



REPUBLIC OF KENYA



**James & 5 others v Motatiro & another (Environment & Land Case E001 of 2023) [2023] KEELC 21131 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21131 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE E001 OF 2023  
MN KULLOW, J  
OCTOBER 23, 2023**

**BETWEEN**

**NYAHIRI KARUNGA JAMES ..... 1<sup>ST</sup> PLAINTIFF  
NYAHIRI NYAMESEGERE DISMAS ..... 2<sup>ND</sup> PLAINTIFF  
PETER MATIKO NYAHIRI ..... 3<sup>RD</sup> PLAINTIFF  
PAUL MUHINDI NYAHIRI ..... 4<sup>TH</sup> PLAINTIFF  
PHANUEL MATIKO NYAHIRI ..... 5<sup>TH</sup> PLAINTIFF  
ANISON NYAHIRI MUHINDI ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**MOTATIRO ..... 1<sup>ST</sup> DEFENDANT  
ROBI NDIMBA GIMUNG'AYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated July 3, 2023 the plaintiff/ applicant sought for the following orders: -
  - a. Spent.
  - b. That pending the hearing and determination of this application, there be an order of temporary injunction to restrain the defendants/ respondents, either by themselves or their agents, or employees, or servants, and/or their family from threatening or harassing the applicants, from destroying the Applicant's properties or in any manner whatsoever trespassing or interfering with the Plaintiffs/applicants quiet and peaceful possession of all that property known as Bukira/ Bwisaboka/ 11231 located in Migori County, Kuria West Constituency, Bukira East Sub- County.



- c. That pending the hearing and determination of the main suit, there be an order of temporary injunction to restrain the Defendants/ respondents, either by themselves or their agents, or employees, or servants, and/or their family from threatening or harassing the applicants, from destroying the Applicant's properties or in any manner whatsoever trespassing or interfering with the Plaintiffs/applicants quiet and peaceful possession of all that property known as Bukira/ Bwisaboka/ 11231 located in Migori County, Kuria West Constituency, Bukira East Sub- County;
  - d. That the orders for temporary injunction be enforced by the OCS (Officer Commanding Kehancha Police Station);
  - e. That the costs of this application be provided for
  - f. That this court be pleased to issue other orders as it may deem fit for the interest of justice and for purposes of protecting the interests of the applicants in the suit property.
2. The application is based on the 5 grounds thereof and on the supporting affidavit sworn by the 6<sup>th</sup> applicant, on his own behalf and on behalf of the Co- applicants, on even date. He averred that the suit land is their ancestral land where they have lived for over 50 years. The land was demarcated during adjudication process and was originally registered as Bukira/ Bwisaboka/828, in the year 1974 and they have been in actual possession and active use of the same since then. He stated that he has developed the suit parcel; he has built his homestead, constructed permanent structures that are used as commercial buildings where he has been collecting rent.
  3. He further stated that he was issued with title deed in respect of the original land No. 828 in the year 1992 and in the year 2022; he decided to subdivide the original land and transfer the same to his rightful heirs, 1<sup>st</sup> – 5<sup>th</sup> applicants. After the said subdivision and transfer of the new parcels; the said portions were registered in the names of the new owners as absolute proprietors.
  4. It is his claim that sometimes in May, 2023; the respondents started threatening to evict him and his co-applicants from the land, threatening to inflict harm and destruction of property without any lawful justification. Further, the respondents went ahead and illegally registered a caution/ restriction against the title of the suit parcel.
  5. He maintained that the respondents have no right whatsoever over the suit property and their actions are aimed at grabbing their rightful land parcel. They are apprehensive that should the orders of temporary injunction sought not be granted, then the respondents will continue to threaten, harass and attack them hence the need to be restrained.
  6. The application was opposed. The 1<sup>st</sup> defendant/ respondent filed a replying affidavit sworn on 02.08.2023, on his own behalf and on behalf of the 2<sup>nd</sup> respondent. He stated that on 28/05/1973; his father was registered as the sole proprietor of parcel No. 229 measuring 20Ha; bordering the 6<sup>th</sup> applicant's land No. 267. The 2 parcels of land are however separated by a murrum road.
  7. It is his claim that the 6<sup>th</sup> applicant conspired with the officers at the Lands Office, to subdivide the said original land No. 267 into 2 and thereafter register a portion measuring 3.5Ha in the name of the 6<sup>th</sup> applicant.
  8. He contends that he only found out of the said illegal subdivision by the 6<sup>th</sup> applicant sometimes in May, 2023; when he applied for a Certificate of Search of the suit land and also found out that the portion left for their deceased father was only 16.5Ha.



9. He denied the allegations of destruction of property or threats of eviction and physical harm. He however conceded that an order of status quo as at the year 2022 be issued and be observed by all parties to the suit.
10. The application was canvassed by way of written submissions. Both parties filed their rival submissions together with authorities which I have considered and taken into account in arriving at my decision.

### Issues For Determination

11. I have considered the entire application, the affidavits together with the annexures thereto and the rival submissions. Consequently, it is my humble view that the sole issue arising for determination therefrom is;
  - a. Whether the applicants have met the requirements for the grant of a temporary order of injunction sought.
12. The law relating to injunctions is provided under order 40 (1) (2) of the Civil Procedure Rule which provides as follows: -
  1. “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;
    - (b) .....,  
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.” (emphasis mine)
13. Section 13 (7) (a) of the Environment and Land Court Act, 2015 further mandates this court to grant interim preservation orders; including an interim order of injunction in the nature sought herein.
14. The principles guiding the grant of injunctions are well settled. An applicant seeking orders of injunction must satisfy the 3 elements set out in the celebrated case of *Giella vs Cassman Brown and Co. Ltd* [1973] EA. 358 at 360 as follows: -
  - a). where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt;
  - b). He will suffer irreparable harm/injury which cannot be adequately compensated by damages;
  - c). Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.
15. It is now well settled that all the 3 elements indicated above are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. The existence of one pillar alone does not automatically entitle an applicant to an order of injunction without considering the other hurdles. See *Kenya Commercial Finance Co. Ltd vs Afraba Education Society* [2001] Vol. 1 EA 86.



