



Ganiji (Suing as the Personal Representative of the Estate of Mohsinali Jiwali Ganijee) v Ultra-Modern Homes Limited & another (Environment & Land Case E029 of 2024) [2025] KEELC 1205 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E029 OF 2024**

**YM ANGIMA, J
MARCH 13, 2025**

BETWEEN

**SHAMIMBAI MJ GANIJI PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
MOHSINALI JIWALI GANIJEE**

AND

**ULTRA-MODERN HOMES LIMITED 1ST DEFENDANT
RAYYAN DRIVE LIMITED 2ND DEFENDANT**

RULING

Plaintiff's Application

1. By a notice of motion dated 15.4.2024 brought under Sections 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) and Order 40 Rule 1 and Order 51 of the Civil Procedure Rules and other enabling provisions of the law, the plaintiff sought inter alia the following orders pending the hearing of the suit:
 - a. That this Honorable Court be pleased to issue a temporary injunction restraining the Defendant/Respondents, themselves, agents, servants, employees, representatives and/or any other persons acting on their behalf from proceeding with constructions or in any other way in Plot No. Mombasa/block X/85 pending the hearing and determination of this suit.
 - b. That an order for restoration and/or reinstatement of all destroyed pipes/walls/gate and/or the Plaintiffs/applicant's infrastructure utilities to the state in which they were in prior to the said destruction by the Defendant/Respondents at the Respondents' own costs to the satisfaction of the Plaintiff/applicant.



- c. That an order of permanent injunction restraining the Defendants by itself, its agents, employees, workmen and/or servants from digging further trenches and/or doing any acts in Plot No. Mombasa/Block X/85 that are likely to interfere plaintiffs' access, quiet possession of Plot No. Mombasa/Block X/338, Mombasa/Block X/339 & Mombasa Block X/340 pending the hearing and determination of this suit.
 - d. That this Honourable court be pleased to issue an order that the Officer Commanding Station, Makupa Police Station do enforce the interim orders.
 - e. That costs of this application be provided for.
2. The application was based upon the grounds set on the face of the motion and the contents of the supporting affidavit sworn by the plaintiff on 15.04.2024. It was contended that the plaintiff resided in Plot No. Mombasa/Block X/340, which together with Plot No. Mombasa/block X/338 and Mombasa/block X/339 belong to the estate of Mohsinali Jiwaji Ganijee. It was pleaded that the three plots were adjacent to the defendants/respondents Plot No. Mombasa/block X/85, where they were constructing a block of apartments. It was contended that the defendants' construction works on Plot No. 85 had destroyed the concrete perimeter wall along with the gates, pipes and electric fences that belonged to the Plaintiff. The defendants were said to have encroached on the plaintiff's suit property and erected iron sheets resting on her wall which prompted the plaintiff to report the matter to the police and the County authorities. The plaintiff urged the court to find that she had demonstrated a prima facie case and stands to suffer irreparable loss and damage unless the orders sought are granted.

B. Defendants' Response

3. The defendants filed a joint replying affidavit sworn on 30.4.2024 in opposition to the application. It was contended that the defendants commenced construction on Plot No. Mombasa/ Block X/85 in November 2023 having acquired all the necessary approvals before commencement. The defendants insisted that at all times they were constructing within Plot No. 85 and had not interfered with the plaintiff's neighbouring plots. Further, the defendants argued that the plaintiff was guilty of laches for coming to court five months after construction had commenced. The court was urged to find that the plaintiff had not established the principles for the grant of an injunction as laid down in *Giella V Cassman Brown & Co Ltd* [1973] EA 358 since any injury suffered can be compensated by way of an award of damages as opposed to the defendants who are undertaking construction on their land.

C. Directions on Submissions

4. When the application was listed for inter parties hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the plaintiff filed her submissions dated 13.1.2025 and the defendants filed their submissions dated 17.1.2025.

