



**Mbiriga v Mutuamwari & 9 others (Environment and Land Appeal  
E097 of 2021) [2022] KEELC 2450 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2450 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E097 OF 2021**

**CK NZILI, J  
JULY 20, 2022**

**BETWEEN**

**STANLEY KITHINJI MBIRIGA ..... APPELLANT**

**AND**

**NDEREBA JOHN MUTUAMWARI ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL NKUNJA MANENE ..... 2<sup>ND</sup> RESPONDENT**

**JOTHAM N'THAMBURI M'TUAMWARI ..... 3<sup>RD</sup> RESPONDENT**

**JOHN MWENDA GITONGA ..... 4<sup>TH</sup> RESPONDENT**

**FRIDAH MAKENA TARATICIO ..... 5<sup>TH</sup> RESPONDENT**

**KITHINJI MUGERA M'IKIUGU ..... 6<sup>TH</sup> RESPONDENT**

**JOSPHAT KINOTI M'ITHINJI ..... 7<sup>TH</sup> RESPONDENT**

**JULIUS GICHURU NKANATA ..... 8<sup>TH</sup> RESPONDENT**

**THE DISTRICT LAND AND ADJUDICATION AND SETTLEMENT OFFICER  
MERU ..... 9<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 10<sup>TH</sup> RESPONDENT**

**RULING**

1. The application before the court is the one dated August 27, 2021, seeking for temporary orders of injunction barring and restraining the defendant/respondents from constructing, alienating or interfering with L.R No. 1106/Ruiriri/Rwarera Adjudication section pending the hearing and determination of this appeal. The application is supported by an affidavit of Stanley Kithinji Mbiriga sworn on the even date. The grounds are that the trial court dismissed the primary suit on account of



jurisdiction despite the availability of the consent to sue obtained from the District Land Adjudication and Settlement Officer dated October 10, 2021, the applicant risked losing his land and that there is need to preserve the status quo until the matter was heard on merits.

2. The application is opposed by the 9<sup>th</sup> and 10<sup>th</sup> respondents by ground of opposition dated February 2, 2022 on the basis that; the application is fatally defective, misconceived, mischievous, an abuse of court process, unsustainable, fails to meet the threshold for granting of injunctive orders; is aimed at defeating the cause of justice and that the applicant had failed to disclose material facts and evidence touching on the nature, content and basis for the orders sought. Despite service of the application, the 1<sup>st</sup> – 8<sup>th</sup> respondents did not file any replies to the motion.
3. With leave of court parties herein filed written submissions dated March 2, 2022 and February 2, 2022 respectively. On his part the applicant submits there are three principles to be met in an application for injunction as set out in *Giella vs Cassman Brown & Co. Ltd* (1933) E.A 358 and *American Cynamid Co. vs Ethicom Ltd* (1975) AER 504, *Camus Oil vs the Minister of Energy* (1983) 1IR 88, *Mbuthia vs Jimba Credit Corporation Ltd* (1988) KLR 1, *Mrao Ltd vs First American Bank of Kenya Ltd & 3 others* (2003) KLR 125, *Njenga vs Njenga* (1991) KLR 401.
4. The applicant submits based on the facts of his appeal, he has established a *prima facie* case against the respondents being a legal owner of the suit land as evidenced by a letter dated June 26, 2020 showing the acreage as 15.3 acres which acreage ought to be rectified following his objection no. 4218 he has proprietary and or beneficial interest and the acts of trespass onto the suit land by the respondents infringe on his rights of ownership which are protectable in law.
5. On the second principle the applicant submits under *Halsbury's Laws of England* 3<sup>rd</sup> Edition volume 21 paragraph 739 at page 352, irreparable damage means injury which is substantial and cannot be remedied or atoned for by way of damages and not injury which cannot possibly be repaired; and the fact that the plaintiff may have a right to recover damages is not objection to the exercise of the jurisdiction of by injunction.
6. The applicant submits in the present case a chunk of land was hived off from his main parcel of land and despite a successful objection, the 9<sup>th</sup> respondent went ahead to subdivide the land to the 1-8 respondents which amounts to illegal possession and now awaits the issuance of title deeds to the detriment of the applicant.
7. On the third test the applicant submits the court if in doubt that his right exists, it should consider the balance of convenience to the parties and the nature of injury to be suffered if the application is not granted and vice versa by the two parties; and if it would ultimately turn out to be right.
8. The applicant submits he is likely to suffer if the injunction is refused than that which the respondent will suffer if it is granted. Therefore, the balance of convenience tilts in favour of granting the injunction since the respondent has trespassed into his land without his consent or authority and was cultivating on it.
9. The 9-10<sup>th</sup> respondents submit based on *Giella vs Cassman Brown, Mrao vs First American Bank Ltd* (*supra*) and *Panari Enterprise Ltd vs Lijoodi & 2 others* (2014) eKLR, the applicant has failed to meet the threshold for the grant of the orders sought since the applicant has neither established his interest in the land nor demonstrated the violation and or any eminent threat to his right over the suit property. Further they submit the balance of convenience lies with them since they are in possession or occupation of the various parcels following the resultant subdivisions.



