



REPUBLIC OF KENYA



**Roge v Rotich & 3 others (Environment & Land Case E019 of 2024)
[2025] KEELC 4051 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 4051 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E019 OF 2024**

**CK YANO, J
MARCH 13, 2025**

BETWEEN

JOHN MUHIA ROGE PLAINTIFF

AND

EZEKIEL KIPCHIRCHIR ROTICH 1ST DEFENDANT

BEATRICE JERUIYOT SAWE 2ND DEFENDANT

TWIGA CAMP AND RESORT LIMITED 3RD DEFENDANT

GEOFFREY KETER 4TH DEFENDANT

RULING

1. By Notice of Motion dated 3rd April, 2024 the Plaintiff/Applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. THAT an interlocutory order of injunction do issue against the Defendants restraining them whether by themselves, their servants, agents and/or employees from ploughing, planting, constructing, leasing, charging, selling, offering for sale and/or in any other way dealing with the whole of that parcel of land known as Eldoret Municipality/block 1X/1XX7 pending the hearing and determination of the main suit.
 - d. Costs of this application be provided for.
2. The application is premised on the grounds set out on the face of the Motion, and on the supporting affidavit of even date sworn by John Muhia Roge, the Plaintiff. In a nutshell, the Plaintiff's case is that in 1976, he purchased from one Paul Kemboi (now deceased) 5 acres of land that were part of L.R. No. 8746. The 5 Acres were designated as Plot Nos. 256, 257, 259 and 260 and he paid for them in



full in 2 instalments paid to Amata & Co. Advocates, the Vendor's Advocate. The land was shown to him by the Vendor's Surveyor, and he immediately fenced it and put up temporary structures for his family and some for rental purposes.

3. The Plaintiff deponed that his interest in the land was recognised by the Vendor, who intervened in 1980 when the government wanted to acquire L.R. No. 8746. He was issued with a letter of allotment Ref. No. 134568/3 dated 26th June, 1992, which he accepted vide letter dated 29th June, 1992. He made the necessary payments per the letter of allotment vide Receipt No. 4791358 and paid for amendment of the RIM as evidenced by Receipt No. 0427463. The land was designated as Eldoret Municipality/block 1X/1XX7 (the suit property herein).
4. It is the Plaintiff's case that he planted trees thereon, and in 2002 he sought permission as was the norm then, from the provincial administration, being the Chief, Pioneer location to harvest and was allowed. The Plaintiff averred that he is still in occupation of the land, but to his shock, he learnt that the Defendants are in the process of subdividing it. The Plaintiff deponed that he has set out a prima facie case with a probability of success. Further, that damages will not be an adequate remedy should the Defendants continue their dealings with the land, and that the balance of convenience tilts in favour of allowing the application.
5. The 4th Defendant swore an Affidavit in Reply dated 14th May, 2024 where he deponed that the Plaintiff is not entitled to the orders sought. The 4th Defendant deponed that the Plaintiff had not established a prima facie case or demonstrated that he will suffer irreparable damage. Further, that an award of damages can adequately compensate the Plaintiff. The 4th Defendant deponed on the contrary, that the balance of convenience tilts in his favour. He accused the Plaintiff of agitating his claim piecemeal and referred the court to Eldoret ELC No. 13 of 2019, which he claimed is over the same subject matter.
6. The 4th Defendant then went on to deny each and every allegation by the Plaintiff specifically regarding purchase, payment, allocation and ownership of the suit property. He deponed that the Plaintiff had no genuine purchase agreement or letter of allotment over the suit property and that the receipts exhibited by the Plaintiff are not genuine. The 4th Defendant deponed that the Chief of Pioneer Location did not approve any undertaking or development as he had no legal capacity to give such approvals. He alleged that the Plaintiff has no tenable claim over the suit property hence the application is incompetent and untenable. He alleged that he is the legal allottee and holder of a certificate of Lease over the suit parcel of land, which he annexed alongside a Certificate of Official Search.
7. The 4th Defendant swore another Affidavit in Reply on 30th October, 2024 reiterating and reproducing the averments in his earlier reply. He reiterated that the Plaintiff was never allocated the suit land and that the Director of Land Adjudication had disowned the Plaintiff's documents. On account of this, he repeated that the Plaintiff's documents are not genuine.

Plaintiff/Applicant's Submissions;

8. The Application was canvassed by way of written submissions. The Plaintiff's Submissions are dated 27th January, 2025. According to Counsel for the Plaintiff, the prayers in the Motion are premised on Order 40 Rule 1 of the Civil Procedure Rules. Counsel cited *Giella vs Cassman Brown Co. Ltd* (1973) EA 358 on the conditions for grant of an injunction. Counsel argued that the Plaintiff has been in occupation of the land since he purchased it to date, and has planted trees and food crops. He urged the court not to allow the ongoing subdivision until the ownership of the land is determined as it would be prejudicial to the Plaintiff who is the registered owner of the land. Counsel argued that the Plaintiff stands to lose his legally acquired land which is also his home. Counsel was of the opinion that the



Plaintiff had established a prima facie case with a probability of success. He relied on *Mrao Limited vs First American Bank Kenya Limited* (2003) eKLR.

