



**Mwangangi v Musyoka (Environment & Land Case E004 of 2023)
[2023] KEELC 22479 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E004 OF 2023
LG KIMANI, J
DECEMBER 19, 2023**

BETWEEN

JACOB MUTUA MWANGANGI PLAINTIFF

AND

JOHN MAITHYA MUSYOKA DEFENDANT

RULING

1. The Plaintiff filed the Notice of Motion dated 9th October 2023 under Certificate of Urgency seeking the following orders:
 1. Spent.
 2. Spent
 3. That pending the hearing and determination of the suit herein, this Honourable Court be pleased to grant a temporary injunction against the defendant restraining him whether by himself, his servants, agents or anybody else claiming ownership and from entering into, trespassing on, encroaching on, remaining upon, fencing, developing, continuing to develop, preparing shamba to plant his crops this coming season or in any manner whatsoever interfering with the Plaintiff's parcel of land known as P/NO.KYUSO/KATSE/3886 situated within Katse.
 4. That this Honourable Court grant any other orders that meet the ends of justice.
 5. That the O.C.S Katse Police Station to enforce compliance of the court orders.
 6. Costs of this application be provided for.
2. The Applicant in his supporting affidavit states that he is the legal owner of the suit land P/NO.KYUSO/KATSE/3886 within Katse Adjudication Section as per the decision in the Minister's



Appeal No. 411/2022. The Applicant stated that the Respondent conspired with the land's officials and was issued with a title deed following the decision by the Land Adjudication Officer at the objection stage while the decision of the Minister's Appeal was pending. Upon realizing this, the Applicant states that he proceeded to the Department of Lands Office and was issued with a letter dated 16th August 2023 addressed to the District Land Registrar Mwingi for implementation of the Minister's decision.

3. Consequently, the District Land Registrar wrote a letter dated 13th September 2023 to the defendant herein informing him that he was erroneously issued with a title deed while there was a pending appeal to the Minister and requested the defendant to surrender the title deed for cancellation but he has not surrendered it to date.
4. Recently, the Respondent entered into the suit land and started fencing, clearing and preparing the land to plant his crops, denying the Applicant access to his land without any colour of right.

The Respondent's Replying Affidavit

5. The Respondent swore a replying affidavit on the 6th of November 2023 deposing that the dispute began in the year 1977 and was subject to a clan meeting in the said year and on the 27th of February 2006.
6. He stated that on the 9th of May 2017, the land adjudication department heard the matter and decided that the Defendant/Respondent is the rightful owner of the suit land. He stated that when adjudication began, the Applicant's father was granted the suit plot which emanated from Land Parcel 1658 on 17th December 2017.
7. After the Applicant herein lodged an appeal to the Minister on the 24th of June 2015, the Respondent states that he was not notified of the same but on 29th January 2021 he received a chief's letter informing parties to await the decision of the Minister.
8. The Respondent notes that the title deed was issued to him on the 11th of October 2019 before he was notified of the appeal to the Minister and states that the said appeal has thus been overtaken by events.
9. Further, the Respondent deposed that the Plaintiff/Applicant refers to the land in dispute as Land Parcel Kyuso/Katse/3886 while he holds title to Land Parcel Kitui/Katse/3886 which is a different parcel of land and also states that injunctive orders can only be issued to registered owners of land and not someone without a title deed as the Applicant.
10. It is therefore the Respondent's contention that the Applicant is the one who has trespassed upon his land and fell trees and uprooted growing crops which he had planted and that he reported the same vide OB Number 05/29/10/2023.

The Hearing of the Application

11. The hearing of the application proceeded orally, where counsel for the Applicant submitted that the said application is brought under Order 40 of the Civil Procedure Rules, 2010. He noted that even though the land appears to have two different names in the registration section, Land Parcel Kyuso/Katse/3886 and Land Parcel Kitui/Katse/3886 the two numbers refer to the same land.
12. Counsel for the Applicant submitted that they have established a prima facie case with a probability of success in that he is the legal owner of the suit land and is in possession of the suit premises. He relied on the judgment of the Minister's appeal in favour of the Applicant which is the final stage of adjudication. Counsel also relied on the letter from the Chief Land Registrar dated 16th August 2023 addressed to



the Mwingi Land Registrar instructing that a title deed be issued to the Applicant and the letter dated 13th September 2023 from Mwingi sub-county Land Registrar to the Respondent instructing him to return the title deed for cancellation. Counsel further stated that the Respondent does not challenge the above documents.

