



**Kamau & another v Kiguru (Sued as the legal representative of the late Kiguru Kamau)
(Environment & Land Case E037 of 2021) [2022] KEELC 2392 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E037 OF 2021**

JG KEMEI, J

MAY 26, 2022

BETWEEN

GICHARU KAMAU 1ST APPLICANT

LOISE NJERI WAITHIMU 2ND APPLICANT

AND

SAMUEL MUCHIRI KIGURU RESPONDENT

SUED AS THE LEGAL REPRESENTATIVE OF THE LATE KIGURU KAMAU

RULING

1. The applicants filed the instant Chamber Summons dated 18/11/2021 premised on Rule 3(2) of the [High Court \[Practice and Procedure\] Rules](#) seeking Orders THAT;
 - a. Spent.
 - b. Pending the hearing and determination of this application the Respondent be barred by himself, representatives, agents and or any other person acting on his behalf from dealing whatsoever in any manner, constructing, demolishing obscuring and or preventing the use and occupation or in any manner interfering with the Applicants' possession of land parcel Plot No. 8 Banana market.
 - c. Costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of even date of Caroline Gathoni Muibu, the Applicants' counsel. She deponed that on 22/11/2017 the trial Court in Kiambu Succ. Case no. 13 of 1992 – In the Estate of the Kiguru Kamau (Deceased) inter alia held that the Plot no. 8 Banana market (the suit land) was held by the late Kiguru Kamau in trust for the Applicants herein. That the Court further held that some of the issues touching on the said trust



could only be litigated upon in the High Court and before moving to the High Court, the respondent invaded the suit land and started developing it to the applicants' detriment hence the Application.

3. The Application is opposed. The respondent filed his replying affidavit dated 8/2/2022. He conceded that the suit land belonged to the late Kiguru Kamau who died on 27/6/1970 but denied that it was held by the late Kamau in trust for the applicants as pleaded. That the trial Court held that the suit property was part of the late Kamau's estate but did not make a finding on trust. A copy of the trial court Ruling was annexed as SMK3. Further that the applicants failed to follow the court's directions to file a claim for trust and instead opted to apply for Review of the said Ruling which was dismissed on 27/7/2021; The respondent averred that the late Kamau was the sole owner of the suit land while the applicants' families owned adjacent plots. That he is among the rightful beneficiaries and administrator of the suit land and urged the court to dismiss the Application with costs.
4. In a rejoinder, the applicants filed a further affidavit sworn by Gicharu Kamau and Loice Njeri Waithimu. They swore that the late Kiguru Kamau owned the suit land before he defaulted in land rates payments prompting the Council to repossess it. That as a result, the 2nd Applicant's husband, the late Wathimu Kamau intervened and paid the outstanding debt. That the three brothers then agreed to construct premises thereon and were jointly registered as owners; a fact that was within the knowledge of the late Kiguru Kamau and his widow Njambi Kiguru. That Njambi would later apply to the now defunct County Council of Karuri but her application was declined for want of relevant documents. That later on the 3/6/1999 the application was approved granting them together with the respondent's mother Njambi Kiguru a letter of allotment for Plot No. 8 Banana market. They contended that they have a definable stake in the suit land and are prejudiced by non-use of the suit land.
5. On 17/2/2022, directions were taken to canvass the application by way of written submissions. Only the respondent filed his submissions dated 28/3/2022 through the firm of Gatitu Wang'oo & Co. Advocates.
6. Two issues were drawn for determination by the respondent; whether the applicants have met the threshold for granting an injunction and whether an advocate can swear an affidavit on behalf of his client and therefore whether the supporting affidavit by Caroline Gathoni Muibu is sustainable in law.
7. On the first issue the respondent cited the guiding principles set out in the case of *Giella v Cassman Brown* (1973) E A 358 and submitted that the Applicants have not established a prima facie in their favour because there is no existing trust as alleged. That the allegation that the applicants have a definable stake on the suit land is not substantiated as they are not in possession of the land and therefore they will not suffer any irreparable loss. Moreover, that the balance of convenience favours the respondent who is a rightful beneficiary and in occupation of the suit land.
8. Regarding the second issue, the respondent was ardent that it is trite that Advocates should not depone on contentious matters of fact as he /she then becomes a potential witness in the event of cross-examination. That consequently the instant Application is defective to the extent that the SA herein is sworn by Counsel. Reliance was placed on the case of *Magnolia Pvt Ltd v Synermed Pharmaceuticals (K) Ltd* [2018] eKLR.
9. The germane issue for determination is whether the Application is merited.
10. The relevant legal provision for granting interim injunction is contained under Order 40 rule 1 of the [Civil Procedure Rules](#) that;

“ 1. Cases in which temporary injunction may be granted [Order 40, rule 1.]



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.”

11. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a *prima facie* case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience. See the celebrated cases of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR.
12. The starting point is to establish whether the Applicants have demonstrated a *prima facie* case to grant the orders sought. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 123, defined a *prima facie* case as:

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. 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.”
13. In *Nguruman* case supra the Court of Appeal went on to further state 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. 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.
14. Injunctive reliefs are equitable orders granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of *Nyutu & others v Gatheru & others* (1990) KLR 554, where the court held that:-

“Whether or not to grant an injunction is in the discretion of the court and the discretion is a free one but must be judicially exercised”.
15. It is trite that in an interlocutory application the court is not required to make any conclusive or definitive findings of fact or law but rather that the court will take into account that it is not supposed to decide the disputed issues with finality. All that the court is supposed to do is to determine whether the Applicant is deserving of the orders sought based on the usual criteria laid down in the case of *Giella* case above.



16. The applicants' case is hinged on the trial court's Ruling delivered Kiambu CMCC Succ. Cause No. 13 of 1992 – In the Estate of the late Kiguru Kamau that *inter alia* found that the issue of whether or not the suit land was held in trust would only be determined in the High Court. That before they could litigate on it, the Respondent illegally invaded the suit land and started developments thereon.
17. It is to be noted that both the 1st applicant and the respondent are the administrators of the estate of the late Kiguru Kamau who according to the letter dated 15/4/2011 is the registered owner of the land.
18. I have read and considered the counter arguments by the respondent claiming the land on account of his understanding with the deceased father. The claim of the Plaintiffs is based on trust which claim, must be proved based on the facts that will be laid before the court.
19. Guided by the *Giella Case* above, I find that this is a case that the court will exercise discretion and order status quo in terms of prayer b for a period of 6 months to allow the plaintiffs to expeditiously fix the matter for hearing and determination.
20. The parties being related. I make no orders as to costs.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 26TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Muibu for the 1st and 2nd Applicant

Gatitu for the Respondent

Court Assistant - Phyllis

