



**Rotich v Kirui (Environmental and Land Originating Summons
E006 of 2024) [2024] KEELC 7408 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2024
MN MWANYALE, J
NOVEMBER 7, 2024**

BETWEEN

JULIUS KIPCHIRCHIR ROTICH PLAINTIFF

AND

KIMBERLEY JEPKOECH KIRUI DEFENDANT

RULING

1. Vide his application dated 1st August 2024 brought under a certificate of urgency, the Applicant Julius Kipchirchir Rotich sought orders as follows; -
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending hearing and determination of this suit, this Honourable Court be pleased to grant an order of interim injunction restraining the Respondent either by herself agents, servants and/or any other person acting under her instructions entering, causing wanton destruction, subdividing, causing registration charging, selling interfering in any way and/or evicting the Plaintiff from parcel known as Nandi/itigo/383 and in particular a portion of the subject land measuring 10.0 (Ten decimal zero) acres which has been in actual use and/or possession of the Plaintiff/Applicant.
 - e. O.C.S. Mosoriot Police Station do effect the orders
 - f. Costs of this application be borne by the Respondent
 - g. Such further and/or other orders be made as the Court may deem fit and expedient.



2. At the Exparte stage, on 6/8/2024, the Court issued directions as follows; -
 - “ 11. The application is not certified as urgent to be heard during the current Court recess.
 - ii. The Application to proceed by way of written submissions, in that regard the Applicant to serve the application within 7 days and the Respondent to serve their response within 14 days of service. Leave is granted to the Applicant to file a further affidavit within 21 days from today and to file their submissions within 40 days from today and the Respondent to file their submissions by 4th October 2024. The timelines herein are strict and shall not be varied. The application to be listed for highlighting and take a ruling date on 7th October 2024.”
3. On 7th October 2024, the Court did not sit, and the matter was mentioned on 15/10/2024, where at Ms. Mabalalu learned Counsel for the Applicant indicated that although they had served the application, no response had been filed, they had filed their submission as directed by the Court.
4. The Court granted the interparty date for 29/10/2024 and directed service of the hearing notice.
5. On 29/10/2024, Mr. Kiprono Learned Counsel appeared for the Applicant and drew the Courts attention to an affidavit of service indicating service to the Respondent through her email address, the Respondent being known to the Applicant’s firm of Advocates on record having previously engaged with her in a succession cause.
6. The Court thus deemed the application unopposed as there was no response nor grounds of opposition and being satisfied as to service and there being submissions having been filed, it reserved the ruling for today 7th November 2024.
7. Turning back to the application, in support of the prayers for temporary injunction, the application is grounded on grounds interalia;
 - a. The Applicant has acquired the rights of adverse possession over 10.0 acres within Nandi/itigo/383
 - b. That the Respondent has demonstrated active manifestation of alienating and/or defeating the interests of the Applicants by evicting him, and the Applicant has a prima facie chance of success having been in occupation for over 12 years.
8. In further support of the application the Applicant has filed a supporting affidavit in which he reiterates the grounds in support of the application and has exhibited therein a certificate of official search, a copy of certificate of confirmation of a Grant and photographs showing makeshift structures hosting cows.
9. In his submissions the Applicant has framed two issues for determination to wit, whether the Application meets the threshold for granting a temporary order of injunction.
10. The Applicant submits that he is in exclusive possession of 10 acres and the rights of adverse possession over the same have been established. Consequently, he submits having established a prima facie necessitating issuance of the temporary injunction. In this regard the Applicant has placed reliance on various decisions including, Kenleb Construction Ltd vs New Gatitu Service Station Ltd and Another (1990) eKLR, as well as Mrao Ltd versus First American Bank of Kenya (2003) eKLR.



11. On whether the Applicant stands to suffer irreparable injury in the event the order of injunction is withheld by the Court, the Applicant places reliance on the decision in the case of Pius Kipchirchir Kogo and Frank Kimeli Tenai (2018) where irreparable injury was defined.
12. On the last limb of balance of convenience, the Applicant submits that his housing rights and other socio-economic rights stand to be violated if he is evicted yet he has been in actual possession of 10 acres of the suit land.
13. On the strength of the above the Applicant prays for issuance of the injunction.

Issues For Determination: -

14. Having analyzed the application, the affidavit, the annexures as well as considered the submissions and applicable laws, the Court frames the following as issues for determination; -
 - i. Whether or not the application meets the threshold for grant of an injunction,
 - ii. Whether the application is meritorious
 - iii. What reliefs ought to issue?
 - iv. Who bears the costs of the application?

Analysis And Determination: -

15. This application is under unopposed, the Applicant nonetheless has to meet and discharge their burden of proof as was held in the case of Kabiya & 3 others vs Karugi & 3 others where the Court held inter alia; -

“The burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended. The burden of proof is not way lessened because this is heard by way of formal proof.”

16. The Applicant herein states that he is in occupation of 10 acres within Nandi/itigo/183, the possession and occupation having been through a purchase. The Applicant has exhibited a search and photographs but did not exhibit the agreement for sale, that was entered into in 2007, the Court has thus been denied the chance to look at the very foundation of the adverse possession claim.
17. The Court is aware that at the interlocutory stage, it cannot dwell in the merits or otherwise of the case, however the Agreement for Sale would have been a good basis for the Court to establish whether a prima facie case has been established. The said agreement would have indeed shed light from when the occupation by the Applicant commenced so as to make the Court return a finding on the establishment of a prima facie.
18. In *Mrao Limited versus First American Bank of Kenya Limited* (2003) eKLR, prima facie was defined as follows; -

“in civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
19. On the material exhibited by the Applicant, his entry in the said land said to have been through a purchase in 2007 has not been exhibited by way of an Agreement for Sale, the Court finds that no prima facie case has been established.



20. Having found no prima facie case has been established, and noting that the principles in *Giella vs Cassman Brown Limited* are sequential as was held in the case of *Kenya Commercial Finance Company Limited vs Afraha Educational Society 2001 (Vol 1) E. A. 86*, where the Courts essentially held that;

“an Applicant must satisfy the first condition for granting temporary injunction for the Court to consider the other conditions.”
21. Having failed to establish prima facie case, the Court shall not consider the other conditions for grant of an injunction; as the application fails.
22. The Court has noted from the photographs that the Applicant is rearing cows on the suit parcel and in accordance to Gazette Notice No. 5178/2014, which Gazetted Practice Directions of the Environment and Land Court, paragraph 28 (k) empower Courts to issue orders for maintenance of status quo in land matters.
23. Accordingly, an order for maintenance of status quo on the register of NANDI/ITIGO/183, and on the ground is hereby issues pending hearing and determination of this suit.
24. For avoidance of doubt, save for registration of transfer b transmission to the beneficiaries, the suit property shall not be transferred and/or charged to any third party, and the Applicant shall remain in occupation and possession of the 10 acres in Nandi/itigo/183 pending hearing and determination of the suit.
25. Costs of the application shall be in the cause.

RULING, DELIVERED AND DATED AT KAPSABET THIS 7TH DAY OF NOVEMBER, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of; -

Mr. Kiprono for the Applicant