13. On substantial loss, it was submitted that the Applicant has been cultivating the suit land for a long time and has planted crops, where if not protected from the Respondent's acts of trespass he will suffer loss and that the balance of convenience rests in his favour. He noted that the person on the ground is the Applicant and therefore the Respondent does not stand to suffer loss. It is their submission that the applicant has met the threshold of granting the interim injunction and urged the court to grant the orders as prayed.
14. Counsel for the Respondent on their part submitted that the suit property is known as Land Parcel Kitui/Katse/3886 and is not the same land as the Kyuso/Katse/3886 that the Applicant refers to. It was submitted that no evidence was presented to confirm and ascertain that the two parcels refer to the same land.
15. Referring to the letter dated 13th September 2023 annexed to the Applicant's supporting affidavit, he noted that the letter states that the land the Plaintiff should be occupying is Kyuso/Katse/3886 which the Respondent states he has no title to. Counsel further submitted that there is no proof of him having conspired with the land officials to acquire the suit land as alleged.
16. Further, it was contended that the Applicant does not have any documents showing ownership nor occupation of the suit land. The Respondent further stated the Applicant was not a party to the adjudication case number 8 of 2017 where the Plaintiff was his father Joel Mwangangi Mulyungi and the Respondent was John Maithya Musyoka and where the finding was that the land parcel 3886 should remain with the Respondent, meaning that he was already in occupation.
17. He also reiterated that the appeal had been overtaken by events as by the time the Minister's Appeal was heard, the title deed had already been issued to him. The Respondent's contends that the Applicant has not established a prima facie case has not come to court with clean hands and has no title to either land parcel to warrant issuance of the orders sought.
18. On rebuttal, counsel for the Applicant quoted Article 159(2)(d) stating that judicial authority should be exercised without due regard to technicalities, confirming that the two parcels of land are the same from his knowledge and inviting the Court to seek clarification from the Land Registrar if necessary.

Analysis and determination

19. The law governing the grant of interlocutory injunction is set out under Order 40 (1) (a) and (b) of the Civil Procedure Rules, 2010 which provides that: -

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) 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.”

20. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, 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.”

21. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“In an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrate irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

22. The first requirement is that the Applicant must establish a prima facie case. The meaning of a prima facie case was explained in the case of *In Mrao Ltd. –vs- First Americal Bank of Kenya Limited and 2 others* (2003) eKLR, which the Plaintiff/Applicant relied on;

“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.”

23. The Applicant attached to his supporting affidavit the decision of the Minister's Appeal 411/2022 over land parcel number 3886 Katse Adjudication Section, where the Applicant herein was the Appellant and the Respondent was the Respondent. The decision was made on 4th September 2022 where it was decided that parcel no. 3886 would revert to the Applicant herein. The Applicant has also annexed a letter from the Chief Land Registrar dated 16th August 2023 addressed to the Mwingi Land Registrar confirming that parcel 3886 is to be registered in the name of the Applicant following the decision in the Minister's Appeal and a letter dated 13th September 2023 from Mwingi sub-county Land Registrar to the Respondent instructing him to surrender the title deed for cancellation and not to interfere with the owner's proprietorship rights. This is his proof that he has a legal right that needs to be protected and his basis for his contention that he has established a prima facie case.

24. The Respondent on the other hand explained the history of the matter from the decision of the clan and the decision of the Land Adjudication Board Case No. 8 where his father, John Maithya Musyoka



