



Were & 2 others v Agricultural Development Corporation- (Environment & Land Case 1 of 2022) [2022] KEELC 3032 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3032 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 1 OF 2022
FO NYAGAKA, J
JUNE 16, 2022**

BETWEEN

KEFA WAFULA KAROLI WERE 1ST PLAINTIFF

BENARD NYONGESA SIMIYU 2ND PLAINTIFF

EDWARD VOREZA KIDULLAH 3RD PLAINTIFF

AND

AGRICULTURAL DEVELOPMENT CORPORATION DEFENDANT

RULING

1. The Notice of Motion Application before me dated 04/01/2022 was brought by the Plaintiffs on 05/01/2022. It was anchored on articles 10, 40, 159 (2) (a), (b) (d) and (e) of *the Constitution*, sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and order 40, rules 2 and 4 (1) of the Civil Procedure Rules. In it, the Applicant sought the following reliefs:
 - a) ...spent
 - b) ...spent
 - c) That pending the hearing and determination of the suit herein, this Honorable Court be pleased to issue a temporary injunction restraining the Defendant, its agents or servants from using, further ploughing, cultivating, selling, cutting trees or in any other manner whatsoever interfering with the Plaintiffs' use, possession and/or interest in that Land Reference Number 11502/1 (Title Number IR 216019) measuring approximately 23.39 hectares and situated in the West of Kitale Municipality within Trans-Nzoia County;
 - d. That the order issued herein be served upon the OCS Kitale Police Station to ensure compliance;



- e. That the costs be provided for.
2. The application was premised on the grounds espoused in the application. It was supported by the Affidavit of one Kefa Wafula Karoli Were, the 1st plaintiff. The affidavit was sworn on 04/01/2022.
 3. According to the Plaintiffs, they were joint legal and registered proprietors of all that parcel of land namely Land Reference Number 11502/1 (Title Number IR. 216019) measuring approximately 23.29 hectares. That parcel of land is situated in the West of Kitale Municipality within Trans-Nzoia County. In support of this deposition, the Plaintiffs annexed a bundle of copies of the Plaintiffs' IDs, the Certificate of Title, the official search certificate and a letter from the Chief Land Registrar dated 28/10/2021. These were all marked in a bundle as KWKW1. They annexed further and produced as KWKW2 a copy of the Land Rent Clearance Certificate. This was to evidence the remittance of rent, owing to the existence of the said parcel of land. They further deposed that they had also paid up to date their land rates and annexed a copy of the Land Rates Clearance Certificate marked KWKW3.
 4. They contended that in spite of their status as proprietors of Land Reference Number 11502 (Title Number IR. 216019), the Defendant had illegally and unlawfully taken over the land and prevented them from accessing, utilizing, dealing, cultivating, tilling, ploughing and using it. They attached a bundle of photographs marked as annexure KWKW4 evincing that the Defendant had gone to the extent of cutting down trees on the land. This, the Plaintiffs stated was an act of trespass, unlawful and illegal and continues to interfere with the Plaintiffs' quiet user and possession of the suit land.
 5. The Plaintiffs' further deposition revealed that the County Surveyor visited the suit land on 28/08/2021 with a view of ascertaining the status and boundaries on the request of the County Commissioner. That a report prepared on 15/10/2021 marked as KWKW5 disclosed that the suit land belonged to the Plaintiffs. In that regard, they contended the Defendant was wrong to mark boundaries of the same plot using concrete posts.
 6. On 02/09/2021, the Plaintiffs served the Defendant with a notice to vacate. It was annexed as KWKW6. They argued that, however, the Defendant continued to trespass and interfere with the Plaintiffs' use and enjoyment of the suit land. Consequently, the Plaintiffs reported the matter to Kitale Police Station and the County Commissioner of Trans-Nzoia County. The Plaintiffs deposed that since the said offices failed to assist them hence the present suit. They urged this Court to allow the Application as prayed. The 2nd and 3rd Plaintiffs similarly swore Supporting Affidavits on 04/01/2022. They were a replica of the 1st Plaintiff's. I will thus not reproduce their contents.

The Response

7. The Defendant opposed the Application. It filed a Preliminary Objection (P.O.) and Grounds of Opposition document dated 14/01/2022 on 18/01/2022. It asked this court to strike out the suit and that the interim orders be vacated. It also filed a Replying Affidavit sworn by Edward Ojode, the Acting General Regional Manager of the Defendant, on 14/01/2022 and filed on 18/01/2022.
8. In its Preliminary Objection and Grounds of Opposition, the Defendant stated that judicial proceedings could not be used to curtail the exercise of its mandate as provided in the *Agricultural Development Corporation Act*, Chapter 444, Laws of Kenya. That the disputed land was a gazetted public land vide Legal Notice (hereinafter L.N.) L.N. 37/2001, L.N. 157/2003 and Section 2 of Cap 444 Laws of Kenya. It stated further that the Defendant had been in full possession and utilization of it since 1965 before its registration on 02/10/1970 in favor of Lands Limited, a subsidiary of the Defendant. Their position was that the land was thus not available for allocation or use by private individuals. They argued that the Plaintiffs' title was obtained by means of fraud and it was



subsequently cancelled on 28/10/2021 in accordance with section 79 (2) of the [Land Registration Act](#) No. 3 of 2012 and its [Land Registration \(General\) Regulations](#) 2017. They stated that a rectification of the register was ordered. Consequently, the Defendant posited that the present suit had been overtaken by events.

