



**Githuku v Kiambu Dandora Farmers Co Ltd & 3 others (Civil Appeal E082 of 2021) [2023] KEELC 21536 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21536 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL APPEAL E082 OF 2021  
J OMANGE, J  
OCTOBER 31, 2023**

**BETWEEN**

**JOSEPHINE WAIYEGO GITHUKU ..... APPELLANT**

**AND**

**KIAMBU DANDORA FARMERS CO LTD ..... 1<sup>ST</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER EMBAKASI SUB COUNTY .... 2<sup>ND</sup>  
RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**ABDUL WAMALA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Vide Memorandum of Appeal dated the 5<sup>th</sup> April 2023, the Appellants herein have appealed against the Ruling and Decision of the Learned Resident Magistrate, namely Hon. S. Muchungi RM, rendered on the 17<sup>th</sup> September 2021 on the following grounds;
  - a. That the Learned Magistrate erred in law and in fact in failing to apply properly the principles of law applicable to grant an order for injunction sought by the appellant.
  - b. That the learned magistrate erred in law and fact in applying the wrong principles and rules of law in evaluating the evidence presented by the appellant and the respondents.
  - c. That the learned magistrate erred in law and fact by improperly exercising her judicial discretion within the established principles in determining the application dated 21<sup>st</sup> July 2021.
  - d. That the learned magistrate erred in law and fact by failing to uphold the certificate of title held by the appellant as proof of prima facie ownership of the suit property.



- e. That the learned magistrate erred in law by arbitrarily and without basis dismissing the appellant's application.
  - f. That the learned magistrate erred in law and fact by holding that the appellant would not suffer irreparable harm if the injunction sought was not granted when the respondents were actively trespassing and constructing on the suit property.
  - g. That the ruling constitutes a grave miscarriage of justice and should be set aside.
2. The appellant seeks from this court the following orders;
    - a. That the ruling delivered by Honourable subordinate court on 17<sup>th</sup> September 2021 and the consequent orders be set aside and/overturned.
    - b. That this Honourable court be pleased to issue an order of temporary injunction restraining the respondents whether by themselves, their employees, servants, representatives or agents or through any other person claiming under them or otherwise howsoever from trespassing into, constructing upon, and or carrying out unlawful acts of violence, destruction or eviction against the Appellant /Applicant , or in any other manner interfering , further interfering and/ dealing in any manner with the appellants parcels of land known as Land reference Number 15400/73 and 15400/74 situated in Embakasi district in Nairobi county and or/ interfering with the appellant's right of occupation, quiet possession , use and ownership of the said properties pending hearing and determination of Milimani CMCC(ELC) E084 of 202.
    - c. Costs of the appeal.
  3. The Appellant claimed to have purchased land reference no 15400 /73 and 15400/74 herein referred to as the suit property from Amboseli Court limited and was issued with a certificate of title to parcel No 15400 /73 while waiting for issuance of title to parcel 15400/74.
  4. The Appellant took possession upon purchase and claimed the 1<sup>st</sup> and 4<sup>th</sup> respondents trespassed on the same claiming ownership.
  5. The 1<sup>st</sup> Respondent claimed he owned the suit property as it formed part of Land known Land reference No 11397/3 herein referred as the original parcel and by virtue of that sold it to a third party who the 4<sup>th</sup> respondent claims to have bought the parcel of land from.
  6. The Appellant then approached the court vide a notice of motion application dated 21<sup>st</sup> July 2021 seeking for injunctive orders restraining the respondents, their employees, servants, representatives or agents or through any other person claiming under them from trespassing, constructing upon or carrying out unlawful acts on the suit properties.
  7. Premised on the Application by the Appellant, the learned Trial Magistrate rendered a ruling on the 17<sup>th</sup> September 2021 dismissing the application and which is the Ruling which provoked the subject of this Appeal.
  8. The Appellant submitted on the following issues

### **Whether an order for temporary injunction should be granted**

Counsel placed reliance on the provisions of Order 40 Rule 1 of the *Civil Procedure Rules* which give instances when temporary injunctions can be issued. He submitted on the principles as laid out in *Giella v Cassman Brown* case that laid out what the court ought to look at in granting of injunctions which are

- (i) Prove of a *prima facie* case



Counsel submitted that on the fact that the appellant had a certificate of title to land reference no 15400/73 in her name and was in the process of acquiring title to land reference no 15400/74 was proof of a prima facie case as she was legally recognized as the rightful owner as per section 26 of the [Land registration Act 2012](#) and as such she had absolute ownership of the land and vested with all rights and privileges. She placed reliance on the case of *Abdalla Mohamed Abdalla v County government of Mombasa* that highlighted section 24 of the [land registration Act](#) which gives absolute and indefeasible title to owner of a property and insisted that title is the primary proof of title.

It was submitted that the trial court failed to consider the provisions of section 26 of the [Land registration Act](#) by failing to consider the title owned by the appellant as prima facie evidence of ownership of the suit property. They also placed reliance on *Mrao v First American Bank of Kenya Ltd & 2 others* (2003) that defined what a *prima facie* case is.

