



**Kavindu v Kamala (Environment & Land Case E46 of 2021)
[2023] KEELC 17744 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17744 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E46 OF 2021**

**TW MURIGI, J
MAY 31, 2023**

BETWEEN

CATHERINE KAVINDU PLAINTIFF

AND

MUTHOKA KAMALA DEFENDANT

RULING

1. By a notice of motion dated December 20, 2021 brought pursuant to the provisions of order 40 rule 1(a), 2 & 4(1) of the Civil Procedure Rules, section 13 (7)(a) of the Environment and Land Court Act and sections 1A, 1B and 3A of the Civil Procedure Act the applicant seeks the following orders: -
 1. Spent.
 2. That a temporary injunction do issue pending the hearing and determination of this application restraining the defendant, his agents and/or servants from entering parcel of 3 acres situated at Kilili Nzau within Makueni County and constructing structures thereon or in any other way interfering with the said parcel of land.
 3. That an order of injunction do issue pending the hearing and determination of this suit restraining the defendant, his agents and/or servants from entering parcel of 3 acres situated at Kilili Nzau within Makueni County and constructing structures thereon or in any other way interfering with the said parcel of land.
 4. That the costs of this application be paid by the defendant/Respondent.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Catherine Kavindu sworn on even date.



The Applicant's Case

3. The applicant averred that she is the legal owner of 3 acres of land situated within Kilili Nzau having purchased the same from the defendant in the year 2009 at a consideration of Kshs 90,000/-.
4. That the defendant has without her knowledge and/or consent encroached and refused to vacate the suit property. It was further averred that the defendant has refused to the transfer the 3 acres to the plaintiff.
5. Though duly served, the Respondent did not file a response to the application.
6. The application was canvassed by way of written submissions.
7. The plaintiff's submissions were filed on November 8, 2022 which I have duly considered.

Analysis and Determination

8. Having considered the application and the written submissions, the only issue for determination is whether the applicant has met the threshold for the grant of an order of injunction.
9. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giellla v Cassman Brown & Co. Ltd* [1973] EA 358 as follows; First the 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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
10. This court will first determine whether the applicant has established a prima facie case with a probability of success.
11. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal 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 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.”
12. The Plaintiff averred that she is the legal owner of three acres of land situated within Kilili, having purchased the same from the defendant at a consideration of Kshs 90,000/=. In this regard, she annexed a translation of an undated agreement for sale between herself and the Respondent herein. The sale agreement states in part as follows;

“I Muthoka Kamala have agreed to sell part of my land measuring 3 acres to Catherine Kavindu Kiema at a price of Kshs 90,000/= (ninety thousand shillings only).”
13. The agreement for sale does not specify the land parcel number in which the three acres are situated or the locality of the land which is subject to the agreement for sale. The issue ownership can only be determined upon hearing the suit on merits.



14. In the case of *Edwin Kamau Munuu v Barclays Bank of Kenya Ltd* NBI HCCC No. 1118 of 2002, the court held that;

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

15. The issue of ownership can only be determined in a full trial where the parties will have the opportunity to call evidence and have the same challenged by way of cross examination.

16. On the basis of the material placed before me, I find that the Plaintiff has not established a prima facie case with a probability of success.

17. For the Plaintiff to succeed in this application, all the three elements must be demonstrated.

18. This was the finding of the Court of Appeal in *Nguruman Limited Vs Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012 which held thus: -

“In an interlocutory injunction 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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests 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. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86. 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 is 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. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

19. The Plaintiff having failed to establish a prima facie case with a probability of success, it would be immaterial for me to consider the other principles governing the grant of an injunction enunciated in the case of *Giella Vs Cassman Brown* (Supra).

20. The upshot of the foregoing is that the application dated December 20, 2021, is devoid of merit and the same is dismissed with no orders as to costs.

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HON. T. MURIGI



JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF
MAY, 2023.**

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Hassan holding brief for Mutua for the applicant.

