Kamau v Nicholus & another (Environment & Land Case E014 of 2022) [2023] KEELC 22548 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 22548 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE E014 OF 2022

A KANIARU, J

SEPTEMBER 28, 2023

BETWEEN

HARRISON NJOROGE KAMAU ..... PLAINTIFF

AND

BONIFACE NJUGUNA NICHOLUS ..... 1ST DEFENDANT

VERONICA WAIRIMU ..... 2ND DEFENDANT

RULING

1. The application under consideration is a Notice of Motion dated 12/10/2022 and filed on the same date. It is brought under a Certificate of Urgency. It is expressed to be brought under order 40 rules 1(a) *Civil Procedure Rules* and Section 3A *Civil Procedure Act*. The applicants – Boniface Njuguna Nicholus & Veronica Wairimu– are the 1st & 2nd Defendant's respectively in the suit. The respondent – Harrison Njoroge Kamau – is the plaintiff. It is essentially an application for Temporary injunction and the prayers sought are as follows:

    1. Spent

    2. Spent

    3. That this Honourable Court be pleased to issue an order of temporary injunction restraining the plaintiff/respondent from entering, trespassing into, cultivating, wasting or inn any other manner interfering with land parcel no. Nthawa/Riandu/5552 pending the hearing and determination of the main suit herein.

    4. That costs be provided for.

2. The application is premised on the grounds that there is a pending suit before the court in which the respondent has laid a claim for the suit land parcel no. Nthawa/Riandu/5552 and in which land the 2nd Applicant is currently occupying. That further the respondent has recently ploughed about one

acre of the suit land using a tractor ready for planting during the expected October rainy season, which action will interfere with the current status of the land and cause damage and waste to the suit land even before the suit is heard and determined. The applicants contend that they will suffer irreparable damage and loss unless the court issues an injunction order against the respondent to preserve the land and the status quo. Further that the respondent's action amounts to forcibly taking over actual possession of the suit land before the suit is heard and determined. In a supporting affidavit that they swore, the Applicants reiterated the averments in the application and annexed photos as evidence of the work that has been done by the respondent.

Response

3. The Respondent filed a replying affidavit in response to the application. The affidavit is dated 26.10.2022. The respondent's case is that the suit land was as a result of subdivision of land parcel no. Nthawa/Riandu/3255(8.84 Ha) which was registered in the name of his late father. He says that the applicant's mother, a widow of his late father's brother, sued his late father claiming a portion of land out of Nthawa/Riandu/3255 that his late father had permitted her to occupy. That the two entered into a consent on 18.8.2014 in which the Respondent's late father agreed to transfer a portion measuring 4 acres (1.6 Ha) out of land parcel no. Nthawa/Riandu/3255 to the Applicant's mother. That the parcel of land no. Nthawa/Riandu/3255 was subdivided into Nthawa/Riandu/5550 (0.40 Ha), Nthawa/Riandu/5551(1.62Ha) and Nthawa/Riandu/5552 (6.25Ha) in which the Applicant's late mother was designated to get land parcel no. Nthawa/Riandu/5551. That at the time of subdivision and transfer of the original parcel of land as per the consent, his late father was ailing and therefore he entrusted the whole process upon the Applicant's late mother and her children. That further, in or about the year 2016 his late father discovered that the Applicant's late mother had fraudulently caused herself to be registered with his late father's balance of land that is Nthawa/Riandu/5552(.625 Ha) as opposed to Nthawa/Riandu/5551(1.62Ha). He says that his father who was still ailing started pursuing the issue by initially having parcel of land no. Nthawa/Riandu/5552 restricted and proceeded to make a complaint to the DCI, Mbeere North, who also restricted the said parcel of land. His father passed away on 31.8.2020 before the dispute was resolved and was buried in the disputed land parcel no. Nthawa/Riandu/5552. That is also where his two children and two grandchildren are buried. He also says that he and his family have all along upto the time of filing the present suit been in occupation and developing parcel no. Nthawa/Riandu/5552 while the Applicant and members of their family have been in occupation of and utilizing parcel of land no. Nthawa/Riandu/5551. He says that he has not committed any acts of waste on the suit land but instead has ploughed the same in readiness for planting as he has always done. Further that he stands to suffer irreparably should the orders be granted since he relies on the food he gets from the said land to take care of his family and his elderly mother. He asks that the application be dismissed with costs.

