



Thuku v Kangethe & 2 others (All three sued in their capacity as Administrators of the Estate of Francis Felix Kangethe s/o Mbithi while Loise Gachiku Kinuthia is also sued as the registered proprietor holding the suit property in trust for beneficiaries of the said Estate) (Environmental and Land Originating Summons E011 of 2023) [2024] KEELC 5841 (KLR) (7 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2023**

**BM EBOSO, J
AUGUST 7, 2024**

BETWEEN

CHARLES GATOTO THUKU PLAINTIFF

AND

EDWARD MBITHI KANGETHE 1ST DEFENDANT

PATRICK NJENGA 2ND DEFENDANT

LOISE GACHIKU KINUTHIA 3RD DEFENDANT

ALL THREE SUED IN THEIR CAPACITY AS ADMINISTRATORS OF THE ESTATE OF FRANCIS FELIX KANGETHE S/O MBITHI WHILE LOISE GACHIKU KINUTHIA IS ALSO SUED AS THE REGISTERED PROPRIETOR HOLDING THE SUIT PROPERTY IN TRUST FOR BENEFICIARIES OF THE SAID ESTATE

RULING

1. The plaintiff initiated this suit through an originating summons dated 8/8/2023. His case is that he has acquired title to land parcel number Kabete /Lower Kabete/5030, a subdivision out of Kabete /Lower Kabete/43 [hereinafter referred to as “the suit property”] under the doctrine of adverse possession. He wants this court to grant him orders of adverse possession vesting the land in him.
2. Subsequent to filing the suit, the plaintiff brought a notice of motion dated 31/10/2023, seeking an interlocutory injunctive order restraining the defendants against disposing, transferring, selling, leasing, charging, entering, subdividing or in any way dealing with the suit land, pending the hearing and determination of the suit. The application is the subject of this ruling.



3. The application was supported by the plaintiff's affidavit sworn on 3/11/2023. It was canvassed through written submissions. The case of the applicant is that he has been on the suit property as an adverse possessor for over 12 years, hence he has acquired title to the land under the doctrine of adverse possession. The applicant adds that the defendants' advocates issued to him a notice under section 152(E) of the Land Act, requiring him to vacate the land. It is his case that the sole purpose of the notice is to defeat this suit.
4. The plaintiff contends that he took possession of the suit land in 2006 and he has developed a school and runs the school on the land. The alleged school goes by the name New Dawn School.
5. Edward Mbithi Kangethe and Loise Gachiku Kinuthia filed a joint notice of appointment, a common response to the application and common written submissions. Patrick Njenga appointed a different law firm and presented his own response and submissions. Because Loise Gachiku Kinuthia was sued in two capacities, I will refer to the administrator of the estate of the late Francis Felix Kangethe s/o Mbithi as the estate. In her personal capacity, Loise Gachiku Kinuthia will be referred to as simply as Loise.
6. The case of both the estate and Loise is that the applicant is untruthful because he concealed the fact that in 2020 he lodged an application in the succession cause that related to the estate of the deceased and that his application was dismissed by the High Court. They contend that the suit land was at all material times trust property, adding that under section 28 of the Land Registration Act, trusts override all other interests in land.
7. The respondents further contend that, having taken out a similar originating summons in the Kiambu Chief Magistrate Court, to wit, Kiambu CMC ELC Case No E060 of 2023, section 6 of the Civil Procedure Act bars this court against entertaining the present originating summons. They add that the applicant's claim is statute-barred.
8. The court has considered the application; the responses to the application; and the parties' respective submissions. The court has also considered the legal frameworks and the jurisprudence relevant to the key question that falls for determination in the application. The key issue to be determined in this ruling is whether the application satisfies the criteria for grant of an ordinary interlocutory injunctive relief.
9. The relevant criteria for grant of an ordinary interlocutory injunction was outlined in *Giella v Cassman Brown & Co. Ltd* (1975) EA 358. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that if the plea for interlocutory injunctive relief is declined, he would stand to suffer damage/injury that may not be adequately indemnified through an award of damages. Third, if the court is in doubt on either or both of the above requirements, the application is to be decided based on the balance of convenience. Lastly, at the stage of interlocutory proceedings, the court does not make conclusive or definitive pronouncements on the key issues in the suit. Definitive pronouncements are reserved for the final determination of the suit.
10. Has the applicant demonstrated a prima facie case with a probability of success? The applicant contends that he has been in adverse possession of the suit property since 2006. He further contends that he has developed and runs a school on the land, going by the name New Dawn School. The court has doubts as to whether the respondents adequately responded to the above allegations relating to development and occupation of the land. The respondents did not also contest the fact that they issued a notice to the applicant requiring the applicant to vacate the land, implying that the applicant was indeed in occupation of the land.



11. In their opposition to the application, the respondents raised questions relating to limitation and subjudice. They have, however, not moved the court through a formal application. On subjudice, one thing the court can observe and comment on without being conclusive or definitive is that, the exact time when Kiambu CMC E & L Case No 60 of 2023 was filed is not clear. The question of “when” is important because the last suit to be filed is the one that suffers the defect of subjudice. This suit was initiated on 23/10/2023. The court does not, however, know when the other alleged suit was initiated. Secondly, if indeed the originating summons was taken out in the Magistrate Court, it is not clear, at this point, if that court has jurisdiction to receive and issue an originating summons under section 38 of the *Limitation of Actions Act*. What is not in doubt is that, an originating summons under section 38 of the *Limitation of Actions Act* is filed and prosecuted in the superior court, to wit, the Environment and Land Court.
12. On limitation period, although the respondents raised the issue of limitation, they did not demonstrate how a claim of adverse possession would be statute-barred in the above circumstances. The applicant’s claim is anchored on adverse possession. He claims to have been in adverse possession of the land since 2006. In her ruling in the succession cause, Judge Kasango observed that the applicant relied on a sale agreement dated 15/4/2008. Clearly, there is doubt as to whether he was an adverse possessor in 2008. It does also emerge at this interlocutory stage that his plea challenging the succession orders was made in 2020.
13. On the adequacy of damages, the applicant deposed that he has developed the suit land and runs a school on it. This fact was not contested. The court doubts that damages would be an adequate remedy were the applicant, together with the children who attend the school, to be uprooted through eviction and the alleged developments demolished.
14. Given the above circumstances, the court takes the view that the present application is one to be disposed based on the balance of convenience. The balance of convenience favours maintaining the obtaining status quo in terms of registration, occupancy and development of the suit land for a period of 12 months. The plaintiff is expected to prosecute his claim and procure a determination within the 12 months. Consequently, the application dated 31/10/2023 is disposed as follows:
 - a. Pending the hearing and determination of this suit, there shall be no dealings in the land register relating to Kabete/Lower Kabete/5030.
 - b. Pending the hearing and determination of this suit, no new construction shall be undertaken on Kabete/Lower Kabete/5030.
 - c. Pending the hearing and determination of this suit, the plaintiff shall not be evicted from Kabete/Lower Kabete /5030.
 - d. Unless extended by the court, the above status quo interlocutory orders shall expire after 12 months from today.
 - e. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF AUGUST 2024

B M EBOSO

JUDGE

In the presence of:

Ms Kamau for the Plaintiff



Mr. Nyangau for the 2nd Defendant

Court Assistant: Hinga

