



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutua v Njeru (Environment & Land Case E006 of 2023)  
[2023] KEELC 21772 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21772 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE E006 OF 2023  
LG KIMANI, J  
NOVEMBER 23, 2023**

**BETWEEN**

**DANIEL MWENDWA MUTUA ..... PLAINTIFF**

**AND**

**GRACE MUTHONI NJERU ..... DEFENDANT**

**RULING**

1. Before the Court is the Plaintiff's Notice of Motion application dated 12<sup>th</sup> May 2023 seeking orders that:
  1. Spent
  2. Spent
  3. That pending the hearing of the main suit interpartes hearing and determination of this application this Honourable Court be pleased to issue a temporary order of injunction stopping the Respondent whether by herself, her employees, her agents or any other person authorized by her herein from stepping, accessing, living, staying, utilizing, using or in any manner wasting, transferring possession, selling, dealing, interfering with Land Parcel known as Land Title Number Kyuso/Katse/4560 situated in Kitui County, the property of the Applicant.
  4. That the O.C.P.D Mumoni Police Station to ensure compliance with these orders.
  5. That this honourable court grants any order that it deems fit
  6. That the costs of this application be provided for.



2. The Application is supported by the affidavit of the Plaintiff/Applicant and on the grounds on the face of the application. The Applicant states that he is the registered owner of land parcel number Kyuso/Katse/4560 situated in Kitui County on which he has built a home for his elderly parents.
3. He states that he has been in possession of the land since sometime in 2015 to date and he has drilled boreholes and installed electricity, a perimeter wall and modern gates.
4. The Applicant states that he was married to the Respondent herein but divorced on June 2<sup>nd</sup> 2020 in Michigan USA, where judgment was delivered by Hon. Charlene M. Elder of the circuit court for the county of Wayne. The said foreign judgment was recognized and adopted as orders of the High Court of Kenya by Lady Justice M. Odero, on 23<sup>rd</sup> February 2023.
5. He deposed that the Respondent continues to illegally trespass on his land without any justifiable cause where she storms the suit land to cause unnecessary chaos, despite the judgment being clear on matters of property, custody of children and inheritance.
6. He therefore seeks the said orders as the Respondent has been disturbing his elderly parents at his home, especially his mother who is 86 years old and is sickly and in need of constant medical care, yet is being disturbed by the Respondent's frequent visits.
7. The Applicant attached to his application a copy of the title deed to the suit land issued in his name on 23<sup>rd</sup> March 2022, a sheet map of the Katse Adjudication section and map, judgement of the Hon Charlene M. Elder of the circuit court for the county of Wayne, order by Hon. Lady Justice M. Odero.

#### **The Respondent's Replying Affidavit**

8. The Respondent, Dr. Grace Muthoni Njeru swore a replying affidavit in response to the application which she termed as full of misrepresentations, untruths, non-disclosure and misleading facts. She acknowledged that indeed she got married to the Applicant on the 11<sup>th</sup> of August 2007 in the United States of America and they were blessed with three children. She however denied that she is divorced from the Respondent and that the attached divorce orders were obtained without her knowledge in the United States of America as she was never served with any court papers. She deposed that the suit parcel of land is her matrimonial property which is registered in both her name and that of the Respondent and where she has built her home.
9. The Respondent avers that the Applicant has denied her access to the children and has maliciously sued her in High Court E259 OF 2021. The Respondent states that the application to have the foreign *ex parte* judgement adopted was dismissed after the applicant tried to lock her out and the same was scheduled for mention on 19<sup>th</sup> September 2023 to fix a hearing date and she was shocked to see the annexed order of the Hon M. Odero attached to the applicant's affidavit which was heard in a separate miscellaneous cause while another cause was pending.
10. She accused the Applicant of attempting to lock her out of her matrimonial home which she participated in building financially. She also accused the Applicant of having his girlfriend move into their matrimonial home in October 2019 without her knowledge after she became a Member of the County Assembly in Kitui. The alleged girlfriend Sarah Mwikali Ngui subsequently filed Kyuso Misc Application No.3 of 2020 and obtained *ex parte* orders barring the Respondent from coming within 50m of her home. Once she entered an appearance in the said suit, the application was dismissed with costs.
11. The Applicant herein and the said Sarah Mwikali Ngui thereafter filed another suit Kyuso Civil Suit No. 6/2020 which was dismissed and her counter-claim upheld and they appealed in Kitui High Court



