



Muthusi & 2 others (Being the officials of Kivaa 15 Alive Self Help Group) v Nyolo (Environment and Land Appeal E045 of 2021) [2023] KEELC 17957 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17957 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E045 OF 2021**

**A NYUKURI, J
MAY 31, 2023**

BETWEEN

**RAPHAEL MULINGE MUTHUSI 1ST APPELLANT
FRANCIS MAITHYA MUTAVI 2ND APPELLANT
JAMES MUTISYA WAMBUA 3RD APPELLANT
BEING THE OFFICIALS OF KIVAA 15 ALIVE SELF HELP GROUP**

AND

MARY NDILA NYOLO RESPONDENT

(Being an Appeal against the Ruling and Orders of Hon. G. O. Shikwe, Principal Magistrate Kithimani delivered on 24th September 2021 in Kithimani PMCC ELC Case No. 35 of 2021)

JUDGMENT

Introduction

1. This is an interlocutory appeal against the ruling of Honourable G. O. Shikwe, Principal Magistrate delivered on 24th September 2021 in Kithimani PMCC ELC Case No. 35 of 2021. In that ruling, the learned magistrate dismissed the Appellant's application dated 17th August 2021 seeking temporary injunction to restrain the Respondent herein from interfering with Plot Number 58 and/or 60 and/or 137 in Kivaa Market in Masinga Sub-County (suit property).
2. The appeal herein was initiated vide a Memorandum of Appeal dated 1st October 2021 which was premised on the following grounds of appeal;
 - a. That the learned magistrate erred in fact and in law by failing to consider the need for an injunction to maintain the status quo pending the determination of the what plot exists on the ground, whether it is Plot Number 58 or 60 or 137 and its ownership.



- b. That the learned magistrate erred in fact and in law by failing to appreciate that by allowing the Defendant to proceed with the construction of the disputed plot the court had openly undermined the Plaintiff's entire claim.
 - c. The learned magistrate erred in law and in fact by failing to appreciate the entire case before him and proceeded to issue conflicting and contradictory orders.
 - d. The learned magistrate failed to appreciate that by ordering a speedy hearing of the case and also allowing the Respondent to continue with construction on the disputed plot the court had extinguished the Appellant's legitimate expectation of a fair hearing.
 - e. The learned magistrate erred in law and in fact in dismissing the Appellant's application after already having held that the Appellant had established a *prima facie case*.
 - f. That the learned magistrate erred in fact and in law by discussing and/or introducing particulars that were clearly in respect of another case.
3. Consequently, the Appellant sought the following orders;
- a. The appeal herein be allowed and the ruling and the orders of the subordinate court dated 24th September 2021 be set aside.
 - b. An order of injunction do issue restraining the Respondent, her agents and/or servants from constructing, disposing and/or transferring Plot Nos. 58, 60 and 137 in Kivaa Market in Masinga Sub-County Machakos County pending the hearing and determination of Kithimani ELC Case No. 35 of 2021.
 - c. Costs of this Appeal and the costs of the application in the subordinate court be awarded to the Applicant.

Background

4. On 17th August 2021, the Appellants who were the Plaintiffs before the subordinate court filed a plaint dated even date against the Defendant (Respondent herein) seeking general damages and a permanent injunction to restrain the Defendant from interfering with Plot Number 58 Kivaa Market. The Plaintiffs averred that they had purchased Plot Number 58 measuring 40 feet by 100 feet in September 2018 and that in October 2019, the Defendant began laying claim on that plot alleging that the same was either Plot Number 60 or Plot Number 137, which she had purchased. They complained that on 15th August 2021, the Defendant had without justification or the Plaintiffs' consent invaded the Plaintiffs' Plot Number 58, and began construction thereon, which actions warranted the grant of a permanent injunction.
5. Simultaneous with filing the plaint, the Plaintiff also filed a Notice of Motion dated 17th August 2021 which sought a temporary injunction to restrain the Defendant from constructing, disposing, transferring or interfering in any manner with Plot Number 58 and/or 60 and/or 137 in Kivaa Market, Masinga Sub-County, Machakos County, pending the hearing and determination of the suit. They attached a sale agreement, photographs and documents allegedly relied upon by the Defendant to lay claim on the suit property.
6. In response to the plaint, the Defendant filed a defence dated 23rd August 2021. She denied the Plaintiffs' claim and stated that she does not claim Plot Number 58 and that she has not trespassed on the Plaintiffs' plot. She maintained that her plot is registered as Plot Number 137 which was formerly Plot Number 60 as per the records held by Machakos County offices.



