



Meto v Rugut & another (Environment & Land Miscellaneous Case 11 of 2021) [2023] KEELC 16098 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16098 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND MISCELLANEOUS CASE 11 OF 2021
MC OUNDO, J
FEBRUARY 23, 2023
N THE MATTER OF THE LAND PARCEL NO. KERICHO/SOSIOT/1364
AND
IN THE MATTER OF AN APPLICATION FOR DETERMINATION OF THE
RIGHTS OF INTEREST IN LAND
IN THE MATTER OF LIMITATIONS OF ACTIONS ACT (CAP 22 LAWS OF
KENYA)
BETWEEN
WENSER KIPKOECH METO PLAINTIFF
AND
ANDREW KIPNGETICH RUGUT 1ST DEFENDANT
JOSEPH CHERUIYOT 2ND DEFENDANT

RULING

1. Vide an application by way of notice of motion dated November 26, 2021 brought under the provisions of order 37 rule 3, order 51 rule 1 of the [Civil Procedure Rules](#), section 3A, and 63 of the [Civil Procedure Act](#) and all enabling provisions of the law, the applicant herein seeks for interim injunctive orders against the defendants/respondents injuncting them by themselves, their agents, and/or servants or otherwise whosoever from using, possessing, interfering with and/or doing any other act prejudicial to his interest on land parcel LR Kericho/Sosiot/1364.
2. That the orders herein be enforced by the OCS-Sosiot police station for compliance.
3. The application was premised on the grounds on the face of it and supported by an affidavit sworn by the applicant on the November 26, 2021.



4. After the above application was filed, the 2nd respondent filed his replying affidavit on behalf of the 1st respondent in which he deponed that he was the registered proprietor of the land parcel LR No Kericho/ Sosit/1364 having bought the same from the first registered proprietor, the deceased Kiplangat A Cherinyit who had then caused the transfer of the suit land in his name in 1983.
5. That LR No Kericho/ Sosit/1364 was distinct from LR No Kericho/ Sosit/1356, land which the plaintiff/applicant was in occupation and the same was registered to his father one Tiongik Arap Temuge.
6. Pursuant to the court's directives, parties filed their respective written submissions to which I shall summarize as follows;

Applicants' Submissions.

7. The applicant in his submissions framed his issues for determination as follows;
 - i. Whether the applicant has satisfied the test for granting of an injunction by establishing a *prima facie* case.
 - ii. Whether the applicant stands to suffer irreparably is (sic) such orders as prayed are not issued.
 - iii. Where does the balance of convenience lie?
 - iv. costs
8. On the first issue for determination, the applicant submitted that the prerequisites to the grant of such restraining orders as sought was whether he had established a prima facie case worthy of the orders sought or whether he would will suffer damage which would otherwise not be cured by an award of damages.
9. He relied on the holding in *Mrao First American Bank of Kenya Limited & 2 others* [2003] eKLR to submit that he had approached the court with an application that was genuine and arguable with probable chances of success should it be argued.
10. That in the case in *Giella v Cassman Brown*, (sic) the predecessor of this court had laid down the principles that one needed to discharge to succeed in such an application. That he had thus demonstrated a *prima facie* case with reasonable prospect of success therefore the temporary orders as prayed should be deemed fit to issue.
11. On the second issue for determination, the applicant submitted while relying on the decision in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR at the time of filing the said application, much damage had taken place on the disputed property which damage may or may not be quantifiable. That if the temporary injunction was not issued, then he would suffer irreparably which may render future causes of action nugatory.
12. While placing reliance on the case in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 others* (sic) that defined what irreparable damage was, the applicant submitted that were the orders sought not granted as prayed, then the process of the litigation would be an exercise in futility and therefore a mockery of the justice system.
13. On the third issue concerning where the balance of convenience lay, the applicant submitted that if the court was in doubt of the first two pre-conditions, then it ought to look at the balance of probabilities which tilted in his favour. Reliance was placed on the decided case in *Amir Suleiman v Amboseli Resort limited* [2004] eKLR.



Respondents' Submissions.

