



**Mbarire v Ileri & another (Environmental and Land Originating Summons
E009 of 2022) [2024] KEELC 4463 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2022**

A KANIARU, J

MAY 27, 2024

BETWEEN

ALBERT IRERI MBARIRE APPLICANT

AND

NICHOLAS IRERI 1ST RESPONDENT

JOHN NJIRU MBARIRE 2ND RESPONDENT

RULING

1. This ruling is on a Notice of Motion application dated 07.03.2022 filed on the same date under a Certificate of Urgency. It is expressed to be brought under Order 40 rules 1 and 2 of the [Civil Procedure Rules](#). The applicant is – Albert Ileri Mbarire - who is the plaintiff in the suit and he is seeking the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. That the Respondents either by themselves, their agents and or servants be restrained from evicting and/or interfering with the applicants peaceful occupation of land parcel number Kagaari/Gikuuri/T.246 pending the hearing and determination of the main suit herein.
 5. That the Respondents either by themselves, their agents and or servants be restrained from selling, transferring, charging, alienating, leasing or in any other way dealing with land parcel number Kagaari/Gikuuri/T.246 pending the hearing and determination of the main suit.
 6. That a prohibitory order do issue and be registered against land parcel number Kagaari/Gikuuri/T.246 pending the hearing and determination of the main suit herein.



7. That costs of this application be provided for.
2. The application is premised on the grounds on the face of it and further on the supporting affidavit sworn by the applicant on 07.03.2022, inter alia; that the Applicant and his siblings reside on the suit land, having been settled there by their uncle, who is their mother's brother after their mother separated from her husband. It is said that the uncle, known as Jacob Njiru Mbarire, is also the respondent's father and is deceased. That their mother died before the suit land could be transferred to her and she was buried on the suit land without their uncle's objection. The uncle was alive at the time. That title to the land remains in the uncle's name.
3. He deposed further that the respondents instituted succession proceedings without his knowledge and a grant was issued and confirmed in their favour. That he wishes to protect his interest in the suit land and therefore he has instituted a suit for adverse possession in this court. He deposed further that together with his siblings, they have extensively developed the suit land having constructed residential houses thereon, cultivated food crops, fodder and macadamia nuts which he harvests as a source of income. That the 1st respondents has been threatening him and through acts of harassment and intimidation has caused his arrest and prosecution for trespass. He is apprehensive that unless a restraining order is issued against the 1st respondent, he will continue to suffer great loss and injury arising from the respondent's acts of interference with his occupation of the suit land.
4. That the respondents have firmly threatened and vowed to forcefully evict him from the land which will render him and his siblings homeless and destitute. He is also apprehensive that if inhibition orders are not issued, the respondents might dispose of the land and thus render the proceedings herein nugatory. He deposed that no prejudice will be occasioned to the respondents if the orders sought are granted as they have never been in occupation of the land. He attached copies of photographs of the suit land. He urges that the application be allowed.
5. The 2nd respondent filed a replying affidavit on 14.06.2022 in support of the applicants application whereas the 1st respondent opposed the same through a replying affidavit dated 17.03.2022. He deposed that he is one of the administrators of the estate of the late Jacob Njiru Mbarire and that the letters of grant were confirmed on 03.05.2016. A copy of the grant is attached. That the applicant filed an application for revocation of grant which was dismissed and now he has filed the present application in the ELC court which has no jurisdiction on matters succession. That the same is a waste of judicial time and the application should be struck out with costs as it has no probability of success.
6. It was agreed that the parties dispose the application by way of written submissions. The applicant opted not to file any whereas the 1st respondent filed his submissions on 11.10.2023.
7. He submitted that it is not clear what orders the applicant is seeking as on one hand he claims adverse possession and on the other hand trust. That for a person to claim title to land through adverse possession, he ought to have occupied the land uninterrupted for a period of not less than 12 years. That there must unequivocal evidence that the possession was not permissible that is, it was open with the knowledge of the title holder. That the applicant has admitted in his supporting affidavit that his late mother had permission from the title holder to occupy the suit land. That there is no evidence that the title holder was dispossessed voluntarily.
8. He submitted further that he denies that he holds the land in trust for the applicant as the land is privately owned. That the applicant has not demonstrated the elements for the grant of conservatory orders and the application should be dismissed. The cases of *Titus Mutuku Kasuve v Mwaani Investments Ltd & 4 others* (2004) eKLR & *Dominic Otieno Ogunyo & 2 others v Helida Akoth Walori* (2022) eKLR were cited in support of the submissions.



