



**Jojomera & another v Kauli (Land Case E013 of 2022)
[2025] KEELC 3257 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E013 OF 2022
LL NAIKUNI, J
APRIL 2, 2025**

BETWEEN

CHAKA MTWANA JOJOMERA 1ST PLAINTIFF

MAKANGA DZITU MWEMBE 2ND PLAINTIFF

AND

EDWARD SHIDA KAULI DEFENDANT

RULING

I. Introduction

1. The Honourable Court was tasked to make a determination onto the Notice of Motion application dated 13th May, 2024. It was filed by Edward Shida Kauli, the Defendant/Applicant herein and brought under the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21, Order 22 Rule 22, Order 40 Rule 7, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. Upon service.....

II. Defendant/Applicants Case

3. The Defendant/Applicant sought for the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Plaintiffs/Respondents by themselves, their authorised agents, employees, representatives, servants or any other person acting on their behalf from further interfering, destroying beacons, burning buildings, creating disturbances, burning fields/farmlands within the suit



property as per the court order issued by this Honourable Court on 31st July 2023 pending the hearing and determination of this application.

- c. That this court be pleased to issue an order directing the Plaintiffs/Respondents by themselves, their authorised agents, employees, representatives, servants or any other person acting on their behalf to maintain the status quo as per the court order issued by this honourable court on 31st July 2023 for purposes of preserving the suit property pending the hearing and determination of this application and the main suit
 - d. That the OCS Samburu police station to ensure compliance of order in [b] above
 - e. That costs be provided for
4. The application is premised upon grounds, testimonial facts and averments made out in affidavit sworn by the Defendant/Applicant EDWARD SHIDA KAULI. He averred as follows that:-
- a. The Plaintiffs/Respondents filed this suit via a certificate of urgency application and an order was issued on 1st August 2022 restraining the Defendant, his authorised agents, employees, representatives, servants and or other persons acting on his behalf from alienating, selling, transferring, erecting, constructing, finishing any construction, renovating the house or any structure in all that parcel of land known as Samburu/Kigombero Area Matopeni within Kwale County pending determination of this suit.
 - b. The Defendant filed an application under certificate of urgency seeking to review, discharge and/or vary the above order and an order was issued vide a ruling dated 31st July 2023 varying the order to read that pending further orders of this court, in order to maintain status quo for purposes of preserving the suit property both the defendant and plaintiff by themselves, their authorised agents, employees, representatives, servants and or other persons acting on their behalf are hereby restrained from, selling, transferring, undertaking any further construction of a permanent nature in all that parcel of land known as Samburu/Kigombero Area Matopeni within Kwale County.
 - c. The Defendant/Applicant and his clan had been complying with the court order and had not sold, transferred or undertaken any further construction of a permanent nature in the suit property.
 - d. However, the Plaintiffs contrary to the court order, had started destroying beacons, burning buildings belonging to the Defendant and his clan causing disturbances and burning the farmlands on the suit property.
 - e. The Defendant reported the incidences to the police station but no action was taken since this matter was in Court.
 - f. The actions of the Plaintiffs had and was causing fear and terror to the Defendant and his clan who fear for their lives
 - g. It was in the interest of justice and in the circumstances of the case to allow this application
 - h. There had been no delay in making this application and no prejudice would be suffered by the Plaintiffs
 - i. That the foregoing was in the interest of justice and equity that the application was allowed.



III. The responses by the Plaintiffs/Respondents

5. While opposing the application, the Plaintiffs/Respondents filed a 13 Paragraphed Replying Affidavit sworn by the 1st Plaintiff CHAKA MTWANA JOJOMERA. He averred as follows:-
 - a. He was the 1st Plaintiff herein duly authorised by the 2nd Plaintiff hence competent to swear this affidavit.
 - b. The application was full of falsehoods and calculated to portray the Plaintiffs in bad light as the Plaintiffs had religiously followed the and maintained the status quo orders issued.
 - c. the Defendant had caused discharge of the orders earlier issued vide the Notice of Motion application dated 31st January 2023 without disclosing that he had already sold part of the suit property to a third party.
 - d. There never existed any beacons at the time the court was issuing status quo orders.
 - e. The Defendant/Applicant from the beginning of December started constructing houses on the suit property and later placed beacons on the suit property knowing very well that there were status quo orders on record.
 - f. It was the Defendant/Applicant who was in contempt of the court orders for status quo.
 - g. The instant application was therefore well calculated and/or orchestrated to hood wink the court as the Defendant continued to disobey the court order earlier issued.

