



**Muchoki & 3 others v Ndung'u & 2 others (Environment & Land Case
E029 of 2023) [2023] KEELC 19281 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E029 OF 2023**

MD MWANGI, J

JULY 25, 2023

BETWEEN

**MARY WAMBUI MUCHOKI 1ST PLAINTIFF
SAMMY KARIUKI WACHIRA 2ND PLAINTIFF
SYLVESTER MAGENI 3RD PLAINTIFF
PETER IRUNGU MUIGA 4TH PLAINTIFF**

AND

**SAMUEL MUGUCHIA NDUNG'U 1ST DEFENDANT
MARY KAMAU 2ND DEFENDANT
NAIROBI CITY COUNTY 3RD DEFENDANT**

RULING

Background

1. The Plaintiffs herein claim Plot Nos 8A, 8B, 8C, 8D, 8E,8F, 8G & 8H each measuring 0.02 ha. The said plots allegedly resulted from a subdivision of a plot of land known as Plot No 8, Kahawa West, Phase II, along Jubilee avenue road, measuring 0.16 ha. The said original plot was owned by the 3rd Defendant, Nairobi City County.
2. The Plaintiffs case was that they were issued with an offer of allotment by the 3rd Defendant on condition that the offer was to be accepted by making of payments being the ground premium and standard premium all totaling Kshs 7,200/- which the Plaintiffs paid and were issued with acknowledgement receipts.
3. The Plaintiffs aver that the 1st Defendant thereafter requested them to pay Kshs 20,000/- each to facilitate the processing of individual titles. For that to happen, 1st Defendant also requested the



Plaintiffs to surrender the original allotment letters and receipts to him which they did. However, despite the Plaintiffs making the requested payment, the 1st Defendant did not process the tiles as promised. The 1st Defendant together with the 2nd Defendant have instead been threatening the Plaintiffs with eviction from their respective plots. The 1st Defendant has intimated to the Plaintiffs that he has an allotment letter the entire plot No 8 Kahawa West, phase II measuring approximately 0.16 Ha. He allegedly obtained the said allotment with the help of the 2nd Defendant, who was working for the 3rd Defendant.

4. The Plaintiffs claim legal ownership of the respective plots (hereinafter referred to as ‘the suit properties’) which they have since developed with permanent residential homes and have enjoyed peaceful use and occupation for over 15 years. They accuse the 1st Defendant for trespass and attempts to unlawfully evict them.
5. The Plaintiffs pray for a declaration that they are the lawful owners of the suit properties, an order of permanent injunction restraining the Defendants from interfering with their possession and occupation of the said plots and an order to cancel the allotment issued to the 1st Defendant for the plot No 8 Kahawa West Phase II (if any) amongst other orders.
6. Pending the hearing and determination of the main suit, the Plaintiffs vide the Notice of Motion application dated January 31, 2023 seeking interim injunction orders to restrain the Defendants from interfering with their occupation of the subject plots.

Response to the application.

7. The application was opposed by the 2nd Defendant/Respondent vide her replying affidavit sworn on January 1, 2023.
8. In the said affidavit, the deponent states that the Notice of Motion is not supported by a valid affidavit since the date on the affidavit does not correspond with that of the Notice of Motion. Further that the said affidavit in support of the Notice of Motion application offends the provisions of Order 1 rule 13 of the Civil Procedure Rules for want of authority from the 2nd, 3rd and 4th Plaintiff.
9. The deponent further asserts that the issue of the Plaintiffs’ claim of ownership over and in respect of the suit property has already been determined by the decision of Oguttu Mboya J in Milimani ELCC 808 of 2012 where the Plaintiffs had filed some purported objection proceedings dated February 6, 2023. This suit by the Plaintiffs as well as the application under consideration therefore amounts to an abuse of the process of court. The deponent has attached a copy of the said ruling to the replying affidavit. The 2nd Defendant/Respondent in this case was the 2nd Defendant in the referred matter (Milimani ELCC 808 of 2012). She asserts that she is the owner of all that parcel of land known as plot No 8 in Kahawa West Phase II and is unaware of any plots emanating from the said Plot No 8.
10. The Judgment of the court in Milimani ELCC No 808 of 2012 and the ruling by Justice Oguttu Mboya, according to the Deponent have not been varied, reviewed and or set aside and are therefore valid and in force.

Court’s directions.

11. The courts directions were that the application be canvassed by way of written submissions. The Plaintiffs/Applicants complied. The Respondents did not file any submissions. The 2nd Defendant/Respondent informed the court that she would rely on her replying affidavit. I have had the opportunity to read the Plaintiffs submissions dated May 15, 2023.



Issues for determination.

12. Having considered the application by the Plaintiffs herein, the response by the 2nd defendant/ Respondent as well as the submissions filed by the Plaintiff, the court is of the view that the sole issue for determination is whether the Plaintiffs' application meets the threshold for the grant of orders of a temporary injunction.

Analysis and determination.

13. I agree with the Plaintiffs' submissions that the principles for the grant of an order of temporary injunction were spelt out in the now famous case of *Giella –Vs- Cassman Brown & Company Ltd (1973) EA 358* and which has been restated in numerous other decisions of the Superior courts of this country.
14. First, an Applicant must establish a prima facie case with a probability of success. Secondly, a temporary 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 the application on the balance of convenience.
15. A prima facie case was defined in the case of *Mrao Ltd –Vs- First American Bank of Kenya and 2 others (2003) KLR 125*, to mean,

A case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'
16. The 2nd Defendant/Respondent, as I have already pointed out, in her replying affidavit brought to the attention of the court the Judgment and ruling in ELCC 808 of 2012 and attached both as annexures to her affidavit. One thing is clear from the said judgment of February 8, 2018; that the court pronounced itself in regard to the ownership of plot No 8 located in Kahawa West Phase II. It found in favour of the 2nd Defendant herein, Mary Kamau and went ahead to issue a permanent injunction in her favour as well as an order of eviction to remove the Plaintiffs and all illegal structures constructed on the said parcel.
17. Again on March 16, 2023, the court in the same matter while considering objection proceedings by the Plaintiffs herein alongside the Plaintiffs in ELCC E063/2023 categorically observed that,

' The judgment of the Hon Court rendered on February 8, 2019 and which has neither been appealed against nor impeached was a judgment in rem. Consequently, the judgment is valid and holds sway against the whole world.'
18. The court went on to conclude that the objectors (now plaintiffs in this suit) have neither established nor demonstrated that they have any legal or lawful rights in respect of the named plots.
19. Arising out of the findings of the court in the referenced case, this court finds that the Plaintiffs have not established a prima facie case. The Plaintiffs did not file any further affidavit after the 2nd Defendant filed her replying affidavit to contradict the averments therein.
20. The Court of Appeal in the case of *Nguruman Ltd –Vs- Jan Bonde Nielsen & 2 others (2014) eKLR*, while upholding the principles in *Giella –Vs- Cassman Brown (Supra)* held that the conditions and the stages set out in the *Giella* case for the grant of an order of temporary injunction are to be applied



as separate distinct, and logical hurdles and which an Applicant for an order of temporary injunction is expected to surmount sequentially.

21. The import of the holding by the Court of Appeal is that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration.
22. Having found that the Applicants have not established a prima facie case, I need not go further than that.
23. Accordingly, the Plaintiffs application dated January 31, 2023 does not meet the threshold for the grant of an order a temporary injunction and is hereby dismissed with costs to the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mutunga for Plaintiffs/Applicants

Mr. Njeru holding brief for Mr. Kiluva for the 2nd Defendant