D. Issues for Determination

5. The court has perused the plaintiff's notice of motion dated 25.04.2024, the defendants' replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following key issues arise for determination herein:
- a. Whether the plaintiff has made out a case for the grant of the interim injunction sought.
 - b. Whether the plaintiff is entitled to the restoration order sought.
 - c. Who shall bear the costs of the application.



E. Analysis and Determination

- a. Whether the plaintiff has made out a case for the grant of the interim injunction sought
6. The court has considered the material and submissions on record on this issue. The principles for the grant of an injunction were set out in the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 as follows:
 - a. First, the applicant must demonstrate a prima facie case with a probability of success at the trial.
 - b. Second, an injunction will not be normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.
 - c. Third, if the court is in doubt on the second principle it shall determine the matter on a balance of convenience.
 7. The plaintiff contended in her application that the defendants had encroached into Plot No. Mombasa/Block X/340, Mombasa/Block X/338 and Mombasa/Block X/339 while constructing a block of apartments on their adjacent Plot No. Mombasa/Block X/85. That the defendants' excavation had destroyed the concrete perimeter wall along with the gates, pipes and electric fences. The defendants on the other hand argued that all their construction activities were confined within Plot No. 85. They further submitted that they had obtained all the necessary approvals from the county government of Mombasa, the National Environment Management Authority, and the National Construction Authority.
 8. The court is thus of the view that the plaintiff has not demonstrated a prima facie case with a probability of success at trial, since her claim seeks to stop construction on Plot No. 85 which is owned and occupied by the defendants. The Court of Appeal in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:

"In civil cases, a prima facie case 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 apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
 9. The court has also considered the material and submissions on record on the second principle. Where the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR held that;

"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...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 such a nature that monetary compensation, of whatever amount, will never be adequate remedy."



10. The court is of the view that the plaintiff has not demonstrated that she stands to suffer irreparable loss or injury that cannot be compensated by an award of damages. There is a standard upon which the damages that the plaintiff alleged to have suffered can be measured with reasonable accuracy. On the other hand, the defendants' project development has been estimated at Kshs 1 billion. If the plaintiff is granted an injunction and loses the case, she may not be in a financial position to adequately compensate the defendants. Additionally, the plaintiff did not render a reasonable explanation as to why she did not come to court immediately after the construction began in November 2023 and why she waited for the defendants to get to the 5th floor before filing suit. The court is of the view that the plaintiff is guilty of laches and hence not entitled to the equitable remedy of injunction.
- b. Whether the plaintiff is entitled to the restoration order sought
11. The plaintiff in her application sought an order for restoration of all destroyed infrastructure to the state in which they were before the commencement of construction. The court has already found that any injury suffered by the plaintiff can be compensated by an award of damages. The court is further of the opinion that a restoration order is a final remedy which may be granted by the court at the conclusion of the suit. The court is, therefore, not inclined to grant the said prayer at this interim stage.
- c. Who shall bear the costs of the application
12. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. In the case of *Giella vs Cassman Brown & Co Ltd* (supra), it was held that the appropriate order to make in an application for injunction is for costs to be in the cause where the order is granted. However, where the application is dismissed costs should be awarded against the applicant. The court finds no good reason to depart from the general rule. As a result, the defendant shall be awarded the costs of the application.

F. Conclusion and Disposal Order

13. The upshot of the foregoing is that the court finds no merit in the plaintiff's application for interim orders. As a consequence, the court makes the following orders for disposal thereof:
- a. The notice of motion dated 15.04.2024 be and is hereby dismissed in its entirety.
- b. The defendants are hereby awarded costs of the application.
- c. For the avoidance of doubt, any interim orders in place are hereby vacated.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 13TH DAY OF MARCH 2025.

In the presence of:

Ms. Kahariri for plaintiff

Mr. Ngure for defendants

Court assistant Gillian

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Y. M. ANGIMA

JUDGE

