



**Mwenda v Mukiyama & 2 others (Environment & Land Case
E008 of 2023) [2023] KEELC 17925 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2023**

CK NZILI, J

MAY 30, 2023

BETWEEN

LILIAN GACERI MWENDA PLAINTIFF

AND

JOSHUA KIRIMI MUKIAMA 1ST DEFENDANT

MUTWIRI MUKIAMA 2ND DEFENDANT

KAINDIO IGWETA 3RD DEFENDANT

RULING

1. By an application dated 5.5.2023 the court is asked to issue a mandatory injunction directed at the respondent to remove the fence erected on land parcel number 2591 Karama Adjudiciaotn and allow the applicant unlimited access to the land. Similarly, the court is asked to restrain the defendants from creating a road, developing or undertaking any action on the suit land pending the hearing and determination of this suit. The application is based on the grounds on its face and in the supporting affidavits sworn on 5.5.2023 and 26.5.2023. The application is opposed through a replying affidavit sworn by Johnson Kirimi Mukiyama the 1st defendant on 22.5.2023. He has not attached any authority to swear and plead on behalf of the 2nd and 3rd defendants. For a party to be entitled to temporary and mandatory injunctions he has to meet the *Giella and Cassman Brown* (1973) E.A 358 as to *prima facie* case, irreparable loss and balance and the balance of convenience.
2. A *prima facie* case as held in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2004) eKLR and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR is established if looking at the material before the court a right has been infringed calling for the opposite party to rebut to it.
3. Further, the court said that the threat or breach must be dealt apparent and not speculative.



4. Again, as to irreparable loss or damage the court said that it is one which may not be quantifiable or compensated by way of damages. Moreover, the court said that a party must demonstrate that the convenience of granting the injunction should be more than the inconvenience of not granting the orders and the matter eventually succeeding after the hearing.
5. Regarding mandatory injunctions in *Attavi v Oduor & another* KEELC 17315 (KLB) May 10 (2023) Ruling cited with approval *Kenya Breweries Ltd and another v Washington O Okeyo* (2002) eKLR, that a mandatory injunction ought not to be granted on an interlocutory application, in absence of special circumstances and the only in clear cases either where the court thought that the matter ought to be decided at once or where the injunctions were directed at a simple and summary at which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff.
6. The court said that in granting the order, the court had to feel a higher degree of assurance that at the trial it would appear that the injunctions had rightly been granted. That being a different and a higher standard than was required for prohibitory injunctions.
7. In *Nation Media Group & 2 others v John Harun Mwau* (2014) eKLR, the court held that an applicant must demonstrate the existence of special circumstances.
8. Applying the foregoing case law, has the plaintiff surmounted the threshold to deserve the orders sought? I think so. The court has looked at both the plaint and the defence. It has also considered the affidavits and the annexures attached there as well as the written submissions dated 26.5.2023 and 29.5.2023.
9. As held in *Peter Kairu Gitu v KCB Bank* (2021) eKLR, *Mrao Ltd (supra)* & *Pius Kogo v Frank Kimeli Tenai* (2018) eKLR a right to the land has been established by the plaintiff who has in her possession a limited grant dated 6.3.2008 consent to sue dated 25.4.2023, confirmation of ownership dated 31.1.2023; surveyors visit notice dated 16.2.2023 and the report dated 2.3.2023.
10. The report lays bare the boundaries to Parcels No's 2291 and 703. The findings were that the 1st defendant had taken the law into his own hands to demarcate and put beacons and boundaries on the land with no land surveyors present and cordoned off 0.729 ha, which was three times the area of Parcel No. 903, which land the plaintiff applicant has planted nappier grass for her cows and food crops hence effectively blocking her from accessing her land.
11. The defence alleged the land belongs to the late Zakaria Kanyi Kanake, but has no letters of administration to represent the estate. Annexures marked JKM 1, 2, 3 and 5 are not certified. The defendants are silent on the findings in the plaintiff's annexures L9 "2" and the county land surveyors report dated 2.3.2023.
12. The circumstances herein reflect a defendant and in particular, the 1st defendant who is bent to take advantage of the plaintiff/applicant and in total disregard of the reports and documents held by the land adjudication officer on the extent of his land. The defendant cannot arrogate to themselves power to determine boundaries and erect beacons without clearance by the officers who have custody of the said land records.
13. The upshot is that the application is allowed, the OCS Muthara Police Station to supervise the removal of the fence and in the presence of the county surveyor Tigania in the next 48 hours.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 30TH DAY OF MAY 2023



HON. CK NZILI

ELC JUDGE

In presence of

C.A John Paul

Maheli for plaintiff

Respondent in person

