were laid in the case of *Giella -vs- Cassman Brown & Co. Ltd* [1973] EA 358 as follows:

"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, and thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. It is common ground that the applicants are in possession and occupation of the suit property which is registered in the Respondent’s name. The Applicants’ claim in this suit is for adverse possession. There has been a caution lodged on the title by the 1st Applicant previously. It is also not in dispute that there were other proceedings in court, though the same was not a claim for adverse possession. The question that arises is whether the Applicants have established a prima facie case with a probability of success.
10. In the case of *Mrao Ltd –vs- First American Bank of Kenya Limited & 2 others* (2003) KLR 125, a prima facie case was described as follows:

“A prima facie case in a civil application includes but is not confined to ‘a genuine and arguable case.’ It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
11. In this case, there is no dispute that the suit property is registered in the name of the respondent. There is also no dispute that the applicants are claiming the land by adverse possession. It is admitted that the applicants are in possession and occupation, though the respondent terms their occupation and possession as trespass and/or encroachment. The claim by the Applicants can only be dealt at the trial.
12. From the material on record, I find that the Applicants have established a prima facie case with a probability of success. I also find that if the orders sought are not granted and the respondent alienates the suit land, the applicants may suffer irreparable injury and their suit will be rendered nugatory. Even if I had doubt, the balance of convenience in this case is in favour of the applicants so that the suit property is preserved and the status quo maintained pending the hearing and determination of the suit. In my view therefore, the applicants have satisfied the prerequisites of grant of the orders sought.
13. Consequently, the notice of motion dated 14th December, 2022 is allowed in terms of prayers 4 and 5 thereof.
14. Costs of the application shall be in the cause.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH FEBRUARY, 2024

In the presence of:

Court Assistant – Martha

Njanja for Respondent

Murango Mwenda for Applicants

C.K YANO,

JUDGE

