



**Muhia v Kihara (Environment & Land Case 69 of 2022)
[2023] KEELC 17458 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17458 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 69 OF 2022**

**LA OMOLLO, J
MAY 18, 2023**

BETWEEN

GEOFFREY KAHIGA MUHIA PLAINTIFF

AND

ELIZABETH WAITHIRA KIHARA DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 7th December, 2022. The said application is expressed to be brought under Order 40 Rules 2 & 4(1), Order 51 (1) of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act.
2. The application is filed under Certificate of Urgency and seeks the following orders;
 - a. Spent
 - b. Spent
 - c. This Honorable Court be pleased to issue a temporary injunction restraining the Respondent either by herself, her agents, servants and/or any other person acting on her behalf from engaging in any further construction on the road of access between Plot No Naivasha 404/26400 and 404/26405 and/or plot No Naivasha 404/26405 pending hearing and determination of this suit.
 - d. The officer commanding Kongoni Police Station to ensure compliance with this Honorable Court's orders.
 - e. Costs of this application be provided for.



3. The application is based on the grounds on its face and supported by the affidavit sworn by the Plaintiff/Applicant. The supporting Affidavit is sworn on 7th December, 2022.

Factual Background.

4. This suit was instituted vide a Plaint dated 7th December, 2022 seeking the following orders;
 - a. A declaration that the Defendant's action of constructing a house on a road of access between plot No 26400 and 26405 is illegal.
 - b. An order of injunction requiring the Defendant either by herself, her agents and/or servant to stop construction on the road of access and/or plot No 26405 as the same amount to trespass.
 - c. The defendant be evicted from the road of access between plot 26400 and 26405 and/or from plot No 26405.
 - d. General damages for trespass and nuisance caused by blockage of the road of access.
 - e. Costs of this suit.
 - f. Interest on (d) and (e) above at court rates from the entry of judgement until payment in full and
 - g. Any other order and/or relief this honorable court may deem fit and just to grant.
5. No statement of Defence has been filed by the

Defendant/Respondent

6. The application under consideration first came up for hearing on 8th December, 2022 when it was certified urgent and the Plaintiff/Applicant directed to serve the Defendant/Respondent.
7. On 19th December, 2022, the said application came up for hearing and the court directed that the Defendant/Respondent files her response to the application.
8. On 21st December, 2022, the court gave directions that the application would be canvassed by way of written submissions and was reserved for ruling

The Plaintiff/applicant's Contention.

9. The Plaintiff/Applicant deposes that he is the administrator of the estate of the late Muhia Thuku vide Nairobi High Court Succession Cause No 524 of 2002.
10. He further deposes that before his death, the late Muhia Thuku was the registered owner of land parcel No Naivasha LR 404/14 which he surrendered to the government of Kenya for change of user from agricultural land to residential.
11. He also deposes that the late Muhia Thuku had subdivided Naivasha LR 404/14 into residential plots numbering 26378 to 26422.
12. He contends that as the administrator, he was issued with the allotment letters for all the resultant plots for onward transfer to the beneficiaries as per the certificate of confirmation of grant.



13. He also contends that as per the certificate of confirmation of grant, he was allocated plot No 26400 and deed plan No 264652 dated 10th May, 2006.
14. He deposes that he was also issued with a letter of allotment for plot No 26405 as a trustee for the family of his late step mother Priscilla Waithira Muhia which he has not transferred to the beneficiaries as they have not agreed on the mode of distribution.
15. He also deposes that there is a road of access between Plot No 26400 and plot No 26405 which is used by the beneficiaries of the estate of the late Flora Wanjiku Muhia who was to get Plot No 26404.
16. He further deposes that in November 2022, the Defendant/Respondent commenced construction of a permanent building on the access road between the two parcels of land without any legal justification.
17. He contends that the Defendant/Respondent is not related to the Estate of the late Muhia Thuku and therefore her occupation amounts to trespass to land.
18. He further contends that the Defendant/Respondent has been given demand and notice to stop the said construction as it is not authorized and/or approved by the relevant authorities.
19. He deposes that he has trouble accessing his home using a motor vehicle because of the encroachment on the said road of access and he is therefore advised by his advocates on record that he is entitled to seek redress in addition to other remedies that are available.
20. He ends his deposition by stating that that the court has the power to give directions to stop the actions of the Defendant/Respondent.

