



Moses Owino Odhiambo t/a Mosem Enterprises v Gisemba (Environment & Land Case E56 of 2022) [2023] KEELC 16403 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16403 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E56 OF 2022
LA OMOLLO, J
MARCH 23, 2023**

BETWEEN
MOSES OWINO ODHIAMBO T/A MOSEM ENTERPRISES APPLICANT
AND
ROBERT GISEMBA RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Applicant's Notice of Motion dated September 30, 2022 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased to issue orders restraining the Respondent, his servants, assigns, agents and or any person whomsoever from trespassing into, encroaching, occupying, grazing, cultivating and/or carrying any activity of whatsoever nature on land parcel number L.R NO. 527 & L.R NO. 528 Njoro till this suit is heard and determined.
 4. That the officer commanding Njoro Police Station do enforce compliance of the honourable court orders.
 5. That the honourable court do issue an order it deems fit, just and fair.



Factual Background.

2. This suit has been commenced by way of a Plaint dated September 6, 2012 and filed on September 30, 2022. The Plaintiff seeks the following orders:
 - a. A permanent injunction restraining the defendant, his agent and/or any person whomsoever from trespassing into, encroaching, occupying, cultivating, grazing and/or carrying any activity of whatsoever nature on land parcel numbers L.R NO. 527 & L.R NO. 528 Njoro.
 - b. An order restraining the defendant, his agents and/or any person whomsoever acting on the defendant's instructions, direction and/or jointly or in cohort from threatening and or use of violence against the plaintiff or plaintiff's employees.
 - c. Costs of this suit.
3. The defendant/respondent did neither entered appearance nor filed any documents despite service.

Issues For Determination.

4. The applicant/respondent filed his submissions on November 4, 2022. He submits that he has demonstrated that he is the owner of suit parcels. He adds that the Respondent has trespassed, cultivated and cut trees which activities are still ongoing.
5. He submits that he deserves the court's protection from the Respondent by stopping him from trespassing onto his land. He further submits that the Respondent's acts have greatly inconvenienced him since he cannot fully utilize his land.
6. He also submits that the said acts have subjected him to insecurity as the Respondent is using goons to intimidate him.
7. The Applicant relied on the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and Court of Appeal case in *Mrao Ltd v First American Bank of Kenya* [2003] eKLR. He submits that he has demonstrated that he is the owner of the suit parcels and also evidenced the Respondent's acts of trespass by attaching photographs. He further submits that he has proved that irreparable injury will be occasioned to him if orders of temporary injunction are not granted to him.
8. The Applicant also relies on the decisions in *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* [2018] eKLR and *Amir Suleiman Vs Amboseli Resort Limited* [2004] eKLR and submits that the balance of convenience tilts in his favour.
9. In conclusion, he submits that he has proved his case and urges the court to grant him the orders as prayed.

Analysis And Determination.

10. Upon perusal of the submissions, it is this court's view that the main issue for determination is:
 - a. Whether this application is merited.
 - b. Who shall bear the costs of this application?



A. Whether this application is merited.

11. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella vs Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR the Court of Appeal held that;

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

12. It is important to note that the above conditions are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

13. Consequently, the Plaintiff ought to, first, establish a *prima facie* case. In *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

“... 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.”

14. In support of its application, the applicant has attached copies of allotment letters and receipts. He explains that he is waiting for the lease documents and that he has paid all premiums to the Government of Kenya.

15. The Applicant has also annexed photographs to show that the suits parcels are being tilled by the Respondent.

16. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* the Court of Appeal held that:

“...The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...”

17. I find that from the material placed before this court, the Applicant has demonstrated a prima facie case in view of the specific circumstances herein and is therefore entitled to the orders sought.

18. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to him if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction



is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

19. The Applicant deposes that the Respondent has invaded a portion of the suit parcels, ploughed and planted wheat. He also deposes that the Respondent has cut down mature trees. I find that the Applicant has demonstrated that injury has been and will continue to be occasioned to him in the event that orders of temporary injunction are not granted.
20. Thirdly, the plaintiff/applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.
21. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. (Emphasis is mine). The court will seek to maintain the status quo in determining where the balance of convenience lies.”
22. In *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR, the learned Judge offered further elaboration on what is meant by “balance of convenience” and stated

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”
23. Bearing this in mind, I am convinced that there is a greater risk in not granting an order of temporary injunction than in granting it. This is especially so because the Respondent who was served with this application failed to appear and challenge it.



24. In *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR, the court in deciding on an injunction application stated thus;

“Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

25. I am further convinced that if orders of temporary injunction are not granted in this suit, the suit properties will continue to be in danger of being dealt in the manner set out in the application and/or apprehended by the Applicant.

B. Which party shall bear the cost of this application?

26. On the question of costs of the application, the general rule is that costs shall follow the event. This is in accordance with the provisions of section 27 of the *Civil Procedure Act* (cap. 21).

DISPOSITION.

27. The Upshot of the foregoing is that the Notice of Motion Application dated September 30, 2022 is merited and is allowed in the following terms:

- a. The Respondent, his servants, assigns, agents and or any person whomsoever is hereby restrained from trespassing into, encroaching, occupying, grazing, cultivating and/or carrying any activity of whatsoever nature on land parcels L.R NO. 527 & L.R NO. 528 Njoropending the hearing and determination of this suit.

C. The cost of this application shall abide the outcome of the main suit.

28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Geke for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Court Assistant; Ms. Monica Wanjohi.