4. The application was canvassed by way of written submissions. The Applicants filed their submissions on 29.3.2023 whereas the Respondent filed his submissions on 3.4.2023. The respondent on his part sought reliance on his replying affidavit filed. The applicants gave a synopsis of the application and identified three issues for determination, the same being the threshold principles for the grant of an injunction as set out in the case of *Giella vs Cassman Brown* (1973)EA 358.

Analysis

5. I have considered the application, the response made, and submissions by the parties. I find that only one issue commends itself for determination before the court, which is whether the court should grant orders of temporary injunction pending hearing and determination of this suit.

6. The applicant has moved the court under the provisions of Order 40 Rule 1 of the *Civil Procedure Rules* 2010, which states as follows;

> " Where in any suit it is proved by affidavit or otherwise—
>
> 1. 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
>
> 2. 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."

7. The locus classicus case on temporary injunction is that of *Giella v Cassman Brown* [1973] EA 358 where the court set out three conditions that ought to be met for grant of a temporary injunction. It was stated:

> " 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.

8. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, described a prima facie case as:

> " 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 right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

9. The Applicants have submitted that the respondent has recently ploughed about one acre of the suit land using a tractor ready for planting during the expected October season. They allege the land belongs to them as the administrators/legal representatives of the estate of their late mother. They have annexed a copy of the search as evidence of ownership of the land by their late mother. Also annexed in support of the application are photographs of the ploughing done on the suit property. The respondent has not denied such ploughing on the land. He says that his family has always occupied the suit land and that while he works and lives elsewhere, he has always farmed on the said land. He says that the Applicant's do not occupy the disputed parcel of land but land parcel no. Nthawa/Riandu/5551 where their mother was living until she passed away.

10. I wish to appreciate that I am not called upon to determine the contention on ownership or whether there was fraud or not or even the issue of eviction at this stage. Having brought out the background above, I am of the considered view that the applicants have established a prima facie case with high chances of success based on the fact that the land is still registered in their late mother's name. The rest of the issues on whether the land was fraudulently transferred to the Applicant's late mother or not will be best be determined at the trial stage.

11. Having come to the conclusion that the applicant has a prima facie case, this court now has a duty to establish whether the applicant will suffer irreparable loss and damage if the orders for an injunction are not granted. What amounts to irreparably injury was well described and defined by the court in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where it was stated that

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury".

12. The applicants have averred that the respondent has entered into the said property and has begun ploughing the same in readiness for planting during the expected October rainy season. This fact has not been denied by either of the parties. The only issue in dispute is who currently occupies the land as both parties claim to be in occupation of the same. The respondent clearly has already committed acts of waste on the said land by ploughing it. If he is allowed to plant and the court finds that the suit property doesn't belong to him, it might be difficult to return the suit land to its original state. I find that there will be injury that will be said to occur in the interim that cannot be sufficiently compensated by way of damages. I find that the applicant have satisfied the second condition for grant of an injunction.

13. In *Helga v Charles Mumba Mwagandi* [2008] eKLR, Justice L. Njage (as he then was) cited with approval the reasoning of the court of appeal in *Mureithi v City Council Of Nairobi*[1976-1985] EA 331. In *Mureithi's case* Madan JA (as he then was) had observed as follows:

> " The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial ... if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

14. Further, in *Nguruman Ltd v Jan Bonde Nelson& 2 others*: Civil Appeal No. 21 of 2014 UR where, while making reference to Giela's case (supra) it was observed as follows:

> " It is established that all the above three conditions are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction; the court must further be satisfied that the injury the respondent will suffer if the injunction is not granted will be irreparable."

In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. Therefore the existence of a prima facie alone does not automatically mean that the applicant is entitled to an order of injunction.

15. The other condition laid out in Giela's case supra is that where the court is in doubt, it will decide an application on the balance of convenience. The most convenient step to take in this application is

to maintain the status quo until this case is heard and determined in order to preserve the suit land. It is more likely than not that applicants are in occupation. It seems clear that the respondent works and/or lives elsewhere. His interest at this stage is that of farming. On balance, the applicants might suffer greater inconvenience. In the circumstances, I do find that the applicant have proven a case for grant of a temporary injunction pending hearing and determination of the suit. I therefore allow this application with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28TH DAY OF SEPTEMBER, 2023.

A.K. KANIARU

JUDGE

In the presence of:- M/s Muthoni for Njeru Ithiga for applicants and Okwaro for Rose Njeru for respondent.

Interpretation:- English/Kiswahili