



Obayo & 2 others (Registered trustees of Pentecostal Evangelistic Fellowship of Africa) v Gachanja & 2 others; Nairobi County (Third party) (Environment and Land Case Civil Suit 349 of 2022) [2023] KEELC 16439 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 349 OF 2022
J OMANGE, J
MARCH 16, 2023**

BETWEEN

**REVEREND SIMEON OBAYO 1ST PLAINTIFF
REVEREND PETER S DAYAS 2ND PLAINTIFF
REVEREND JOSEPH M KILIOBA 3RD PLAINTIFF
REGISTERED TRUSTEES OF PENTECOSTAL EVANGELISTIC FELLOWSHIP
OF AFRICA**

AND

**NJOKI GACHANJA 1ST DEFENDANT
EVANS ODENYO 2ND DEFENDANT
FREDRICK OCHIENG 3RD DEFENDANT**

AND

NAIROBI COUNTY THIRD PARTY

RULING

1. The subject matter of this suit is the Parcel of Land known as Nairobi Block 119/534 (the Suit Property).
2. Before this Court is the Plaintiff's Notice of Motion Application dated October 16, 2022 filed under a Certificate of Urgency seeking the following reliefs:
 - a. Spent



- b. That a conservatory order by way of an interim injunction do issue restraining the Defendants either by themselves, servants or agents from offering for sale, selling, alienating, entering, vandalizing, stealing, trespassing, occupying, building or otherwise interfering with all that parcel of land known as Nairobi/Block 119/534 pending the hearing and determination of this Application inter partes.
 - c. That a conservatory order by way of an interim injunction do issue restraining the Defendants either by themselves, servants or agents from offering for sale, selling, alienating, entering, vandalizing, stealing, trespassing, occupying, building or otherwise interfering with all that parcel of land known as Nairobi/Block 119/534 pending the hearing and determination of the suit.
 - d. That the costs of this Application be provided for.
3. The Application is supported by the Affidavit of Reverend Joseph m. Kilioba and further based on the grounds on the face of the Application, inter alia that Plaintiffs bought the suit property from Githurai Ting'ang'a Company Ltd for KES 1.3 Million and went ahead to acquire a Certificate of Lease from the Ministry of Land, having been allotted the same, and has been using it for Sunday School and Church services.
4. It is the Plaintiff's case that the Church has a good title as opposed to the Defendants who don't and are just trying to grab it. That when the Plaintiff wanted to fence the property, a conflict arose and the youth, led by the Defendants, leading to the injury of one church official.
5. It is the Plaintiff's case that though the matter was initially brought to Court, it was not determined substantively as the Court ordered that the right litigants who could prosecute the case are the Registered Trustees of the PEFA Church.
6. That the matter was subject of a discussion in the Nairobi City County Assembly which led to a report vindicating the Plaintiff as the rightful owner of the suit property. That the Defendants intended to forcefully enter the occupation of the property and have in conjunction with others, built a toilet, thus there was need to stop the forceful entry and construction as it would subject the Plaintiff to irreparable harm.
7. The Applicant adduced a copy of the property ownership documentation for the suit property, a copy of a search, copies of the correspondences for the beacon establishment, the Defendants' letter dated May 11, 2021, photographs as well as other correspondences with the authorities.
8. In the letter dated May 11, 2021, members of Githurai Social Justice, Githurai Sports Fraternity and a Githurai Sports leader signed by the Defendants herein issued a Notice to the Plaintiff to vacate the suit property within 7 days as its continued occupation had caused chaos among the community members. The Plaintiff also attached a copy of the minutes of the Nairobi City County Assembly sectoral committee on planning and housing where it was recommended that the Government agencies would within 90 days determine the exact size of the suit property originally owned by Githurai Tinganga Company, to determine the land allocated to Githurai Primary School, the Plaintiff and Githurai Catholic land, and the plots be clearly demarcated and each party issued with title documents. This was in the year 2014. Subsequently, in 2016, the Assembly discussed and found that the suit property belonged to the Church.
9. The suit documents were served upon the Defendants who, did not file a response to the Application per se, but instead filed an Application dated November 4, 2022 seeking joinder of Nairobi City County.