9. Counsel further submitted that the land had been allocated to the Plaintiff and was not available for re-allocation, thus the registration in favour of the Defendants is illegal, unlawful, null and void. Counsel explained that the Plaintiff has been living on the land since 1976 with his wife and children who were born and brought up on the land. Counsel argued that under the circumstances, damages cannot be adequate remedy, as explained in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*. In addition, that the balance of convenience tilts in the Plaintiff's favour. Counsel urged that the Plaintiff had met the threshold for granting the order of injunction, thus the court should grant it.

4th Defendant's Submissions.

10. The 4th Defendant filed written submissions dated 28th January, 2025. In the submissions, Counsel argued that the Plaintiff had failed to make out a prima facie case against the 4th Defendant since the documents he relied on were disowned by the Lands Office. Counsel also submitted that the Plaintiff had not shown that he has any rights over the suit property to demonstrate that he stands to suffer irreparable harm.
11. Counsel argued that the 4th Defendant on the other hand had demonstrated his interest in the suit land, and is the one who stands to suffer loss if restrained from utilizing it. As a result, Counsel further submitted that the balance of convenience tilts in favour of the 4th Defendant. Counsel submitted that the Plaintiff had failed to meet all the conditions set out in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR sequentially. It was urged that due to failure to satisfy any of the requirements, the Plaintiff's application should be dismissed with costs to the 4th Defendant.

Analysis and Determination.

12. I have considered the application, the responses thereto as well as the submissions of the parties and authorities cited thereunder. The only issue for determination is whether the injunctive order sought should issue.
13. The now famous case of *Giella vs Cassman Brown & Co Ltd* (1973) EA 358 set the following conditions for the grant of a temporary injunction: -

“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.”
14. The Court of Appeal, in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR further explained that:-

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the



respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

15. This Court needs to analyse the circumstances herein to determine whether the Plaintiff has satisfied the triple requirements in *Giella vs Cassman Brown (Supra)*, to entitle him to a grant of the order of injunction sought in the application.

16. The first element that the Plaintiff is required to establish is that he has a prima facie case with a probability of success. As to what a prima facie case is, the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR* held that:-

"So, what is a prima facie case? I would say that 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

17. I note that the Plaintiff has annexed an agreement for sale dated 23rd February, 1976 between himself and one Paul Kibor Kemboi, as well as receipts showing that he paid for the land in full. The Plaintiff has also annexed a letter dated 15th November, 1980 where the said Paul Kemboi confirmed having sold the land to the Plaintiff herein. He has also presented before this court a bundle of photographs showing his existence on the land, spanning from 1976 to 2024.

18. The Plaintiff herein has no title over the suit property. Clearly, his claim on the suit property emanates from the Letter of Allotment dated 26th June, 1992. To prove the existence of any interest arising from a letter of allotment, a claimant must present documentary evidence of their claim. In the case of *Kenya African National Union vs Cabinet Secretary Ministry of Lands & Physical Planning & 5 others (Environment & Land Petition E025 of 2020)* [2024] KEELC 4563 (KLR) (3 June 2024) (Judgment), the court explained what evidence a claimant must table to prove such a claim, and held that:-

"Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline..."

19. Indeed, the Plaintiff has annexed a letter of allotment dated 19th June, 1992 and receipts for payment of the amounts demanded thereunder. I note that the letter of allotment did not specify the time within which the stand premium and ground rent were to be paid, so this court cannot at this interlocutory stage determine whether or not they were paid within the requisite time. The Plaintiff's Annexure JMR8 is a Part Development Plan, which the letter dated 15th October, 2019 from the Ministry of Lands acknowledged as being an authentic copy. These documents in my opinion demonstrate that the Plaintiff has sufficient legal interest over the land, to entitle him to an order of injunction.

20. The 4th Defendant alleged in his second Affidavit in Reply that he had annexed a letter to and from the Director of Land Administration disowning the documents relied on by the Plaintiff being Annexures GK2 and GK3. I have perused two Affidavits in Reply filed by the 4th Defendant in response to this Application. I have confirmed that no such letters were annexed to the said Affidavit. Instead, annexures GK2 and GK3 in both responses filed by the 4th Defendant are a Certificate of Lease and



a Lease respectively. The alleged letters are the premise upon which the 4th Defendant alleged that the Plaintiff's documents were not genuine, making him the legitimate owner of the land. Since the same were not exhibited before this court, the court has no option but to disregard that allegation.

