



Leseru Tebeson Farmers Society v National Land Commission & 3 others (Constitutional Petition 7 of 2020) [2022] KEELC 4784 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
CONSTITUTIONAL PETITION 7 OF 2020
SM KIBUNJA, J
SEPTEMBER 21, 2022**

BETWEEN

LESERU TEBESON FARMERS SOCIETY PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF TITLES NAIROBI 2ND RESPONDENT

MINISTRY OF DEFENCE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The petitioners filed the notice of motion dated the January 28, 2022 seeking for the following prayers;
 - a. spent.
 - b. Spent.
 - c. That the 3rd respondent its agents, servants, assignees, or any other persons claiming under them or any government agency or any other person whatsoever be restrained by a temporary order of injunction from trespassing, interfering, invading encroaching ploughing or carry on any activities on land parcels reference numbers 27206/3 and 27206/4 in the North West of Eldoret Municipality within Uasin Gishu County pending hearing and determination of this petition.
 - d. That this order be implemented by the deputy county commissioner Turbo Sub County, the OCPD Eldoret West Division and OCS Baharini Police Station.



- e. That costs be provided for.
2. The application is based on the seven (7) grounds on its face and supported by the affidavits sworn by Wilson Too, the chairman, on the January 28, 2022 and February 24, 2022. The petitioners' case is that while the parties have been directed to maintain *status quo* in this petition, the 3rd respondent took surveyors to the suit lands on the December 25, 2021 to carry out survey work for unknown purposes. That when neighbouring residents went to inquire what was happening on a public holiday, the 3rd respondent personnel reacted by shooting dead three people. The 3rd respondent invaded the suit lands again on the January 27, 2022 and continued with the survey works, and counting the houses thereon. That as the petition is still pending in court, the 3rd respondent's activities are likely to irreversibly change the suit lands and render the pending petition nugatory if not stopped.
3. The application is opposed by the 3rd respondent through the replying affidavit sworn by Major Boniface Maina Ombiro on the February 17, 2022. It is the 3rd respondent's case that the suit lands the petitioners have claimed were compulsory acquired for military use by the Government *vide* "gazette notices 2878 and 2879 dated September 24, 1976, September 1976, and 710 and 711 from the year 1977". That the Ministry of Defence was issued with an allotment letter for the acquired land measuring 6,379.07 hectares. That the Ministry of Defence has never surrendered any portion of the said land to the petitioners, and the letter of allotment they rely on were revoked on the June 14, 2006, as well as the title documents that were subsequently issued fraudulently. That the 1st respondent has already determined that the lands in dispute belongs to the 3rd respondent. That the petitioners are squatters on a small part of the suit land measuring 1,500 acres, and that the 3rd respondent conducts activities on the larger portion of the suit land, but with a lot of interference from the petitioners. That the petitioners have no legal rights over the suit lands, and have not demonstrated a *prima facie* case. That injunctive orders sought should not issue against the government.
4. Directions on filing and exchanging submissions were issued on the February 21, 2022 and March 17, 2022, but only the petitioners' counsel filed theirs dated the March 10, 2022. It is the petitioners' submissions that they have established a *prima facie* case as is outlined in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR for reasons that they are the current registered owners of land parcel No 27206/3 and 27206/4; that the 3rd respondent has not denied the activities the petitioners have complained of, but sought to justify their actions by stating that they own the suit land; that Misc Appl No 38 of 2019 had established that the petitioners were in possession of the suit lands, defined the status quo to be maintained by the parties and prohibited the interference with substratum of the subject matter, and that the temporary relief being sought is qualified under section 16 (1)(1) of the *Government Proceedings Act* chapter 40 of laws of Kenya.
5. The following are the issues for the determination by the court;
 - a. Whether the petitioners have met the threshold for the grant of a temporary injunction order.
 - b. Who pays the costs of the application.
6. The court has carefully considered the grounds on the application, the affidavit evidence filed, the submissions by counsel for the petitioners, superior courts decisions cited thereon and come to the following determinations;



- a. When making a determination whether to issue a temporary injunction, courts are guided by the principles set out in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at 360 where the court held as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

The petitioners have submitted that they have established a *prima facie* case to warrant the grant of a temporary injunction in their favour. The court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 defined what is meant by a *prima facie* case as follows:

“A *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case. Court went on to state but as I earlier endeavored to show, and I cite ample authority for it, a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”.