9. Without rehashing the grounds espoused in the Preliminary Objection and Grounds of Opposition, it was disclosed in its Replying Affidavit that the original Certificate of Title namely I.R. No. 20422/4 (Land Reference Number 11502/1) was later transferred and registered as a Grant on 02/10/1970. The Title was annexed and marked EJ1. The deponent swore that since then, the Defendant has been in actual possession of the suit land. He stated further that the parcel was later reserved for special use in seed maize and livestock production upon the Defendant's creation by statute.
10. He deposed further that this special use was announced vide the Rules, published as Legal Notice No. L.N. 37/2001, L.N. 157/2013, s.2. He annexed copies of the Notices and marked them as EJ 2 (a), (b) and (c) respectively. It was further stated that the suit land hosts the Defendant's Artificial Insemination Centre specifically for training learners pursuing veterinary courses.
11. The Defendant deposed further that the Plaintiffs' title was cancelled on 28/10/2021 as it was found that its alienation was illegal. It stated that in that regard, the Defendant's Certificate of Title issued on 02/10/1970 superseded that of the Plaintiffs. It annexed the order of rectification and cancellation notice and marked the same as annexures EJ 3(a) and (b).
12. It was deposed that no other entity other than Parliament could approve the sale, subdivision and transfer of its land and it had to be by way of a Bill of Motion over the suit land. It then argued that the Plaintiffs had never applied for allocation or transfer of the Certificate of Title namely I.R. 216019. Consequently, the procedure in issuance of title namely I.R. 216019/1 was illegal as it failed to follow procedures captured in Chapter 444 Laws of Kenya. The Defendant deposed that it has never relinquished physical and actual possession thereof. To the Defendant, it was a fact that it was in the process of ploughing in preparation of planting season.
13. It was thus deposed that in light of this, the orders sought would be prejudicial to its rights. It was further stated that the provisions of article 40 of [the Constitution](#) did not protect the Plaintiffs' rights, if any, as the title was cancelled for having been unlawfully acquired. The Defendant deposed that its possessory rights overrode any rights of the Plaintiffs and that the balance of convenience militated towards striking out the Application and the suit in its entirety.

The Supplementary Affidavit

14. The Defendant supplemented its Relying Affidavit. The Supplementary Affidavit sworn on 07/02/2022 and filed on the same day deposed that the said title was issued to the Defendant as a lease/grant for a 958 year and 8-month term from 01/07/1964. Therefore, it was not available for allocation and/or sub-leasing for the said period. It stated further that its title had never been canceled. It had been acquired from Mr. Michael Arthur Unwin Heathcote who was the previous proprietor.
15. It was its contention that the Defendant's quiet and uninterrupted enjoyment of the land was disturbed by the Plaintiffs when they claimed ownership rights on 02/09/2021. The Defendant accused the Plaintiffs of falsifying their position as they had never used the suit land and/or the properties erected thereon. It claimed that the suit title was cancelled on 16/11/2021 by the Land Registrar as per Gazette Notice no. 506 on 21/01/2022. The same was annexed and marked EJ1. Finally, it was deposed that the photographs taken by the Plaintiffs were done so without their consent.



Further Affidavit

16. The 1st Plaintiff swore a further Affidavit on 21/04/2022. He filed it on 10/05/2022. He deposed that the transfer document filed by the Defendant was in the name of Lands Limited and not the Defendant, and that the Certificate of Title in the suit land, namely Land Reference Number 11502/1 (I.R. 216019), had never been cancelled. They stated that they had neither been served with a recalling letter nor an invitation for hearing of the dispute. They argued that the gazette notices annexed by the Defendant are not evidence of title. Further, that Gazette Notice No. 506 could not affect the Plaintiffs' rights to ownership since it was made after the suit was filed. Again, he contended that the Registrar of Titles had no power to cancel a title document since he did not issue the same ab initio. That a title document can only be cancelled by Court order. They deposed that the said Notice No. 506 was irregular and an affront to due process and Articles 40 and 47 of *the Constitution*.

