



**Gicangacia v Namu (Environment & Land Case E034 of 2021)
[2023] KEELC 18914 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 18914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E034 OF 2021
A KANIARU, J
JANUARY 24, 2023**

BETWEEN

NYAGA GICANGACIA APPLICANT

AND

JOHNSON NGARI NAMU DEFENDANT

RULING

1. What is before the court for determination is a notice of motion dated August 31, 2021 and filed on September 7, 2022. The Application is expressed to be brought under Section 68 (1) [Land Registration Act](#) No 3 of 2012 Laws of Kenya, Section IA, 1B and 3A of the [Civil Procedure Act](#) and all enabling laws.

Application

1. The parties in the application are Nyaga Gicangacia the applicant and plaintiff in the suit while Johnson Ngari Namu is the respondent and defendant in the suit.
2. The motion came with Six (6) prayers but prayers 1, 2 and 3 are now moot. The prayers therefore for determination and consideration by the court are as follows:-

Prayer 4: The Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent whether by himself, his servants, agents, or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the Applicant's houses, burning charcoal, selling, leasing, charging or otherwise howsoever interfering with the Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the Land Parcel No Evurore/ Nguthi/1963 pending the hearing and determination of this suit.

Prayer 5: The Honourable Court do Issue an order of inhibition restraining any dealings whatsoever with Land Parcel No Evuvore/Nguthi/1963 until this suit is heard and determined.

Prayer 6: Cost be borne by the Respondent.



3. The Application is anchored on the grounds on the face of it and the supporting affidavit of Njagi Gicangacia, the applicant herein. The applicant's averred that the suit land Evuvore/Nguthi/1963 is registered in the names of the respondent. He however contended that his family and him, have been in open, exclusive, uninterrupted occupation from the time he was born. It is his assertion that they made developments on the suit land and he has attached photographs as evidence of this.
4. He stated that the respondent had served him with an application filed in Civil Suit Siakago Land Dispute Tribunal 17 of 2002, seeking to be granted security to evict him. He deposed that the respondent had also resorted to sending goons to his land with the aim of evicting him. According to the applicant, that Decree in Siakago Ldt No 17 of 2002 was said to be time barred having been issued on 11th June, 2009. He argued that upon receiving the said decree he was advised by his advocate, to file the instant suit and application for inhibition. He contended that his suit is for adverse possession and if evicted from the suit land, the suit will be rendered nugatory and he will suffer irreparable loss and damage that cannot be compensated. He also stated that he was apprehensive that if the land was not inhibited, it would be disposed of and he would be rendered a destitute.
5. According to the applicant, the respondent does not live on the suit land or use it for any purpose and he will therefore not be prejudiced if the orders are granted as prayed. He therefore, urged the court to preserve the status quo of the suit land pending the hearing and determination of the suit.
6. The respondent opposed the suit by way of grounds of opposition and replying affidavit both filed on April 26, 2022. In the grounds of opposition, it was stated that the application is an abuse of the court process for reason that there was a pending case being Siakago Ldt No 17 of 2002 between the parties which sought eviction of the applicant. The respondent contended that he had filed a preliminary objection dated August 19, 2021 which was yet to be disposed. It was said that the application was an abuse of the court process and in the absence of the order for stay of proceedings in the Siakago Ldt No 17 of 2002 then the application be dismissed with costs.
7. In the replying affidavit, the respondent termed the application as premature, misguided and an abuse of court process on what he said was an attempt by the applicant to contrive himself as an adverse possessor of suit land. He deposed that he was awarded the suit land vide a decision rendered on March 13, 2002 by the then Mbeere Land Dispute Tribunal. He averred that the decision was adopted as a judgment of the court and in essence it crystalised his right over the suit land. He further deposed that the court ordered a stay of execution until finalization of an intended appeal by the Applicant and further orders of maintenance of status quo were issued pending hearing of an appeal by the Applicant.
8. The appeal to the provincial land dispute committee was said to have been determined on March 23, 2009, a further appeal against the provincial appeal was preferred in Kerugoya ELC Appeal No 86 of 2013 but the same was dismissed with costs for having been filed outside the statutory period for filing of appeals.
9. The respondent contended that in the circumstances, time could not run against him until the determination of the appeal. He deposed that his application seeking to have the applicant evicted from the land was made after a period of 7 years after the High Court decision and which time was said to have been well within the 12 years limitation period provided by the law for execution of a judgement. He deposed that the delay in executing the decree was as result of an administrative delay in transferring the file from Kerugoya to Siakago upon conclusion of the Appeal. He further deposed that, the applicant has not satisfied the threshold for grant of an order of adverse possession.
10. The application was canvassed by way of written submissions. The applicant filed his submissions on July 4, 2022. He gave a synopsis of the case by the parties. He referred the court to paragraph 10 of



his supporting affidavit and stated that therein, he had sought for an order of stay of execution of the respondent's suit at Siakago Ldt No 17 of 2002 pending determination of the present suit. It is his submission that the court has discretionally powers to order for the stay of proceedings in order to get a fair and final determination of the dispute.

