Ndung'u v Mwangi (Environment & Land Case E026 of 2022)
[2023] KEELC 16394 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16394 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE E026 OF 2022

LN GACHERU, J

MARCH 16, 2023

BETWEEN

MILKAH KANENE NDUNG'U ..... PLAINTIFF

AND

PETER MWAURA MWANGI ..... RESPONDENT

RULING

1. Vide a Notice of Motion Application, dated November 10, 2022, the Plaintiff/Applicant sought the following orders;

    a. That the Defendant/Respondent be restrained by way of injunction by himself, his agents, servants, employees and/or person claiming authority of the Defendant/Respondent from trespassing, interfering with picking leaves, cultivating and/or in any way making use of land parcel No Loc 16/Kigoro/712, pending the hearing and determination of this application and suit.

    b. That the costs of this suit be in the cause.

2. The application was premised on the grounds stated thereon and on the Supporting Affidavit of the Plaintiff/Applicant Milkah Kanane Ndung'u, sworn on November 10, 2022. It was her contention that she is the registered owner of land parcel No Loc 16/Kigoro/712 (the suit property), and that the Defendant/Respondent without any justifiable cause, had been interfering with her peaceful and quiet possession. Further, that the Defendant/Respondent or his agents have been trespassing on the suit property, continuously picking tea and committing acts of waste on the suit property. The Plaintiff/Applicant further averred that she declined to attend summons to the Assistant County Commissioner to discuss issues relating to entry and use of the suit property with the Defendant/Respondent.

3. The application was opposed through the Replying Affidavit of Peter Mwaura Mwangi, sworn on November 28, 2022, in which he avers that he is a lessee of the suit property having obtained a lease

from Newton Mukunya Ndung'u (deceased) on March 8, 2021, whose term runs from April 1, 2021 to 31st April 2028. The Defendant/Respondent averred that in consideration for the lease, he would service Newton Ndung'u's loan from Unitas, which levied the tea bushes as collateral, an agreement the Applicant was aware of. The Defendant/Respondent further avers that he has been servicing the loan which the Plaintiff/Applicant is also aware of, and lastly, that the late Newton Ndung'u transferred his KTDA Growers Certificate to him in order to pick tea from the suit property uninterrupted. The Defendant/Respondent further averred that Newton Ndung'u (deceased) together with his family resided on the suit property for 22 years.

4. It is the Respondent's contention that Newton Ndung'u (deceased) was the son of the Plaintiff/Applicant herein, and resided on the suit property. That Newton Ndung'u subsequently died on or about September 2022, at which point the Plaintiff/Applicant's other sons began harassing the Respondent and denying him access to the farm. The Defendant/Respondent further averred that prior to his death Newton Ndung'u, had stated that he wished the suit property to be inherited. The Defendant/Respondent averred that he reported the matter to the Assistant County Commissioner – Kigoro Division, whose intervention failed to yield any fruits. Lastly, that the Defendant/Respondent avers that the application herein is meritless and an abuse of the Court process, for the Plaintiff/Applicant to unjustly enrich herself. The Respondent prays that the application be dismissed.

5. The Plaintiff/Applicant filed a Further Affidavit sworn on December 21, 2022, in which she denied the existence of a lease agreement between Newton Ndung'u and the Defendant/Respondent. She reiterated that she was the registered owner of the suit property, and therefore her son had no capacity to enter into agreements involving the suit property. She averred that she was not privy to the lease agreement between her deceased son and the Defendant/Respondent. She further averred that she temporarily permitted her son to settle on the suit property and that he harvested the tea for himself until his demise. Lastly, she stated that she only took an interest in the harvest of tea on the suit property when her son died. She averred that the Defendant/Respondent is indeed trespassing on the suit property which he has admitted to.

6. The application was canvassed by way of written submissions.

7. The Applicant through the Law Firm of Mbiyu Kamau & Co Advocates, filed their submissions dated January 10, 2023. The Applicant submits that she has met the threshold for granting of an interlocutory injunctions as established in *Giella Vs Cassman Brown & Co Ltd* (1973) EA 358, which was restated in *Nguruman Ltd Vs Jan Bonde Nielsen & 2 Others* (2014) eKLR, as follows:

8. In an interlocutory application, the Applicant has to satisfy the triple requirements to:

    a. Establish his case only at a *prima facie* level;

    b. Demonstrate 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.

9. The Plaintiff/Applicant further submitted that she has established a *prima facie* case being the registered owner of the suit property; has demonstrated that she will suffer irreparable loss if the temporary injunction is not granted and proven that the balance of convenience tilts in her favour as the registered owner.

10. The Defendant/Respondent did not file his written submissions and the Court will rely on his pleadings herein.

11. The court has looked at the rival pleadings, annextures thereto, and written submissions herein and finds that the key issues for determination are as follows:

    1. Whether the Applicant has satisfied the conditions for grant of a temporary injunction?

12. Before delving into the merits of the Application, the Court notes that the remedy for injunction is an equitable remedy and is granted at the discretion of the Court. The discretion must be exercised judiciously. This has been held in multiple cases including the case of *Daniel Kipkemoi Siele Vs Kapsasian Primary School & 2 others* [2016] eKLR, wherein the Court stated as follows:

> "...the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously."

13. The application before this court seeks that a temporary injunction be issued on the suit property restraining, the Defendant/Respondent or his agents from in any way interfering with the picking and cultivating tea leaves on the suit property, pending the hearing and determination of this suit herein and the application. The application is premised on the grounds that the Applicant is the registered owner of the suit property and did not at anytime agree to lease the suit property to the Defendant/ Respondent. The Applicant annexed a search conducted on October 28, 2022, indicating that she was indeed the registered owner of the suit property.

