



**Okwemba v Mullo & another (Environmental and Land Originating
Summons E014 of 2023) [2024] KEELC 5355 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E014 OF 2023**

OA ANGOTE, J

JULY 18, 2024

BETWEEN

CAROLYNE AKEYO OKWEMBA PLAINTIFF

AND

CHARLES ODHIAMBO MULLO 1ST DEFENDANT

ROSELYN ADOYO MULLO 2ND DEFENDANT

RULING

1. Before the Court for determination is the Plaintiff's Notice of Motion dated 14th March 2023 and brought under Sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Sections 238 and 239 of the *Companies Act* and Order 5 Rules 21, 22 and 25, Order 39 Rule 5 and Order 40 Rules 1, 2, 4 of the Civil Procedure Rules.
2. The Plaintiff is seeking for the following orders:
 - a. Pending the hearing and determination of this suit, a temporary order of injunction do hereby issue restraining the Defendants whether by themselves, their agents, servants or anyone claiming under the Defendants or their instructions from evicting the Plaintiff, re-entering, leasing, selling, disposing off, charging, mortgaging, encumbering or in any way interfering with the Plaintiff's quiet possession, use and/or ownership of the suit property (Maisonette No. U03 on L.R No 18111/45, Baraka Estate within Embakasi Area, Nairobi).
 - b. An order do issue calling for the subordinate Court file in Milimani CMCC/E822/2023 Charles Odhiambo Mullo vs Moran Auctioneers & 2 Others to this Court for hearing and determination with the instant suit for the fair, just and expeditious disposal together with the instant Originating Summons.



3. The application is based on several grounds and supported by an affidavit sworn by the Plaintiff where she stated that the Defendants who have been residing in Amman, Jordan since 2012 are the joint registered proprietors of the suit property.
4. She further deponed that the Defendants sold the suit property to her and her estranged husband, Alfrique Otieno, in 2010 for Kshs. 6,300,000; that they took vacant possession of the suit property but are yet to register a transfer in their favour and that they have enjoyed quiet possession of the suit property for a continuous period of over twelve years.
5. The Plaintiff deponed that at all material times since the acquisition of the premises until March 2021 when divorce proceedings were instituted, the suit property was rented out and Mr. Otieno collected rent from the same and used the money to meet family needs within their matrimonial home.
6. It was deponed that in November 2022, she instructed Moran Auctioneers to levy distress for rent for arrears that stood at Kshs. 630,000; that the tenant eventually settled the arrears and opted to vacate the suit property in February 2023 and that the suit property has been unoccupied since then.
7. The Plaintiff averred that the sale agreement, transfer and all other documents relating to the acquisition of the suit property are in the exclusive custody of her estranged husband who has refused to share the same with her.
8. The Plaintiff further deponed that they were not able to register the transfer; initially because of financial constraints and later because of irreconcilable differences that later led to the dissolution of their marriage.
9. The Plaintiff asserted that the Defendants' title in the suit property had been extinguished by her adverse possession of the same. She further averred that on or about 8th March 2023, the 1st Defendant filed Milimani CMCC/E822/2023 Charles Odhiambo Mullo vs Moran Auctioneers & 2 Others claiming that he never sold the suit property to the Plaintiff and Mr. Otieno and claimed for the rent that was due for the months between February and October 2022.
10. The Plaintiff averred that unless restrained by the Court, the 1st Defendant could restrain her from going into the suit property.
11. In conclusion the Plaintiff stated that the suit in the subordinate Court raises similar issues to the instant suit and the two should therefore be heard concurrently.
12. The 1st Defendant filed a Replying Affidavit sworn on 18th August 2023. He deponed that him and the 2nd Defendant are the joint owners of the suit property having acquired the same in 2003. He denied the Plaintiff's claim of ownership.
13. The 1st Defendant further averred that as the owner of the suit property, he has been paying land rates and rents for the same. He stated that since 2012, him and his family have been living abroad and that he appointed agents to manage his properties while he was away and that one of those was Mr. Otieno whom he engaged on a voluntary basis to manage the suit property.
14. The 1st Defendant averred that the Plaintiff has never had a legitimate claim on the suit property. He stated that this position was supported by the fact that they were still living on the suit property in 2010 - the year the Plaintiff claims to have taken possession.
15. Additionally, he averred that the Plaintiff's estranged husband denied ever purchasing or owning the suit property as per the documents filed in the subordinate Court; that he renovated the suit property in 2011 and secured tenants through the agent and that the last tenant (who denied knowing the