11. He relied on the provisions of Section 68 of the *Land Registration Act*, which empowers the court to make an order of inhibition. It was said that such an order serves to preserve the suit property pending an occurrence of a particular event. The applicant submitted that the court in granting an order of inhibition considered if there is the land is likely to be alienated or transferred by the time the trial is concluded, if the applicant has an arguable case, if refusal to grant the order will render the suit nugatory and lastly an prejudice likely to be occasioned on any party.
12. The applicant further submitted that the principals for grant of an inhibition were similar to principles set for grant of an order for a temporary injunction and reliance was placed on the case of *Giella .v. Cassman Brown And Company Ltd.* On whether the Applicant has established a prima facie case with a probability of success, the applicant averred that his claim was on adverse possession over land parcel Evuvore/Nguthi/1963 which he stated to have been in occupation of for a period exceeding 12 years. He stated that he had developed the land and that the said evidence had been presented before the court. According to him, the issue of his occupation on the land was not in dispute as he alleged that the respondent had made an admission on this. He further alleged that the respondent had never resided on the land and only wanted to evict him with the aim of selling the subject land.
13. On whether the suit will be rendered nugatory if the orders sought are not granted. He contended that the respondent had filed an application at Siakago in which he had sought orders of eviction from the suit land. He decried that if evicted from the suit land or the same is disposed he would suffer irreparable damages and the substratum of the dispute would be lost.
14. On the issue of whether he can be compensated by way of damages, he relied on the case of *Panari Enterprises Limited v Lijoodi & 2 Others* [2014] eKLR where it was stated that land is unique and no one parcel can be equated in value to another. It was further stated that damages are not always a suitable remedy where the plaintiff has established a clear legal right. The applicant was of the view that he had proven his case and that his suit has a high likelihood of success.
15. Lastly he submitted that the balance of convenience tilts in his favour as he is the one in occupation of the suit land and urged the court to grant him the prayers he had sought in the application.
16. The respondent filed his submissions on December 14, 2022. He gave a summary of the case as presented by both parties. It was his submission that there was a pending case between the parties at Siakago Law Court. He also argued that the applicant had failed to satisfy the requirements for issuance of the orders of adverse possession sought.
17. Further it was his submission, that grant of interlocutory orders was not a matter of right but could only be granted in deserving cases, it was said that the applicant was seeking injunctive orders when the respondent was the valid title holder to the suit land after the parties had litigated over the matter. The court was therefore urged to dismiss the suit with costs.

Analysis and determination

18. I have considered the application before me, the grounds of opposition and replying affidavit filed by the respondent, the rival submissions by the parties and the court record in general. The applicant has filed a suit seeking to be recognized as having acquired land by way of adverse possession, according



to him he has been in open, continuous and uninterrupted occupation of the suit land for a period of more than 12 years.

19. The respondent has however disputed this, according to him the said claim is premature for reason that he had a filed a claim against the respondent and judgment was entered in 2009 in which orders were granted for the applicant to be evicted. He also contended that an appeal preferred by the applicant before the high court was dismissed in the year 2014. It is his case that the period of 12 years has not materialized and the applicant has not met the threshold as required for a claim on adverse possession. He also filed grounds of opposition contending that the application was an abuse of the court process by virtue of the fact that there was a pending application which he had filed in Siakago LdtNo 17 of 2002 seeking to have the applicant evicted from the suit land. He also stated that he had filed a Preliminary Objection which was yet to be determined on merit and further that there was no stay of proceedings sought in the Siakago matter.
20. The undisputed facts herein are that the respondent is the registered owner of land parcel Evuvore / Nguthi / 1963 and further that the applicant is in possession of the land. It is also not in dispute that there is a pending application before the Siakago Land Dispute Tribunal No 17 of 2002 in which the respondent has sought to have the applicant evicted from his land. I wish to point out that the Defendant in the Siakago Case is one Felix Ngari Samuel while the applicant herein is Ngari Gacangaria. The parties all through are consistent in their pleadings that the applicant herein is the same as the defendant in that suit and I will therefore proceed with that assumption being that no objection has been raised.
21. The applicant has in essence filed this application seeking for orders of temporary injunction and orders for inhibition pending hearing and determination of the suit. Before I proceed to determine the merits of this application, my attention is drawn to the existence of a suit being Siakago Ldt No 17 of 2002 between the parties herein. I note that the suit therein is one for eviction of the applicant who has now filed this suit for adverse possession. The respondent is of the view that the applicant has not sought to stay proceedings of that suit.
22. I have reviewed the application by the applicant and though he has referred to stay of proceedings in his supporting affidavit. This prayer was not sought in the Originating summons or the present application and a mere mention of it in the supporting affidavit does not warrant this court to treat it as a prayer. A party is bound by their pleadings and the prayers having not been sought the same cannot be granted. However, this court shall, if persuaded after considering the merits of this application make a determination on whether to stay such proceeding or not.
23. On to the merits of the application, the conditions for grant of an injunction were well settled in the celebrated case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 where the court held as follows: “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.”
24. What is a *Prima Facie* case was defined by the Court of Appeal in the case of *Mrao Ltd v First American Bank Ltd & 2 others* [2003] KLR 125, where the court stated as follows:

