



**Warukira & 2 others v Miti (Environment and Land Case Civil Suit
118 of 2017) [2023] KEELC 16672 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 118 OF 2017**

EC CHERONO, J

MARCH 21, 2023

BETWEEN

PETER MBOGO WARUKIRA 1ST PLAINTIFF

SAMUEL MWANGI WARUKIRA 2ND PLAINTIFF

BENARD MUTUGI WARUKIRA 3RD PLAINTIFF

AND

MOSES MUGERA MITI DEFENDANT

JUDGMENT

1. The plaintiffs by an amended plaint dated August 2, 2017 aver that they are the registered owners of land parcels Mutira/Kathare/679, 1495 and 682 respectively while the defendant is the administrator of the estate of Mathew Miti Mugeru, the registered owner of land parcel Mutira/Kathare/308. They further aver that land parcels No Mutira/Kathare/679, 1495 and 681 are the resultant subdivisions of land parcel Mutira/Kathare/309.
2. The plaintiffs also aver that on July 13, 2017, they entered into a lease agreement with Stecol Corporation over a portion measuring 529 square metres and on July 19, 2017, the defendant through his advocates demanded from the plaintiffs a cessation of the mining and or excavation on land parcels Mutira/Kathare/308 and 309. It is the plaintiff's case that the defendant has no right to interfere with the subdivisions emanating from land parcel Mutira/Kathare/309. As a result, the plaintiffs sought the following reliefs as against the defendant.
 - a. An order of permanent injunction restraining the defendant from interfering with the plaintiff's use, and occupation of land parcel number Mutira//679, 1495 and 681.
 - b. Costs of the suit.



3. The defendant through his Amended statement of defence accused the plaintiffs of interfering with the boundary marks so that the land earmarked for lease by the plaintiffs belongs to him. Thereafter, the parties agreed to canvass the matter by *viva voce* evidence.
4. Peter Mbogo testified as PW-1. His testimony was that the defendant had encroached onto their land and therefore wanted this court to issue orders restraining such encroachment.
5. In cross examination, the witness stated that problems emanated from their excavation of murram on the suit parcel of land they had leased to Stecol Corporation.
6. The defendant, Moses Mugeru testified as DW-1 and stated that his biological father Mathew Miti was the proprietor of land parcel MUTIRA//308 before the 1st plaintiff encroached onto the parcel together with 6 other individuals which dispute was referred to the land disputes tribunal which directed the land Registrar to fix the boundaries. The boundaries were finally fixed in the year 2018 after the resistance by the plaintiffs. He stated that due to subdivision on the parcels, there was confusion so that the place the plaintiffs wanted to excavate from was their land.
7. In cross examination, he stated that the boundary issue had been in existence even before the excavation of murram. That the land disputes tribunal had attached conditions which ought to be fulfilled first; for example the land surveyor was to sign some documents but due to the plaintiff's violence, the same could not be done. He stated that the plaintiffs occupy their land.
8. The court directed the parties to file their written submissions. At the expiry of the timelines set, only the plaintiff had complied. In his submissions, Counsel identifies the following issues for determination;
 - a. Whether the defendant has interfered with the plaintiff's quiet use and occupation of land parcel MUTIRA//679, 1495 and 681.
 - b. Whether the plaintiffs are entitled to the orders sought
 - c. The costs of the suit.
9. On the first issue, it is submitted that the suit was prompted by the defendant's demand letter to Stecol Corporation for extraction of murram in parcel numbers Mutira/Kathare/679, 681 and 1495 and that the corporation had extracted murram from his parcel of land number Mutira/Kathare/308. The lease to the said corporation was produced in evidence but no evidence of the alleged encroachment by the defendant was shown. Counsel cited the provisions of Section 107 of the [Evidence Act](#) in support of the plaintiffs' claim.
10. On the second issue, it is submitted that the plaintiffs are entitled to the orders sought because the defendant has caused the cessation of the works by Stecol Corporation.
11. On the aspect of costs, it is submitted that costs follow the event.

Analysis and Determination.

12. The bone of contention between the parties herein is a boundary dispute disguised as an injunction. It is not in dispute that the plaintiffs and the defendant share a common boundary between land parcel No Mutira/Kathare/308 and No Mutira/Kathare/309, now subdivided into LR No Mutira/ /679, 1495 and 681. It is not also in dispute that on August 9, 2017, the parties through their advocates on record filed a consent directing the land Registrar Kirinyaga County to visit the two parcels of land No Mutira/Kathare/308 and Mutira/Kathare/309 and establish the boundary and file a report in court.



