



Ngui & another v County Government of Kitui & 2 others (Environment & Land Case E001 of 2023) [2023] KEELC 17470 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E001 OF 2023**

LG KIMANI, J

MAY 11, 2023

BETWEEN

SAID HAILE NGUI 1ST PLAINTIFF

ALICE KOKI NGUI 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF KITUI 1ST DEFENDANT

GIDEON KITIL 2ND DEFENDANT

KILUNDO KIMANTHI 3RD DEFENDANT

RULING

1. The Plaintiff filed the Notice of Motion dated 2nd February 2023 seeking orders that:
 1. Spent
 2. Pending the hearing and determination of the Plaintiff/Applicant's Application herein, the Honourable Court be pleased to grant an order of temporary injunction restraining the Defendants/Respondents by themselves, their agents and/or servants and/or anyone claiming through them from destroying the Plaintiff/Applicant's fence, trespassing, encroaching onto, entering, occupying, disposing of, alienating and/or in any other manner whatsoever dealing with the suit property known as Land Parcel Numbers 1 and 2 Endau Market within Ndetani Adjudication Section n Mutito Sub-County of Kitui County pending the hearing of the Application inter-partes.
 3. The Order hereinabove sought to be executed by the Officer Commanding Station (OCS) Endau Police Station.



4. The Honourable Court be pleased to issue any further order that it deems fit in the circumstances of the case.
2. The Application is supported by the affidavits of the 1st Applicant sworn on 2nd February 2023, and one by Dickson Kimulu Ngui sworn on 20th February 2023 and a further affidavit sworn on 7th March 2023. The Applicants claim to be the legal and beneficial owners of all that parcel of land known as Land Parcel Numbers 1 & 2 Endau Market situated within Endau Market in Ndetani Adjudication Section in Mutito Sub-County of Kitui County (hereinafter known as “the suit land”).
3. According to the Applicants, the 1st Defendant/Respondent has constructed County Education Offices, a cereals office and runs a bee-keeping project on the suit property, the 2nd Respondent has constructed a church and the 3rd Respondent operates a posho mill on the suit land. They add that there are other squatters on the suit land whose occupation is premised on the strength of the 1st Respondent herein.
4. The Applicants claim that the 1st Respondent fenced off part of the suit land being land parcel number 1 Endau Market while they fenced off land parcel number 2 enclosing the 2nd and 3rd Respondents and the other squatters who have despite notices to vacate, refused/declined to vacate and that efforts to have the Respondents vacate amicably have borne no fruit.
5. The Applicants depose that the suit land is private land and that despite declaration of Ndetani Adjudication the adjudication process has not yet commenced.
6. It is the Applicants accusation that between 28th and 30th January 2021, the 2nd and 3rd Defendants wantonly and maliciously destroyed their fence on the suit land which act they to the police and they are apprehensive that the malicious and wanton destruction of their fence will undoubtedly pave way for the other squatters to illegally invade the suit premises. They seek orders restraining the Respondents from committing acts of waste on the suit land.
7. As proof of ownership of the land the Plaintiff exhibited a letter dated 2nd July 2020 from the 1st Respondent addressed to O. N Makau & Mulei Advocates referenced “Encroachment into private land at Endau Market claimed by Simon Nguthu Makuthu” seeking to resolve the matter amicably and a reply from the Chief Endau location addressed to the 1st Respondent stating that the suit property is private land. The Plaintiffs have also exhibited photographs and minutes of Locational Leaders held at Endau Chiefs Office on 12.8.2020 and a letter dated 15th April 2021 from Simon Makuthu Family.

The 1st Respondent’s Replying Affidavit

8. The 1st Respondent’s replying affidavit is sworn by Timothy Kyalo Mwangi Advocate, the County solicitor, County Government of Kitui. He denied that the Applicants are the owners of the suit land parcel numbers 1 and 2 situated in Endau, stating that it is unsurveyed communal land held by the County Government of Kitui in trust for the people resident in Endau area awaiting completion of the adjudication process.
9. He deposed that pursuant to a statutory notice given under section 5 of the *Land Adjudication Act* dated 9th September 2014, Endau Town where the suit property is situated was declared an adjudication section and the process is yet to be completed. He stated that property claims in the area are subject to the adjudication process as provided by the law.
10. It is the 1st Defendant’s position that the Plaintiffs have no legitimate rights and enforceable interests over the suit property until they are ascertained by the adjudication process. Further, he denied that the 1st Defendant has allowed any party to invade the suit property and damage any fence. They state



that if the Plaintiffs have erected any fence, the same has been erected illegally and the Court cannot further an illegality.

