



**Aska v Ngutheru (Environmental and Land Originating Summons
E004 of 2024) [2024] KEELC 7502 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7502 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2024
JO OLOLA, J
NOVEMBER 14, 2024**

BETWEEN

ABIBA NUNO ASKA APPLICANT

AND

JOHN MUGENYU NGUTHERU RESPONDENT

RULING

1. By the Notice of Motion dated 13th February 2024, Abiba Nuno Aska (the Applicant) prays for an order that pending the hearing and determination of the Originating Summons herein, this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent from entering and/or remaining upon or interfering with the Applicant's quiet possession of the parcel of land known as Aguthi/Gatitu/2 (the suit property).
2. The application is supported by an affidavit sworn by the Applicant and is premised on the grounds that:-
 - a. The Applicant has been in occupation of the suit property for over 50 years;
 - b. Her occupation has been open and without permission of the registered proprietor;
 - c. The Respondent got registered as the proprietor of the suit property in 1994 and is now threatening to evict the Applicant; and
 - d. The Applicant is elderly and this is the only home she knows.
3. John Mugenyu Ngutheru (the Respondent) is opposed to the application. In his Replying Affidavit sworn on 15th March 2024, the Respondent avers that he neither knows the Defendant nor has she been in occupation of the suit property since the year 1970 as purported.



4. The Respondent avers that he had purchased the suit property from one Isabel Wanjiru Wood and that he had full time employees in the suit land since 1994 and that it is therefore not true that the Applicant has been residing thereon. The Respondent further avers that he has planted and harvested trees from the suit property continually through the years. It is further his case that he has overtime taken loans from Commercial Banks using the land as collateral and the Bank valuers have continued to visit the land without any objection from anyone.
5. The Respondent avers that at some point in time, he asked one of the workers to demolish a dilapidated wooden structure on the suit land and it was only then that the Applicant's daughter one Zainad Mohamed claimed the property belonged to her.
6. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
7. By her application herein, the Applicant has urged the court to issue temporary injunction orders restraining the Respondent from entering and/or remaining upon or interfering with her quiet possession of the suit property. It is her position that she has acquired the suit property under the doctrine of adverse possession having occupied the same for more than 50 years.
8. On the other hand, the Respondent denies the Applicant's claim and avers that the Applicant has not been occupying the land as alleged. It is the Respondent's case that he did purchase the property in 1994 and has since employed people who work thereon taking care of the same. Accordingly, he denies that the Applicant has become entitled to the land by way of adverse possession or at all.
9. As was stated in the celebrated case of *Giella v Cassman Brown & Co.* [1973] EA 358:

“The conditions for the grant of an interlocutory injunction are, now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”
10. Arising from the foregoing, the first inquiry that this court must make herein is whether or not from the material so far placed before the court, the Applicant has made out a *prima facie* case with a probability of success at the trial. As the Court of Appeal explained in *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] KLR 125:

“...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 the matter before me, the Applicant asserts that she has acquired the suit property by dint of adverse possession having been in occupation thereof for over 50 years. It is her case that the Respondent now threatens to evict her from the said property yet that is the only home she knows.
12. In support of her case, the Applicant avers as follows at Paragraphs 10 to 12 of the Supporting Affidavit:
 10. That I moved into the land in 1970 when my husband abandoned my children and I;



11. That when I moved in, I found a temporary house on the land which I occupied and have continued to be in occupation to date (Annexed herewith and marked “A3” are photos of the house); and
12. That I have lived on the said parcel of land for all those years, planted trees and farmed for subsistence.”
13. I have looked at the photos annexed to the Affidavit. While the house is extremely dilapidated, I was not persuaded that the same would have been on the land in 1970. Given the vegetation surrounding the house, it was apparent that there was not much human activity that had taken place around it for a long period of time.
14. For one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force and without licence or permission of the land owner, with the intention to take over the land.
15. From the material placed before the court, there was nothing to demonstrate that the temporary structure erected on the land had been occupied by the Applicant or anyone else. While the Applicant contends that she had planted trees and farmed the land, there was nothing placed before the court to demonstrate that position.
16. There was no evidence that if there was any occupation, the same had been long, open and notorious. While the Applicant asserted that the Respondent had demolished the house and taken away furniture therefrom, there was no evidence of any such recent demolition or any report made to the police to that effect.
17. On the other hand, the Respondent produced a Green Card for the suit property which shows that since 1994, he has used the property as collateral to secure Bank loans. If indeed the Applicant’s occupation of the land was open and notorious as alleged, her presence could not have been missed when the Bank valuers visited the land to assess the same.
18. In the premises, I was not, persuaded that the Applicant’s Notice of Motion dated 13th February 2024 had any merit. I dismiss the same with an order that the costs shall be in the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 14TH DAY OF NOVEMBER, 2024.

In the Prescreen of:

Ms. Mwikali for the Applicant.

No appearance for the Respondent.

Court Assistant: Kendi

.....

J. O. OLOLA

JUDGE

