



**Ngatho & another (Both Suing as Administrators of the Estate of  
Wanjiku Njau - Deceased) v Kigo & another (Environment & Land Case  
E389 of 2022) [2023] KEELC 20170 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20170 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E389 OF 2022  
AA OMOLLO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**LILIAN WAIRIMU NGATHO ..... 1<sup>ST</sup> PLAINTIFF  
ELIZABETH MURUNGARI NJOROGE (BOTH SUING AS ADMINISTRATORS  
OF THE ESTATE OF WANJIKU NJAU -DECEASED) ..... 2<sup>ND</sup> PLAINTIFF  
BOTH SUING AS ADMINISTRATORS OF THE ESTATE OF WANJIKU NJAU -  
DECEASED**

**AND**

**STEPHEN KIGO ..... 1<sup>ST</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed a notice of motion dated 18<sup>th</sup> November 2022 seeking for the following orders;
  - a. Spent
  - b. Spent
  - c. Spent
  - d. Spent
  - e. That pending the hearing and final determination of this suit; the Honourable Court be pleased to issue a temporary injunction against the 1<sup>st</sup> Defendant/Respondent restraining him, his agents and/or servants from evicting the Plaintiffs from the suit property and/or demolishing the development undertaken on the suit property and/or in any way howsoever



interfering with the Plaintiffs peaceful enjoyment of all that property known as LR.no 36/11/24.

- f. That pending the hearing and final determination of this suit; the Honourable Court be pleased to issue a temporary injunction against the 2<sup>nd</sup> Defendant/Respondent restraining him from registering any dealings and/or making any entries in respect of all that property known as LR.no 36/11/24 without notice to the Plaintiffs and/or this Honourable Court.
  - g. That the costs of this application be provided for.
2. The Application was supported by an affidavit and supplementary affidavit sworn by Elizabeth Murungari Njoroge on 18<sup>th</sup> November 2022 and 31<sup>st</sup> March 2023 respectively outlining the grounds of the motion. The Applicants stated that they are the administrators of the Estate of Wanjiku Njau-deceased who is the registered owner of Land Ref. no36/11/24 herein after referred to as “the suit property”. Ms Njoroge deposed that the late Wanjiku Njau purchased the suit property from the estate of Valji Mavji *vide* an Indenture of Conveyance dated 11<sup>th</sup> June 1981 and registered at the Ministry of Lands in Volume N32 Folio 54/1 File no 10107 in her favour with a search carried out as at 11<sup>th</sup> January 2023 confirming the same.
  3. The Applicants also stated that the deceased estate legal interest in the suit property is confirmed by the various requisite statutory charges registered on its titles, the respective bills including property rates payment request from the Nairobi City County, water bills from the Nairobi Water Company and electricity bills from Kenya Power from as far as the year 2001 issued in her name.
  4. Ms. Njoroge further stated that the 1<sup>st</sup> Defendant through his advocates Messers Abdiaziz & Co. Advocates, issued them with an eviction notice dated 16<sup>th</sup> November 2022 requiring them to vacate the suit property immediately failure to which he would take legal action. The Applicants stated that on account of the 1<sup>st</sup> Defendant’s impending actions they are exposed to grave irreparable harm that will render the suit a nugatory thus warranting intervention of this court to protect the substratum of the suit.
  5. The Applicants contended that they are at risk of being evicted from the suit property without being heard and that an award of damages will not adequately compensate them. They added that their suit has a high probability of success and are currently in possession of the suit property since 1981 thus in the interest of justice, the suit property should be preserved pending hearing and final determination of the suit property.
  6. The 1<sup>st</sup> Defendant opposed the application *vide* his replying affidavit sworn on 1<sup>st</sup> March 2023 contending that they are the registered proprietor of the suit property having purchased it from Mr.Rajesh Alibhai Patel via an Indenture of Conveyance dated 14<sup>th</sup> April 1997 and registered on 30<sup>th</sup> April 1997 under Vol N32 Folio 54/7 File 10107. He averred that he had never heard about the deceased claim over the suit property and that the deceased had conspired with others and procured a forged indenture of conveyance.
  7. The 1<sup>st</sup> Defendant/Respondent stated that he has legal interest in the suit property and produced receipts of payments for property rates, stating that the applicants are attempting to grab the suit property and this court should not aid them in their quest.
  8. The 1<sup>st</sup> Respondent further deposed that applicants have not given sufficient grounds for the injunctive orders sought. That the Applicants not suffer irreparable loss if the injunction is not granted as the alleged trespass and encroachment can be compensated in damages. He contends that if the



orders sought are granted the Respondents will suffer irreparable loss and damage since they will be dispossessed throughout the trial of this case.