11. The 1st Respondent's position is that the Applicants should not be granted the orders of injunction sought for the reasons that the Defendants are in current occupation of the suit property and have been for over 15 years. That the Applicants do not have any title document and neither do they have consent to file this suit from the adjudication officer in charge of the area. The 1st Respondent further stated that the balance of convenience lies in favour of the defendants and citizens of Endau since the livestock market and education offices offer crucial services to the citizens and that the Plaintiffs cannot purport to have legitimately erected a fence over the land that is not in their possession and use.
12. Further, the 1st Defendant accused the Plaintiff of lacking clean hands since they failed to inform the court that they withdrew a similar suit Kitui ELC No. 2 of 2022 against the Defendants on 25th January 2023 and instituted the instant suit on 2nd February 2023.

The 2nd and 3rd Respondent's Replying Affidavit.

13. The 2nd Respondent filed an affidavit in response on his own behalf and on behalf of the 3rd Respondent. The 2nd Respondent stated that the area where the suit land is located was declared an adjudication section on 14th September 2014 but the adjudication exercise is yet to start. He stated that the area claimed by the Plaintiff comprises the whole of Endau market especially the livestock market owned by the 1st Respondent, community land with shops, hotels, churches and other plots owned by the Plaintiffs.
14. The 2nd Respondent claims that he operates a church on the community land where he is the Bishop and overseer of the Pentecostal Evangelistic Fellowship of Africa (PEFA) churches in Mutito Sub-County. That the church rightfully owns the land and will assert their ownership rights once the adjudication process kicks off. According to the 2nd Respondent, since the adjudication process is yet to start, the numbers the Applicants claim to hold are merely 'holding numbers' illegally allocated to them by the Land Adjudication officer.
15. The 2nd Respondent accuses the Applicants of conspiring to grab the entire Endau Market and surrounding community land with the Land Adjudication and Settlement Officer being a willing accomplice. He further stated that there was a previous similar suit that was withdrawn.

Applicants' written submissions

16. Counsel for the Applicants relied on Order 40(1)(a) and(b) of the [Civil Procedure Rules](#) (2010) on the Courts jurisdiction to grant injunctive reliefs and relied on the case of [Peter Kairu Gitu v KCB Bank Kenya Limited & Another](#) (2021) eKLR on the conditions necessary for the grant of an injunction.
17. It is the Applicants' submission that they have established a prima facie case by exhibiting documents of ownership of the land. They relied on the case of [Stek Cosmetics Limited v Family Bank Limited & Another](#) (2020) eKLR on the meaning of a *prima facie* case as provided by the Court of Appeal in the case of [Mrao Ltd v First American Bank of Kenya Ltd and 2 others](#) (2003) eKLR. They also rely on the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) (2014) eKLR.
18. The Applicants submitted that the photographs attached clearly demonstrate the illegal actions of the 2nd Respondent as willful and malicious damage of the suit premises by the 2nd and 3rd Respondents.
19. On irreparable injury, the Plaintiffs/Applicants submit that the continued acts of wastage will irreparably injure the interests to Parcel Number 2 Endau Market and will pave way for all and sundry



to illegally invade and occupy the land in question. The Applicants concluded that the balance of convenience lies in the favour of granting the injunctive restraining orders sought since they stand to suffer irreparably unless the orders sought are granted.

20. Counsel for the Applicants further cited the case of *Muthiani Ndonyi (suing the administrator of the Estate of Ndonyi Mruvi (Deceased) vs District Land Adjudication & Settlement Officer Mutomo Sub-County & 8 others* (2021) eKLR) where the court granted an injunction and the other case of *Ngungi Nthunkire & 3 others vs Joseph Mbugi Ngari & 6 others* (2019) eKLR where the court issued an order of status quo instead, stating that the Court should attempt to preserve property which may be in issue.