10. Additionally, the 9-10 respondents submits based on [\*George Ndegwa Mwangi & 3 others vs Ruth Wakapa and 6 others\*](#) (2020) eKLR the applicant has failed to disclose material facts leading to the application so as to defeat the cause of action. In particular the applicant has not attached the order or ruling appealed against.
11. The basis of the instant application is the appeal filed on August 25, 2021 against the ruling dated August 10, 2021 in which the primary court had been asked in an identical application as the instant one save for the prayer for restriction in which held it lacked jurisdiction order to entertain the suit for non-exhaustion of internal mechanisms under the [\*Land Adjudication Act\*](#).
12. The applicant appeals against the entire ruling and attached the same to the memorandum of appeal. He seeks the court to issue an injunction as an appellate court, pending the hearing and determination of the appeal.
13. The main ground of the appeal is that the trial court erroneously found it lacked jurisdiction for non-exhaustion of the internal dispute mechanisms under the [\*Land Adjudication Act\*](#) and for lack of consent to sue yet there was a consent to sue dated September 10, 2019 before it.
14. The jurisdiction and the guiding principles to be applied on whether to grant an injunction pending appeal were set out in Madhu paper International Ltd vs Kerr & 3 others (1985) KLR 840, [\*Patricia Njeri & 3 others vs National Museum of Kenya\*](#) (2004) eKLR.
15. Order 42 Rule 6 [\*Civil Procedure Rules\*](#) provides that the High Court while exercising its appellate jurisdiction may grant a temporary injunction on such terms as it thinks just provided the procedure of instituting an appeal from the subordinate court has been met.
16. The ruling appealed against was delivered on August 10, 2021 while the appeal was filed on August 28, 2021. This was in line with Section 79 (9) of the [\*Civil Procedure Act\*](#) and therefore the proviso to Order 42 Rule 6 (6) Civil Procedure Rules.
17. In [\*Patricia Njeri \(supra\)\*](#) Visram J as he then was held an injunction pending appeal is a discretionary order which will be exercised against an applicant whose appeal is frivolous or where will inflict greater hardship than it would avoid. The applicant must show that to refuse the injunction would render the appeal nugatory and the court should also be guided by the principles in [\*Giella vs Cassman Brown \(supra\)\*](#).
18. In [\*Mrao Ltd supra a prima facie\*](#) case includes but is not limited to a genuine or arguable case, while in [\*Nguruman Ltd vs Jan Bonde Neilsen & 2 others\*](#) (2014) eKLR the Court of Appeal held a party must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substance and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
19. To determine whether the appellant has a prima facie case with chances of success in the present application calls for the court's consideration of the prospects of success of the pending appeal since the ultimate objective is to safeguard the rights of the appellant in the appeal by maintaining the status quo, if need be.
20. The court has gone through the appeal the ruling and the application dated October 5, 2020 which the trial court dismissed and forming the backbone of this appeal. The said application was based on a plaint dated October 5, 2020 in which the applicant's main claim was based on fraudulent conduct allegedly perpetuated by the respondents in illegally subdividing the applicants parcel number and failing to effect or implement the decision after the objection. The applicant prayed for declaratory



orders that the resultant subdivisions were illegal, un procedural and of no legal effect. Annexed to the plaint was a consent to sue as well as in the application.

21. In my considered view therefore, the applicant has a protectable right as to ownership which appears to be under threat. Similarly, the appeal raises arguable points as to whether the issues raised in the plaint are matters falling beyond the internal mechanisms under the *Land Adjudication Act* or squarely fall under the jurisdiction of the court to determine.
22. As to the issue of irreparable loss and damage, it is quite evident that at the time the trial court made its findings, the averments over fraud, illegalities, collusion and invasion by the 9-10<sup>th</sup> respondents had not been controverted. The same is the position in this application where the 9-10<sup>th</sup> respondents have merely filed written submissions which the law is that however forceful or convincing they might not amount to pleadings and evidence as held in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi* (2014) eKLR.
23. The 9<sup>th</sup> – 10<sup>th</sup> respondents have not denied that there was a decision in favour of the applicant concerning the removal of a large chunk of his land and subdividing it in favour of the 1-8<sup>th</sup> respondents. The factual basis of the plaint, the application and supporting affidavit before the trial court and the instant application remain unchallenged by the respondents.
24. So 9<sup>th</sup> and 10<sup>th</sup> respondents cannot vouch for the injury the 1-8<sup>th</sup> respondents are likely to be inflicted if the application herein is allowed by written submissions. In any event prayers 3 & 4 of the application is directed at the 1-8<sup>th</sup> respondents.
25. In the premises I find the applicant has an arguable appeal and has also satisfied the requirements for a grant of temporary order of injunction pending hearing of the appeal. I allow the application in terms of prayers no. 3 & 4 to subsist for a period of one year only. The parties to set down the appeal for hearing within 6 months.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 20<sup>TH</sup> DAY OF JULY, 2022**

**In presence of:**

Kieti for 9<sup>th</sup> & 10<sup>th</sup> respondents

**HON. C.K. NZILI**

**ELC JUDGE**

