



**Lagat v Marusoi & another (Environment & Land Case E004 of 2023)  
[2023] KEELC 20014 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20014 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E004 OF 2023**

**JM ONYANGO, J**

**SEPTEMBER 25, 2023**

**IN THE MATTER OF L. R NO . [PARTICULARS WITHHELD]**

**AND**

**IN THE MATTER OF SECTION 38(1) OF THE LIMITATION  
OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA**

**BETWEEN**

**ANDREW CHESILUT LAGAT ..... APPLICANT**

**AND**

**JOEL TUEI MARUSOI ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Andrew Chesilut Lagat, the applicant herein filed a notice of motion dated March 14, 2023 seeking a temporary injunction to restrain the respondents jointly and severally whether by themselves, their servants, agents employees and/or officers from entering, trespassing, taking possession, wasting damaging, transferring to any third party or in any other way interfering with the Plaintiff's possession of all that fenced portion of land measuring 0.896acres as indicated and shown in the extract survey map within L.R No.[particulars withheld] pending the hearing of the Originating Summons herein.
2. The application is premised on the grounds stated in the notice of motion and the applicant's supporting affidavit sworn on the March 14, 2023. In the said affidavit he avers that the 1<sup>st</sup> Respondent is the registered owner of land parcel number [particulars withheld]and that the Respondent's title extends to the portion of land measuring 0.896 acres as indicated in the extract Survey plan, which portion is the subject of the present proceedings. He further avers that he has been in open, continuous, uninterrupted and exclusive occupation of the said portion of land since 1980. It is his contention that the 1<sup>st</sup> Respondent has now sought to interrupt his occupation by involving the chief and goons with a



view to evicting him from the land and destroying his fence and properties on the said land. He claims that the 1<sup>st</sup> Respondent's acts are illegal as he has acquired a right to the suit property by way of adverse possession.

3. The application is resisted by the 1<sup>st</sup> Respondent through his Replying Affidavit sworn on April 24, 2023 in which he refutes the applicant's allegations. He avers that he was registered as the owner of the suit property in 1990 having purchased it from Ketibilong Farm, while the applicant is the owner of an adjacent parcel of land known as [particulars withheld]. He avers that the Applicant encroached on his land and the boundary dispute was first referred to the District Commissioner Kesses Division and later to the Land Registrar Uasin Gishu. That even though the parties were summoned by both the Assistant County Commissioner and the Land Registrar, the applicant failed to attend the meetings to resolve the matter. He denies that the Applicant acquired his land and states that he has illegally encroached on his land.
4. The application was prosecuted by way of written submissions and both parties filed their submissions which I have carefully considered.

### **Analysis and Determination**

5. Having considered the Notice of motion, affidavits and rival submissions, the only issue for determination is whether the Applicant has met the threshold for the grant of a temporary injunction.
6. The conditions that the court must consider in granting an injunction were set out in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself as follows: -

“Firstly, 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.”
7. The first hurdle for an Applicant is to establish that he/she has a prima facie case before an order of injunction can be issued.
8. In the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR the Court of Appeal stated that:

“With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid v Ethicon Limited* [1975] AC 396 stated thus,

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief.”
9. The Applicant has in his affidavit averred that he has been utilizing the disputed portion of land since for about 40 years and that he has fenced the same and planted trees which are almost mature. The Respondent does not deny that the Applicant has been using a portion of his land though he contends that this is an act of encroachment which has been referred to the County Commissioner Kesses and the Land Registrar. What is clear from these two accounts is that the Applicant, has been in occupation of a portion of the Respondent's land, and whether the said occupation is legal or not can only be determined after a full hearing.



10. In *National Bank of Kenya v. Duncan Owour Shakali & another*, CA No. 9 of 1997 Omolo JA stated:
- “The question of finally deciding whether or not there is a contract between the parties and if there is, what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”
11. In the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* 2014 eKLR the Court of Appeal observed as follows:
- “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”.
12. In the circumstances, I am of the view that the Applicant has established a prima facie case.
13. The second hurdle that the Applicant has to surmount is to demonstrate that he would suffer irreparable loss if the injunction is not granted. In *Halsbury’s Laws of England*, Third Edition, Volume 21, paragraph 739, page 352. it is stated that:-
- “It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm" Robert Sharpe, in "*Injunctions and Specific Performance*," [*Robert Sharpe, Injunctions and Specific Performance, loose-leaf*, (Aura, On: Canada Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."
14. What can be gleaned from the above text is that irreparable injury is injury that cannot be adequately remedied by an award of damages, but even in cases where damages would be an adequate remedy, the courts will grant an injunction in order to preserve the subject matter.
15. In the present case, the subject matter is land which could easily be sold, transferred, mortgaged or alienated thus putting it out of reach of the successful litigant. It is therefore necessary to preserve it.
16. Regarding the balance of convenience, it is not in dispute that the Applicant is the one who is utilizing the suit property and the balance of convenience therefore tilts in his favour.



17. Taking all factors into consideration and particularly bearing in mind the need to preserve the subject matter before the suit is heard, the order that commends itself to me is that the *status quo* be maintained pending the hearing and determination of the main suit.
18. The costs of this application shall be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**J.M ONYANGO**

**JUDGE**

