



**Njeru v Gisheko (Environment & Land Case 14 of 2020)
[2023] KEELC 19824 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 19824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 14 OF 2020
A KANIARU, J
JUNE 12, 2023**

BETWEEN

ENOS MUGENDI NJERU PLAINTIFF

AND

GISHABO GISHEKO DEFENDANT

RULING

1. I am called upon to determine the amended Notice of Motion dated November 5, 2021 and filed in court on the same date. It came with six (6) prayers but prayer I is spent. The prayers for consideration are therefore five (5) and they are as follows:

Prayer 2: That this honourable court be pleased to issue an order restraining the defendant, his servants and/agents from entering, occupying, wasting, cultivating, constructing any buildings or trespassing in the plaintiffs parcel of land title EMBU/KAMARANDI/223 until further orders of this honourable court.

Prayer 3: That this honourable court be pleased to cite the defendant as a trespasser in the plaintiffs said parcel of land.

Prayer 4: That this honourable court be pleased to order the defendant to quit, vacate, and deliver up vacant possession of the subject parcel of land and in default or breach of compliance of the court order, this honourable court be pleased to order that the OCS – Ishiara police station to enforce compliance of the same and put the plaintiff to exclusive possession of the subject parcel of land.

Prayer 5: That the OCS–Ishiara police station be ordered to apprehend anyone in breach of this court order.

Prayer 6: That the costs of this application be provided for.



2. The application is premised on the grounds, inter alia, that the plaintiff is a bonafide purchaser and also the registered owner of the subject parcel of land; that the defendant has encroached and started some construction there; that the defendant is a trespasser; and that the plaintiff is obstructed from gaining entry into his own land.
3. The application came with a supporting affidavit which elaborates the grounds on which it is anchored.
4. The defendant responded to the application vide a replying affidavit filed on April 19, 2022 and dated the same. He said, inter alia, that he is not in occupation of the land in dispute and that he is living on his own land, which is adjacent to the land in dispute. The plaintiff was also faulted for seeking orders of a final nature in the application. His application was said to be frivolous, vexatious, and unmeritorious.
5. The response by the defendant provoked the filing of a further affidavit by the plaintiff. In the affidavit the defendant's denial that he is in occupation of the land was said to be an attempt to confuse the court. The denial, he said, was not made in good faith. The plaintiff reiterated that the defendant is in occupation of the land and that the defendant had chased him away from the land whenever he tried to enter it. Further, the plaintiff deposed that the matters raised by the defendant in the replying affidavit are suitable only for consideration during the hearing of the suit.
6. The application was canvassed by way of written submissions. The plaintiff's submissions were filed on November 17, 2022. He submitted, inter alia, that he purchased the land and that whenever he tries to enter it, the defendant prevents him from doing so. He wants the court to order the defendant to deliver up vacant possession to him and if the defendant fails to comply, he would wish the police to be involved in the enforcement of the order. The rest of the plaintiff's submissions is essentially a rehash of the substance of his application and the response by the defendant.
7. The defendant's submissions were filed on January 11, 2023. He submitted that the disputed land was a subject of litigation in ELC No 214 of 2014. The plaintiffs in that case were claiming the land as adverse possessors and they succeeded. The defendant in the suit was one Lawrence Muriuki and when he realised that he would lose the land, he hurriedly sold it to the plaintiff in this case. It was submitted further that for purposes of this suit, the plaintiff had not demonstrated the conditions necessary for grant of a temporary restraining order. The case of *Giella v Cassman Brown & Co Ltd [1973] 358* was cited to drive home the position that in an application for a temporary injunction one has to establish a prima facie case with a probability of success and also show the likelihood to suffer irreparable loss that damages would not adequately compensate. It was pointed out further that where the court is in doubt as to either or both of these two requirements, then it has to decide the application on a balance of convenience.
8. The plaintiff was said to have an invalid title to the disputed land. He was also said to have failed to demonstrate that the defendant is in occupation of the land. The defendant was said to be occupying the adjacent land which is parcel No 224. For these reasons, the plaintiff was said to have failed to demonstrate a prima facie case.
9. Further, the plaintiff was also said to be unlikely to suffer irreparable loss. He is not in occupation of the land and is not using it. He was said to have failed to demonstrate the loss he will suffer.
10. On the plaintiff's prayer for what in essence is a mandatory injunction – prayer 4 – the defendant submitted, inter alia, that if the prayer is granted, the court will have determined the suit at the interlocutory stage. The prayer was said to be suitable for granting only where the applicant demonstrates some special circumstances, which the plaintiff has not shown to exist in this matter. The case of *Kenya Breweries Limited & Another v Washington O Okeyo [2002] eKLR*, which quoted Halsbury Laws of England on the issue, was cited to drive the point home. Reference was also made to