IV. Submissions

6. On 30th January 2025 while all the parties were present in Court, they were directed to have the application dated 13th May 2024 disposed of by way of written submissions. Pursuant to that, it is only the Defendant/Applicant obliged and a ruling date was reserved for 25th March 2025 but eventually delivered on 2nd April, 2025 accordingly.

A. The Written Submissions by the Defendants/Applicants.

7. The Defendant/Applicant through the Law firm of Mutanu & Company Advocates filed their submissions dated 17th February 2025. M/s. Musyoki Advocate averred that her submissions were in respect of the following:
 - a. Whether the Defendant/Applicant has satisfied the threshold for a grant of a temporary injunction Orders?
 - b. Who should bear the cost?
8. Whether the Defendant/Applicant has satisfied the threshold for grant of a temporary Injunction orders? It was submitted that the germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of “Giella – Versus - Cassman Brown & Co. Ltd (1973) EA” as follows:
 - a) The Applicant must first establish a prima facie case with a probability of success.
 - b) The Applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.



- c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the Applicant.
9. The Applicant further relied in “Mrao Limited – Versus - First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “prima facie case” and further referred to the holding in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2others [2014] eKLR by the Court of Appeal on the threshold for grant of injunctive orders.
10. The Learned Counsel submitted that the Defendant/Applicant had established a prima facie case and demonstrated before this Honourable Court that the Plaintiffs had not complied with orders issued before this Honourable court on 31st July, 2023 by having destroyed beacons and burned buildings belonging to the Defendant.
11. That the Plaintiffs’ actions had not only rendered the Defendant losses but they have also suffered irreparable damages. Nonetheless, the Defendant and his family are living in constant fear for their lives as the said suit property is a home to the Defendants where they reside together with their children.
12. On whether the threshold for injunction orders had been met Learned Counsel submitted that the Defendant has satisfied the conditions to grant a temporary injunction and as such this Honourable court should grant the orders herein as prayed for by the Defendant pending hearing and determination of the main suit.
13. On the issue of costs, it is submitted that costs follow the event. The court was urged to award costs of the application to the Defendant/Applicant. Reference was made in the case of “Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & Another 2016 eKLR”. In conclusion the court was urged to grant the orders to the Defendants the orders as prayed for.

V. Analysis and Determination

14. I have carefully read and considered all the pleadings herein being the application dated 13th May 2024, the replying affidavit by the Defendant herein, the written submissions, the authorities cited to bolster, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
15. In order to arrive at an informed, fair, just and reasonable decision, the Honourable Court has framed three (3) issues for determination. These are: -
- a. Whether the Notice of Motion application dated 13th may, 2024 by the Defendant/Applicant has met the threshold for granting of temporary injunctive orders sought.
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who bears the costs of the application?

Issue No. a). Whether the Notice of Motion application dated 13th may, 2024 by the Defendant/Applicant has met the threshold for granting of temporary injunctive orders sought.

16. Under this sub – heading, the Honourable Court will examine whether the Plaintiffs/Applicants should be granted the temporary orders of Injunction or not. The text “Commercial Injunctions Sixth Edition by Steven Gee QC published by Sweet & Maxwell at Pg. 36 explicates an injunction as: -

“a discretionary remedy granted or refused in accordance with principles elucidated by the courts, and which can be enforced through proceedings of contempt. For the remedy to be available, there must be proceedings about to be commenced before the court, which have



been served on the Defendants, or there must be procedural machinery under which the proceedings can be served on the defendant, which the claimant is about to utilise so that the court has territorial jurisdiction over the Defendant in respect of those proceedings under its own domestic rules”.

17. The law regarding grant of interlocutory injunctions is found in the provision of Order 40 Rule 1 of the Civil Procedure Rules, 2010 which provide as follows:

“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;
- (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 order.”

18. Further, the principles upon which an interlocutory injunction may be granted are well settled in the famous case of “Giella – Versus - Cassman Brown & Co Ltd (1973) EA 358 (Supra)’. One has to establish a prima facie case with a probability of success and 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. If in doubt, the court will decide the matter on a balance of convenience.