7. She also stated that the dispute between the parties herein was reported to the DCI at Masinga, who sought a report from the subcounty administrator and a detailed report was done by the County Surveyor after listening to all the parties. She stated that the finding of the County Surveyor in his report dated 28th April 2021, established that Plot Number 58 does not exist on the ground. She took the position that the Plaintiffs ought to concede that they were defrauded by the person who sold them a non-existent plot and their recourse lay in pursuing the seller of the plot. She sought for the dismissal of the plaint.
8. In response to the Notice of Motion dated 17th August 2021, the Defendant filed a replying affidavit sworn on 23rd August 2021. She averred that it was not true that she had trespassed on the Plaintiffs' Plot No. 58. She stated that her plot was Number 60 and registered as Plot No. 137 Kivaa Market which plot had originally been allocated to Ebrahim Murage who sold to Bernice Mueni and the latter sold to Phoebe Njeri Karii, who subsequently sold to the Defendant.
9. The Defendant further asserted that she purchased the suit property for Kshs. 220,000/- on 3rd February 2014 and that she has since been paying rates. She stated that she had sought to have the plot transferred to her which application was approved vide the letter of 22nd February 2013 upon which the plot was registered as Plot Number 137. She averred that towards the end of 2018, she began developing the suit property but the Plaintiffs stopped her workers claiming the plot was theirs. That the dispute was reported to Masinga Police Station by the Plaintiffs upon which the Defendant was summoned. That the police heard both sides of the dispute and sought for a report from the subcounty administrator Masinga on the ownership. That the County Surveyor heard both parties and prepared his report which showed that Plot Number 58 does not exist on the ground or on paper and that the plot where the Defendant was constructing belonged to the Defendant.
10. It was therefore contended by the Defendant that the Plaintiffs had not met conditions for grant of temporary injunction set out in the case of *Giella v. Cassman Brown* [1973] EA 358. She produced a copy of sale agreement, rates payment receipts, letter from Masaku County Council and County Surveyor's report.
11. Upon hearing both parties on the motion dated 17th August 2021, in his ruling delivered on 24th September 2021, the learned trial Magistrate held that the Respondent had demonstrated to the court that she had been in possession of her plot at an earlier date than the Applicants. Therefore the trial court relying on the report of the County Surveyor found that the Plaintiffs had failed to meet the threshold for grant of temporary injunction and proceeded to dismiss the application.
12. It is the above decision that provoked the instant appeal.
13. This appeal was canvassed by way of written submissions. On record are the Appellants' submissions dated 29th August 2022 as well as the Respondent's submissions dated 19th May 2022.

Appellants' Submissions

14. Counsel for the Applicants submitted that although the trial magistrate found that the Appellants had established a *prima facie case*, the court proceeded to dismiss the application. The Appellants' counsel referred to the court's findings at the first paragraph of page 6 which was quoted verbatim as follows;

I find in this case the Applicant has been able to demonstrate that he has a *prima facie case* as the allottee of the land and that the balance of convenience favours him since he has been in actual possession of his portion since 1981. He risks suffering irreparable harm should



this court fail to intervene since his building materials are at the risk of being stolen from his property.

15. Counsel submitted that the subordinate court failed to appreciate the issues before court and issued a conflicting ruling by holding that the Applicant had established a *prima facie case* and then dismissed the same application without any explanation. Counsel contended that by allowing the Respondent to proceed with the construction, that undermined ownership claim of the Appellants. Counsel argued that the trial court erred in failing to appreciate that the orders sought were intended to maintain the status quo.

16. Counsel argued that the learned trial magistrate took into account matters he ought not to have taken into account. Counsel referred to page 3 of the ruling where the court stated as follows;

Avers that her late husband is the owner of Plot Number 148 at Ikombe Market which plot the Plaintiff is bent on grabbing by all manner of allegations.

17. Counsel therefore argued that the facts above were wrongly imported by the court into the dispute herein which misled the court in its findings. Counsel relied on the cases of *Thomas Mumo Maingey (suing on his behalf and on behalf of the Franciscans of our Lady of Good Sisters Registered Trustees) v. Sarah Nyiva Hillman & 3 Others* [2018] eKLR, *George Wachira Irungu v. Francis Njoroge Gatheru* [2015] eKLR, *Mbogo v. Shah* [1968] EA and *Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & 4 Others*, Nairobi Civil Appeal No. 91 of 1999.

Respondent's Submissions

18. Counsel for the Respondent submitted that the Applicants had failed to meet the conditions for grant of injunction set out in the case of *Giella v. Cassman Brown* [1973] EA 358, and the requirements under Order 40 Rule 1 of the *Civil Procedure Rules*. Reliance was placed on the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR, for the proposition that to meet the threshold for grant of temporary injunction, an Applicant must show a *prima facie case* with chances of success; demonstrate irreparable injury if the injunction is not granted and that to allay any doubts, the court ought to consider the balance of convenience.

