



REPUBLIC OF KENYA



KENYA LAW
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**Kitela v Kitela (Environment & Land Case E38 of 2021)
[2022] KEELC 2323 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E38 OF 2021**

**TW MURIGI, J
JUNE 29, 2022**

BETWEEN

FESTUS JACKSON MUSYOKA KITELA PLAINTIFF

AND

ISAAC MANZA KITELA DEFENDANT

RULING

1. By a Notice of Motion dated 17th of November 2021 brought pursuant to Order 51 Rule 1, Order 40 Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant is seeking for the following orders: -
 - 1) Spent.
 - 2) That this Honourable Court be pleased to issue an order of injunction restraining the Defendant, either by himself, his agents/servants/or employees from interfering with land parcel number Konza South/Konza South Block 5/1326 measuring 4.37 hectares pending the hearing and determination of this suit.
 - 3) That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on the face of the application. These grounds are: -
 - 1) That the Applicant is a brother to the Respondent herein.
 - 2) That the Applicant is the proprietor of the suit property having received the same from his mother.
 - 3) That since the demise of their mother, the Respondent has not filed any suit to demonstrate that there is a dispute regarding the suit land.



3. The application is supported by the affidavit of the Applicant sworn on the even date. The Applicant averred that on 8th of June 2021, his mother Beatrice Mutiso Kitei in the presence of his brother Bernard Mutuku Kitela, transferred her shares in Konza Ranching and Farming Co-operative Society in his favour. That after the transfer of the shares was effected, he was registered as member number 1144. That thereafter, he balloted for agricultural Plot No 0701 and for the commercial Plot No 462 and that on 7th of July 2017, he was issued with a certificate of title with respect to the suit land. He urged the Court to restrain the Respondent from interfering with his plot pending the hearing and determination of the case.
4. Although the Respondent was duly served he failed to enter appearance or respond to the application.
5. The application was canvassed by way of written submissions.

Submissions

6. The Applicant's written submissions were filed on 18th of February 2022.
7. Counsel submitted that the Applicant has met the threshold for the grant of an injunction as laid out in the case of *Giella vs Cassman Brown Co Ltd* [1973] EA 358. On the first limb, Counsel submitted that the Applicant had established a prima facie case with a probability of success as he is the registered owner of the suit land. On the second limb, Counsel submitted that the Respondent was cultivating the suit land without the Applicant's consent to his loss and detriment. Counsel submitted that an order of injunction was necessary to preserve the suit property.
8. Counsel further submitted that the balance of convenience was in favour of the Applicant as he was the registered owner of the suit land.

Analysis And Determination

9. Having considered the application and the written submissions, I find that the issue for determination is whether the Applicant has met the threshold for the grant of an order of injunction.
10. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 where the Court held that in order to qualify for an injunction: -First the 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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
11. The first issue for determination is whether the Applicant has established a *prima facie* case with a probability of success.
12. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as follows;

“ a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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. The Applicant gave an elaborate history of how he became the registered owner of the suit property. The Applicant annexed to his supporting affidavit the shareholder's particulars from Konza Farming Co-operative (Annexure FJMK1), a letter of transfer by Beatrice Mutiso Kitei to Festus Jackson



- Musyoka, (annexure FJMK2), an allotment letter for agricultural and commercial plot in the names of the Applicant (annexure FJMK 3) and a certificate of title to the suit property (annexure FJMK 4). The Applicant relied on the certificate of title to prove his ownership over the land.
14. Looking at the documents annexed to the Applicant's affidavit, it is crystal clear that the Applicant is the registered owner of the suit property.
 15. On the basis of the material that is on record, I find that the Plaintiff/Applicant has established a *prima facie* case with a probability of success.
 16. On the second limb on whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.
 17. The Court of Appeal in *Nguruman Limited v Bonde Nielsen & 2 others* [2014] eKLR held that: -

“On the second factor, the Applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”
 18. On whether the Applicant will suffer irreparable harm which cannot adequately be compensated by an award of damages, it is evident that the Applicant is the registered owner of the suit property. The Applicant alleged that he would suffer irreparable loss unless an order of injunction is granted since the Respondent was occupying and cultivating the suit property without his consent. Having established that the Applicant is the registered owner of the suit land, the Court is convinced that the Applicant stands to suffer irreparable harm if the orders sought are not granted.
 19. 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 injunction, against the hardship to be borne by the Respondents by granting the injunction. Looking at the evidence presented by the Applicant, I find that if the suit property is not preserved, it may be wasted away. I find that the balance of convenience tilts in favour of preserving the suit property.
 20. In light of the foregoing, I find that the Applicant has met the threshold for the grant of a temporary injunction. Consequently, the application dated 17th November, 2021 is allowed in the following terms: -
 - a) An Order of temporary injunction be and is hereby issued restraining the Defendant either by himself, his agents/servants/or employees from interfering with land parcel number Konza South/Konza South Block 5 (Konza)/1326 measuring 4.37 hectares pending the hearing and determination of this suit.
 - b) The costs of the application be in the cause.
 21. Parties are directed to comply with Order 11 of the *Civil Procedure Rules* within the next 30 days from the date of this ruling.



HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JUNE, 2022.

In the presence of: -

Court Assistant – Mr. Kwemboi

Mr. Mutinda holding brief for Musila for the Applicant