9. I have considered the Notice of Motion as filed, the respondent's replying affidavit together with the submissions, and I find that two issues are for determination;
- i. Whether the Applicant is entitled to restraining orders.
 - ii. Whether the applicant is entitled to an order of prohibition.
10. The guiding principles in handling an application for restraining orders were laid down in the case of *Giella v Cassman Brown Co. Ltd* (1973) 358. They are that the Applicant must establish a prima facie case with a probability of success, that the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of probabilities.
11. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank Kenya Ltd & 2 Others* [2003] eKLR 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.”
12. The applicant has filed this case seeking orders of adverse possession over land parcel Kagaari/Gikuuri/T.246. He claims that he has been in occupation of the land together with his siblings since 1973 and that they have made extensive developments. He produced in evidence photographs showing the said developments, which the 1st respondent did not challenge. The 1st respondent notably did not also challenge the applicants occupation of the land. The applicant's occupation of the land was also confirmed by the 2nd respondent in his replying affidavit. The main ingredient in a claim for adverse possession is actual occupation and possession of land uninterrupted for over 12 years. Whether the applicant's occupation of the land has been for over 12 years uninterrupted is a matter to be determined during trial. Therefore, from the material before me, I do find that the applicant has demonstrated a *prima facie* case with probability of success.
13. On whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Court of Appeal in *Nguruman Limited v Bonde Nielsen & 2 Others* (2014) eKLR as cited in *Isaac Musyoki Komoni v Sammy Kaumbulu Mbuvi* [2022] eKLR held that: -
- “On the second factor, 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. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. 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 stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”
14. The Applicant claims that the 1st respondent has been interfering with his peaceful occupation of the suit land by threatening him and has caused his arrest and prosecution for trespass. That he has also threatened to forcefully evict him from the land, facts which the respondent did not deny. The 2nd respondent also confirmed in his replying affidavit that the applicant and his siblings have no other



place to call home and they would be rendered homeless were they to be evicted from the suit land. The applicant's suit is based on adverse possession. This court agrees with the applicant that were he to be evicted from the suit land, the suit would be rendered nugatory. Therefore these factors to me amount to irreparable injury that cannot be compensated by way of damages.

15. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicants by refusing to grant the restraining orders, against the hardship to be borne by the Respondent by granting them. From the circumstances, I find that the balance of convenience tilts in favour of the applicant who is in occupation and use of the suit land. I also find that the respondents stand to suffer no prejudice if the restraining orders are granted as they will still be assured of the land should the applicant's claim fail.
16. On whether the applicant is entitled to orders of prohibition for the preservation of the suit property, I appreciate that from the material on record, the applicant is seeking a declaration that he has acquired the suit property by way of adverse possession. The purpose of a prohibitory order is to preserve the suit property pending the hearing and conclusion of a suit. As was held in the case of *Shivabhai Patel v Manibhai Patel* [1959] EA 907 as cited in *Bernard Ngari Njoka v John Ngungi Muthakie* [2019] eKLR, it is the duty of the court to preserve property which is in dispute. The court is of the view that if the suit land is disposed before the pending suit is determined, the suit will be rendered nugatory.
17. For the foregoing reasons, the court finds that the notice of motion application dated 07.03.2022 has merit and the same is allowed in terms of prayer (4), (5) and (6).
18. Costs to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 27TH DAY OF MAY, 2024

In the presence of the plaintiff/ Applicant and defendant/ respondent.

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

27. 5.2024