- Plaintiff) prior to the filing of this suit had been on the suit property for eight years and his occupation was interrupted by the Plaintiff's illegal distress for rent.
16. The 1st Defendant deponed that the issuance of an eviction notice by the Plaintiff did not confer title to her; that the tenant did indeed pay Kshs. 750,000 in rent arrears and Kshs. 120,000 in auctioneers' fees and that the tenant did so to forestall any damage to his property as he was being threatened by auctioneers and police officers.
 17. Concerning the rent collected by Mr. Otieno, the 1st Defendant averred that he did so as his agent; that the bank statement exhibited by the Plaintiff in support of her rent collection claims was for Mr. Otieno's tour business and had no bearing to the suit property and that when he learnt of the Plaintiff's attempted intrusion on the suit property, he filed the suit in the subordinate Court.
 18. It was deponed by the 1st Defendant that contrary to the Plaintiff's averments, he has been able to get another tenant to occupy the suit property and it is no longer vacant and that judgement was being awaited as the subordinate Court had jurisdiction to hear the matter before it as the value of the suit property did not exceed Kshs. 13,000,000.
 19. The Plaintiff filed a further affidavit dated 16th February 2024. She deponed that the rent and rate receipts exhibited by the Defendants were for 2023 and did not cover the material period. The Plaintiff further averred that she has been in possession of the suit property since 2010 when her and Mr. Otieno purchased the same and took vacant possession.
 20. Concerning Mr. Otieno's denial of the purchase of the suit property, she stated that he denied having knowledge of the existence of the suit property. Concerning the tenant, the Plaintiff stated that Ben Mwangi Nguyo was the tenant who had rightfully identified her and Mr. Otieno as the landlords.
 21. She stated that she legally levied distress against him; that the suit property was left vacant after Mr. Nguyo vacated but after the instant suit was filed, the Defendants colluded with Mr. Otieno to break into the suit property and install a new tenant.
 22. In conclusion, the Plaintiff stated that the matter in the lower Court was stayed pending the determination of the instant suit as the issue of ownership is likely to be determined in the instant suit.
 23. The 1st Defendant filed a further affidavit sworn on 9th May 2024. He deponed that the Plaintiff had in Civil Case No. E046 of 2022 (OS) *Carolyn Akeyo Okwemba vs Alfrique Otieno Mwana* claimed ownership of the suit property in a matrimonial property dispute and that the application for a temporary injunction in that suit was dismissed. This, according to the 1st Defendant, is an indication that the issue of ownership has been settled.
 24. Parties filed submissions and authorities which I have considered.

Analysis and Determination

25. The conditions for the grant of a temporary injunction were set out as follows in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358:

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.



26. In the case of *Mrao Ltd. vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 the Court defined a prima facie case as follows:

“In civil cases, a prima facie case 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 apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

27. In the instant suit, the right that the Plaintiff is relying upon is that of being in possession of the suit property for more than twelve years and collecting rent from the same. She has averred that her possession has its origins in a sale agreement completed between herself, Mr. Otieno and the Defendants.

28. The existence of that right has been denied by the Defendants who have averred that they are the rightful owners of the suit property.

29. Section 107(1) of the *Evidence Act* provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

30. The Plaintiff is desirous of this Court finding that her right of possession in the suit property exists. It was therefore up to her to prove, prima facie, that the facts she relies upon exist. Having perused the evidence on record, I have found as follows concerning the Plaintiff’s claim of possession.

31. Firstly, the title deed on record is in the names of the Defendants. Secondly, the Plaintiff has averred that she came into possession of the suit property by way of a sale in 2010. However, no single document has been exhibited in support of the said sale.

32. Additionally, the Defendants have produced communication between them and the water company to show that they were living on the suit property in 2010. Thirdly, the Plaintiff has exhibited documents showing that her and Mr. Otieno had been collecting rent from the suit property. The document in question is a copy of a bank statement from March 2019. This is just one month out of the alleged twelve year period.

33. Further, while there is a payment made by the tenant during that month, there is also an agency agreement exhibited by the Defendants. The agreement is between the 1st Defendant and Mr. Otieno. It is therefore plausible that the bank statement is evidence of Mr. Otieno receiving money from the tenant on behalf of the 1st Defendant.

34. Fourthly, the Plaintiff has exhibited documents showing that she instructed auctioneers to distress for rent against the tenant on the suit property. However, the legality of this has been called into question and is the subject of ongoing Court proceedings. It can therefore not be relied upon as conclusive evidence of possession.

35. Based on the foregoing, I am not convinced that the Plaintiff has an unmistakable right of possession in the suit property that is in danger of being infringed by the Defendants. Having failed to prove possession, the Plaintiff has consequently failed to prove that she has a prima facie case with a probability of success. She is therefore not entitled to an order of injunction.



36. The Plaintiff has stated that the suit in the lower Court should be concurrently heard with the instant suit and determined by this Court. The Plaintiff has stated that this is because the suits raise similar issues. However, a perusal of the pleadings in both cases reveals that that is not the case. The suit in the lower Court was filed by the 1st Defendant in this suit and while it involves the Plaintiff in this case as a Defendant, it also involves others who are not parties to the instant suit.
37. Further, the suit in the lower Court is about interruption of quiet possession, illegal distress for rent, liquidated damages and other matters incidental to the illegal distress for rent. The instant suit is about adverse possession. Further, the Defendants herein averred that the subject matter of the suit property was within the pecuniary jurisdiction of the lower Court. This was not denied by the Plaintiff.
38. From the foregoing it is clear that the two suits are manifestly different. Additionally, the lower Court is clothed with jurisdiction to hear the matter. That being the case, it is the finding of the court that the current suit is not sub-judice.
39. For those reasons, the Plaintiff's application dated 14th March, 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JULY, 2024.

O. ANGOTE

JUDGE

In the presence of;

Mr. Alosa for Respondents

Mr. Olala for Applicant/Plaintiff

Court Assistant: Tracy