14. It is not in dispute that the Plaintiff/Applicant's deceased son, Newton Ndungu, and his family resided on the suit property and harvested tea, prior to his demise. The Defendant/Respondent submitted that he entered into an agreement with in which he would service Newton Ndung'u's (deceased) loan while he would gain access to the suit property in order to harvest tea for the term of the contract. From the documents annexed, Newton Ndung'u is stated to have planted, maintained, and harvested the tea bushes grown on the suit property from 2001 till his demise.

15. The principles set with regard to the prayer for a temporary injunction are now well settled in the celebrated case of *Giella V Cassman Brown and Company Ltd* (1973) EA where it was stated that a party seeking such a remedy (temporary injunction) should satisfy the following:

    1. Establish a *prima facie* case with a probability of success;

    2. Such an injunction will not normally be granted unless the Applicant demonstrates that he will suffer irreparable injury that cannot be adequately compensated by an award of damages; and

    3. If in doubt, the Court will determine the application on the balance of convenience.

16 The *Civil Procedure Rules* under Order 40 Rule 1 similarly provides for temporary injunction. It states:

> "Where in any suit it is proved by affidavit or otherwise—
>
> a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of

the property as the court thinks fit until the disposal of the suit or until further orders.

17. The first issue for determination is whether the Plaintiff/Applicant has established a prima facie case with a probability of success?

18. In the case of *Mrao Vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, 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."

19. It is not in dispute that the Plaintiff/Applicant is the registered owner of the suit property and that she allowed her son to plant tea and harvest on the suit property during his lifetime. During the period the Applicant's son grew and harvested tea on the suit land, he formalised an agreement in which the Defendant/Respondent herein would service Newton Ndung'u's loan at Unitas and in return the Defendant/Respondent would harvest and sell the tea on the suit property.

20. The tea bushes situate on the suit property according to the supporting documentation were planted and owned by Newton Ndung'u, the Applicant's son. The Applicant as the owner of the suit property permitted her son Newton Ndung'u to cultivate the tea on the suit property and the said Newton Ndung'u thereafter leased the tea bushes to the Defendant/Respondent. The Respondent averred that the Applicant's son resided on the suit property for 22 years with the full knowledge of the Plaintiff/Applicant who was also actively involved in the preparation, execution, and transfer of the KTDA Growers Registration Certificate to the Defendant/Respondent. The Defendant/Respondent doubts the Plaintiff/Applicant lack of knowledge of the said lease agreement.

21. Lastly, in the Applicant's Further Affidavit, she averred that she was not privy to the lease agreement between her deceased son and the Respondent herein. Considering the above, this Court finds that the Applicant has established a prima facie case with a probability of success, at the trial.

22. However, it should be noted that the Plaintiff/Applicant stated in her Further Affidavit that she only became keen on harvesting of tea bushes upon the demise of her son.

23. The second matter for determination is whether the Applicant has demonstrated that she will suffer irreparable injury that cannot be adequately compensated by an award of damages?

24. Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff/Applicant herein can be compensated in damages. This Court holds the view that damages are not always a suitable remedy where the Applicant has established a clear legal right or breach. See *JM Gichanga Versus Co-Operative Bank of Kenya Ltd* (2005) eKLR.

25. However, it should also be noted that from the Applicant's conduct, she seems to have assigned the care of the suit property and the cultivating of the tea bushes to her son. That she permitted her son to live and harvest the tea on the suit property as he saw fit which led to the said Newton Ndung'u outsourcing the tea harvesting to the Defendant/Respondent herein.

27. It seems unlikely that the Applicant who had allowed her son to cultivate tea on the suit property would be unaware of the lease agreement between her son and the Defendant/Respondent to allow

the Respondent harvest the tea. The Applicant averred that she only became keen on the tea harvest upon the demise of her son.

28. On the issue of whether the Plaintiff/Applicant stands to suffer irreparable loss, which cannot be compensated by damages, should the temporary injunction orders be denied, the Court notes as follows;

29. The Applicant does not reside on the suit property and the tea bushes do not belong to her, but to Newton Ndung'u (or his estate). From the pleadings, the Plaintiff/Applicant had permitted her son to reside indefinitely on the suit property and cultivate the tea, a task which he outsourced to the Defendant/Respondent through an agreement registered with KTDA. Should the Defendant/Respondent be permitted to continue cultivating the tea bushes on the suit property as per the lease agreement between the Newton Ndung'u and the Applicant, the Applicant does not stand to lose ownership of the suit property.

30. The third and final condition laid out in the Giella versus Cassman case for grant of an interlocutory injunction is that if the court is in doubt, it is to determine in whose favour the balance of convenience tilts. This Court finds that in the present situation, the balance of convenience tilts in favour of the Defendant/Respondent's having provided grounds to deny the Applicant injunctive relief. The Applicant's son resided and cultivated the tea on the suit property for over 20 years, and entered into an agreement where the tea bushes would be cultivated by the Defendant/Respondent, an agreement which prematurely terminated upon his demise, despite their still being legal obligations.

31. For the above reasons, this Court finds and holds that that the Plaintiff/Applicant has failed to establish the threshold for grant of a temporary injunction. Consequently, the Court finds and holds that the Instant Notice of Motion Application dated November 10, 2022, is not merited. Consequently, the said Application is dismissed entirely with costs being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 16TH DAY OF MARCH 2023

L. GACHERU

JUDGE

16/3/2023

In the presence of; -

Joel Njonjo/Mwende- Court Assistants

M/S Njoroge H/B for Mbiyu Kamau for Plaintiff/Applicant

Defendant/Respondent - Absent

L. GACHERU

JUDGE