The Defendant/respondent's Response.

21. In response to the application, the Defendant/Respondent filed a replying affidavit sworn on 20th December, 2022.
22. She deposes that she is the beneficial owner of a parcel of land measuring approximately 58 x 58 excised from the parcel of land known as Plot No 26405.
23. She also deposes that she purchased the property from the owner one Peter Ng'ang'a Muhia on 16th June, 2015 adding that the plot is located in Naivasha Kwa Muhia Estate.
24. She further deposes that Peter Ng'ang'a Muhia of ID No 515XXXXX is a beneficiary of the estate of the late Muhia Thuku(deceased) who was his father.
25. She contends that Plot No 26405 and 404/61 were allocated to Priscilla Waithira Muhia and her three children Peter Ng'ang'a Muhia, Julius Thuku Muhia and Stephen Wainaina Muhia.
26. She also contends that Priscilla Waithira Muhia was the second wife to the late Muhia Thuku (deceased) who passed on 11th June, 2014 and her estate devolved to her three children including Peter Ng'ang'a Muhia.
27. She deposes that she does not dispute the averments in paragraphs 2, 3, 4, 5 and 6 of the Supporting Affidavit dated 7th December, 2022.
28. She also deposes that her parcel of land is not on any access road as alleged by the Plaintiff/Applicant and that it is the Plaintiff/Applicant who has encroached on the access road as per the annexed photographs.



29. She further deposes that it is not true that she has built a permanent house as she has only put up a perimeter wall with barbed wire and a stone wall cowshed and that the allegations by the Plaintiff/Applicant are farfetched.
30. She deposes that as per the annexed photograph her property and that of her neighbor are not on the road reserve as compared to the Plaintiff/Applicant's property which he sold to a third party.
31. She also deposes that Peter Ng'ang'a Muhia who sold the suit property to her is her adjacent neighbor and has constructed rental houses on the remaining part of the parcel.
32. She further deposes that the Plaintiff/Applicant has approached the court with unclean hands as he is an encroacher and his application ought to be disregarded.
33. She deposes that the Plaintiff/Applicant wishes to violate her constitutional right to property as provided for under Article 40 of the Constitution of Kenya and disrupt her quiet possession of the suit property.
34. She also deposes that she denies the averments contained in paragraph 7, 8, 9, 10, 11, 12 and 13 of the Plaintiff/Applicant's Supporting Affidavit and reiterated that her parcel of land measuring 58 x 58 is not on any access road.
35. She further deposes that this court should direct that a surveyor's report and a site visit to be done to determine the said assertions.
36. She contends that she is a stranger to the averments contained in paragraphs 14, 15 and 16 of the supporting affidavit and put the Plaintiff/Applicant to strict proof.
37. She ends her deposition by stating that the Plaintiff/Applicant's application lacks merit and should be dismissed.

Issues For Determination.

38. The Plaintiff/Applicant filed his submissions on 23rd December, 2022 while the Defendant/Respondent filed her submissions on 9th January, 2023.
39. The Plaintiff/Applicant identifies only one issue for determination which is whether he has met the test for grant of the orders sought in his application.
40. He reiterates the contents of his supporting affidavit and relies on Section 45 of the Law of Succession Act, the case of Estate of M'Miriti [2017] eKLR and submits that the Defendant/Respondent cannot acquire beneficial right by purporting to have bought a piece of land from a person not legally recognized as a beneficiary.
41. He also submits that as per the annexed sale agreement exhibited by the Defendant/Respondent, it does not refer to Plot No 26405 or the plot from which Plot No 26405 mutated.
42. The Plaintiff/Applicant also submits that the Defendant/Respondent occupies the wrong parcel of land as she has closed the public access road.
43. The Plaintiff/Applicant further submits that he has annexed a copy of the approved subdivision plan of the plot from which the subject parcels mutated and it shows all the access roads and there is no justification for any encroachment on the access road.
44. The Plaintiff/Applicant relies on Order 40 Rules 2 & 4, Order 50(1) of the Civil Procedure Rules, the case of Giella v Cassman Brown Company Limited 1973 EA 358 and submits that the guiding



principles in granting an order of injunction are that an Applicant has to establish a *prima facie* case with a probability of success, the Applicant stands to suffer irreparable loss which would not be compensated by an award of damages and if the court is in doubt, the application would be determined on a balance of convenience.