Submissions

17. Parties agreed to canvass the Application by way of written submissions. The Plaintiffs filed two sets of submissions. The first one was dated 07/01/2022 and filed on 10/01/2022 while the second was dated 21/04/2022 and filed on 10/05/2022. The Plaintiffs contended that their Application had met the three set requirement threshold for the grant of the orders sought. Firstly, they submitted that they had a prima facie case as they remained the legal and registered proprietors of the suit land. They further submitted that the Defendant had and continued to trespass on the suit land thereby impeding their right to quiet and uninterrupted enjoyment of the suit land. They submitted that it was in the interest of justice that the orders sought be granted as prayed. Secondly, the Plaintiffs submitted that their right to property would be infringed and dispossession would continue to their detriment if the orders sought were not granted. Consequently, they would suffer irreparable harm that could not adequately be compensated by an award of damages. Thirdly, they submitted further that on a balance of convenience, the same tilted towards their favor as they remained the legal and registered proprietors of the suit land.
18. In response to the Defendant's Preliminary Objection, the Plaintiffs submitted that the Preliminary Objections raised, if any, did not meet the requirements set out. They maintained that the Defendant was not the registered owner of the suit land.
19. On the part of the Defendant, it was submitted that the Application failed to meet the prerequisites for the grant of injunction relief. They submitted that the Plaintiffs had failed to establish a prima facie case since their titles had been cancelled. Contra, the Defendant had furnished a title deed and legal notice giving a chronology of the acquisition and possession of the suit property in its favor. That since the Plaintiffs' title was cancelled and the Defendant has been in possession of the suit property with a valid title, they were undeserving of the orders sought.

Analysis and Determination

20. I have considered the Application, the Affidavits filed in support of and opposition to the Motion. I have also made due analysis of the submissions filed by both parties. Before delving into the merits of the Application, I must determine whether the Defendant has raised any Preliminary Objection as characterized in its document titled: "Preliminary Objection and Grounds of Opposition". It was dated 14/01/2022. I say so because a Preliminary Objection, if upheld, had the effect of determining an Application or suit without going into its merits or demerits.



21. The prerequisite requirements as to what constitutes a Preliminary Objection were set out in the celebrated decision of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 as follows:

“ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

22. I have looked at the Defendant’s Preliminary Objection and Grounds of Opposition dated 14/01/2022. Indeed, the Defendant expressed its intention that it intended to raise a Preliminary Objection seeking to have the suit and the Application dated 04/01/2022 struck out with costs and the ex parte orders granted on 05/01/2022 vacated. It listed the grounds in support thereof. However, looking at the grounds with scrutiny, I find that the same merely oppose the Application rather than raise a demurrer. They are simply a response to the Application substantively. I do not find any challenge on a point of law for determination by this court. Moreover, they raise factual rather than legal issues. Consequently, I find that since the Defendant raised no Preliminary Objection, I will proceed to determine the Application on its merits based on the issues raised in the documents filed in respect of the Application.

23. The three (3) fold conditions precedent for grant of injunction were set out in the locus classicus case of *Giella -vs- Cassman Brown* (1973) E.A. 358 as follows:

- (a) The Applicant has a prima facie case with probability of success;
- (b) The Applicant will suffer irreparable loss or damage that will not be adequately compensated by an award of damages;
- (c) If in doubt on the above two (2) requirements, the court will decide the Application on the balance of convenience.

24. Without purporting to reinvent the wheel, in terms of explaining what each of the limbs mean, I will address the Application under them. But as I do so, I will restate the meanings thereof as have been authoritatively given by my predecessor judges or Courts.

Do the Applicants have a prima facie case?

25. In *Mrao -vs- First American Bank of Kenya Limited & 2 others* (2003) KLR 125, a prima facie case was defined as:

“..... 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.”



26. The Court in *David Ndiu & others -vs- Attorney General & others* [2021] eKLR espoused prima facie as follows:

“The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.”

27. The Plaintiffs submitted that they were the registered proprietors of the suit land namely Land Reference Number 11502 (Title Number IR. 216019) measuring 23.29 Hectares. They annexed various documents in support of their assertion, including but not limited to, a certificate of title in their names, certificate of official search, letter from the Ministry of Lands and physical planning, rates and rents clearance certificates as well as report on boundary re-establishment of the said parcel of land. They alleged that the Defendant unlawfully trespassed on their suit land and were intent on ploughing in readiness for the planting season.

28. The Defendant on the other hand maintained that it was the proprietor of the suit land namely I.R. No. 20422/4 (Land Reference Number 11502/1. It contended that in 1970, a grant was obtained from one Mr. Michael Arthur Unwin Heathcote to Lands Limited, their subsidiary company. It annexed the title document. It added that they were indeed intent on ploughing in readiness for planting season in line with their mandate enshrined in Chapter 444 Laws of Kenya. It continued with the argument that the said property was and continued to remain a public utility land and had never passed to the hands of private citizens. According to the Defendant, the title granted to the favor of the Plaintiffs was fraudulently obtained and subsequently cancelled by the Land Registrar on 16/11/2021 and gazetted as recalled per Gazette Notice No. 506 on 21/01/2022.