- b. I note from the facts as presented in this application that the petitioners have title documents over land parcel reference numbers 27206/3 and 27206/4, whose authenticity is questioned by the 3rd respondent who claim the suit lands were compulsorily acquired by the government for military use. It is trite that when the authenticity of a title document is in question, it is not sufficient for a title holder to only dangle the title document, but they are required to explain the process through which the title document in issue was acquired, as was held in the decision of the Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR where the court held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

- c. From the facts presented by the petitioners in support of their application, they appear to be of the view that all they needed to prove was the existence of a *prima facie* case to enable them to secure a temporary injunction order. However, in the case of *Kenya Commercial Finance Co Ltd v Afraba Education Society* [2001] VOL 1 EA 86 the court held that the three-part test set out in the *Giella* case (*supra*) are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. These three conditions and stages are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. The petitioners have not made any attempt to surmount any of the three aforementioned hurdles, beyond attaching copies of the certificates of searches to the



further supporting affidavit. In the case of *Susan Wangari Mburu & 5 others v Eldoret Water and Sanitation Company Limited & another* [2020] eKLR the court held as follows as relates to the manner in which courts ought to handle application for injunctions:

“Apart from the three principles set out in the *Giella* case, the court should also look at the circumstances of each case as was held in the case of Jan Bolden Nielsen v Herman Philliipus Steya also known as Hermannus Phillipus Steyn & 2 others [2012] eKLR where Mabeya J remarked as follows:

‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella v Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law. In *Suleiman v Amboseli Resort Ltd* [2004] eKLR 589 Ojwang Ag, J (as he then was) at page 607 delivered himself thus:

“Counsel for the defendant urged (sic) that the shape of the law governing the grant of injunctive relief was long ago, in *Giella v Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover Internationale* made this point regarding the grant of injunctive relief [1986] 3 All ER 772 at page 780 – 781:

“A fundamental principle of ...that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ...”

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella v Cassman Brown* the court has had to consider the following questions before granting injunctive relief.

- i. Is there a *prima facie* case...
- ii. Does the applicant stand to suffer irreparable harm...
- iii. On which side does the balance of convenience lie?

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...

When dealing with an application for injunction you must consider which option has a lower risk of injustice for a party. Would it be in the interest of justice to grant an order of injunction or decline to do so.”

- d. Having considered the evidence tendered by the petitioners and the 3rd respondent for and in opposition to the application, and the foregoing decisions of the superior courts, I find that the



petitioners have failed to meet the threshold for granting of temporary injunctive order that they sought. That as they have not shown that they are likely to suffer irreparable loss unless the order sought is granted, the court finds it would also not be in the interest of justice for the court to grant an order for injunction prayed. In the circumstances, I find that the petitioners application herein lacks merit and the same is to be dismissed.

- e. That this being a constitutional petition, and even though the petitioners are not successful in the application, I am of the view justice of the case will be better served by an order that the costs be in the cause.
7. That flowing from above findings, the court orders as follows;
 - a. The petitioners' application dated the January 28, 2022 has no merit and is hereby dismissed.
 - b. The costs be in the cause.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 21ST DAY OF SEPTEMBER, 2022

SM Kibunja, J

Environment & Land Court - Eldoret

IN THE VIRTUAL PRESENCE OF;

Petitioners: Absent

Respondents: Absent

Counsel: Mr Ngaiva and Ms Muji for petitioners

Ms Ombino for 1st respondent

Ms Odeyo for 2 nd and 4th respondents

Court Assistant: Oniala

SM Kibunja, J.

Environment & Land Court - Eldoret

