



**Wanjiru & another v Tumbo & 11 others (Sued as the duly
Appointed Attorney of James Kipkoech) (Environment & Land Case
E431 of 2021) [2022] KEELC 14493 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E431 OF 2021**

**EK WABWOTO, J
OCTOBER 27, 2022**

BETWEEN

MERCY WANJIRU 1ST PLAINTIFF

PETER MAINA NDEGWA 2ND PLAINTIFF

AND

CICILIA TUMBO 1ST DEFENDANT

GILBERT OMWENGA 2ND DEFENDANT

JONNAH NZIOKI 3RD DEFENDANT

SIMON MAINA 4TH DEFENDANT

JOSEPH MATHENGE MWAI 5TH DEFENDANT

HARUN WACHIRA 6TH DEFENDANT

PETER MARIRA GIKONYO 7TH DEFENDANT

WYCLIFFE ONYANGO 8TH DEFENDANT

ANTHONY KILONZO 9TH DEFENDANT

WILFRED KIPTUM KITUR KIMALAT 10TH DEFENDANT

AYUB ASINASIO ANGACHI 11TH DEFENDANT

EMILY ADHIAMBO MAKUNDA 12TH DEFENDANT

SUED AS THE DULY APPOINTED ATTORNEY OF JAMES KIPKOECH



RULING

1. The facts of the case are that the Plaintiffs allege to be the proprietors of Land Title No. Nairobi/Block 107/1131(suit property) as of November 2004 whereas the Defendants allege the suit property is actually Nairobi/Block/107/1/1131 which was allotted to James Kipkoech Kimalat by the Nairobi City Council in 1998 and consequently involved varied transactions and undertakings among the Defendants.
2. The Plaintiffs filed a Notice of Motion Application dated December 15, 2021 which was accompanied by a Supporting Affidavit sworn by Peter Maina Ndegwa. The Plaintiffs sought the following orders:
 - i. The matter be certified as urgent and service of the same upon the Respondents be dispensed with in the first instance
 - ii. A temporary injunction be issued restraining the Defendants/Respondents whether acting in person, by proxy, through their agents, servants, directors, employees or any other person acting at their behest, from trespassing, engaging in construction/fencing and/or interfering in any other way with the Plaintiff/Applicant's peaceful and/or quiet enjoyment of Land Title No Nairobi/Block 107/1131 (the suit property) pending inter parties hearing of this application.
 - iii. A temporary injunction be issued restraining the Defendants/Respondents whether acting in person, by proxy, through their agents, directors, servants, employees or any other person acting at their behest, from trespassing, engaging in some of the orders which the Honourable Court may issue at determination of the main suit.
3. The Application was made on the grounds that:
 - i. The Plaintiffs are the registered owners of the suit property by dint of a Certificate of Lease registered in their favour on the November 23, 2004 and a recent search confirming the same registration position.
 - ii. On or about March 2021, the Defendants began to interfere and/or encroach on the Plaintiff's suit property without any colour of right
 - iii. The Defendants have recently escalated their unlawful actions to the extent that they are clearing the ground and digging trenches on the suit property with an aim of erecting structures and denying the Plaintiffs' agents access
 - iv. The Plaintiff has reported the Defendants' actions at BuruBuru Police Station but has not obtained reprieve
 - v. The Plaintiffs constitutional rights to property have been infringed.
 - vi. Unless the Court intervenes, the Plaintiffs will suffer irreparable harm as the Defendants unabatedly continue changing the character of the suit property through unapproved constructions, lease or sale of structures



4. In the Plaintiffs’ Supporting Affidavit dated December 15, 2021 and sworn by Peter Maina Ndegwa it was prayed that the Application should be considered on the strength of the Certificate of Lease.
5. In Defendants’ relying affidavit dated February 11, 2022 was sworn by Ciciliah Tumbo on behalf of the 2nd-10th Defendants. It was submitted that the suit property was allotted to James Kipkoech Kimalat in 1998. It was also averred the application should fail on account that the Plaintiffs have not attached the allotment letter and lease agreement from the Nairobi City Council. It was further submitted that the Plaintiffs Certificate of Lease is fraudulent and as such they should not be entitled to any relief from the Court.
6. The 11th and 12th Defendants in their replying affidavit dated May 27, 2022 and sworn by Ayub Angachi averred that it was suspicious that the Plaintiffs have never taken possession of the suit property since 2004.
7. I have considered the application, evidence adduced and respective responses that were filed. In my view, the sole issue that arises for determination is whether the Plaintiffs have met the threshold to be granted the temporary injunction order.
8. Section 63 of the Civil Procedure Act and Order 40(1) of the Civil Procedure Rules, stipulates 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. [Emphasis Mine]
9. The principles to determine the threshold for temporary injunction are well enunciated in *Giella v Cassman Brown* (1973) EA 358 to the effect that a party seeking a temporary injunction has to establish a *prima facie* case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
10. This position was also reiterated in *Nguruman Limited v. Jan Bonde Nielsen & 2 others*, Ca No. 77 of 2012, where the Court stated that:

“In an interlocutory injunction application, the applicant has to satisfy the three 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) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour”



11. I share in the sentiments of the Court of Appeal in *Director of Public Prosecutions v Justus Mwendwa Kabenge & 2 others* [2016] eKLR where it was held that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court. I take note that the copy of Certificate of Lease relied on by the Plaintiffs was incomplete and they presented no further evidence of possible irreparable harm.
12. The photographs presented showed structures that have been substantially developed which would suggest that the Plaintiffs could not have merely have stumbled upon the development.
13. Ultimately this Court makes its determination on a balance of convenience. I believe the question of ownership is the crux of the suit which could be determined in the main suit and the current developments could be run down should I grant the orders sought.
14. In the foregoing, this Court finds that the Plaintiffs have failed to establish a prima facie case and therefore Notice of Motion application dated December 15, 2021 is unmerited and the same is hereby dismissed with an order that costs shall abide the determination of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27th DAY OF OCTOBER 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kamau for the Plaintiffs.

Ms. Karimi for the 2nd - 10th Defendants.

Mr. Kiptoo for the 11-12th Defendants.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

