



**Kinuthia v Kenya National Highways Authority (Environment & Land
Case 104 of 2021) [2022] KEELC 3201 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3201 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 104 OF 2021**

JG KEMEI, J

JUNE 9, 2022

BETWEEN

FREDERICK CHEGE KINUTHIA PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY DEFENDANT

RULING

1. This Ruling is with respect to the Notice of Motion dated the 27/9/2021 filed by the Applicant. The Motion is brought under Section 3, 13(7) of the *Environment and Land Court Act*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 40 rule 1 of the *Civil Procedure Rules*.
2. The Applicant has sought the orders restraining the Defendant from demolishing the Applicant's structure on the Applicant's land known as KIAMBAA/RUAKA/2700 pending the hearing and determination of the suit.
3. In the alternative the Applicant sought orders that the Defendant give an undertaking that it will compensate him for the loss of the developments on the part of the suit land.
4. The application is supported by the grounds annexed thereto and the affidavit of the Applicant sworn on the 27/9/2021. He averred that he is the registered owner of the suit land since 2007 on which he has developed a 3 storey building. That he took every step to ensure that the approvals were obtained and that the existing reserve boundaries were respected.
5. He avers that on the 24/9/2020 the Respondent issued a notice through his tenant stating that he had encroached on the road reserve and that the building should be demolished. That though the notice affects part of the building the whole building has to be demolished as what remains will be weak to stand on its own.



6. That on receipt of the said notice he commissioned his private surveyor to reconfirm the land and verify whether there was any encroachment on the road reserve. That on the contrary the Respondent had encroached onto his property by 7 meters as shown in the RIM map and the beacons on the ground. He urged the Court to stop the intended demolition so that the matter may be interrogated in full. He termed the notice by the Respondent illegal and argued that if the Respondent wanted to acquire part of the suit land for development of the road, it should follow the law.
7. The Applicant further stated that he has made substantial developments on the suit land and any demolition will occasion him loss without any justifiable cause.
8. On the 14/10/2021 it was intimated by the Respondents counsel that the application was opposed. The Court granted him 14 days to file the replying affidavit. I have carefully perused the record and am not able to sight the replying affidavit although the same has been alluded to by the Applicant in his written submissions.
9. Parties have filed written submissions. The firm of Ngania & Company Advocates filed written submissions on behalf of the Applicant while Nathaniel Munga Advocate filed on behalf of the Respondent.
10. I have read and considered the submissions.
11. The key issue for determination is whether the application is merited.
12. The relevant legal provision for granting interim injunction is contained under Order 40 rule 1 of the [Civil Procedure Rules](#) 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; 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.”
13. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated on: 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 vs. Cassman Brown & Co. Ltd* [1973] EA 358.
14. It is trite 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.



15. And what is a prima facie case? The answer was given by the appellate Court in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123, where a prima facie case was defined 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.”
16. Injunctive reliefs are equitable remedies granted at the discretion of the Court, which discretion must be exercised judicially. I rely on the case of *Nyutu & Others... Vs... 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”.
17. It is the case of the Applicant that he is the registered owner of the suit land. A copy of the title issued on the 20/6/2007 was annexed in support. That on it he has developed a 3 storey building which was leased to Gertrude Children’s Hospital for a period of 6 years from the 1/3//2017. It was his case that the Respondent has issued him with a notice to demolish part of the building on the grounds that it encroaches on the road reserve on which the Respondent is intent on constructing a public road. It was his case that to the contrary the Respondent has encroached onto his land to the extent of 7 meters.
18. The Respondent on the hand as I can glean from the written submissions is persuaded that the Applicant has encroached on the road reserve thus impeding on the ongoing construction of the public road and that he must demolish the building in default the Respondent would have to do so under Section 49(5) of the *Kenya Roads Act* read together with Section 91 of the *Traffic Act*.
19. In its submissions the Respondent raised the issues of the jurisdiction of the Court arguing that the matter being purely that of boundary encroachment should be heard and determined by the Land Registrar. The Respondent has not placed a pleading before the Court so that the Applicant may respond. The Court shall restrain itself in that regard and not delve into the matter which in my view has been improperly raised in the absence of any pleadings.
20. It is clear that there are arguments and counterarguments on the issue of who has encroached on the others land. As stated above the Court is not to conduct a mini trial at this point but it suffices to hold that the Applicant, being the registered owner of the suit land has demonstrated a prima facie case with a probability of success.
21. On the second limb, the Court is being called to answer whether, if the injunction is refused, the Applicant will suffer irreparable loss which would not be adequately compensated by an award of damages. Should the Court find that the Plaintiff has encroached on the road reserve, it shall be forced to remove the encroachment and if no encroachment is found, then damages suffered by the Applicant are capable of being assessed. On the other hand, should the Respondent have encroached on the Plaintiff’s land, the Respondent has confirmed that it would be ready to compensate. In that regard, therefore, I find that the Applicant’s loss if any is capable of being compensated with damages.
22. On the 3rd limb, the Court is of the view that in the circumstances of this case, the position that appears to carry the lower risk of injustice if it should turn out that the Court was wrong is to order status quo be maintained pending the hearing and determination of the suit.
23. Final orders and disposal.



a. An injunction be and is hereby issued restraining the Defendant whether by itself, its agents, employees or servants from demolishing the Applicant's structure on the part of the Applicant's land known as KIAMBAA/RUAKA/2700 pending the hearing and determination of the suit.

b. Costs of the application shall be in the cause.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Wairegi holding brief for Ng'ania for the Plaintiff

Munga for the Defendant

Court Assistant - Phyllis