45. On what constitutes a *prima facie* case, the Plaintiff/Applicant relies on the case of *Mrao Ltd v First American Bank Limited & 2 others* [2003] eKLR and submits that blocking an access road which the Applicant and others use to access their homes is a fundamental right which has been infringed by the Defendant/Respondent.
46. The Plaintiff/Applicant also submits that Peter Ng'ang'a Muhia did not own any land capable of being sold to the Defendant/Respondent as at 16th June, 2015 and therefore the occupation by the Defendant/Respondent on Plot No 26405 amounts to intermeddling with the Estate of the late Muhia Thuku as a trespasser.
47. The Plaintiff/Applicant further submits that building on a public access road and interfering with the use of the road cannot be compensated by way of damages unless the house and/or structures are demolished.
48. The Plaintiff/Applicant also submits that the balance of convenience tilts in his favour and in conclusion he sought that his Notice of Motion application dated 7th December, 2022 be allowed.
49. The Defendant/Respondent in her submissions identifies only one issue for determination which is whether the Plaintiff/Applicant's application for temporary injunction against her has met the required threshold.
50. The Defendant/Respondent submits that the Plaintiff/Applicant has failed to meet the requirements for grant of orders of temporary injunction as was laid out in the case of *Giella v Cassman Brown & Co. Limited* [1973] E.A 358.
51. On whether the Plaintiff/Applicant's case meets the requirement of a *prima facie* case with a probability of success, the Defendant/Respondent submits that the main issue in contention is as to who is the owner of the parcel of land measuring 58 x 58 which can only be determined at the hearing. The defendant/Respondent relies on the case of *Rebeccah Motabori Ongera v Alloys Moseti & another* [2015] eKLR in support of her arguments.
52. The Defendant/Respondent submits that the Plaintiff/Applicant will not suffer any irreparable loss if the orders sought are not granted as the issues in contention can only be determined at the hearing of the main suit.
53. The Defendant/Respondent submits that the balance of convenience does not tilt on either side as the existence of the access road has to be independently ascertained.
54. The Defendant/Respondent relies on the case of *Ougo & another v Otiemo* [1987] KLR 384 and submits that it is in the interest of justice that the *status quo* be maintained.

Analysis And Determination.

55. I have considered the application, supporting affidavit, replying affidavit and the submissions.
56. The only issue that arises for determination is whether the Plaintiff/Applicant has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.



57. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No77 of 2012 (2014) eKLR the Court of Appeal held that;

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

58. The first requirement is that the Plaintiff/Applicant must establish a *prima facie* case. The Plaintiff/Applicant relies on the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR where the Court of Appeal held as follows on what constitutes a *prima facie* case:

“... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

59. In support of his application, the Plaintiff/Applicant annexed copies of Grant of Letters of Administration and a certificate of confirmation of grant dated 30th July, 2002 and 12th June, 2003 respectively. They are in respect of the Estate of Muhia Thuku and issued by the High Court of Kenya at Nairobi in Succession Cause No 524 of 2002.

60. The Plaintiff/Applicant has also annexed a Certificate of Confirmation of Grant issued to him by High Court of Kenya at Nairobi in Succession Cause No 524 of 2002 which indicates that he is a beneficiary of LR No 26400 and a trustee of LR No 26405.

61. Th Plaintiff/Applicant also deposes that he is the trustee of LR No 26405 on behalf of the family of his step mother Priscilla Waithira Muhia.

62. The Plaintiff/Applicant’s deposition is that the Defendant/Respondent has commenced construction on the access road between LR No 26400 and LR No 26405 and after being asked to stop she has continued the said construction.

63. The defendant/Respondent on the other hand argues that she purchased a portion of land measuring 58 x 58 excised from LR No 26405 from Peter Ng’ang’a Muhia a beneficiary of the estate of Muhia Thuku on which parcel she is constructing a perimeter wall with barbed wire and a stonewall cowshed.

64. The Defendant/Respondent denies that she is constructing on an access road and in support of her assertions she has annexed sale agreement between her and Peter Ng’ang’a Muhia dated 16th June 2015.