Nguruman Limited v Jan Bonde Nielson & 2 others CA No 7 of 2012 as cited in *Lucy Wangui Gachara v Minudi Okemba Civil Appeal Case No 77 of 2012 [2015] eKLR*. The cases were cited to reinforce the same position.

11. Ultimately, the court was urged to dismiss the application with costs.
12. I have considered the application, the response made, rival submissions, and the suit as filed generally. My task is to find out if the plaintiff has demonstrated the merits of his application. As I do so, I bear in mind that I should not decide substantive issues at the interlocutory stage. This ought to be left for the trial of the action. The law relating to the two types of injunctions – temporary restraining order and mandatory injunction – sought by the plaintiff is as stated by the defendant. A look at the court record shows prima facie that there was a case against the seller of the land to the plaintiff. The seller seems to have lost the case, which was about ownership, but that notwithstanding he sold the land to the plaintiff. When the defendant therefore questions the validity of the plaintiff's title, the court must take that with some seriousness at this stage. It is also easy to appreciate that the plaintiff is not using the land. It appears like the seller never put him into vacant possession. Bearing all this in mind, is easy to agree with the defendant when he says that the plaintiff has not established a prima facie case or demonstrated irreparable loss that he is likely to suffer. In other words, the plaintiff has not met the threshold set in *Giella's case (supra)*. His prayer for a temporary restraining order is therefore not demonstrated.
13. The plaintiff is also asking that the court makes an order directing the defendant to vacate the disputed land. Such an order would be in the nature of a mandatory injunction. An order like that is also asked for in the plaint (see prayer b). When the defendant therefore says that the plaintiff is asking for orders of a final nature in an interlocutory application, it is again easy to agree. When he also says that the court will be deciding the suit at the interlocutory stage if it grants the order his averment is not far fetched.
14. I find it necessary to point out that it is not easy to get a mandatory injunction at interlocutory stage. In *Boyani v Mwagboti [2002] 2KLR 774*, it was held, inter alia, that a mandatory injunction at an interlocutory stage is granted only when the plaintiff's case is clear and incontrovertible. That is not the kind of case that I am dealing with here. Further, in *Showwind Industries Ltd v Guardian Bank Ltd & Another [2002] 2KLR 378*, the court pointed out that a mandatory injunction is only granted sparingly at the interlocutory stage. It is only grantable in exceptional circumstances such as where the applicant's case is very strong and straightforward. I am constrained to observe that at this stage, the plaintiff's case does not seem straightforward to me. The defendant seems to have raised a formidable defence against it.
15. The defendant has also been called a trespasser. That needs to be demonstrated at the trial. I make this observation because the defendant has countered this by saying that he is living or occupying his land which is adjacent to the disputed land. The court would need more information than is currently on record to show that the defendant is indeed a trespasser.
16. The upshot, when all is considered, is that the merits of the plaintiff's application have not been demonstrated. I therefore dismiss the application. Costs will be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 12TH DAY OF JUNE, 2023.

In the presence of Kimanzi for defendant and plaintiff present in person.

Court assistant: Leadys

A.K. KANIARU



JUDGE

12. 06.2023