- was awarded the land. However, it is noted that this decision was made during the initial stage of the adjudication process and that there are many more levels of appeals culminating in the Minister's Appeal under Section 29 of the *Land Adjudication Act* CAP 284, is final.
25. The Respondent contends that he was issued with the title to the suit land on the 11th of October 2019 before he was notified of the Appeal to the Minister and that the said appeal has now been overtaken by events.
26. Under Sections 27(3) and 28 of the *Land Adjudication Act* CAP 284, a title deed cannot be issued before the decision in the Minister's appeal is delivered. Section 27(3) provides that:
- When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall—
- (a) alter the duplicate adjudication register accordingly; and then
 - (b) certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
 - (c) forward the adjudication register to the Chief Land Registrar together with a list of the appeals.
27. Section 28 provides that:
- Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register:
- Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination, the register shall if necessary be altered in accordance with the determination.
28. Section 29 of the *Land Adjudication Act* provides for filing and hearing of appeals to the Minister. Section 29(3) states that:
- When the appeals have been determined, the Director of Land Adjudication shall-
- a. Alter the duplicate adjudication register to conform with the determination; and
 - b. Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.
29. The provisions of the above sections of the law are a clear indication that in this particular case, the adjudication register sent to the Chief Land Registrar under Section 27 was to be accompanied by a list of appeals to the Minister. Registration of the persons adjudged as owners of the land at the objection stage ought to have been made but accompanied by a restriction to endure until the determination of the appeal to the Minister and on the determination of the appeal, the register was to be altered to reflect the decision of the Minister.
30. The Respondent contends that he holds title to Land Parcel Kitui/Katse/3886 while the Applicant lays claim to Kyuso/Katse/3886. The court has looked at the documents provided by the parties and it



is clear that the land in dispute is within Katse Land Adjudication Section. The land in dispute at the committee stage in committee case number 136 was 1658 which according to the Respondent, gave rise to land parcel number 3886.

31. At the Objection stage in Objection case number 8, it is clear the land in dispute was land parcel number 3886 Katse Adjudication Section. The decision of the Land Adjudication Officer awarded the land to the Respondent herein. The same parcel of land was the subject of the Minister's appeal case number 411/2022.
32. Further, the letter by the Chief Land Registrar addressed to the District Land Registrar Mwingi Lands Registry dated 16th August 2023 and the letter by the Sub-County Land Registrar Mwingi addressed to the Respondent dated 13th September 2023 seem to suggest that the title deed the Respondent holds was for land parcel number 3886 the subject of the land adjudication proceeding that culminated in the appeal to the Minister case number 411 of 2022.
33. In the court's view and on the face of the documents on record, the two parcels of land refer to the same land. In the court's view the contention to the contrary may be proved at the hearing of the suit subject to proof.
34. The Applicant has also stated that the Respondent has entered into the suit land and started fencing, clearing and preparing the land to plant his crops, denying the Applicant access to his land without any colour of right.
35. From the foregoing, the court is of the view that the Applicant has established a prima facie case by showing a claim where the court upon properly directing itself concludes that there exists a right which has apparently been infringed by the Respondent and which calls for an explanation or rebuttal.
36. The second requirement for the grant of a temporary injunction is that 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 in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others*(supra) the Court of Appeal held that the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable.
37. In this particular case, it is admitted by the Respondent that a title deed to land subject matter of land adjudication was issued to him while an appeal to the Minister was pending. On the face of it, this was in contravention of Sections 27, 28 and 29 of the [Land Adjudication Act](#). I find that the Applicant will suffer irreparable loss which cannot be compensated by an award of damages. This is for the reason that damages cannot be a substitute for loss occasioned by a clear breach of the law. The court agrees with the finding of Warsame J (as he then was) when he held as follows in the case of *Joseph Siro Mosioma V Housing Finance Company Of Kenya & 3 others* [2008] eKLR:

“On my part let me restate that damages are not automatic remedy when deciding whether to grant an injunction or not. Damages are not and cannot be a substitute 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.”

38. The last consideration is where the balance of convenience lies. The Applicant has stated that he is in possession and occupation of the suit land, while the Respondent claims that the Applicant is guilty of



trespass. In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus: -

“Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

39. The court has found that the Applicant has established a prima facie case with a probability of success. On the balance of convenience, the court finds that the same tilts in favour of the Applicant.
40. The final order of the court is as hereunder;
 1. That pending the hearing and determination of the suit herein, a temporary injunction be and is hereby granted against the defendant restraining him whether by himself, his servants, agents or anybody else claiming ownership from entering into, trespassing on, encroaching on, remaining upon, fencing, developing, continuing to develop, preparing shamba to plant his crops this coming season or in any manner whatsoever interfering with the parcel of land known as P/No.kyuso/katse/3886 also known as Kitui/katse/3886 situated within Katse.
 2. That the O.C.S Katse Police Station to enforce compliance of the court orders.
 3. Costs of this application are awarded to the Applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 19TH DAY OF DECEMBER, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