The 2nd and 3rd Defendants' Submissions

21. Counsel for the 2nd and 3rd Respondents contended that the Plaintiffs have not established a *prima facie* case with a probability of success and that their prayer should fail since it is not in dispute that the area has fallen under adjudication, which process has not commenced.
22. Counsel highlighted that the Plaintiffs admit that the 2nd and 3rd Defendants are in occupation of the disputed land and they maintain that they occupy their respective portions as a matter of right having been allocated the same by the defunct County Council of Kitui. They therefore submit that the balance of convenience tilts in favour of the respondents since the orders sought would amount to evicting them from the suit land at the preliminary stages.
23. The 2nd and 3rd Respondents also submitted that the *Land Adjudication Act* cap 284 of the Laws of Kenya has an elaborate process of determining the kind of disputes preferred by the plaintiffs in this case and there are no special circumstances justifying removing the dispute from the said process, stating that consent from the Land Adjudication and Settlement Officer was issued prematurely and without sound basis.

Analysis and Determination

24. The Court has considered the application herein, replying affidavits filed, submissions by Counsel and the authorities cited and formed the opinion that the following issues arise for determination;
 - a. Whether the Plaintiff/Applicant's Application has met the threshold established in for the grant of temporary injunction pending hearing and determination of the suit.
 - b. What orders should the court make?
25. The application herein is brought under Section 1(A), 1 (B), 3 (A) of the *Civil Procedure Act*, Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and Article 48 and 50 of the *Constitution* of Kenya. Order 40 provides for cases in which temporary injunctions may be granted and states as follows;

“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.

Rule 2 provides

“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

26. Further, the conditions set for consideration in granting an injunction are now well settled in the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy;

“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.”

27. Have the Applicants established a *prima facie* case with a probability of success? *Black's Law Dictionary 11th* Edition defines a *prima facie* as “sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue”

“At first sight; on first appearance but subject to further evidence or information”

28. A *prima facie* case was explained as follows in the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

“In *Habib Bank Ag Zurich v Eugene Marion Yakub*, ca NO. 43 OF 1982 this Court considered the role of the court when determining whether or not a *prima facie* case has been made out. The Court expressed itself thus:

“Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

The court further stated

“A *prima facie* case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

29. The Applicants have cited the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the Court defined the measure of a ‘*prima facie*’ case as follows:

“The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be



restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

30. In answering the question of whether a *prima facie* case has been established the court has considered the agreed position that the suit land is part of an area that has been declared an adjudication section under section 5 2(b) and (d) of the [Land Adjudication Act](#) through the notice dated 12th September 2014. Upon declaration of an area as an adjudication section, the [Land Adjudication Act](#) provides a forum for the ascertainment and recording of rights and interests in community land and such rights and interests are to be ascertained in accordance with the Act. Section 5 of the [Act](#) provides for establishment of adjudication sections and ascertainment and recording of interests in land and states;

“(b) shall declare that interests in land within the adjudication section will be ascertained and recorded in accordance with this [Act](#);

d. may require any person making a claim to point out to the demarcation officer or to demarcate or assist in the demarcation of the boundaries of the land in which he claims to be interested or to clear any such boundaries or any other line in the manner and before a date fixed by the demarcation officer..”

31. The Plaintiffs have stated that the process of land adjudication has not yet commenced and they have obtained consent to file this suit from the Land Adjudication Officer under section 30 of the [Act](#). The said section states;

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this [Act](#).”

32. As proof of ownership of the suit land the Applicants have made a statement in the plaint that they are the beneficial and legal owners of the land parcels 1 and 2 Endau Market and that the Respondents have illegally and without right occupied the land and carried out several activities. The Court has considered the documents supplied by the Applicants to support their claim of ownership of the suit land being a letter dated 2nd July 2020 from the 1st Respondent addressed to O. N Makau & Mulei Advocates referenced “Encroachment into private land at Endau Market claimed by Simon Nguthu Makuthu” seeking to resolve the matter amicably and a reply from the Chief Endau location addressed to the 1st Respondent stating that the suit property is private land. The Plaintiffs have also exhibited photographs and minutes of a meeting of Locational Leaders held at Endau Chiefs Office on 12th August 2020 and a letter dated 15th April 2021 from Simon Makuthu Family. The said documents claim that the suit land belonged to the family of Simon Nguu Makuthu and the Plaintiffs herein are representatives of that family.



