



REPUBLIC OF KENYA



KENYA LAW
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**Nkonge v Kariuki (Environment and Land Appeal E002 of 2023)
[2023] KEELC 17782 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

CK YANO, J

MAY 31, 2023

BETWEEN

MARTIN GITONGA NKONGE APPELLANT

AND

NANCY WANJIKU KARIUKI RESPONDENT

(APPEAL FROM CHUKA CM ELC E064 OF 2022)

RULING

1. The application for determination is the notice of motion dated February 15, 2023 by the appellant. The application is brought pursuant to the provisions of section 1A and 3A of the *Civil Procedure Act*, order 40 rule 1 and order 51 rules 1, 2, 3 & 4 of the *Civil Procedure Rules* and articles 22, 40, 50 and 159 of the *Constitution*. The applicant seeks for orders of injunction restraining the respondent either by herself, her agents, representatives, servants and/or anybody else acting at her behest from evicting the applicant from parcels of land LR No Muthambi/Upper Karimba/267, 1892 and 1895 pending hearing and determination of Chief Magistrate at Chuka ELC No E064 of 2022 and pending hearing and determination of this appeal.
2. The application is supported by the affidavit of Martin Gitonga Nkonge, the applicant, sworn on February 15, 2023 and is based on the following grounds:
 - a. That there is a suit in the lower court *vide* Chief Magistrate's Court at Chuka ELC Case No E064 of 2022 which suit is pending hearing and determination.
 - b. That the lower court has dismissed the appellant's/applicant's in the Chief Magistrate's Court at Chuka ELC Case No E064 of 2022 which application seeks injunctive orders restraining the respondent from either demolishing the appellants/applicants home and other properties and/or from evicting the appellant/applicant from the suit land pending hearing and determination of the suit



- c. That the applicant has appealed the lower court's ruling delivered on February 10, 2023.
 - d. That the appellant's/applicant's appeal herein against the lower court's ruling delivered on February 10, 2023 in Chief Magistrate's Court at Chuka ELC Case No E064 of 2022 has high chances of success.
 - e. That unless injunctive orders are issued herein there is real danger that the respondent will certainly make good her threats, evict the appellant/applicant from and destroy the applicant's home and developments on the suit lands LR No Muthambi/Upper Karimba/267, 1892 and 1895 thereby rendering him homeless and destitute.
 - f. That the respondent has threatened to evict the applicant from the ancestral land where he has developed his home where he lives together with his young family and has undertaken vast and/or substantial developments on the suit land.
 - g. That unless *ex-parte* injunctive orders are issued herein there is real danger that the respondent is likely to make good her threats and evict the appellant/applicant from the suit land thereby inhumanly rendering the appellant/applicant together with his family homeless and destitute.
 - h. That if the orders sought are not granted, the applicant stands to suffer great hardship, prejudice, loss and irreparable damages.
 - i. That the defendant will not suffer any prejudice if the orders are granted but the same will serve the ends of justice.
 - j. That it is in the interest of justice, equity and fairness that the orders sought be granted.
3. The applicant has exhibited a copy of the memorandum of appeal and a bundle of photographs showing his developments on the suit properties and urged the court to grant the orders sought.
 4. The application is opposed by the respondent *vide* a replying affidavit sworn on February 23, 2023. The respondent avers that her correct name is Nancy Wanjiku Njeru and not Nancy Wanjiku Kariuki and states that she is fully aware of the properties which are subject of this suit and which are part of the estate of her late husband Plasido Njeru Nkonge.
 5. The respondent pointed out the existence of Nairobi High Court succession cause No E401 of 2022, in the matter of the Estate of Plasido Njeru Nkonge where the respondent and her son Justus Kariuki Njeru were appointed the administrators of the said estate and in which the applicant herein has filed a protest claiming to be a beneficiary. Relying on advise, the respondent contends that any matter relating to claim of property of estate of the deceased can only be dealt with by the court handling the succession matter.
 6. The respondent avers that in her replying affidavit and submissions before the trial court in Chuka CM ELC E064 of 2022, she challenged the jurisdiction of the court and argued that the applicant has no locus standi to institute the suit in the magistrate's court as he is not the legal representative of the estate of the deceased and urged that courts have previously held that issues of distribution of the property of the deceased should be raised in the succession cause and not by filing a separate cause of action. The respondent relied on *Salim Ali Said v Salwa Ali Said Abdulrehman & 3 others* [2020] eKLR and argued that the appeal has zero chances of succeeding.
 7. The respondent avers that the trial court did not err in dismissing the appellant's application based on the documents that were placed before the court. It is the respondent's contention that the applicant



has no locus standi to institute and sustain these proceedings and is intermeddling with the estate of the deceased contrary to section 45 of the *Law of Succession Act*.

8. The respondent states that she formerly solemnized her marriage with her deceased husband on August 22, 2019 and have a son called Justus Kariuki Njeru, and denied that the applicant was adopted by the deceased. The respondent made reference to a certificate of confirmation of grant issued in Nairobi succession cause No 2579 of 2005 in which the appellant's name does not appear as a beneficiary. The respondent accuses the applicant of bringing down their house and putting up another structure on the suit property and failing to vacate. The respondent states that the applicant is a wealth man aged about 45 years, works and stays in Nyeri county. That any development done by the appellant on the suit property amounts to trespass and must be surrendered to the estate of the deceased. The respondent has annexed the relevant documents to her replying affidavit.
9. The application was canvassed by way of written submissions. The applicant's submissions dated March 20, 2023 were filed through the firm of M/s Waklaw Advocates while the respondent filed hers dated March 22, 2023 through the firm of M/s Walker Kontos Advocates.

