



Asava & 2 others v Kiminywi & another (Environmental and Land Originating Summons E011 of 2024) [2024] KEELC 7543 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2024
EC CHERONO, J
OCTOBER 31, 2024
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP
22) SECTIONS 5, 7 & 17 AND SECTIONS 36 OF THE CIVIL
PROCEDURE ACT.
AND
IN THE MATTER OF LAND PARCEL NO. LR NO.
BUNGOMA/KIMINII/78**

BETWEEN

**PETER MIHAVA ASAVA 1ST APPLICANT
GIDEON MARK ASAVA 2ND APPLICANT
JOHN NYONGESA WEY ALISIA 3RD APPLICANT**

AND

**PATRICK MBASU KIMINYWI 1ST RESPONDENT
JOYCE KALEGO KIMINYWI (BEING SUED AS THE
LEGAL REPRESENTATIVE OF THE ESTATE OF THOMAS
KEVONGO) 2ND RESPONDENT**

RULING

1. Before me for determination is the Notice of Motion application by the Applicant which has been expressed under Order 40 Rule 1 of the Civil Procedure Rules of 2010. The applicants are seeking the following orders;
 - a. Spent



- b. Spent
 - c. That the Respondents acting either by themselves and/or through their servants, agents and/or family members be and are hereby restrained from entering, taking possession of, utilizing, developing and/or otherwise interfering with the Applicants possession, use and enjoyment of land parcel no. Bungoma/Kiminini/78 pending the hearing and determination of this suit.
 - d. That costs of this application be provided for and be borne by the Respondents.
2. The application is premised on the grounds set out on the face of the application supported by the affidavit of Peter Mihava Asava, on his behalf and that of Gideon Mark Asava and John Nyongesa Wey Alisia.
 3. The said Peter Mihava Asava deposed that on 30th December, 1996 the 1st Applicant entered into an agreement for the purchase of 5 acres of land forming part of LR No. Bungoma/Kiminini/78(hereinafter referred to as ‘the suit land’) from one Tomas Kiminywi Kevongo(deceased) who is the registered proprietor of the suit land and his estate represented by the Respondents herein. He deposed that the agreed consideration of Kshs. 40,000/= was fully paid by the 1st and 2nd Applicants and they have been in occupation of the suit land since the year 2008 to date. It was their case that they have developed the said 5 acres and that the Respondents herein have now purported to lease out the land to third parties to their detriment.
 4. The Applicants made reference to a replying affidavit to the Notice of Motion in their supplementary affidavit dated 28th October, 2023 but the same does not seem to be on record for this court’s consideration.
 5. When the said application came for directions on 23/04/2024, this court directed the said application be canvassed by way of written submissions. The Applicant filed submissions dated 15th May, 2024 while the respondent did not file written submissions.
 6. In the present application, the Applicants are seeking for orders of injunction. It is trite that the principles upon which such applications are determined were settled in the case of Giella v Cassman Brown (1973) EA 358. In essence, one needs to demonstrate a prima facie case with a probability of success, demonstrate that she will suffer irreparable injury unless the orders of injunction are granted, and finally, where the court is in doubt, it will decide the application on a balance of convenience.
 7. As to whether a prima facie case has been established with a probability of success, the Applicants have attached an agreement for the sale of the suit land dated 20th December, 1996 in support of their case. They have also attached a copy of search indicating that they registered a cautions claiming purchasers’ interest.
 8. The second condition for the grant of an injunction is that where an award of damages would be adequate, an order for a temporary injunction would not be granted. It is the applicant’s contention that he and his family have put up structures on the suit land and that they have known the same as home. They further stated that they have been in occupation of the suit land since the year 2008 which is well over 12 years. Giella vs Cassman.
 9. The third and final condition is whether the Applicants have established the first two conditions to the satisfaction of the court but where the court is in doubt, it shall decide the case on a balance of convenience.
 10. On the first condition, the Applicants have stated on oath that on 30/12/1996, they entered into a sale Agreement with one Tomas Kimiywi Kevogo (now deceased) for the purchase of land measuring



- 5 acres at a consideration of Kshs. 40,000/= and paid the entire purchase price and took vacant possession of the land from then to date. They stated they have been in quiet, open, notorious, peaceful, continuous and uninterrupted possession of the suit land to date.
11. They stated that they have extensively developed the land by planting and cultivating crops and constructing semi-permanent house.
 12. The Plaintiffs/Applicants further stated that in March, 2024, the Respondents have purported to lease out a portion of the suit land to third party who attempted to cultivate the same for the first time but they thwarted such attempt. The Applicants contend that they have always had possession and occupation of the suit property at the exclusion of the Respondents. They also argued that they stand to suffer irreparable loss unless the orders sought are granted and that the damages, defendant may suffer, if any, is incomparable to that of the Applicants. Consequently, they urged this court to grant the orders sought.
 13. I have considered the said application, the supporting affidavit, the submission and the applicable law. Though the said application was served and an affidavit of service was filed confirming that the Respondents were indeed served, there is no response filed in opposition thereto. Having satisfied the court that the application was served, the application proceeded ex-parte.
 14. From the affidavit evidence, the Applicant deposed that after they entered into a sale Agreement with the registered owner, one Tomas Kimiywi in December, 1996 they purchased a portion of land measuring 5 acres for a consideration of Kshs. 40,000/= and took vacant possession immediately. They contend that they have been in quiet, open, notorious, peaceful, continuous, and uninterrupted possession from then to date. The Applicants also stated that they have extensively developed the suit land by planting and cultivating crops and constructing a semi-permanent house. These averments given under oath have not been controverted. If the Applicants bought the suit land from Tomas Kimiywi Kevogo who is the registered owner and was given possession immediately and has been in open, quiet, peaceful and uninterrupted occupation of the suit land from 1996 to date, the Applicants in my view have satisfied the first condition for a prima facie
 15. The Applicants have also stated under oath that they have lived on the suit land uninterrupted from 1996 and have extensively developed the same by planting crops and constructing a semi-permanent house where they have known as home. I agree with the Applicants that with such massive developments on the suit land, they stand to suffer irreparable loss if the injunction order is not granted. I am also satisfied that the second condition has equally been met. The Applicants have also stated that they have constructed a semi-permanent house on the suit land where they live and have known as home from 1996 to date. Based on this set of facts, I find that should the Applicants be evicted from the suit land before this suit is heard and determined, the inconvenience they are likely to suffer is greater than that of the Respondents. It is my view that the convenience in this matter tilts in allowing this application.
 16. The upshot of my finding is that the plaintiffs' Notice of motion dated 14th March 2024 is merited and the same is allowed as follows;
 - a. A Temporary injunction is granted in terms of prayer 3 of the Notice of motion dated 14/03/2024.
 - b. The Applicant shall fully comply with the provisions of order 11, of the Civil Procedure Rules, within 21 days of delivery of this ruling and the Respondents shall comply with order 11, of the Civil Procedure Rules within 21 days after the period stipulated for compliance by the Applicant.



- c. An affidavit of service to be filed by the Applicant.
- d. This matter shall be mentioned for pre-trial on 5th December, 2024
- e. Costs shall be in the cause.

17. It is so ordered.

DATED AND SIGNED BUNGOMA THIS 31ST DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

JUDGE

In the presence of;

1. Mr. Okaka H/B for Were for the Applicants
2. Respondents/Advocate-absent.
3. Bett C/A.