## Submissions

9. The Applicants and the 1<sup>st</sup> Respondent filed submissions dated 31<sup>st</sup> March 2023 and 17<sup>th</sup> April 2023 respectively. The Applicants gave a background to the matter as stated in the supporting and supplementary affidavits and submitted that they had satisfied the threshold for grant of the injunctive relief as set out in the case of *Giella v Cassman Brown & Co.Ltd* [1973]EA.358.
10. The Applicants relied on the provisions of Section 26 of the [Land Registration Act](#), the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR and [Nguruman Limited v Jan Bonde Nielson & 2 Others](#) [2014] eKLR in submitting that they have established a prima facie case with a probability of success. That they had demonstrated as having a valid, legal and lawful proprietary rights over the suit property. They further stated that they had produced a Certificate of title to the suit property and as per Section 25 of the [Land Registration Act](#), it is *prima facie* evidence of ownership. In support they cited the case of *inter alia Anthony Mbugua Njihia & 4 Others v Uritibi Housing Cooperative Society Ltd & another* [2019] eKLR among others which held that a court is to assume that the title is a good title and *prima facie* evidence of ownership.
11. The Applicants submitted that the 1<sup>st</sup> Defendant issued them with an eviction notice to vacate the suit property and in light of their intention to abridge their property rights and dispossess them of the said suit property, by the time this suit is set down for hearing and its determination, the applicants will be exposed to insurmountable loss and damage that cannot be adequately compensated with an award of damages. They supported their argument by citing the case of [Margaret Njeri Muiruri \(Being the Administrator of the Estate of Joseph Muiruri \(Deceased\)\) v Bank of Baroda \(Kenya\) Ltd](#) [2020]eKLR which held that disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.
12. The applicants also submitted that balance of convenience tilts in their favour citing the concept of balance of convenience as cited in the case of [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) (2018) eKLR stating that inconvenience caused to them would be greater if the injunction is not granted and the suit is ultimately decided in their favour than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. They also submitted that having permanent structures in the suit property, the court should opt for the lower rather than the higher risk of injustice in considering injunctive relief as set out in the case of [Amir Sulciman v Amboseli Resort Limited](#) [2004] eKLR .
13. The 1<sup>st</sup> Defendant submitted that Order 40 Rule (a) (b) requires that an Applicant must prove that a property in dispute is in danger of being alienated or disposed of or damaged and that the Respondent has threatened or intends to remove or damage the same and in this case the Applicants have not shown or proven it.
14. The 1<sup>st</sup> Defendant also cited the case of *Mrao Limited v First American Bank of Kenya Ltd*; Civil Appeal 39 of 2002(cited with approval in the case of 4 [Bulk Medicals Ltd v Paramount Universal Bank Ltd & 2 others](#) [2006] eKLR where the Court echoed the legal position that in order to establish a prima facie case, a party is required to demonstrate the infringement of a right and the probability of



success of the Applicant's case at trial. They relied on the definition of the word probability in the Concise Oxford Dictionary of Current English, 8th Ed Pg. 950 to mean,

‘...the likelihood of something happening....the extent to which an event is likely to occur measured by the ratio of favourable cases to the whole number of cases possible..’

15. The 1<sup>st</sup> Defendant submitted that the Applicants have failed to establish that they have a *prima facie* case because the 1<sup>st</sup> Defendant/ Respondent is the owner of the suit property having purchased it in 1997 and registered as proprietor. He submitted also that the Plaintiffs/ Applicants have claimed ownership of the suit property through a fraudulent and forged indenture of conveyance and fraudulently purported to be owners of the suit property without the knowledge of the 1<sup>st</sup> Defendant/ Respondent.
16. The 1<sup>st</sup> Defendant submitted that a party seeking interlocutory orders is required to satisfy the first and second requirements in *Giella v Cassman Brown (supra)* and it is only when the court is in doubt does it consider the third aspect which he stated the balance of convenience tilts to his favour. The 1<sup>st</sup> Defendant submits that he will be highly prejudiced if the orders sought by the Plaintiffs/ Applicants are granted as his proprietary rights and interests are well secured by the title he holds in the form of an Indenture of Conveyance and which was duly registered on the 30th day of April 1997. Therefore, any adverse orders made with regards to the suit property will highly prejudice him citing the provisions of Section 24(a) and Section 26(1) of the [Land Registration Act](#). The 1<sup>st</sup> Defendant added that before this Honourable Court issues the injunctive orders sought by the Plaintiffs/ Applicants, it should first scrutinize the two titles presented before it and only then should it issue injunctive orders.