Applicant's Submissions

10. It is the applicant's submission that for the reasons given above, he is seeking protection of the suit properties and argued that the respondent's contention that he has no *locus standi* is misinformed as one does not need to take out letters of administration whenever he/she is desirous of instituting proceedings in respect of such properties as the ones in the name of the deceased. That all a party needs to do is to either have or demonstrate an interest or right that they need to either protect or defend. The applicant pointed out that the succession cause referred to is still ongoing and that the applicant is a party having protested to the distribution of the estate of the deceased to his exclusion, adding that he has not been declared not to have capacity. The applicant's counsel cited the provision of order 40 rule 1(a) & (b) of the *Civil Procedure Rules* and relied on the case of *Giella v Cassman Brown Co Ltd* (1973) EA 358, *American Cyanamid v Ethicon* (1975) 1 All ER 504, *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*, *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 others* [2008] eKLR, *Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another* [2019] eKLR; *Paul Gitonga Wanjau vs. Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR, *East African Industries v Trufoods* [1972] EA 420; *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR; *Airland Tours & Travel Limited v National Industrial Credit Bank* Nairobi (Milimani) HCCC No 1234 of 2002, *Lucy Nungari Ngigi & 4 Others v National Bank of Kenya & Anor* eKLR; *Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd*. Nairobi (Milimani) HCCC No 360 of 2001; *Esso Kenya Limited v Mark Makwata Okiya* civil appeal No 69 of 1991; *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125; and *Pius Kipchirchiri Kogo v Frank Kimeli Tenai* [2018] eKLR, and submitted that he has satisfied the conditions necessary for the grant of the injunction orders sought. The Applicant's counsel also submitted that by virtue of section 1A (2) of the *Civil Procedure Act*, the court is enjoined to give effect to the overriding objective as provided in that section.

Respondent's Submissions

11. It is the respondent's submissions that the applicant has no prima facie case because he does not have locus standi to institute the suit. Counsel for the respondent relied on the case of *Mrao Ltd v First American Bank of Kenya & 2 others* (supra), *Daniel Njuguna Mbugua vs. Peter Kiarie Njuguna & 2 others* [2021] eKLR; *Sisilia Nyakoe & another v Attorney General & 4 others* [2021] eKLR; *Lucy Wambui Njoroge (suing as the legal representative of the estate of Benard Wamiri Ngugi – Deceased) v Lands Registrar, Nairobi & another* [2021] eKLR.



12. It is the respondent's submissions that by initiating other suits instead of seeking all remedies in the succession matter is an abuse of the process of the court. Counsel for the respondent relied on the case of *Salim Ali Said v Salwa Ali Said Abdulrehman & 3 others* [2020] eKLR. It is also the respondent's submission that the applicant is trying to sanitize his criminal conduct of intermeddling with the estate of the deceased and cited section 45 of the *Law of Succession Act* and relied on the case of *Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others* (supra) and urged the court to enforce the law and not accept the applicant's tactics to sanitize his criminal conduct.
13. On the threshold for injunction pending appeal, the respondent relied on the case of *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR; *Giella v Cassman Brown* (supra); *Esther Muthoni Mwangi v Samuel Maina Njaria* [2021] eKLR and urged the court to dismiss the application with costs.

Determination

14. This court has considered the application, the response as well as the submissions and authorities. The issue for determination is whether the applicant has demonstrated a *prima facie* case to be granted the interlocutory injunction pending the hearing of the suit and the appeal herein. The guiding principles for the grant of temporary injunction are well settled and are set out in the classic case of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from this and higher courts.
15. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra), the Court of Appeal held that:

“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 the rest of the order of injunction interlocutory or permanent. It is established that all the above three conditions and states 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 applicant will suffer, in the event the injunction is not granted will be irreparable...”

16. On what constitutes a *prima facie* case, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra), the Court of Appeal held as follows:

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show *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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is



meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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 apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

17. In this case, the applicant is claiming to have an equitable interest in part of the suit properties. The applicant avers that he has developed and is living on the suit land together with his family. The applicant states that he is apprehensive that the respondent may evict him and demolish his structures. No doubt, if the respondent proceeds to carry out the eviction and demolish, the applicant will certainly suffer irreparable harm and the appeal will be rendered nugatory.
18. I note that the applicant has approached the court through, *inter alia*, order 40 rule 1 of the [Civil Procedure Rules](#). That rule provides that:
 1. “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.”
19. There are also three conditions for granting of stay order pending appeal under order 42 rule 6(2) of the [Civil Procedure Rules](#) to wit; the court is satisfied that substantial loss may result to the applicant unless stay is ordered, the application is brought without undue delay, and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
20. The court has to balance the rights of the appellant and the respondent. The Court of Appeal in the case of [Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another](#) [2015] eKLR, was cautious of the need to balance between the rights of the parties as well as interfere in instances where an appeal would be rendered nugatory.



21. This court has considered the evidence on record. The purpose of the orders sought herein are to preserve the subject matter pending hearing and determination of the appeal. By preserving the subject matter, the rights of the appellant are also preserved in case the appeal is successful.
22. The upshot is that I find the application dated February 15, 2023 has merit and the same is allowed. Costs of the application shall abide the outcome of the appeal and shall follow the event.
23. Orders accordingly.

Dated, signed and delivered at Chuka this 31st day of May, 2023.

In the presence of:

CA: Martha

Kirimi for Appellant/Applicant

Kimani for Respondent

C. K. YANO,

JUDGE.