65. The terms of the agreement are that Peter Ng’ang’a Muhia is the registered owner of Plot No 404/4 and was selling a portion measuring 58 x 58 feet for a sum of Kshs 500,000/=.

66. Also annexed to the replying affidavit is an affidavit sworn by Peter Ng’ang’a Muhia where he deposes that he is a beneficiary of the estate of Muhia Thuku who was his father and that they were allocated



Plot No's 26405 and 404/61 which they were to share equally between his two siblings and his late mother Priscilla Waithira Muhia.

67. He deposed that he sold part of his portion of land measuring 58 x 58 feet to the defendant and that it is not on any access road and that the Plaintiff/Applicant is addressing the wrong party instead of addressing him.
68. The Plaintiff/Applicant in his submissions points out that the Defendant/Respondent's actions amount to intermeddling which is contrary to Section 45 of the Succession Act.
69. It is my view that the acts complained of by the Plaintiff/Applicant arise from permission granted or invitation given to the defendant by a beneficiary of the Estate of Muhia Thuku i.e Peter Ng'ang'a Muhia.
70. The Plaintiff/Applicant Acknowledges at paragraph 7 and 8 of the affidavit in support of his application that he holds a letter of allotment for plot 26405 as a trustee for step mother and her children, one of whom is Peter Ng'ang'a Muhia.
71. The Defendant/ Respondent has attached an affidavit sworn by Peter Ng'ang'a Muhia from whom she purchased the suit land wherein the said Peter Ng'ang'a confirms the fact of sale, refutes the fact that it is on the access road, adding that he has also put up rental houses on the remaining portion. I note that the Plaintiff/Applicant has not responded to this deposition by the Defendant/Respondent.
72. From my analysis as set out in the foregoing paragraphs, this is largely a disagreement between an administrator of and a beneficiary to the Estate of a deceased person. The defendant is, as it were, caught in the line of fire. She has been described as an intermeddler. This disagreement needs to be resolved by the court that issued letters of administration and confirmed the grant.
73. In *Susan Katinda Lewa & another v Christine Ndinda Maingi & 4 others* [2015] eKLR it was held as follows;

Under Section 45 of *Succession Act*, intermeddling of Estate of deceased is prohibited. It is even a criminal offence to intermeddle. The whole suit is based on the alleged intermeddling in form of sale and development of the estate property before distribution of the estate to the beneficiaries. Under the provisions of the Cap 160, the family court is mandated to handle all aspects pertaining to the estate of a deceased person. The ELC court under Article 162 of the *Constitution* and the provisions of *ELC Act* 2012 is mandated to deal with occupation, use and title to land plus environmental issues.

The core issue in the instant suit is Rose Kendi Muoki sale to 3rd Defendant of ½ of suit land before distribution. It is not denied that she is a beneficiary just like the Plaintiffs. The Plaintiffs have not denied also that they sold off suit land to third party before distribution. The sale by both sides amounts to intermeddling which the court finds falls in the jurisdiction zone of the family court and not ELC.

74. The court in the case of *Susan Katinda Lewa & another v Christine Ndinda Maingi & 4 others* (*supra*) cited above held that issues of intermeddling of an estate of a deceased person can only be dealt at the High Court and not the Environment and Land Court.
75. I find that the Plaintiff/Applicant in this matter has not established a *prima facie* case. I liken the triple requirements for the grant of an order of temporary injunction to hurdles which an Applicant must surmount sequentially; one before the next. If any one of the requirements is not met, the application for a temporary injunction fails.



76. The Court of Appeal in the case of *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR cited the case of *American Cyanamid v Ethicon Limited* [1975] AC 396 where the court held as follows;

“If there is no *prima facie* case on the point essential to entitle the Plaintiff to complain of the Defendant’s proposed activities, that is the end of any claim to interlocutory relief.”

Disposition.

77. In the result, I find that the Plaintiff/Applicant’s application dated 7th December, 2022 lacks merit and is hereby dismissed with costs to the Defendant.

78. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 18TH DAY OF MAY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Ouma for Mr. Oluoch Olunya for the Plaintiff/Applicant.

Mr. Gatitu for the Defendant/Respondent.

Court Assistant; Ms. Monica Wanjohi.

