



REPUBLIC OF KENYA



**Kabuga & 46 others v Njiru & 2 others (Environment & Land Case 5 of 2023) [2023] KEELC 22552 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22552 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 5 OF 2023  
A KANIARU, J  
NOVEMBER 21, 2023**

**BETWEEN**

**RONALD NJUE KABUGA ..... 1<sup>ST</sup> PLAINTIFF**

**KENNEDY MWANIKI & 45 OTHERS ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JULIUS NJERU NJIRU ..... 1<sup>ST</sup> DEFENDANT**

**BENJAMIN NJERU NGANATHA ..... 2<sup>ND</sup> DEFENDANT**

**NJAGI IRERI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling on a Notice of Motion dated 10.02.2023 and filed on 15.02.2023. It was brought under a Certificate of Urgency and is expressed to be brought under Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 40 rules 1 & 2 of the *Civil Procedure Rules* and the inherent powers of the court. The applicants – Ronald Njue Kabuga, Kennedy Mwaniki & 45 others – are the Plaintiffs in the suit respectively and the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents – Julius Njeru Njiru, Benjamin Njeru Nganatha, Njagi Ireri - respectively are the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants in the suit. It is essentially an application for temporary injunction and the prayers sought are as follows:

1. Spent

2. That a temporary injunction do issue restraining the defendants/respondents by themselves, their agents, servants, employees and or anybody or authority working under them from entering, encroaching onto, trespassing and or in any other way interfering with the plaintiffs/applicants possession and proprietary rights over their land parcel numbers 521,306,308,311,313,314,316,319,321,323,324,325,326,327,331,334,335,337,338,356,373,387,390,392,395,



502 Kasavari Adjudication Section pending the hearing interpartes of this application and further pending the hearing and determination of this suit.

3. That the costs of this application be borne by the defendants/respondents.
2. The application is premised on the grounds *inter alia*; that the Respondents encroached onto the Applicant's subject land parcels without any colour of right thereby depriving them of the possession they have enjoyed uninterrupted since the year 1970; that the Respondents have committed acts of waste, destruction, damage and that they continue to destroy the developments undertaken by the Applicants; that the Respondents have adamantly ignored requests or protests by the Applicants to await resolving the matter without recourse to court unsuccessfully, thus leading to continued loss on the part of the Applicants; and that the Applicants are apprehensive that the Respondents are likely to continue destroying their property if the orders are not granted.
3. The application came with a supporting affidavit in which it is deposed by the Applicants, *inter alia*; that the Applicants are the proprietors of the suit parcels of land which were resultant subdivisions of Land parcel Kasavari block no. 146; that prior to the adjudication process, some of the Applicants were living on the subject land and after subdivision each of the Applicant took immediate possession of their respective portions; that they have been living on the subject parcels of land and have developed the same by constructing residential houses and planting trees and khat among other crops; that between the month of November 2022 and February 2023 the Respondents, without authority, claimed ownership and started encroaching onto the subject parcels, utilizing some of their property without permission; that the Applicants have met the requirements to be granted a temporary injunction as against the Respondents and therefore pray that the application be allowed.
4. The Applicants further filed a Supplementary affidavit on 11.04.2023 where they acknowledge that there is a decree issued in Embu Civil Suit No. 342 of 1995 which they say that the Respondents have been using to justify that the suit land parcels belong to them and have consequently encroached on the said land parcels despite there being an order for stay of execution issued on 02.04.2003. It is their position that the appeal referred to is still active, only that some of the Appellants and Respondents have died and are awaiting substitution.
5. The application was responded to vide a Replying Affidavit dated 27.02.2023 and filed on 28.02.2023. The same has been sworn by the 1<sup>st</sup> Respondent on behalf of the other Respondents and he denies any encroachment on the suit parcels of land. Their position is that their clan known as Ngai Kwa Njue Clan was awarded the subject land parcels against the Applicants who belong to Ngai Kwa Njogu clan. This happened in the proceedings of Embu Civil Case 342 of 1995 where the said parcels of land were subject of the proceedings. They attached a copy of the decree and proceedings. That they have allegedly been unable to implement the decree in their favour as the defendants in the said case, of which the 1<sup>st</sup> Applicant was one, obtained an order of stay of execution of the decree pending appeal, which appeal has never been prosecuted; that the Applicants are in occupation of the said parcels of land as the members of the Respondent's clan have not taken over possession; that they in fact live on their other parcels of land which are not subject matters of these proceedings. They urge that the Applicants have not elaborated on the particulars of trespass and/or encroachment to warrant this court to grant the orders sought.
6. The application was canvassed through written submissions. The applicant's submissions were filed on 07.06.2023. They gave a background to the application, mainly reiterated the case as set out in their Affidavits, and maintained the position that they had demonstrated the principles for granting an order of temporary injunction as set out in the celebrated case of *Giella v Cassman Brown & Co. Ltd*