#### **9. Whether the 4<sup>th</sup> Respondent's claim to ownership of the suit property is valid?**

Counsel for the appellant submitted that the 1<sup>st</sup> respondent did not have any valid title to the suit properties herein and hence could not affect transfer. It was submitted that the original parcel was acquired through compulsory acquisition and title passed to the government hence the claim that the land was sold to a third party (Margaret Gathoni Maina) who then sold it to the 4<sup>th</sup> Respondent was false.

It was submitted that the appellant had demonstrated how she acquired the title to the said suit property but the same could not be said about the respondents. The appellant stated that the learned trial magistrate failed to question the authenticity of the purported ownership documents from respondents as possession of the documents alone was not enough to prove ownership. This they backed up with what was decided in the case of *Munyu Maina v Hiram Gathiba Maina* (2013)eKLR where it was stated that if the title document is in contention, showing a title is not sufficient proof ownership the proprietor must go beyond the instrument and prove the legality of how the title was acquired.

#### **10. Whether the appellant will suffer irreparable loss and damage**

The Appellant submitted that the 4<sup>th</sup> respondent had initiated construction activities on the suit property which works would change the status and value of the land and the damage and loss suffered would not be capable of being compensated through damages. It was submitted that the subordinate court failed to look at the activities already being carried out in the suit property which activities would change the topography of the land. Further it was submitted that the subordinate court failed to consider that the act of trespass by the respondents might dispose of the suit property to 3<sup>rd</sup> parties occasioning multiplicity of suits in the event the appellant is successful in the main suit.

#### **11. Balance of convenience**

Lastly, the Appellant submitted that the balance of convenience tilted in her favour by the mere fact that she has been in possession of the suit property for the last 12 years and the 1<sup>st</sup> and 4<sup>th</sup> Respondents have never been in possession of the same up until their illegal trespass. It was submitted that acts of construction will be irreparable to the appellant in the event the appellant is successful in the suit. Counsel submitted the subordinate court failed to consider the final outcome on where loss will be great is it in the issuing of the injunction or in not issuing and have the Appellant greatly prejudiced even if the suit were to be successful.

12. The 1<sup>st</sup> Respondent in their submission highlighted that the Appellant had failed to meet all the three conditions necessary for the grant of injunctive orders. It was submitted that the Appellant did not establish prima facie case as the title she produced had been issued way later after the 1<sup>st</sup> Respondent had been issued with title to the same suit property making the 1<sup>st</sup> Respondent's title valid and that



the title to the 1<sup>st</sup> Respondent could only be challenged on the ground of fraud which the Appellant had not adduced. They placed reliance on the case of *Gitwany Investment Limited v Tajmal Ltd & 3 others* (2006) where the court stated that where two titles are in contention, and it is deemed that both were issued regularly and procedurally without fraud, then the 1<sup>st</sup> title will prevail.

13. The 1<sup>st</sup> Respondent submitted that failure to prove a prima facie case automatically failed the tests of proving how the applicant will suffer irreparable harm. Furthermore, it was submitted that the Appellant was not in occupation of the suit property and had not given any evidence to show that had developed on the same hence no loss occasioned.
14. Lastly the 1<sup>st</sup> Respondent submitted that the Appellant failed to prove that the balance of convenience tilted in her favour as it was not clear how she will be inconvenienced as opposed to the 4<sup>th</sup> respondent who was actually in possession and had developed on the suit property.
15. The 4<sup>th</sup> respondent submitted that the Appellant had failed to satisfy all the three limbs required to grant of temporary injunctions. He submitted on the issue of *prima facie* case, irreparable loss and balance of convenience relying on the contents of the ruling being appealed against and stated that the learned magistrate did not error on face of facts or law but that she restrained herself from making definitive finding of fact or law on account of contradictory facts as stated in affidavits of parties.
16. Counsel submitted that the Appellant had not raised any issue as to how the decision of the lower court was erroneous rather he had brought forth the same arguments as in the application in the hope that this honourable court would adjudicate on as a court of 1<sup>st</sup> instance.
17. The Appellant filed rejoinder submission in response to the 4<sup>th</sup> Respondent's submissions. In the said submissions the Appellant highlighted that on the issue of whether the original title was compulsorily acquired and compensation given, it was yet to be decided in ELC petition No 47 of 2021. Counsel submitted that the that the original parcel title that is Land reference No 11397/3 is a matter in contention in many cases which cases he referred to in his submissions. He stated that different courts in their ruling agreed that until the determination of the petition, the 1<sup>st</sup> respondent cannot claim to hold title as the government had allocated parcels of land to third parties within the original title who held certificates of title including the Appellant herein.
18. It is on this basis that counsel submitted that the certificate of title issued to the Appellant should be protected as it had not been revoked or otherwise cancelled and as such as status quo should be maintained. Counsel relied on the decision as in *Emco Billets and steel v Kiambu Dandora Farmers Company Limited* (2016) eKLR where the court stated the same sentiments in a case where 1<sup>st</sup> respondent herein was a defendant over the same subject matter of trespass. The court stated that until the plaintiff's title is cancelled or revoked the same was valid for all intents and purposes and it was not open to the defendant to take the law in its own hands by forcefully taking possession of the disputed property from the defendant and as such the acts of the defendant amounted to trespass. The court went to further grant the injunctive orders to preserve the disputed property pending hearing and determination of the suit.