- Civil Appeal E040/23. The Respondent claims that she eventually accessed her home when she got orders granting her access to her matrimonial home.
12. After this, the Respondent claims that the Applicant had her security withdrawn through another court case MCL & E E004/2022 at Kyuso Magistrates Court claiming to be the sole owner of the land and as a result, the Applicant and his girlfriend stormed the matrimonial home in the company of one uniformed police officer and others in civilian clothes and questioned what she was doing in their home, while chasing her around with a jembe and performed what the Respondent termed as a “witchcraft” ritual. This caused her to instruct her advocates to have the Applicant committed to civil jail for disobedience of the existing court orders ordering that she not be barred from accessing her matrimonial home as she moved out of the home for safety.
  13. She deposed that the Applicant again approached the Court vide HCCC Misc. Application No.E033/2023 seeking similar orders as in the present suit, which was eventually dismissed on 12<sup>th</sup> October 2022. He again filed HCC Misc Application E008/2023 seeking similar orders pending Appeal but the orders were declined and the matter is still pending in Court.
  14. She further states that the Applicant and the said Sarah Mwikali Nguu instituted Kyuso Civil Suit 6/2020 seeking to evict her from her matrimonial home, they were never ready to proceed with the hearing and their suit was dismissed for non-attendance and allowed the Respondent to proceed with her counter-claim. However, pending judgment, the Applicants filed an application dated 5<sup>th</sup> November 2021 seeking to set aside the orders issued. The application was allowed on the condition that they were to pay thrown-away costs of Ksh.20,000.00 and to set down the same for hearing, which they failed to do. She fixed the same suit for hearing on 3<sup>rd</sup> October 2022 and served notice but the Applicant again did not show up, and judgment was issued and she was awarded Ksh.2,000,000.00 in damages, which is what the Applicant is now seeking an appeal from.
  15. She therefore seeks that the court see through the charade of the Applicant and that none of the requirements have been met for the said orders to be granted.

### **Applicant’s submissions**

16. Counsel for the Applicant submitted that the requirements for an injunction set out in Order 40 of the *Civil Procedure Rules* (2010) and the case of *Giella v Cassman Brown* have been met, submitting that a prima facie case does not require the court to decide on the case or hold a mini-trial but determine that the applicant has a genuine and arguable case. They submit that they have a prima facie case since the suit property is registered to the Applicant as the sole proprietor, and the same is corroborated by a copy of the title deed. The Applicant contends that the Respondent’s actions are tantamount to trespass and that she is denying him and his kin quiet possession and enjoyment of his property, contrary to Article 40 of *Constitution* on his right to property.
17. On the element of irreparable injury, the Applicant submits that the Applicant's ageing mother who is under much-needed hospice and by extension the Applicant stand to suffer since their peaceful enjoyment of their home is constantly being interrupted. He stated that he bought the suit property in 2015 for the sole purpose of providing his ageing parents with a home to retire and rest in and that the Respondent has no colour or right to interfere with the suit property as each party at the divorce proceedings was awarded their personal property. The Applicant relies on the holding in the case of *Sharon Kher Mohammed Ali & Another v Southern Credit Banking Corporation* (2008) eKLR where the court held that a party deprived of his property through an illegal process would suffer irreparable loss and/or damage and cannot be made to take damages instead of his right.



18. Regarding where the balance of convenience lies, counsel for the Applicant relied on the definition in the cases of *Paul Gitonga Wanjua v Gathuthis Tea Factory Company Limited & 2 others* (2016) eKLR, *Charter House Investments Ltd v Simon K. Sang & others* Civil Appeal No.315 of 2004 and *Suleiman v Amboseli Resort Ltd* (2004)7KLR 589 submitting that the path leading to the lower risk of injustice would be to curtail Respondent's apparent trespass and disturbance upon the Plaintiff's/Applicant's rightful property.
19. It is the Applicant's submission that unless these orders of injunction are granted, the Applicant's mother is likely to be left homeless and destitute before the matter is heard in merit which may greatly affect her physical and mental health and may never fully recover from such impact. On the other hand, he states that the Respondent is not likely to suffer any prejudice or loss if the injunctive orders are issued since she is not a resident in the suit property.
20. Counsel for the Respondent did not file written submissions but sought to rely entirely on the replying affidavit.