Despite the County Registrar for Kirinyaga filing the said report in court, none of the parties called her as a witness.

13. Having said that, it is trite law that an injunction is an equitable relief which is granted at the discretion of the court. However, that discretion must be exercised judicially and not whimsically. The guiding principles for the grant of an injunction order was discussed in the case of *Giell v cassman Brown Co. Ltd* (1973) EA 358 where the court stated that before granting an order of injunction, an applicant establish the following conditions;
1. Prima-facie cas with a likelihood of success at the main trial
 2. That he/she will suffer irreparable loss which cannot be compensated by an award of damages.
 3. Where the court is in doubt, it may decide the matter on a balance of convenience. Peter Mbogo Warukira, the 1st plaintiff testified on his behalf and that of the 2nd and 3rd plaintiffs and asked the court to adopt his witness statement recorded on 26/7/2017. In his testimony, the 1st plaintiff stated that the defendant who is their neighbor has, without any reasonable cause, been interfering with their quiet use and occupation of the suit land. He further stated that on July 19, 2017, the defendant through his advocate wrote a demand to Stecol Construction Company who were to carry out excavation activities on the suit land to immediately stop mining/extraction activities on land parcels No Mutira/Kathare/308 and Muthira 309. He stated that they leased the suit land parcel No Muthira /309, now subdivided into No Muthira 679,681 & /1495 to stecol Company who were to carry out excavation activies. He stated that they stand to suffer loss and damage as they had executed a lease Agreement. He produced five documents contained in his list of documents dated 26/7/2017 as exhibits in this case. The first exhibit is a Title deed for land parcel No Mutira/Kathare/309 which is subdivided into three portions namely, Mutira/Kathare/679, 681 and 1494 respectively. The second Exhibit is a certificate of official search for the two parcels of land under contestation. The third exhibit is a lease agreement between the 2nd and 3rd plaintiffs on one part and Stecol Corporation on the other over a parcel of land situated in Mutitu village Kirinyaga County measuring 529 and 667 square metres respectively. For reasons known to the plaintiffs, the description of the parcel of land being leased to the said Stecol Corporation is not given. The lease agreement does not indicate that they leased portions of land parcel No MUTIRA//309 to Stecol Corporation.
 4. This being a claim for an injunction order, the plaintiff is obligated to establish the triple conditions as set out Giella case(*supra*). In the first condition, the plaintiff has not shown that the defendant has encroached on their portion of land parcel No Mutira/Kathare/309, now subdivided into land parcel No Mutira/Kathare/679, 681 and 1495. They have not also called a surveyor or a land Registrar to present a beacon certificate or a report on the boundaries between the plaintiffs' land and the defendant and any encroachment by the defendant. The plaintiffs' counsel in his submission has alluded to some two site visit reports dated October 29, 2018 and 8/12/2020. Those reports were not produced by any of the parties in evidence. Those reports in my view are prima facie evidence to assist in establishing whether there is encroachment on the plaintiffs' land.
 5. The plaintiffs have also failed to prove that they will suffer irreparable injury which cannot be compensated by an award of damages. Halsbury's Laws of England, 3rd Edition Volume 21, paragraph 739 page 352 defines irreparable injury as follows;

“ injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the



plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subject matter in question.”

The plaintiffs have submitted that they signed a lease agreement with Stecol Corporation which was to commence on July 19, 2017 and that they expected to make financial gain from the lease. From a cursory look at the said lease agreement produced as an exhibit, the plaintiffs were to be paid a total of sum of kshs 130,000/ an for 12 months. The plaintiffs have not alleged that the defendant cannot pay the said sum.

The third condition is that the plaintiffs have to demonstrate that the balance of convenience tilts in their favour. The concept of balance of convenience was discussed in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR where the court held;

“ The meaning of balance of convenience in 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 defendant. Inconvenience be equal, it is the plaintiffs 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.”

From the above analysis, I find that the plaintiffs have miserably failed to prove that they are deserving the equitable orders of injunction sought. Consequently, this suit is hereby dismissed with costs.

READ, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 21ST DAY OF MARCH, 2023.

HON. E. C CHERONO

ELC JUDGE

In the presence of;

1. M/s Githaiga holding brief for Mukworo for Plaintiff
2. Defendant advocate absent
3. C/A