29. The Defendant’s position was vehemently opposed by the Plaintiffs who avowed that they remained the registered properties and that their title has never been cancelled. They further dismissed the Gazette Notice No. 506 as a crafty machination with intent to disinherit the Plaintiffs from their acquisition and ownership of the title document.

30. At the heart of the dispute lies two rival parties claiming ownership of the subject parcel of land. On one hand, the Plaintiffs claim proprietorship of the suit land which is the same claim raised by the Defendant. They annexed title documents to their favor respectively. I must hasten to add that I am not conducting a mini trial at this juncture. It is not my duty, at this point, to ascertain who the lawful proprietor is. All that must be apparent is that there are genuine issues that demand a full trial where witnesses will be heard and documents further furnished for the Court’s scrutiny when it retires. I am certainly not convinced that a prima facie case has been established by the Plaintiffs in their favour. The existence of two rival titles calls for this court to hear and determine who the proprietor of the suit land is and who is in actual trespass. This calls for evidence to be adduced since both parties claim credence of their titles on the ownership of the suit land.

Will the Applicants suffer irreparable harm that cannot be compensated by an award of damages?

31. It is not gainsaid that the Defendant has ploughed in readiness for planting season. The Plaintiffs also indicated that the Defendant is in occupation and has ploughed the land in readiness for planting. They fell short of stating when they started occupying the parcel of land if at all they were dispossessed of it. All that they exhibited in evidence of ownership was a certificate of lease issued to them on 21/06/2021,



a copy of an official search of the same date, a copy of Rent Clearance Certificate printed on 7/09/2021 at 12.06 pm and a Rates Clearance Certificate issued by the County Government of Trans Nzoia on 15/11/2021. These, as compared with the documents exhibited by the Defendant as shown in the next paragraph, are extremely recent documents.

32. The Defendant, contending that it is the proprietor by proxy through Lands Limited, alleged that the ownership documents of the Plaintiffs were fraudulent and it accused the Plaintiffs of illegally taking photographs of its property since it never consented to the same. On the one hand, the Plaintiffs claimed that they had been dispossessed of the parcel of land by the Defendant. They did not, however, indicate from when that happened. On the other hand, the Defendant deponed in paragraphs 3 and 4 of the Replying Affidavit that it had been in occupation of the parcel since, and had never been dispossessed of it from, the times it obtained title on 2nd October, 1970, although it took possession in 1965, and that it had been using the parcel since then.
33. According to *Halsbury's Laws of England [Halsbury's Laws of England]*, Third Edition, Volume 21, paragraph 739, page 352]. irreparable harm was deciphered as follows:

“By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance," [Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

34. While it may be argued that if the Defendant is allowed to continue with the ploughing and eventually commence the planting season, this action will change the character of the suit land, the said party too claim to have title to the land. Also, the Defendant argued specifically deponed that it had been using the land from 1965. This fact was not specifically controverted by the Plaintiffs in the Further Affidavit sworn by the 1st Plaintiff as summarized in paragraph 16 above which was in answer to the Defendant's Replying Affidavit. Instead, the Plaintiffs trained their response to only the fact of cancellation of the title as deponed by the Defendant. The silence on this vivid and glaring assertion was loud and clear. I therefore do not find that the harm will be irreparable harm would be suffered and damage suffered which would not be an adequate remedy: the activities of the Defendant have been carried out on the land for a long time without any challenge by the Plaintiffs until this suit was filed.
35. In sum, I find that the Applicant has not satisfied the first two conditions precedent for the grant of injunction. That regardless, I still would find that the balance of convenience shifts in favor of not granting the injunction rather than granting it because on the one hand, the Defendant have been in occupation of the parcel for the long period of time it deposed it had been and on the other the Plaintiffs failed miserably to state when they were dispossessed, if any, of the parcel. For the above reasons, I make the following consequential orders: that the Application dated 4/01/2022 lacks merit and it can only find its rightful position in those that have been dismissed and it is therefore dismissed with costs to the Respondent.



36. For purposes of case management, the Plaintiff is directed to comply with Order 11 of the [Civil Procedure Rules](#) by filing an indexed paginated trial bundle containing the pleadings and properly cross-referenced witness statements and documents within the next 14 days, and serve on the Defendant. The Defendant is directed to comply with the said law in a similar manner within 21 days of service of the Plaintiffs' bundle and serve. This suit shall be mentioned on 20/07/2022 to confirm compliance. Any party who shall have not complied shall be visited with sanctions as the law provides: these shall be specified on the mention date.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 16TH DAY OF JUNE, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