33. The court notes that the Applicants have not disclosed if the Respondents were present or were invited at the meeting of Locational Leaders held at Endau Chiefs Office on 12th August 2020 whose minutes are exhibited and where it is claimed ownership of the suit land was determined. It is not clear if the 2nd and 3rd Respondents were involved in the deliberations that led to the Chief's letter alluded to.
34. It is also noted that the Plaintiffs do not claim to be in occupation of any part of the suit land. The Plaintiffs confirmed that the 1st Respondent is in possession of land parcel 1 and is carrying on activities therein where it has constructed County Education Offices, a cereals office and runs a bee-keeping project. The said Respondent states that all the Respondents have been in occupation of the suit land in exclusion of the Applicants for over 20 years.
35. The Court has also considered that the 2nd Respondent is in occupation of part of land parcel number 2 and has constructed a church. According to the further affidavit by the Applicants, there is communication between the 1st and 2nd Respondents showing that the 2nd Respondent had been in occupation of the land since 1992 and was seeking to be allocated the plot by the Kitui County Council. The letters further show that the 2nd Respondents quest for allocation of land date between 1999, 2008 and 2018. The Court also notes that the 3rd Respondent operates a posho mill on parcel 2 of the suit land. The Applicants confirm that there are other persons in occupation of the suit land who are not parties to this suit.
36. On the other hand, the only activity the Applicants claim to have carried out on the land is the fencing of land parcel number 2. Indeed the Plaintiffs claim that when they fenced off the said parcel, they enclosed the 2nd and 3rd Defendants premises as well as squatters who were in occupation of portions of the said parcel number 2.
37. As was stated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (*supra*) the applicant must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. The Court finds the documents of ownership of the suit land provided by the Applicants are inadequate and do not show a clear and unmistakable right to be protected. The explanation given in the said documents especially the letter from the Chief Endau location that the land was donated to the 1st Respondent's predecessor by Simon Ngui Makuthu as the family land custodian on condition that after subdividing the plots the family of Ngui Makuthu shall get $\frac{3}{4}$ plots while the county Council would get $\frac{1}{4}$ has not been deponed to by the Applicants or proved. The Court observes that the said allegation can only be subject to proof at the time of hearing of the suit itself.
38. The Court has further considered that the Respondents and other persons who have been referred to by the Applicants as "squatters" are the persons in possession, occupation and use of the suit land and are carrying on various activities therein. As earlier stated the letters attached to the applicants further affidavit show that the 2nd Respondent sought allocation of land where he had constructed a church and the communication dates between 1999, 2008 and 2018. On the other hand, the documents presented in support of the Applicants claim of ownership are recent commencing from March 2020. In the circumstances the Court finds that the Applicants have not presented a prima facie case with a probability of success.
39. The Court further finds that the 1st Respondent has a pivotal role in relation to Community land which it holds under Article 62 of *Constitution* of Kenya 2010 and *Community Land Act* No. 27 of 2016 which role the Applicants seek to curtail by an order of the court. Article 62 of *the Constitution* provides for Community Land and sub-articles 3 states that "Any unregistered community land shall



be held in trust by county governments on behalf of the communities for which it is held”. Section 6 of the *Community Land Act* states that “County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held”.

40. The 1st Respondent is thus entitled to hold unregistered, unsurveyed community land in trust until rights and interests have been ascertained and recorded. As to whether the Applicant stands to suffer irreparable injury incapable of being compensated by damages, The Court is of the opinion that the tort of trespass is grave enough to cause irreparable injury if it turned out that the Respondents are trespassing upon the Applicants’ land. However the Court is of the view that the Applicants have not shown that they will suffer irreparable loss since in the first place they have not shown prima facie ownership of the suit land.
41. On the question of balance of convenience, it is noted that the Applicants sought to fence off the suit land while the Respondents were already in possession, occupation and use of the same thus fencing them in and cutting them off from the outside. I do agree that the orders sought would entail evicting the Respondents together with other people admittedly not parties to this suit. In the Court’s view the balance of convenience tilts towards disallowing the application.
42. The upshot of this is that the application dated 2nd February 2023 is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 11TH DAY OF MAY, 2023.

L. G. KIMANI

ENVIRONMENT & LAND COURT JUDGE - KITUI

Ruling read in open Court and virtually in the presence of;

C/A Musyoki

C. M. Maweu for the Applicants

K. Musyoki holding brief for Mwalimu for the 2nd and 3rd Respondents