### Analysis

17. The 1<sup>st</sup> Defendant has not denied issuing the Applicants with an eviction notice to vacate the suit property thus confirming who are in possession of the property in dispute. The Applicants filed this motion seeking for injunctive orders against the 1<sup>st</sup> Defendant pending the hearing and determination of the suit. The 1<sup>st</sup> Defendant have opposed the motion on the grounds that the application does not meet the threshold to grant such orders.
18. The issue for determination before this court is as to whether the application meets the threshold for granting injunctive orders. Both the Applicants and the 1<sup>st</sup> Defendant have outlined the principles applied by court in considering whether to grant injunctions as set out in the case of *Giella v Cassman Brown* and *Mrao v First American Bank (supra)*.
19. As to whether the Applicants have established a *prima facie* case, in [Nguruman Limited v Jan Bonde Nielsen & 2 Others](#) [2014] eKLR the Court of Appeal adopted the definition of a *prima facie* case that was given in *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and went further to state 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. ...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 threatened with violation...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.”

20. Both the Applicants and the 1<sup>st</sup> Defendant have produced a title to the suit property laying claim of ownership over the property in dispute. The Applicants have however stated that they have been in possession of the suit property and it is therefore evident that on the face of it, they have a right (of possession) which is threatened with violation. Secondly, by virtue that both parties hold distinct titles to the suit property, the 1<sup>st</sup> Defendant's allegation of forgery cannot at this interlocutory stage be settled.
21. That said, the Applicants were supposed to not only establish a *prima facie* case but also that unless the orders sought are granted, they will suffer irreparable harm. In the case of *Moses M Wairimu & 24 Others v Kenya Power & Lighting Co Ltd & Another* [2020] eKLR, the Court held as follows:

“On whether they will suffer injury which will not be compensated, there is no doubt that the structures which they were seeking to protect have already been demolished. If the Applicants will succeed to show that their buildings were unlawfully brought down, they will always be compensated in monetary terms. An injunction cannot therefore be granted and in any case an injunction cannot issue to prevent what has already happened.”
22. The Applicants have shown that their occupation of the suit property is by virtue of the title documents bearing the name of the deceased and that they have permanent structures on the suit land. It is imperative that the suit property be preserved in its current state to allow parties ventilate their stake. The 1<sup>st</sup> Defendant's averred that granting the orders will cause him loss as he would be denied possession but he fell short of telling this court when he lost possession in the first instance.
23. In any event, the 1<sup>st</sup> Defendant cannot effect the eviction notice without a court order. So that whether the orders of injunction are not granted, he would have still moved this court appropriately. Consequently, the balance of convenience titles in favour of the Applicants who are in possession of the suit property. For the reasons highlighted, I find merit in the application and allow it on the following terms;
  - a. That pending the hearing and final determination of this suit; the Honourable Court does issue an order of temporary injunction against the 1<sup>st</sup> Defendant/Respondent restraining him, his agents and/or servants from evicting the Plaintiffs from the suit property and/or demolishing the development undertaken on the suit property and/or in any way howsoever interfering with the Plaintiffs occupation of all that property known as LR.no 36/11/24.
  - b. That pending the hearing and final determination of this suit; the Honourable Court does issue an order of temporary injunction against the 2<sup>nd</sup> Defendant/Respondent restraining him from registering any dealings and/or making any entries in respect of all that property known as LR.no 36/11/24 without notice to the Plaintiffs and/or this Honourable Court.
  - c. That the costs of this application to abide the winner of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**A. OMOLLO**

**JUDGE**

**In the Presence of:**

Gisemba advocate for Applicant



AbdiAziz for Defendant/Respondent

Court/Assistant: Valentine