14. The respondents framed their only issue for determination as;
 - i. Whether or not the plaintiff/applicant has satisfied the court on the conditions required for the grant of injunctive prayers being sought herein.
15. They then submitted that it was well settled in law that an applicant seeking the grant of injunctive orders/relief must satisfy the three tests set out in the leading case of *Giella v Cassman Brown & Company Limited* 1973 EA 358.
16. That on the first issue as to whether the plaintiff had a *prima facie* case, they submitted that whereas the plaintiff's claim was one of adverse possession, there was no evidence at all on record to demonstrate that he was in current occupation and/or has been in occupation, use and possession of the suit property.
17. That the 2nd respondent had however availed a certificate of official search for land parcel Kericho/Sosiot/1364 as exhibit "JKC-1" together with advice slips for the months of 2020 and 2021 as exhibits JKC-19(a)(b)&(c) to demonstrate that he was the registered proprietor thereof and in current occupation of the subject land.
18. That the plaintiff/applicant on the other hand had not challenged that the 2nd defendant/respondent's registration as the proprietor of the suit property on which land he has planted tea bushes.
19. That it was also not clear from the pleadings herein on which of the suit properties the plaintiff was seeking adverse possession in view of the plaintiff's averments in paragraph 29 of his affidavit in support of the originating summons. The respondents relied on the *Mrao First American Bank case* (supra) to submit that the plaintiff/applicant had not availed to the court any tangible evidence to warrant the grant of the orders sought and therefore he had failed to satisfy the 1st test as set out in the *Giella case* (supra)
20. On the second issue as to whether the plaintiff/applicant stood to suffer loss or damage of such a nature and magnitude that would not be adequately compensated, the respondents' submission was that since the year 1983 to date, the 2nd respondent had been in exclusive use, occupation and possession of the subject land. That the mature tea bushes now growing thereon were planted by the 2nd respondent as per the advice slips for the months of 2020 and 2021 as exhibits JKC-19(a)(b) &(c). Reliance was placed on the case of *Nderu v Kenya National Chamber of Commerce & Industry & another* [2003] KLR 160 to submit that the applicant's claim at this stage was "unclear and controvertible."
21. That the applicant had not shown that he had a right legal or equitable, which required protection by injunction, indeed he had failed to satisfied all the (3) three tests required to justify the grant of the orders being sought and therefore application dated November 26, 2021 ought to be dismissed with cost to the 2nd defendant/respondent.

Determination.

22. The celebrated case of *Giella v Cassman Brown* (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows:-
 - i. Is there a serious issue to be tried(*prima facie* case)
 - ii. Will the applicant suffer irreparable harm if the injunction is not granted;



- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").
23. On the first issue as to whether the plaintiff/applicant in this matter has made out a *prima facie* case with a probability of success, I am guided by the case of *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125, where a *prima facie* case was described 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.”
24. The court has been moved under a certificate of urgency, by the applicant, to issue temporary injunction against the respondents. At this stage, the court is only required to determine whether the applicant is deserving of the orders sought. The court is not required to determine the merit to whether the applicant herein has demonstrated that he has a genuine and arguable case or not.
25. In this matter, the plaintiff/applicant in his originating summons dated November 26, 2021 is seeking the court to declare that he is entitled to a portion measuring 2 acres in land parcel Kericho/Sosiot/1364 by way of adverse possession. He has not however exhibited that he is in current occupation and/or has been in occupation, use and possession of the suit property as compared to the 2nd respondent whose list of documents include a copy of title deed for land parcel Kericho/Sosiot/1364, a copy of the Registry Index Map (RIM) for Waldai location Sosiot registration section sheet No 8, a certified copy of his growers statements from Tegat Tea Factory Company Limited for the period between 2005 to 2021, copies of his advice slip for December 2020, September 2021 and October 2021 which demonstrate that the 2nd defendant/respondent was in current occupation of the subject land where he has planted tea bushes and which occupation had not been challenged by the applicant.
26. It is also not clear from the pleadings herein as to which of the suit properties the plaintiff is seeking adverse possession in view of his averments in paragraph 29 of the supporting affidavit sworn on the November 26, 2021 in support of his originating summons filed herein wherein he seeks entitlement to two (2) acres of the land comprised in Kericho/Sosiot/1356 which is different from Kericho/Sosiot/1364.
27. Quite clearly it is also not possible to make a final determination at this interlocutory stage as to whether or not the applicant is in occupation and/or possession of the suit land and or which of the two parcels of land he seeks adverse possession, the 2nd respondent having confirmed that he is indeed in possession and has planted tea bushes which he delivers for process at the Tegat Tea Factory Company Limited. By granting orders of injunction so sought in a situation where the respondents are in occupation, there could be an eviction which at this interlocutory stage would be premature.
28. Since at this stage the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases as observed by Lord Diplock in *American Cyanamid Co v Ethicon Limited* (1975) 1 ALL ER 504; (1975) AC 396 HL at 510 where he stated as follows:
- “It is no part of the court’s function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.’,



29. I have anxiously considered the applicant’s application herein and considered that 2nd respondent hold titles to the disputed suit land where he is in occupation and possession and thus issuing the orders sought would amount to an eviction which is premature at this stage. To this effect, I find that the applicant has not established a *prima facie* case herein.
30. That having been said, I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella case* (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of *Kenya Commercial Finance Co Ltd v Afraba Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya v David Kitu & another* (2014) eKLR observed as follows:-
- “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. I find that the balance of convenience does not tilt in favour of granting the injunctive orders sought and therefore the order that best commends itself in the circumstances of this case is an order of status quo, to this effect;
- i. Parties shall maintain the status quo prevailing pending the hearing and determination of the suit.
 - ii. Parties shall set down this matter for hearing expeditiously by complying with the provisions of order 11 of the *Civil Procedure Rules* within the next 21 days upon delivery of this ruling
 - iii. Costs to be in cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 23RD DAY OF FEBRUARY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