“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.”



25. As already stated above, the claim by the applicant is one on adverse possession. In support of the application for injunction and inhibition, he has argued that he has established a prima facie case as he has been in continuous occupation of the land parcel Evuvore/Nguthi/1963 for a period of twelve years. He decried that the applicant had now filed an application to have him evicted based on a judgment that was time barred. The respondent has however maintained that the claim by the respondent is premature, as according to him, the suit has been filed 7 years after the appeal before the high court was dismissed in the year 2014 and time for purposes of adverse possession started running from then.
26. I am alive to the fact that a court in determining whether or not a party has established a prima facie case, need not conduct a mini trial but should only consider whether the applicant has a right that is been threatened or at threat of violation. However the circumstances are different, when a party seeks an order of injunction in a case of adverse possession. In such a case the court has to consider at least in the interim whether the party has met the conditions to be satisfied in a claim for adverse possession.
27. This was the reasoning by Justice Okongo in the case of *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauuma & 3 Others* [2013] Eklr while called upon to determine an application for injunction in a suit on adverse possession where he stated that "The Plaintiff's claim on the basis of which the present application for injunction has been brought is one for adverse possession. For the Plaintiff to succeed in the present application, he is duty bound to demonstrate to the court on a prima facie basis that he has been in open, continuous and uninterrupted occupation of the suit property for a period of 12 years or more.
28. As aforementioned, the applicant is indeed in possession of the suit parcel of land which land is registered in the name of the respondent. From the photographic evidence before the court the applicant seems to have also developed the land but this will best be established at the trial. The other element is whether this occupation has been for a continuous period of twelve years. It is trite law that time for purposes of adverse possession is considered to stop running when a party moves the court to assert his rights over the land. It is not in contention that there is a suit in existence in this case. According to the applicant, the respondent filed a suit against him and an award adopted in court in Siakago Ldt No 17 of 2002 in the 2002. An appeal was preferred and determined in the year 2009 and a decree extracted in the matter. From the pleadings by the applicant, the decree was issued in the year 2009 and time for adverse possession started running from that time.
29. The respondent has a contrary view on this, which view I consider to be the correct position. From the pleadings annexed before the court after the decree was issued in the year 2009, the applicant proceeded to file an appeal before the court in Kerugoya ELCA No 86 of 2003 which appeal was dismissed on July 8, 2014. Time for purposes of adverse possession can only be said to have started running from that time. Without going into the merits of the case, the element of time which is 12 years for a suit of adverse possession, has not been proven at this stage. It is my finding that the applicant has not established a prima facie case for grant of an injunction in a suit of adverse possession.
30. Having not established a prima facie case on a balance of probability, this court need not proceed to determine the other two elements for grant of an order of injunction. This was stated in the case of *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] IEA 86 where it was held that "The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".
31. The only issue remaining for this court's determination is whether the applicant is deserving of an order for inhibition. In *Rosemary Wanjiku Njigi v Nancy Munjiru Ngige* [2013] eKLR, LN Gacheru J cited



with approval the decision of Makau J in Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria[2012] eKLR where the conditions necessary for grant of an order of inhibition were stated as follows:-

- a) That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.
- b) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
- c) The applicant has an arguable case.

32. In my view the suit property is at risk of being disposed or alienated considering an application has already been filed to have the applicant evicted from the suit property and also failure to grant the orders has the potential of rendering the suit nugatory. However, even though the two elements have been satisfactorily proven the issue of whether the applicant has an arguable case need to be proven as well. I have stated that the applicant has not established the elements of adverse possession in the interim and as such he cannot be said to have an arguable case. He can proceed to prove his case at the trial but at this juncture, he has failed to prove that his case on adverse possession is arguable.

33. This court is therefore not inclined to grant the two orders sought for injunction and inhibition and the application herein is dismissed. With regard to costs the same shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH DAY OF JANUARY, 2023.

A.K. KANIARU

JUDGE

24.1.2023