21. All in all, it is clear that from the evidence presented at this interlocutory stage, and without digging into the merits of the case, the Plaintiff has sufficient interest over the suit property to warrant protection by way of injunction. That being the case, I hereby find that the Plaintiff has established a prima facie case.
22. The second element is whether the Plaintiff has demonstrated that he will suffer irreparable harm if the injunction is not granted. The term irreparable harm is aptly explained in Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352 which reads:-

“It is the very first principle of injunction law that primo 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”

23. The Plaintiff averred that he has lived on the suit property since he purchased it in 1976, together with his wife and children who were born and brought up on the land. In other words, the suit property is his home where he has lived for almost 50 years, and he now faces the risk of losing it if the Defendants are not restrained. It is the Plaintiff's case that he will suffer irreparable harm. Moreover, that damages cannot compensate for the emotional aspect of his loss, thus they are not an adequate remedy in this instance, and I agree with this contention.
24. On the other hand, the 4th Defendant contended that the Plaintiff has not demonstrated the irreparable loss he will suffer, and claimed instead that he is the one to who stands to suffer if restrained from utilising the land. The 4th Defendant's claim is premised on the alleged letters to and from the Director of Land Administration which he purports disowned the Plaintiff's documents. However, as earlier explained, the said letters have not been shown to this court.
25. In any event, it is trite law that where there is breach of the law, an applicant cannot be compelled to accept damages as compensation. In the case of, it was held that:- Joseph Siro Mosioma vs Housing Finance Company of Kenya Limited & 3 Others (2008) eKLR

“...that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”



26. I am further guided by the case of Said Almed vs Mannasseh Benga & Another (2019) eKLR, where the court held that:-

“Where it is clear that the defendant’s act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of Aikman vs Muchoki (1984) KLR 353. See the case of Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd (2005) eKLR.”

27. Furthermore, the extract from the Halsbury’s Laws of England above clearly explains that even where the injury is capable of compensation in damages, an injunction may be granted if there is any possibility that the act sought to be restrained is likely to destroy the subject matter in question. There can be no doubt that if the Defendants are allowed to proceed with the subdivision, the suit property being the subject matter herein, will be altered and/or destroyed. For the above reasons, I am convinced that the Plaintiff has established that he will suffer irreparable harm if the orders sought are not granted.

28. The law on injunctions is that if the court is in doubt over the first two tests, then it must determine the matter on a balance of convenience. The concept of balance of convenience was defined in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”

29. In short, this court is required to make a determination as to which party will suffer the greater harm with the outcome of the motion. From the Plaintiff’s pleadings, the Defendants have commenced the process of subdividing the suit land. The 4th Defendant has not disputed that he is indeed subdividing the land, claiming instead that he is doing so as the registered owner of the land. This is clearly an ownership dispute which needs to be determined to establish which of the parties herein is entitled to the suit property.

30. Moreover, the Plaintiff is the one currently in occupation and use of the suit property. The 4th Defendant has not claimed that he lives on the suit property, and there is no evidence that the 4th Defendant is otherwise utilising the suit property. In the circumstances, I am of the opinion that the balance of convenience tilts in favour of granting the order of injunction.

31. My decision is bolstered by the fact that the Plaintiff’s rights over the suit property were already determined in Eldoret ELC No. 13 of 2019 through a judgment delivered on 29th January, 2025. Although the 4th Defendant claims that the Plaintiff is agitating his rights piecemeal, I have taken time to read the annexed Plaintiff, Eldoret ELC No. 13 of 2019. I note that the said suit was between the Plaintiff herein and David Songok, Teresa Kemboi and the County Government of Uasin Gishu.



32. Despite the fact that the case is over the suit property herein, it was clearly with regards to invasion by the said Defendants in that suit, which resulted in destruction of property, as opposed to the alleged attempted subdivision by the Defendants herein. Evidently, although the two suits involve the same subject matter, they arose from two very distinct causes of action. This explains why the Defendants in this case were not sued in ELC 13 of 2019. Therefore, there can be no allegation that the Plaintiff is agitating his claim piecemeal.
33. Eldoret ELC No. 13 of 2019 was determined in favour of the Plaintiff herein, with the court directing the County Government of Uasin Gishu to facilitate registration of the suit land in favour of the plaintiff within 90 days thereof. It would appear that the said judgment may not be enforceable unless this suit herein is determined as there is in existence a title in the hands of the 4th Defendant. Since the Plaintiff's rights were determined by the court, the balance of convenience tilts in favour of granting him the injunction pending hearing and determination of this suit.

Orders.

34. The upshot is that the Plaintiff has met the threshold for grant of temporary injunction sought in his Notice of Motion dated 3rd April, 2024. This court therefore finds merit in the said Motion and the same is hereby allowed as prayed with costs to the Plaintiff.
35. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 13TH DAY OF MARCH, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

