



**Green & another v Mangi (Environment & Land Case E65 of 2022)
[2023] KEELC 17223 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E65 OF 2022
EK MAKORI, J
APRIL 27, 2023**

BETWEEN

DAVID RODNEY GREEN 1ST PLAINTIFF

DEBORAH JANE GREEN 2ND PLAINTIFF

AND

JOE KAZUNGU YAA MANGI DEFENDANT

RULING

1. Before this court for determination is a Notice of Motion dated November 10, 2022 brought under sections 3, 13(7) of the *Environment and Land Court Act*, Section 1A, 1B, 3A and 63 (b) and (e) of the *Civil Procedure Act*, and Order 36 Rule 1, Order 40 Rules 1,2,4 of the *Civil Procedure (Amendment) Rules 2020*. The Plaintiffs seek the following orders;-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending hearing and determination of this suit a temporary order of injunction do hereby issue restraining the Defendant and anyone claiming under him from entering, encroaching, trespassing, evicting, causing nuisance, invading, remaining on, damaging, grazing animals thereon, wasting away and or in any way dealing with or interfering in any manner with the Plaintiff's peaceful, quiet possession, enjoyment and use of the property known as Title No Kilifi/Mtondia/182 situate in Kilifi.
 - e. That costs of this Application be paid by the Plaintiff.



2. The application is based on the grounds on its face and supported by the affidavit sworn by David Rodney Green. The Plaintiffs' contention was that they were at all material times the registered owners of the property known as Title No Kilifi/Mtondia/182 measuring approximately 14 acres situated in Mtondia area in Kilifi. (The suit property). That they acquired the property in the year 1999 and have since had quiet possession until sometime in September and October 2022 when the Defendant trespassed on the suit property by cutting down orchard trees, grazing his cattle, and construction of a permanent structure thereon.
3. That judgment was issued by this court in ELC No 25 of 2018 on May 6, 2020 in favour of the Defendant but the same was overturned in Appeal No E017/2020 on September 23, 2022 in the favour of the Plaintiffs herein.
4. The Defendant opposed the application. He filed a Replying Affidavit sworn on November 22, 2022 and another dated January 23, 2023. He contested that the Plaintiffs should seek to execute the judgment of the court of appeal and not file a fresh suit as the present one.
5. The application was canvassed by way of written submissions.

The Plaintiff's submissions

6. Counsel for the Plaintiff submitted that the principles for granting an injunction were established in the case of *Giella -v- Cassman Brown [1973] EA*. Firstly that an applicant must establish a prima facie case. Counsel argued that having demonstrated legal ownership of the suit property, the Plaintiff had established a prima facie case as it was held in *Kenya Commercial Finance Company Ltd -v- Afraha Education Society [2001] 1 EA 86*. Counsel added that the court of appeal having determined the issue of ownership, the same was now res judicata. Secondly, that the Plaintiff will suffer irreparable loss. Counsel submitted that denying an injunction to a party that has established a prima facie case would ultimately cause him irreparable loss. Counsel relied on the case of *George Orango Orago v George Liewa Jagalo and 3 others [2010] eKLR* and *Kamau Mucuba v Ripples Ltd [1993] eKLR*. Thirdly, counsel relied on the case of *Joseph Siro Mosioma v Housing Finance Company of Kenya and 3 others [2008] eKLR* and submitted that damages will not be an adequate remedy to allow the Defendant to continue trespassing.

The Defendant's Submissions

7. Relying on the definition of a prima facie case established in the case of *Mrao Ltd -v- First American Bank of Kenya Ltd and 2 others [2003] eKLR*, counsel for the Defendant submitted that the Plaintiffs failed to demonstrate a prima facie case for failure to prove trespass on the part of the Defendant. And having failed to establish a prima facie case, the other two conditions automatically fail as it was discussed in the Afraha case [supra]. On whether the Plaintiff will suffer irreparable loss, counsel cited the case of *Nguruman Ltd v Jan Bonde Nielsen and 2 others CA 77 of 2012* and *Anthony Bulitia Simiyu and 5 others v Meave Khalagai and others [2022] eKLR*. He submitted that the Plaintiff did not present any evidence of their alleged investment on the suit property, therefore, this ground could not succeed. In the ultimate, counsel submitted that the Plaintiffs were not entitled to the orders sought.

Analysis and Determination

8. I have carefully considered the application, affidavits, and submissions filed by both sides. I have also perused the copies of judgments delivered by this court in ELC No 25 of 2018 and by the Court of Appeal in Civil Appeal No E017 of 2020 on May 6, 2020 and September 23, 2022 respectively. It is evident that the issue before those two courts was on ownership of the suit property. The court of



appeal faulted and set aside this court's judgment which had allowed the Defendant's case against the Plaintiffs herein. The court of appeal held:-

' The court misapplied the doctrine of legitimate expectation elevating it above the law and overlooking the sanctity of certificate of lease under section 36 of the LRA'

9. In other words, the issue of ownership was heard and determined in favour of the Plaintiffs herein. Consequently, the Plaintiffs have now filed the present suit on trespass against the Defendant. It follows therefore that the sole issue for determination in this application is whether the Plaintiffs are entitled to an order of injunction pending the determination of the suit.

10. The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the Civil Procedure Rules which provides that: -

' 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 [Rev 2012] Civil Procedure CAP 21 [Subsidiary] C17 – 165;

(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.'

11. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [Supra] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

' Firstly, 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.'

Further, in *Nguruman Limited –v- Jan Bonde Nielsen & 2 others* [supra] the court opined as follows:-

' 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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.'



12. The question which therefore arises is whether the notice of motion herein meets the threshold set for the granting of a temporary injunction. The Court of Appeal in Moses C Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, defined a prima facie case 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter'.

13. From the above definition, it is clear that a prima facie case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial. I find that the Plaintiffs have demonstrated a prima facie case. It is undisputed that there is a court of appeal judgment on the ownership of the suit property in favour of the Plaintiffs. The Plaintiffs also attached a copy of a certificate of lease in their names. The Defendant admitted that he has been in occupation of the suit property since the year 1985. In the circumstances, I am convinced that there exists the Plaintiffs' right which has apparently been infringed by the Defendant as to call for an explanation or rebuttal from the latter.

14. Regarding the second hurdle I will rely on the case of Pius Kipchirchir Kogo -v- Frank Kimeli Tenai [2018] eKLR where it was stated that 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.'

15. The Plaintiffs contested that the Defendants has continued to destroy the suit property with impunity by destroying their orchard. That the Defendant has since started constructing a house on the suit property to defeat the present application. The Plaintiffs annexed copies of photographs of fresh construction, evidence which was not rebutted by the Defendant. To avoid running the risk of touching the merits of the suit at this point, I find that the Plaintiffs have demonstrated that the suit property is in danger of being wasted or damaged, and that they stand to suffer irreparable loss.

16. Given the above, I am satisfied that there is need to issue an order so as to preserve the substratum of the suit pending the hearing and determination of the suit on merits.

17. The upshot is that the notice of motion dated November 10, 2022 is merited is hereby allowed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI

THIS 27TH DAY OF APRIL, 2023.

E.K.MAKORI

JUDGE