Counsel highlighted that this evidence of compulsory acquisition was presented to the subordinate court but the learned magistrate misapprehended the facts and hence came to a wrong conclusion.

19. He also highlighted that the only evidence presented by the 4<sup>th</sup> Respondent to prove ownership was an agreement for sale and cannot be deemed superior to the certificate of title by the Appellant was submitted that the learned magistrate took into consideration the certificate of title not in existence.



20. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

21. Having considered the submissions from all parties, the following are the issues for determination

i. Whether an interlocutory injunction should have been granted by the learned magistrate pending the hearing and determination of Milimani CMCC (ELC )E084 of 2021

The law on interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the *Civil Procedure Rules* thus:

“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

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 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.”

The principles for grant of injunction are well settled in the case of *Giella v Cassman Brown & Company Limited* [1973] E.A. 358., where the court 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.”

In the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR the Court of Appeal had this to say on a prima facie case:“... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

22. The learned trial magistrate in considering the question of prima facie case considered that the Plaintiff/ Appellant had a title but that the title had been cancelled by the National Land Commission. On being referred to the decisions of the High Court quashing the decisions of the National Land Commission, it was the finding of the learned magistrate that the decisions she was referred to did not deal with the validity. In considering the case of the 4<sup>th</sup> Defendant the court found that the 4<sup>th</sup>



Defendant was not a trespasser. She did not at the interlocutory stage find that the 4<sup>th</sup> Defendant had a superior claim. She stated “I am thus hesitant to come to the conclusion that the Plaintiff’s title is indefeasible or that her title is superior bearing in mind that the 1<sup>st</sup> Defendant too alleged that it possesses a title to the original parcel. I am further hesitant to conclude at this stage that the 4<sup>th</sup> Defendant is a trespasser. While I do agree that the issue of trespass is one which could only have been dealt with after hearing the matter, the fact that the Plaintiff/ Appellant had a title as against the 4<sup>th</sup> Defendant who only had a share certificate it was a misdirection for the learned magistrate to fail to consider the import of Section 26 of the [Land Registration Act](#) which provides;

‘the certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner’

23. The next course of action was to consider whether irreparable harm would be suffered by the Plaintiff/ Appellant if the application for injunction was not granted. The learned magistrate found that the Plaintiff/ Appellant had not proved irreparable harm. The reasoning being that any loss would be borne by the 4<sup>th</sup> Defendant/ Respondent who was carrying out development on the land.

24. Irreparable injury was defined in the case of [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) (2018) eKLR thus;

“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.

25. The court found that irreparable harm had not been proved by the Plaintiff/ Appellant who demonstrated that she had already obtained approval to develop the property stated that if the Respondent was allowed to continue developing the property it would affect her right to enjoyment of the property if the suit were to be determined in her favour. The learned magistrate found that the harm was not quantified and considered the balance of convenience.

26. In considering the balance of convenience, the learned magistrate found that the balance of convenience tilted in favour of the 4<sup>th</sup> Defendant who was in possession. In considering this issue the learned magistrate failed to consider the title held by the Plaintiff/ Appellant and the effect that the construction works would have on the Plaintiff’s/ Appellants use of the property if the case were to eventually be decided in her favour. I find that tilting the balance in favour of the 4<sup>th</sup> Defendant on the basis of possession and failing to consider the effect that the construction would have on the Plaintiff/ Appellants demonstrated intention to construct on the property was a misdirection by the court.

27. There is no doubt that although a building on a property can be demolished, it is an outcome that a court should be reluctant to promote. It could well be that by the time a property is being demolished, it could have been passed over to third parties.

28. The Appellants counsel has vehemently argued that the Appellant ought to have been reinstated in the suit property and the Respondent evicted. Having considered the proceedings in the lower court I find that the court properly did not make this determination as there are many contested issues of fact that will have to be proved at the main hearing before this determination can be made.



29. The upshot of the foregoing is that I find that the appeal has merit and consequently the appeal is partially allowed in the following terms;
- a. An order of temporary injunction is hereby issued restraining the Respondents whether by themselves, their employees, servants, representatives or agents or any other person claiming under them from, selling or carrying out any construction on Land Reference Number 15400/73 and 15400/74 situated in Embakasi District pending the hearing and determination of Milimani CMCC ( ELC) E 084 of 2021 Josephine Waiyego Githuku and Kiambu Dandora Farmers Co Ltd and Others.
  - b. Each party is to be their own costs for the appeal.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**Judy Omenge**

**JUDGE**

In the presence of: -

Ms Maya holding brief for Mr. Nderitu for the Appellant

Mr. Were for 1<sup>st</sup> Respondent

Mr. Mogire for the 4<sup>th</sup> Respondent

Steve - Court Assistant