[1973] EA 358. The Respondents on the other hand filed their submissions on 25.05.2023 where they countered the Applicants position that they had met the requirements as set out in *Giella's case (supra)*.

7. I have considered the application, the responses made to it, and the rival submissions. The issue for determination is whether the Applicants are entitled to an order of temporary injunction.
8. The principles which guide the court when considering an application for a temporary injunction were set out in the case of *Giella v Cassman Brown* [1973] EA 358. The court set out three conditions that ought to be met for grant of a temporary injunction. It was 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.”

9. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, described a prima facie case as:

“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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

10. In another case of *Jan Bonde Nielsen v Nguruman Limited & 2 others* [2016] eKLR the court of appeal stated 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 urgent necessity to prevent the irreparable damages 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”.

11. The applicant’s main contention is that they are the Proprietors of the subject parcels of land and that the Respondents have encroached on the same on the basis that they have a decree declaring them to be the lawful owners of the land. They say that they have filed an appeal against the said decree, though there has been no evidence provided of the same. The Respondents on the other hand deny any such encroachment or commission of acts of waste on the said parcels of land. In fact they say that they live on their other parcels of land, which are not subject of these proceedings, and that they have no intention of occupying the said parcels of land until the decree in their clans favour is executed. In my opinion, it is the Applicant’s duty to demonstrate how the said encroachment of their parcels of land has been done by the Respondents or what acts of waste have been committed in order to persuade this court that their rights are at the risk of being violated. This would justify this court’s protection. I am not persuaded that there is any threat of encroachment or destruction on the said parcels of land



by the Respondents. I therefore make a finding that the Applicants have not demonstrated that they have a prima facie case with probability of success.

12. The Applicants also have a duty to demonstrate that should the orders sought not be granted, they stand to suffer irreparable loss and damage that cannot be compensated with damages. In my opinion, the Applicants have not demonstrated what loss they stand to suffer should the orders sought not be granted. As said above, there is no evidence of encroachment or destruction of the subject land nor is there a threat of the land being disposed of or the Applicants being evicted from the said land. In any case they say that they live on the suit parcels of land and that even though there is a decree declaring the Respondents as the lawful owners, they have a stay of execution of the decree in place pending the determination of an appeal they have filed. In my opinion, this also offers sufficient protection from any threats of interfering with the status of the subject parcels of land. The applicants should take the necessary action if the order of stay is violated. I don't understand why they want an order of injunction while they are enjoying an order of stay.
13. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the temporary injunction, against the hardship to be borne by the Respondents by granting it. Looking at the evidence presented by the parties herein, I find that no hardship will be suffered by the Applicants should the orders sought not be granted.
14. Further, I am of the considered view that the applicants were being less than truthful when they stated in their plaint that there is no case pending between them and the respondents. It later turned out that there was a case – Civil suit No. 342 of 1995, Embu – concerning the same land and decided against their clan. The 1<sup>st</sup> applicant was infact said to have been a party in the case. It emerged further that there is an appeal pending relating to the case and the applicants are infact enjoying an order of stay.
15. An order of injunction is an equitable remedy and a party seeking it is supposed to come to court with clean hands. The law of equity places a very high premium on honesty. In *Bv Attorney General* [2004] 1 KLR 431, the court held, interalia, that once a court is satisfied that an applicant had obtained an order by concealing other relevant material, the court is entitled not to consider the applicant's application as courts must be able to protect themselves from parties who are prepared to deceive. The case concerned discharge of injunctive orders granted to a party who was found to be less than honest.
16. Ultimately, I find that the applicants have not demonstrated the merits of their application and I hereby dismiss it with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2023.**

In the presence of M/s Murigi for applicant/plaintiff and in the absence of Muthoni Ndeke for defendant/respondents.

Court assistant: Leadys

Interpretation: English/Kiswahili

**A.K. KANIARU**

**JUDGE**

**11.2023**

