



REPUBLIC OF KENYA



**Nyamu v Matibo & 2 others (Civil Appeal E339 of 2023)
[2024] KEHC 9690 (KLR) (Civ) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E339 OF 2023

AM MUTETI, J

JULY 31, 2024

BETWEEN

TIMOTHY MAITHO NYAMU APPELLANT

AND

NGEI MATIBO 1ST RESPONDENT

BENEDICT NZANGU 2ND RESPONDENT

MUIMARA ESTATE RESIDENCE ASSOCIATION 3RD RESPONDENT

*(Being an appellant against the Ruling of the Honourable chief Magistrate in
Milimani Commercial Court No. E 875 of 2022 delivered on 31st March, 2023)*

JUDGMENT

1. The appellant in this appeal is aggrieved by the decision of the learned Honourable Chief Magistrate Wendy K. Micheni (as she then was) delivered on 31st March 2023 in which she declined to grant an application for an injunction to the appellant.
2. The appellant in his memorandum of Appeal sets out 10 grounds which grounds can be summarized as hereunder: -
 - a. that the learned Honourable Magistrate misdirected herself on the principles to be applied in granting an injunction,
 - b. that the Honourable Magistrate failed to find that the evidence presented demonstrated irreparable damage and loss.
 - c. that the learned Honourable Magistrate failed to consider the balance of convenience tilted in favour of the Appellant for the grant of an injunction.



- d. No prejudice would have been suffered by the Respondents had an injunction been issued
 - e. that the learned Honourable magistrate derogated the appellant's constitutionally protected right to property and freedom from discrimination.
3. It is the above stated grounds that this court will consider in determining whether the appeal has any merit.
 4. In *Giella Vs. Cassman Brown & Co. Ltd (1973) E.A 385* the principle for the grant of an injunction are settled. The appellant in order to succeed in his quest for an injunction must be able to demonstrate that;
 - i. that he has a prima facie case with a probability of success;
 - ii. that he is likely to suffer irreparable loss and damage if an injunction is declined.
 - iii. that the balance of convenience tilts in favour for the grant of the interim injunction.
 5. The appellant by way of a Notice of Motion dated 14th November 2022 sought a temporary injunction to bar the Respondents from interfering, halting or in any other manner causing stoppage of construction on the plaintiff's land L.R 209/17/24.
 6. The appellant also sought a further order to have the OCS. Villa Police Station, Embakasi Nairobi provide security during enforcement of the order of injunction. He further sought costs for the application.
 7. The learned Honourable Magistrate heard the application and delivered a Ruling on the 31st March 2023. I have considered the same. The uncontested facts are that the Appellant was in the process of constructing a house in the plot No. L.R 209/17/24 which land was owned by him. The respondents are neighbours to the appellant and their protestation against further construction was that the appellant was putting up a house that if allowed to continue being constructed would violate the rules set out for construction of houses within that vicinity by the 3rd Respondent.
 8. The duty was thus upon the Appellant to persuade the learned Honourable magistrate that he was within the law and had complied with all the rules governing construction in the area in question.
 9. It was not disputed by the Appellant that the 1st & 2nd Respondents were his neighbours and that the 3rd Respondent was the Association for the area.
 10. For the appellant to prove that he had a prima facie case with a probability of success it would have been necessary, in this court's view, to prove that he had not breached any by law and that any rules set by the 3rd Respondent were also not breached.
 11. In this court's view the appellant failed to discharge that burden and the court could not in the circumstances grant his request for an interlocutory injunction. The burden was on him and not the Respondents.
 12. Further, the court in granting or declining to grant the injunction would consider whether the appellant would suffer irreparable loss and damage. It is this court's view, that in circumstances where construction is on going and the question of compliance with county by laws and community Associations rules governing construction within a given area arises, common prudence would dictate that the construction be halted pending determination of that question.
 13. Indeed, to allow further construction would have been detrimental to the Appellant because in the event that the dispute was eventually decided against him, he would suffer loss by having to pull down



the structure. The Appellant in this case ought to have seriously considered halting construction on his own volition to mitigate potential loss should the Respondents succeed in their objection to the continued construction.

14. In my considered view, therefore, the learned Honourable Magistrate was right in declining to grant the injunction. It would have exposed the Appellant to further loss in the event he loses his suit against the Respondents.
15. It is this court's finding therefore all the principles for the consideration in granting injunctions were in favour of the refusal to grant. I do not therefore find any merit in this appeal.
16. The appellant is not without remedy should he emerge victorious in the final end, he can be adequately compensated by way of damages. The neighbours too have equal right to protection under the Law and their properties and the quiet enjoyment thereof do not rank lower than the Appellants right to develop his property.

The appeal is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2024.

HON. A.M MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Musyoki for the Respondent

Muriuki for the Appellant

Appellant- Absent