10. From the Defendant’s Application, it was clear that though the Defendants have no rival title to the suit property, they had a contention that the suit property was initially allocated for public use for a school and a dispensary, and this was the necessity of joining the County government to give account of how land intended for the benefit of the public is claimed to belong to the Plaintiff.
11. On November 22, 2022, I granted the Defendants leave to join the County as a 3rd Party. After this joinder, neither the Defendants nor the 3rd Party opposed the Plaintiff’s motion.
12. The Plaintiff nevertheless filed submissions dated January 19, 2022. The Plaintiff submitted that it had fulfilled the test outlined in the *Giella vs Cassman Brown* case and the Application should be allowed with costs.
13. I note that in this case, what the Plaintiff seeks pending the hearing and determination of the suit is a Conservatory order, instead of an injunction.
14. The Supreme Court of Kenya in [*Gitaru Peter Munya v Dickson Mwenda Kitbinji & 2 others {2014} eKLR*](#) had the following to say about conservatory orders,

“conservatory orders’ bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes ...However, in the context of the [*Constitution*](#) of Kenya, 2010, a third condition may be added, namely.... That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the [*Constitution*](#).”
15. In [*Kenya Association of Manufacturers & 2 others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others {2017} eKLR*](#) the Court held as follows

“in an application for a conservatory order, the Court is not invited to make any definite or conclusive findings of fact or Law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public Law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”
16. Conservatory orders are therefore different from injunctions due to the public interest perspective. A party seeking a conservatory order should demonstrate that unless a conservatory order is granted, there is real danger that they will suffer prejudice as a result of the violation or threatened violation of the [*Constitution*](#).



17. In terms of real and imminent danger, the High Court in *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others [2014] eKLR*, held as follows:

“To those erudite words I would only highlight the importance of demonstration of “real danger.” The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

18. In this case, the Plaintiff’s basis for asserting real danger is the allegation that the Plaintiff’s church leaders were injured, and that the Defendant demanded the Plaintiff to vacate the suit property in the year 2021, and that they were in the process of erecting a toilet.

19. Though the property may arguably be said to be used by the public, either as a school or even as a church, the title to the land is to a private entity- the Plaintiff, at least from what the Plaintiff has adduced. Therefore, instead of a conservatory order, I find that an injunction is preferable, although they may both have the same effect.

20. As rightly submitted by the Plaintiff, the principles for grant of injunction are well settled by decision of *Giella v Cassman Brown & Company Limited [1973] E.A. 358.*, where the court stated thus:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

21. In this case, the Plaintiff has demonstrated that it purchased the suit Githurai Tinganga Company, and now holds title documents. A recent search, states as much. However, there seems to have been a contention on how the suit property was acquired, and this explains why the Defendants have joined the County government to these proceedings.

22. Be so as it may, from the material filed in Court by the Defendants, or relating to the Defendants, it would appear to me that the Defendants do not claim that the property is their own, all they seem to propound, is that the suit property had initially been allocated to Schools and a dispensary. The Defendants have not denied the authorship of the letter dated May 11, 2021 and the efforts towards implementing its contents. I have also perused a raft of correspondences with authorities to the effect that incidences may have occurred due to the battles on the ownership of the suit property. Such dispute is one which this Court would hopefully resolve, and if the law of the jungle is left to prevail, the Court will have nothing to adjudicate upon. On this basis, I have no hesitation to hold as I do, that Plaintiff has established a prima facie case with a reasonable probability of success.

23. The second limb is on the concept of irreparable injury. In order to prove that the Plaintiff risks suffering irreparable injury, he must demonstrate that the injury cannot be compensated adequately by an award of damages. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR*, the court sated as follows;

“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.”

24. The Plaintiffs allege that the activities castigated by youths led by the Defendants has caused chaos to the Church environment. They have cited injuries of their church officials and breach of peace. Chaos leading to destruction of property and injury of members of the public can never be remedied by an award of damages.
25. I have had the benefit of perusing the photographic evidence adduced by the Plaintiff, and with this, I find no hesitation in agreeing with the plaintiffs’ claim that there is imminent likelihood of violence and harm.
26. It is my view that if the injunction is not issued, the Defendants may continue to invade and even make good their action as threatened. This action, will no doubt damage or waste the suit property, eventually rendering the suit nugatory. Therefore, I hold that unless the injunction is granted, the Plaintiff shall suffer irreparable injury that may not be adequately compensated by way of damages.
27. The upshot of the foregoing is that the Plaintiff’s Application has merit, and is allowed in the following terms:
 - a. *That pending the hearing and determination of the suit, an interim injunction is hereby issued restraining the Defendants, their servants, agents or anyone whosoever acting in, or under their direct or indirect instruction from vandalizing, trespassing upon, building on or interfering, in whatsoever manner with the suit property.*
 - b. The costs of the Application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF MARCH 2023.

JUDY OMANGE

JUDGE

In the presence of:-

No appearance for the Plaintiffs

No appearance for the Defendants

Steve - Court Assistant

