



REPUBLIC OF KENYA



**Salil & another v Kitur (Environment & Land Case E027 of 2023)
[2023] KEELC 22177 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E027 OF 2023
JM ONYANGO, J
DECEMBER 13, 2023**

BETWEEN

DANIEL KIPTUM SALIL 1ST PLAINTIFF

SHADRACK KIPKOSGEI CHEPKOK 2ND PLAINTIFF

AND

DANIEL KIPLAGAT KITUR DEFENDANT

RULING

1. By a Notice of Motion dated 27th April, 2023 the Plaintiffs filed an application seeking a temporary injunction restraining the Defendant by himself, his servants, agents, employees or anyone acting on his behalf from interfering with, trespassing, encroaching on or in any other manner dealing with land parcel number Uasin Gishu/kuinet Settlement Scheme/68 pending the hearing and determination of the main suit.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Daniel Kiptum Salil, the 1st Plaintiff/Applicant sworn on the 27th April, 2023. In the said affidavit, he deposes that he and his co-plaintiff are the registered proprietors of the suit property as per the copy of the title deed annexed to his affidavit. He deposes that they are in possession of the suit property having lawfully acquired it from the original owner.
3. It is his further contention that the defendant started laying claim to the suit property, unlawfully entered thereon, evicted their workers and caused destruction. The said incident was reported at Kuinet Police Station. It is his deposition that as a result of the Defendant's actions the Applicants interests over the suit property have been violated and unless an injunction is granted, the Applicants shall suffer loss and damage.
4. The application is resisted by the Defendant through his Replying Affidavit sworn on the 6th June 2023 in which he deposes that the suit property belonged to his grandmother Miriam Jelel Malakwen



- Deceased who died on 13th April, 2004 and he obtained an *Ad Litem* Grant in respect of his grandmother’s estate. That his late grandmother bought the suit property from the Settlement Fund Trustee in 1986 and paid the sum of Kshs.625. He deposes that he has been paying the land rates in respect of the suit property and he has planted wheat thereon.
5. It is the Respondent’s deposition that the Applicants have failed to disclose to the court that they filed another suit touching on the subject matter in the lower court vide CMELC Case No. 167 of 2022 court where they sought an order of injunction but their application was dismissed. He is therefore of the view that the suit herein is an abuse of the process of the court.
 6. The court directed that the application be canvassed through written submissions and both parties filed their submissions which I have carefully considered.

Analysis And Determination

7. The only issue for determination is whether the Applicants have met the threshold for the grant of a temporary injunction.
8. The principles that guide the court in the exercise of its discretion to grant an order of temporary injunction were set out in the celebrated case of *Giella V Cassman Brown & Company Ltd 1973 EA 358* where the Court held as follows:

“First, the applicant must show that he has 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 compensated by damages. Thirdly, if the court is in doubt it will decide the application on a balance of convenience.”
9. In the case of *Mrao V First American Bank of Kenya Limited (2003)* eKLR Bosire JA (as he then was) stated as follows:

“A *prima facie* case is one 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.
10. As was stated in the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 Others 2014* eKLR;

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.
11. In the present case, the Applicants have demonstrated that they are the registered proprietors of the suit property by annexing a copy of the title deed in their joint names. Although the Respondent claims that the suit property belonged to his late grandmother, Miriam Jeel Malakwen, he has not produced any title document.
12. On the material placed before the court, I am persuaded that the Applicants have established that they have a *prima facie* case with a probability of success.
13. With regard to the second condition, the Applicants have stated that the Respondent’s acts of trespass and destruction of their houses on the suit property will cause the Applicants irreparable loss and damage. The Respondent has not denied that he has entered the suit property. Infact he claims that he



has been in occupation thereof and that he has planted wheat. He however claims that he is occupying the suit property by virtue of the fact that it belongs to his late grandmother.

14. Whether or not the suit property was lawfully acquired by the Applicants shall only become clear after the hearing of the main case. For now, the Applicants appear to have rights over the suit property which would be prejudiced if an injunction is not granted.
15. Although the Respondent has alluded to a suit in the lower court where the Applicants' application was dismissed, he has not furnished the court with a copy of the ruling in the said case to enable the court appreciate the issues raised in the said case so to gauge if they have a bearing on this case.
16. It is trite that at an interlocutory stage the court cannot make findings with regard to contested issues. This was so stated in the case of Edwin Kamau Muniu Vs Barclays Bank of Kenya Nbi HCCC No. 1118 of 2002 where the court observed that:

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”

17. Having considered the Notice of Motion, the Replying affidavit and the rival submissions, as well as the authorities cited to me, I am of the view that the application has merit and I grant it and make the following orders;
 - a. A temporary injunction is hereby granted restraining the defendant by himself, his servants, agents, employees or anyone acting on his behalf from interfering with, trespassing, encroaching on or in any other manner dealing with land parcel number Uasin Gishu/kuinet Settlement Scheme/68 pending the hearing and determination of the main suit.
 - b. The costs of this application shall be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF DECEMBER 2023

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J.M ONYANGO

JUDGE

In the presence of;

Miss Rop for the Plaintiff/Applicant

Mr. Kapere for Mr. Warigi for the Defendant/Respondent

Court Assistant: A. Oniala