### **Analysis and Determination**

21. Having considered the application herein, replying affidavit, submissions by Counsel and the authorities cited the court is of the opinion that the following issues arise for determination;
  - a. Whether the Plaintiff/Applicant's Application has met the threshold established in for the grant of temporary injunction pending hearing and determination of the suit.
  - b. What orders should the court make?
22. The application herein is brought under Section 3A and 3B of the *Civil Procedure Act*, Order 40 and Order 52 Rule 1 of the *Civil Procedure Rules*. Order 40 Rule 1 provides for cases in which temporary injunctions may be granted and states as follows;

“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 the 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.
23. The conditions set for consideration in granting an injunction are now well settled in the case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself on the conditions that a party must satisfy;

“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.”

24. The Applicant relied on the definition of a “prima facie case” as given in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the Court defined it as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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.”

25. The Applicant has also relied on the case of *Mrao Ltd. v First Americal Bank of Kenya Limited and 2 others* (2003) eKLR, where the Court held that:

“In civil cases, a prima facie 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. 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.”

26. The Applicant supplied the court with the following documents; a title deed for land parcel number Kyuso/Katse/4560 registered in his name on 8<sup>th</sup> January 2019 and a title deed issued on 23<sup>rd</sup> March 2022, a sheet map of the Katse Adjudication section and map showing the location of the said land as well as the location of land parcel 4563, default judgement of the Hon Charlene M. Elder of the circuit court for the county of Wayne and an order by Hon. Lady Justice M. Odero.

27. The Applicant claims that the default judgement of the Hon Charlene M. Elder of the circuit court for the county of Wayne and the order by Hon. Lady Justice M. Odero adopting the said judgement awarded him the suit land under the headline Personal Property Division. The said default judgement held that;

“each party is awarded all personal property as his sole and separate property those items of personal property now in their respective possession, and each party is responsible for any outstanding balance due on the said property, and shall hold the opposing party harmless of any further claims.”



28. The court observes that the said judgement went further and under the heading Real Property Division held that;
- “It is Further Ordered and Adjudged that the plaintiff is awarded free and clear of any claim of the defendant, the marital home located at 1941 Balmoral Drive, Michigan 48302. The parties shall cooperate in removing the Defendant’s name from the mortgage obligation within a reasonable time after entry of this judgment.”
29. *Black’s Law Dictionary* defines personal property as “Any movable or intangible thing that is subject to ownership and not classified as real property”. The same dictionary defines real property as “Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements-also termed as realty; real estate.”
30. From the above definitions of personal and real property, it would appear that what the Applicant was awarded by the court did not include the suit land since the same cannot be described as personal property. Further under the heading “Real Property” the Applicant was not awarded the suit land.
31. In the court’s view the suit property can only be categorized as real property and as set out in the above-mentioned judgement, the only real property dealt with was the marital home located at 1941 Balmoral Drive, Michigan 48302 which was awarded to the Applicant herein.
32. The Respondent’s opposing claim is that the parcel of land where she has built her matrimonial home is registered in the joint names of herself and the Applicant. In support of the claim, she has provided a title deed for land parcel number Kitui/Katse/4561 registered in their joint names on 8<sup>th</sup> January 2019 and a title deed issued on 11<sup>th</sup> October 2019. The Respondent states that even if the matrimonial home is built on a different parcel of land, her interests in the land are not diminished by the mere assertion that the Applicant is the sole proprietor.
33. The Respondent stated that in 2015 together with the Applicant they agreed to construct the matrimonial home at Kaliwa which the Applicant now claims he built for his parents. She stated that she heavily participated financially and foresaw the construction since the Applicant was in the USA and that she moved into the house the same year in December.
34. The Applicant on the other hand states that as the sole registered proprietor of the suit land, he has been in possession since he purchased it in 2015 and he has built a home for his elderly parents. He states that he has drilled boreholes and installed electricity, a perimeter wall and modern gates.
35. The Applicant seeks in the substantive suit orders of permanent injunction stopping the defendant/respondent from dealing with suit parcel of land, general damages and order that she drops use of the name “Mutua” in her documents.
36. According to the Respondent after she moved into the matrimonial home in 2015 the marriage seems to have experienced heavy headwinds resulting in the filing of several court cases.
37. From the rival claims of purchase, construction, development, occupation and possession of the suit land by the Applicant and the Respondent herein, the court is of the view that the cause of action by the Plaintiff/Applicant is a claim for property that from the face of it was purchased and developed during the subsistence of the marriage with the Respondent and which property is also claimed by the Respondent. It therefore is more likely than not that the cause of action is a Matrimonial property cause.