19. The above are the three pillars on which rests the foundation of any order of injunction. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited – Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

20. Has the applicant established a prima facie case? In Mrao Limited – Versus - First American Bank of Kenya and 2 others, (2003) KLR 125 which was cited with approval in “Moses C. Muhia Njoroge & 2 others – Versus - Jane . W. Lesaloi & 5 Others (2014) eKLR”, the Court of Appeal defined a prima facie case as: -

“ A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

21. The Defendant alleges that the Plaintiffs invaded the suit property despite the status quo orders earlier issued by the court and has continuously caused destruction over the same. That the Plaintiffs have sent agents to throw stones at the Defendant’s roofs at night and to graze animals on their land. Further that the Plaintiffs have gone ahead to destroy beacons on the suit property on a distinct parcel that has been sold to Trade Magnate Limited in the year 2020 way before this suit commenced.



22. I have further come across the allegations that the Plaintiffs have gone ahead to burn the Defendants filed and the matter was reported to the police where OB numbers were issued. The said OB numbers are quoted at paragraph 10 of the Defendants affidavit in support of the application.
23. The Plaintiffs disparage all the allegations made by the Defendant and state that the same is a ploy to be allowed to sale more land as they have done before. The Plaintiffs deny engaging in any destructive activities and state that they have religiously stuck to obedience of the status quo orders issued.
24. I have carefully interrogated the evidence tendered by the Defendant/Applicant in support of the application. It is trite that he who alleges must proof see the supreme court holding in the case of- “Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 3 Others (2014) eKLR”. I must first comment on the quality of the photographs annexed by the Defendant, the same do not clearly depict a true picture of what is alleged to have transpired. The court is not able to make out whether what has been captured are burnt crops and the beacons which were allegedly destroyed. The OB number referred to indicates a report having indeed been made but what was the report for? That cannot be established from just an OB number.
25. Also the alleged issue of the Plaintiffs consenting to the sale of the land as per minutes of a local meeting being held have not been properly outlined. What has been availed are minutes for a public participation meeting for construction of a data centre.
26. In my humble view, what has been presented before court are allegations without sufficient evidence to back the same up. I note the apprehension by the Defendant/Applicant over the suit property but then the court cannot issue orders based on the emotive state of litigants but rather facts and evidence presented before it.
27. The court is therefore not satisfied that the Applicant has established a prima facie case so as to warrant the granting of the orders of injunction. I am guided by the decision of Ringera J. (as he was then was) in the case of “Showind Industries – Versus - Guardian Bank Limited & Another (2002) 1 EA 284 where the Learned Judge stated as follows: -
- “.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity or his equity has been defeated by laches”
28. As was earlier observed, the threshold for grant of injunctive orders are rather conjunctive and not disjunctive, all aspects are to be satisfied. In the event that one aspect of the principles for grant of injunction has not been met then the court has no business further interrogating the rest. I am guided by the decision in “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012”, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -
- “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
- (a) Establish his case only at a prima facie level,
 - (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.



These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

29. The court had earlier on issued status quo orders which will remain in place pending the hearing and determination of this suit. It is also proper to point out at this point that breach of orders attracts a party to being liable for contempt. It is expected that all orders issued by the court are implicitly observed failure to which attracts punitive measures.
30. The court cannot entertain any party who deliberately disobeys orders or acts in a manner that obstructs the administration of justice. In the above instance the court is of the view that the application was simply not properly discharged by the Defendants for any orders to be issued in terms of an injunction.

Issue No. c). Who will bear the costs of the application?

31. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that the party is granted at the conclusion of the legal action and /or proceedings. The Proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By event, it means the result and outcome of the said legal action.
32. In the instant case, although the Plaintiffs/Applicants have partly managed to proof their case, in the interest of Justice, its reasonable that each party bear their own costs herein.

Conclusion & disposition

33. Consequently, upon causing indepth analysis of the framed issues, the Honourable Court on the principles of Preponderance of Probabilities and the balance of convenience, arrived at the following orders:-
 - a. That the Notice of Motion application dated 13th May 2024 partly succeeds on only one limb.
 - b. That the status quo orders issued by this Honourable Court on 31st July 2023 for purposes of preserving the suit property pending the hearing and determination of the main suit are still in place.
 - c. That for expediency sake, there shall be a mention on 17th June, 2025 for purposes of conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 for compliance a hearing date on 22nd October, 2025 by virtual means.
 - d. That each party shall bear its costs of the application herein.

It is ordered accordingly.



**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT KWALE THIS 2ND DAY OF APRIL, 2025**

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT**

AT

KWALE.

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Musyoki Advocate for the Plaintiff/Respondent.
- c. Mr. Otwere Advocate for the Defendant/Applicant.