16. The first ground is that an Applicant must establish a Prima Facie case, which raises arguable and triable issues with a probability of success. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2* (Supra) explained what amounts to a prima facie case and stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 as to call for an explanation or rebuttal from the latter.”

17. The applicant contends that they are the registered, absolute and actual owners of the suit parcel, having been in occupation and use thereof for a period of over 50 years. They annexed copies of the title deeds and Green cards in support of their ownership claims and photographs to show the various developments in the suit land, which includes permanent structures and cultivated crops.

18. The respondents on the other hand deposed that the applicants did not established a prima facie case since both parties are alleging that they are the rightful and beneficial owners of the suit parcel. It was therefore his contention that a prima facie case can only be established and tested by way of evidence.

19. In determining whether a prima facie case has been established, I am guided by the Court of Appeal decision above. From the rival positions taken by the parties herein, it is not in dispute that the plaintiffs/ applicants are in possession and use of the suit land outlined. This fact was further acknowledged by the respondents at paragraph 14 of their written submissions, where they confirmed that the applicants are in actual possession and use of the suit land.

20. The applicants also annexed copies of the title deed, Green card to demonstrate their ownership claims and photographs to show that they are in active occupation of the suit land. The annexed photographs further prove the alleged dealings complained about.

21. I have however noted that both parties are alleging to be the actual/beneficial owners of the suit land. This court is mindful not to delve into the substantive issues of ownership of the suit parcel at this interlocutory stage. At an interlocutory stage, the Court is not required to make any conclusive or definitive findings of fact or law, particularly on the basis of conflicting affidavit evidence or disputed propositions of law. (See *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002)

22. In view of the foregoing, I do find that the applicant has satisfactorily established a prima facie case against the defendant/respondent for the purposes of the grant of an injunction pending the hearing and determination of the suit.

23. The second element is that an applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by damages. The burden lies with the applicant to demonstrate the nature and extent of the substantial injury likely to be suffered.

24. The court in *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR defined what amounts to an irreparable injury as follows;

“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. It is the applicants contention that they have erected permanent structures on the suit land, he collects rent from some of the commercial buildings and he has also cultivated crops. Further, it is their claim that the respondents have been threatening them with bodily harm and have been actively cutting down trees. They thus aver that unless the orders of temporary injunction seeking to stop the respondents from further illegal destructions, then they stand to suffer loss which cannot be compensated by an award of damages.
26. The respondents on the other hand denied the allegations made by the applicants, they denied threatening the applicants or destroying their properties. They further dismissed the bundle of photographs annexed by the applicant and stated that from a look at the same; everything appeared intact save for 3 trees that had been cut down by unknown people. They consequently accused the applicants for cutting down the said trees since they are the ones in possession of the suit land. They thus maintained that there was no demonstration by the applicants of the suffer irreparable harm they are likely to suffer and which cannot be compensated by way of damages.
27. This court has a duty to prevent grave and irreparable injury; where it is demonstrated that the same is likely to be suffered by the Applicant. An injury is irreparable where there is no standard by which an amount can be measured with reasonable precision and accuracy or is in such a nature that monetary compensation, of whatever amount, will never be adequate remedy. The applicants have demonstrated that are in possession and use of the suit land, where they have constructed permanent commercial buildings and are also cultivating crops. They have also annexed photographs to show the destruction on their properties, cutting down of trees and complained of threats of physical harm against them by the respondents. Other than denying the said claims of destruction or threats, no contrary evidence has been produced by the respondents.
28. Consequently, I find that the applicants have demonstrated to the required standard, the irreparable loss that they are likely to suffer and the same cannot be compensated by an award of damages.
29. The final element to be established is the balance of convenience. This court needs to be satisfied that the inconvenience likely to be caused to the Applicant by declining the injunction is greater than that which is likely to be caused to the respondent. The court is called upon to balance the inconveniences of both parties and possible injuries to them and their properties.  
*(See [Charter House Investment Limited vs Simon K. Sang and 3 Others](#) [2010] eKLR.*
30. It is common ground that the applicants are in possession and occupation of the suit land; they have developed the said land, constructed permanent structures and cultivated crops. There is proof of illegal acts or destruction of property on the said suit land and they are apprehensive that unless the respondents are stopped by an order of the court, they are likely to continue with the said illegal actions to their detriment. In the premises, it is my considered opinion that the inconvenience likely to be caused to the applicants is greater than that which is likely to be caused to the respondents in the circumstances.

## Conclusion

31. In view of the foregoing, I find that the Application dated 3<sup>rd</sup> July, 2023 is merited and I proceed to make the following orders;
  - a. An Order of Injunction be and is hereby issued restraining the Defendants/ respondents, either by themselves or their agents, or employees, or servants, and/or their family from threatening or harassing the applicants, from destroying the applicants' properties or in any manner whatsoever trespassing or interfering with the Plaintiffs/applicants quiet and peaceful



possession of all that property known as Bukira/ Bwisaboka/ 11231 located in Migori County, Kuria West Constituency, Bukira East Sub- County; pending the hearing and determination of the main suit.

- b. Further, the OCS (Officer Commanding Kehancha Police Station is hereby directed to enforce the said Orders of Temporary Injunction and ensure strict compliance.
- c. Costs of the Application to be in the cause.

It is so Ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 23<sup>RD</sup> DAY OF OCTOBER, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