38. Section 6 of *Matrimonial Property Act* No. 49 of 2013 provides for the meaning of matrimonial property and states as follows;

“For the purposes of this Act, matrimonial property means—

- a. the matrimonial home or homes
- b. household goods and effects in the matrimonial home or homes; or
- c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”

39. Under Rule 5 of the *Matrimonial Property Rules*, 2022, a spouse or former spouse may apply to a court for the determination or declaration of any right or claim over the matrimonial property. Rule 6 provides for the Court to which the application may be made and states that;

1. An application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act —
  - a. to the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate’s court; or
  - b. to a magistrate’s court having civil jurisdiction to adjudicate matters within the court’s pecuniary jurisdiction.

40. Apart from the challenge on the court’s jurisdiction, the documents provided by the parties to the application herein, show that the suit land has been the subject of previous litigation. Attached to the Respondent’s replying affidavit is an order marked as “GMM-4” issued at the Principal Magistrate’s Court sitting at Kyuso Civil Case 6 of 2020 where the Respondent herein who was the 1<sup>st</sup> Defendant/Applicant in that case obtained an order of permanent injunction barring the Applicant herein Daniel Mwendwa Mutua and Sarah Mwikali Ngui from accessing and interfering with the suit land herein Kyuso/Katse/4560 which she stated was her matrimonial property.

41. It has also been stated that there was a case at the High Court in Kitui Misc Application No. E033 of 2022 filed by the Applicant herein, where he sought a stay of execution of orders issued in the ruling by Hon Aringo at Kyuso Law Courts on 29<sup>th</sup> June 2022 in Civil Case No. 6 of 2020, where the parties were *Sarah Mwikali Ngui & Daniel Mwendwa Mutua v Grace Muthoni Mutua & David Mwini Kitulu* pending an appeal against the said decision. The said application was in respect of this very same suit property.

42. The Respondent states that the above-mentioned application was dismissed but that there is yet another Misc. Application E008/2023 at the High Court in Kitui seeking similar orders pending appeal. The said application is said to be still pending in Court.

43. The doctrines of res judicata and sub-judice prevent a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same as the previously instituted suit between the same parties pending before the same or another court with jurisdiction to determine it.

44. The provision of Section 6 of the *Civil Procedure Act* defines the principle of sub-judice as follows;

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating



under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

45. The doctrine of sub judice is put in place to avoid having different courts of the same jurisdiction arriving at different outcomes as was held in Civil Appeal No. 83 of 2017 *Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others* (2019) eKLR where the court held as follows:-

“Section 6 of the *Civil Procedure Act* is meant to prevent abuse of the court process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”

46. From the foregoing, the court finds that the Applicant has failed to show that he has a prima facie case with a probability of success as set out in the case of *Giella vs Cassman Brown & Company Limited* (Supra). He has failed to show that he has a clear and unmistakable right to the suit land to be protected by the court which is directly threatened by the acts of the Respondent. Further, the court finds that the entire suit faces challenges of jurisdiction, Res judicata and Subjudice. The court finds that the application has not met the threshold established for the grant of a temporary injunction pending hearing and determination of the suit.
47. Having found that a prima facie case has not been established the court finds no need to go into determination of the test of whether the applicant might suffer irreparable injury, which would not adequately be compensated by an award of damages or the question of the balance of convenience.
48. The upshot of the above is that the court finds that the application dated 12<sup>th</sup> May 2023 lacks merit and the same is hereby dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

The ruling read in open court and virtually in the presence of-

J. Musyoki - Court Assistant

Lusweti for the Plaintiff/Applicant

No attendance for the Defendant/ Respondents

