



**Kinya v Buchex Company Limited & another (Land Case
E039 of 2023) [2023] KEELC 18734 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18734 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E039 OF 2023**

**AE DENA, J
JULY 17, 2023**

BETWEEN

WARUI GITARI KINYA PLAINTIFF

AND

BUCHEX COMPANY LIMITED 1ST DEFENDANT

KENYA URBAN ROADS AUTHORITY 2ND DEFENDANT

RULING

1. The application subject of this ruling is dated 8/6/2023 and has been brought before court pursuant to the provisions of Order 40 Rule 1 and 2 of the [Civil Procedure Rules 2010](#), Order 51 Rule 1 and Section 3A of the [Civil Procedure Act](#). The application was filed under Certificate of Urgency and presented as such before me in chambers on 9/6/2023. I certified the same urgent and made an order that the status quo over suit properties Kwale/Diani Complex /275 and 439 be maintained. Orders for service of the application upon the Defendants were issued and the same was set down for interparties hearing on 26/6/2023.
2. Upon the matter coming up for hearing of the application, it was ordered that the application be dispensed off by way of written submissions. It is noteworthy that no response has been filed by the defendants herein over the application despite service as evidenced by the affidavit of service dated 23/6/2023 as sworn by Vincent Omollo Advocate.
3. The applicant seeks for restraining orders against the defendants over the suit premises Kwale/Diani Complex /275 and 439 pending the hearing and determination of the application and suit altogether. The Applicant seeks that the defendants are restrained from entering upon or carrying out any construction on the suit premises or further dealing with the same in any manner whatsoever.
4. The application is premised upon grounds it's face which summarily state that the Plaintiff/Applicant is the registered proprietor of the suit properties and which have been invaded upon by the defendants



without the Plaintiff's consent or authority. It is alleged that the defendants are constructing a road upon the suit properties and the continued trespass is denying the plaintiff the peaceful enjoyment of the suit properties. The Applicant further states that the defendants actions are bound to cause him irreparable loss which cannot be adequately compensated by an award in damages. According to the Applicant, the defendant's actions are an infringement of his right to ownership of property as enshrined under Article 40 of the [Constitution of Kenya, 2010](#).

5. The application is further supported by an affidavit sworn by Warui Gitari Kinya the Applicant. The Applicant annexes copies of the title deeds to the suit properties in evidence of ownership of the same. It is averred that the 1st defendant has been contracted by the 2nd defendant to carry out the road construction activities upon the suit properties. It is also stated by the Applicant that he has engaged the services of a licensed surveyor to establish whether the suit properties have encroached on the road reserve but upon the survey exercise it has been established that they have not. Reference is made to an annexed registry index map and a survey report.
6. The Plaintiff states that the 2nd defendant's mandate as stated under Section 9 of the Roads Act 2007 is for rehabilitation and management of public roads and in carrying out the said mandate it is enabled under Section 23 to acquire private land after negotiations and compensation which it has not. The court is urged to allow the application.
7. The application is undefended despite service of pleadings upon the defendants. Counsel for the applicant made oral submissions on the application on 26/6/2023 which I have considered in this ruling.
8. The solitary issue for determination is whether or not the Plaintiff/Applicant is entitled to the injunctive orders sought. The law on granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides:

“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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- (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.”

9. The conditions for consideration in granting an injunction are now well settled in the celebrated case of [Giella vs Cassman Brown & Company Limited](#) (1973) E A 358, where the court expressed itself as follows: -

“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"

10. The same was further affirmed in the *American Cyanamid Co. vs Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely: There must be a serious/fair issue to be tried, Damages are not an adequate remedy and The balance of convenience lies in favour of granting or refusing the application.
11. From the foregoing it is clear that the circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit, the court in such situation is called upon to grant a temporary injunction/restraining orders to restrain such acts. In the instant case, there is no doubt that the suit property is in danger of being alienated by the actions of the defendants.
12. The Plaintiff/Applicant has presented before the court evidence in support of him being the lawful owner of the suit properties by copy of title deeds. The said evidence has not been contested by the defendants, further it is clear that the defendants, more particularly the 2nd defendant have not in any way engaged the plaintiff on use of the suit properties in terms of acquisition of the same for purposes of building the road. From the documents tendered before court it is clear that the suit properties *prima facie* belong to the Plaintiff and that the same have not encroached on the road reserve as per the survey report and the annexed RIM. In the event that the suit properties are not protected from further construction it is clear that the defendants actions could lead to more wastage of the property to the detriment of the Plaintiff. This therefore call for the court in the interest of doing substantive justice to issue restraining orders until the suit is heard and determined.
13. In *Mrao Ltd Vs Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Mubia Njoroge & 2 others vs Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a *prima facie* case as:

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is 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 later”.
14. In support of the application, the Plaintiff has attached as evidence before court several documents including the title deed to the suit properties. Evidence of ownership which is through a title deed is not only substantive but solid. I find support in the courts dictum in *Kenleb Cons Ltd Vs New Gatitu Service Station Ltd & another*, (1990) eKLR where the court had this to say on what a party seeking an injunction must demonstrate:

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”
15. The Plaintiff alleges that the continued invasion of the defendants by construction of the road on the suit properties is bound to cause him irreparable loss and damages that cannot be compensated by an award of damages. The Plaintiff has annexed photographs in evidence of the activities being undertaken by the defendants. The nature and extent of the alleged loss has been disclosed and demonstrated by



the Applicant as being the eminent loss of the land. In the case of Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal considered irreparable injury as follows:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is, injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

16. Applying the above I’m satisfied that the Plaintiff has demonstrated the risk of irreparable loss or injury on the basis of the material on record. The element of irreparable loss alleged has been demonstrated as required by law. Accordingly, the court finds and holds that the Plaintiff has proved the second crucial requirement for the grant of an interim injunction.

17. In the case of Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue on balance of convenience expressed itself thus: -

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. ”

18. From the evidence tendered in support of the application, obviously the balance of convenience tilts towards granting the restraining orders to the Plaintiff. It is clear that in the event the same is denied it will lead to loss on the part of the Plaintiff through further dealings on the suit land by the defendants.

19. For the foregoing reasons, this court finds that on the material availed the Plaintiff is entitled to grant of restraining orders against the defendants. The following orders shall and do hereby issue; -

- i. A restraining order against the Respondents herein from entering upon, or carrying out any construction of any nature on the suit premises known as title numbers Kwale/Diani Complex/439 and Kwale/Diani Complex/275 pending the hearing and determination of this suit. The restraining orders will serve its purpose thus to preserve the substratum of the dispute, while the rest of the issues are due for determination upon the substantive hearing of the suit.
- ii. Costs of the application are hereby awarded to the Plaintiff.

It is so ordered.



DELIVERED AND DATED AT KWALE THIS 17TH DAY OF JULY ,2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Omollo for the Plaintiff/Applicant

N/A for the Defendants

Court Assistant: Disii