19. It was submitted for the Respondent that a *prima facie case* was defined in the case of *Mrao Ltd v. First American Bank of Kenya Ltd* [2003] eKLR, to mean a case that discloses an apparent infringement of the rights of the claimant. Counsel maintained that the report of the County Surveyor was clear that plot No. 58 does not exist on the ground and that the plot occupied by the Respondent belonged to the Respondent and that the same was Plot Number 137 (previously Plot Number 60).

20. On whether there was a risk of irreparable injury, counsel argued that the Appellants had not shown that they stood to suffer irreparable injury not capable of being compensated in damages if the injunction is not granted. To buttress their argument, reliance was placed on the cases of *Pius Kipchirchir Kogo v. Frank Kimeli Tenai* [2018] eKLR, *Elizabeth Muthoni Hussein v. Vikesh Jinit Shah* [2018] eKLR and *Fredrick Nganga Thuo v. Peter Mungai Njubo* [2019] eKLR.

21. As regards the question of the balance of convenience, counsel relied on the case of *Pius Kipchirchir Kogo v. Frank Kimeli Tenai* (*supra*) to submit that the meaning of balance of convenience requires that the court is satisfied by the application that the inconvenience caused to them will be greater than that caused to the Defendant.

22. As regards grounds 2, 3, 4 and 5 of the appeal, counsel argued that the court was a neutral arbiter with no interest in the matter and that by disallowing the application, that did not amount to undermining



the suit. Counsel argued that as the Appellants had not demonstrated a *prima facie case*, the trial court was right in dismissing their application.

Analysis and Determination

23. I have carefully considered the appeal, rival submissions and the record. The only issue that arises for determination is whether the Appellants met the threshold for grant of temporary injunction.
24. Principals for grant of temporary injunction are well settled. The Applicant must demonstrate a *prima facie case* with chances of success; demonstrate irreparable injury that cannot be compensated in damages if the injunction is not granted and where the court is in doubt as to whether the injury to be suffered is irreparable, the court shall determine the application on the balance of convenience.
25. The above elements were set out in the case of *Giella v. Cassman Brown* [1973] EA 358, where the court held as follows;

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.

26. A *prima facie case* is a case that demonstrates an apparent infringement on the rights of the claimant, which calls for a rebuttal from the Respondent. In the case of [*Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others*](#) [2003] eKLR, the Court of Appeal described a *prima facie case* as follows;

In civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

27. In the instant case, the Appellants main complaint is that the subordinate court ought to have granted the orders of injunction sought so as to maintain the *status quo* pending determination of the question of ownership of the suit property. The Appellant insists that dismissing the application for injunction and allowing the suit to proceed expeditiously amounted to denial of a fair hearing as there was no point of hearing the case where the Respondent is proceeding with construction on the suit property. In my view, this argument does not address the real issues that were before the trial court.
28. To begin with, in the circumstances of this case, the question of granting interlocutory injunction to preserve the status quo pending hearing of the dispute is a question that has to be considered in the context of property rights claimed by the parties. Injunctions are not entitlements of parties. They are equitable remedies which can only be granted to deserving parties. Under Article 40 of the [*Constitution*](#), the right to acquire and own property is a right that is Constitutionally protected and therefore interfering with another person's exercise of their rights over property they apparently own must be justified in law. Therefore injunctions are not merely granted to preserve the status quo pending determination of disputes, they are granted where as a matter of principle, the court is satisfied that the claimant has demonstrated that they have a *prima facie* claim. In my view, granting an injunction merely for purposes of maintaining the status quo where there is no demonstration of a *prima facie case*, to begin with, would amount to elevating one party's interest over the other, contrary to Article 159 of the [*Constitution*](#) which requires justice to be done to all, as that would be an injustice to the owner of the property. I therefore reject the Appellants' submissions that dismissing their application violated their right to a fair hearing.



29. On the question as to whether the Appellants established a *prima facie case*, the learned trial magistrate found that the Respondent had demonstrated possession of the suit property way before the Appellants' claim and that the Surveyor's report was clear as to the number of the disputed plot. The Appellants' counsel submitted at length that the trial magistrate made contradictory and confusing findings by finding that the Appellants had established a *prima facie case*, but then proceeded to dismiss the application.

30. I have considered the ruling of the subordinate court and this is what the learned trial magistrate stated;

The issue of ownership of the suit properties is in great dispute. The parties are talking of two different parcels of land, the applicant talks of Plot Number 58 while the Respondent talks of Plot Number 137. Clearly, they cannot be talking of the same land. The Respondent has been able to demonstrate that this is a dispute that has been ongoing since 2013 and has annexed the relevant documents to prove this aspect. I cannot tell at this interlocutory stage whether the said documents are forgeries as alleged by the Applicants. This can only come out during a full hearing. What is clear is that the Respondent has been able to demonstrate to the court that she has been in possession of her plot at an earlier date than the Applicants. That this dispute between the two parties started a few years ago and that they have even been to the police who had even involved the County Surveyor in determining the issue.

The findings contained in the County Surveyor's report cannot be ignored at this stage wherein he affirms the Respondent's title and validity. Respondent claims ownership of Plot Number 148 by virtue of inheritance from her deceased husband. The Applicant claims the original allottee of his land and has been in actual occupation since 1981. She risks suffering irreparable harm should this court fail to intervene since his building materials are at the risk of being stolen from his property.

Disposition

Since this dispute is still at the interlocutory stage, it is my considered finding that the Applicant has failed to meet the threshold required before injunctive orders were issued. Firstly, I do not think that they have been able to establish a *prima facie case* at this stage because other than the blunt assertions they have not demonstrated that the documents of ownership in the possession of the Respondent are forgeries.....

Secondly, after assessing the respective claims, it is my considered view that it is the Respondent who stands to suffer the greater irreparable harm if the orders sought are issued against her since she has been in possession of her plot a longer duration of time than the Applicants herein.

The balance of convenience is also in her favour when one considers that the dispute has been looked at by the police and even the County Surveyor who has affirmed her claim.

The application is accordingly dismissed with costs to the Respondent for the reasons given above.

31. Clearly, looking at the ruling where it refers to Plot Number 148; the property being inheritance of the Respondent from her deceased husband; the Applicant having been in possession of the property since 1981 and the risk of theft of the Applicants' building material, it is clear that that portion of the ruling has nothing to do with the facts of the case herein or the issues arising from the pleadings and the only inference this court can make is that this is a case of copy and paste gone awry. I say so because even at the base of each page of the ruling, it is indicted "ELC 19/18". In my view therefore,



that portion of the ruling was wrongly included therein as the same does not touch on the facts and issues in question in dispute.

32. Having said that, and noting that the learned trial magistrate made a finding at paragraph 2 of page 6 of the ruling that the Applicants had failed to meet the threshold for grant of injunction and proceeded to address the three conditions for grant of injunction, I do not agree with the submissions made by the Appellant that there was contradictory findings, as the findings on the three limbs for grant of injunction were specifically addressed and the reasons for the findings indicated accordingly. The two paragraphs which on pages 5 and 6 of the ruling in so far as they do not touch on the facts and issues in the suit, in my view do not amount to a contradictory finding, but the same were in respect of, another suit and not the suit which was being handled by the subordinate court.
33. Having found that there was no contradiction in the ruling but a copy and paste exercise gone awry, I now proceed to consider whether the Applicant demonstrated a *prima facie case* with chances of success. The Appellants' case is that they are the owners of Plot Number 58 Kivaa Market by virtue of having purchased the same. They attached a sale of plot agreement dated 22nd September 2018 between the Appellants and one John Wambua Maingi and a subsequent acknowledgement of payment dated 23rd October 2018. Besides, they produced what they referred to as a letter of allotment dated 17th January 1974 which stated that Plot Number 58 had been granted to Wambua Maingi. They also produced a receipt dated 11th March 2020 in the name of Wambua Maingi from the County Government of Machakos for payment of Plot rent for Plot Number 58 Kivaa Market. They further produced a letter dated 16th October 2019 summoning them to Masinga Sub-County Town Planning Committee to resolve the dispute. Further they produced all the documents relied upon by the Respondent in their claim, save the Surveyor's report.
34. Having considered the Appellants' claim, I note that they alleged to own Plot Number 58 Kivaa Market, which claim was denied in the report by the County Surveyor Machakos County, who stated that Plot Number 58 Kivaa Market did not exist and that the disputed ground was Plot Number 137 formerly Plot Number 60 belonging to the Respondent. In the circumstances, the Appellants having been confronted with the Surveyor's report, ought to have produced evidence to counter the report. They ought to have availed evidence to demonstrate that Plot Number 58 apparently existed, at least from the records of the custodians thereof, who are the County Government of Machakos. As that evidence was not provided at the preliminary stage, it is my view that the trial court did not error in making a finding that the Plaintiffs failed to prove a *prima facie case*.
35. As there was no proof of a *prima facie case* upon which the issue of irreparable injury would have been anchored, it is needless for this court to inquire into the questions of irreparable loss and the balance of convenience.
36. In the premises, I find no basis for interfering with the exercise of discretion and findings of the subordinate court. The result is that this appeal lacks merit and the same is dismissed with costs to the Respondent.
37. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;



Mr. Mutua for Appellants

Ms. Nzili holding brief for Mr. Munyao for Respondent

Josephine – Court Assistant

