



REPUBLIC OF KENYA



**Kavu & 8 others v Mwarogo (Environment & Land Case 67 of 2022)  
[2022] KEELC 13810 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13810 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 67 OF 2022  
NA MATHEKA, J  
OCTOBER 25, 2022**

**BETWEEN**

**JABALI CHONDO KAVU ..... 1<sup>ST</sup> PLAINTIFF  
DAVID YAMO ADEMBA ..... 2<sup>ND</sup> PLAINTIFF  
DAVID GUDAHI ..... 3<sup>RD</sup> PLAINTIFF  
EVANSON SIMON KINYANJUI ..... 4<sup>TH</sup> PLAINTIFF  
SAIDA OMAR RAJAB ..... 5<sup>TH</sup> PLAINTIFF  
PAUL NZAU KIVUVA ..... 6<sup>TH</sup> PLAINTIFF  
ESHE SALIM AWADH ..... 7<sup>TH</sup> PLAINTIFF  
STEPHEN MUANGE MUTUA ..... 8<sup>TH</sup> PLAINTIFF  
YONAS KARIUKI MOGES ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**SULEIMAN OMAR MWAROGO (AKA CHIBWANDA) ..... DEFENDANT**

**RULING**

1. The application is dated June 20, 2019 and is brought under order 40 rules 1, 2, 3 & 4 of The *Civil Procedure Rules* S IA & 3A of the *Civil Procedure Act* seeking the following orders;
  1. That this application be certified as urgent and its service be dispensed with in the first instance for reasons of its urgency.
  2. That pending the hearing of this application inter partes this Honourable Court be pleased to issue a temporary injunction restraining the Defendant either by himself, his servants, agents and/or employees from entering, trespassing into, digging, building structures, depositing



construction materials or in any other manner dealing with the property known as plot No. 356/ 11 / MN to the adverse interests of the Plaintiffs.

3. That pending the hearing of this suit this Honourable Court be pleased to issue a temporary injunction restraining the Defendant either by himself, his servants, agents and/or employees from entering, trespassing into, digging, building structures, depositing construction materials or in any other manner dealing with the property known as plot No. 356/11/ MN to the adverse interests of the Plaintiffs
  4. That an order of mandatory injunction directed to the Defendant, his servants, agents, employees and/or assigns to forthwith vacate and remove all the construction material deposited onto the said property or remove any construction erected on plot No. 356/11/ MN.
  5. That In the event the Defendant does not comply with order (4) above Eviction of the Defendant and demolition of structures of the structures erected by the Defendant be conducted at the Defendant's costs.
  6. That the OCS Bamburi Police station and Deputy County Commissioner to assist in enforcement of the order.
  7. That costs of this application be provided for.
2. It is based on the grounds that the Plaintiffs are the legal registered proprietor of subdivisions hived from all that property known as plot No. 356/11/ MN registered in the Mombasa Lands District Registry situate in Utange Mombasa County. That the Plaintiffs purchased the property for valuable consideration of over 20 million and had subdivision titles registered in their names. That the Plaintiff did subdivide the property and has and is in process of transferring the subdivided portions to the co-Plaintiffs for a valuable consideration. That the Defendant has, without any permission or authority encroached onto the said property belonging to the Plaintiffs, and dug trenches with the aim of constructing, has poured therein construction materials and is intent, unless barred by injunction on proceeding with the construction. That the acts by the Defendant are an abrogation of the all time concept of sanctity to private property. The Plaintiffs have not granted the Defendant permission by way of lease, easement or any other permission known in law to entitle his trespass and place construction materials therein. That the Defendant's actions are a clear violation of the Plaintiffs' constitutional right to own, freely use and occupy land without interference. That despite attempts to report the matter at Bamburi Police through 0B NO. 16/ 17/2019, the Defendant has been adamant and has continued with his illegal actions. That the Defendant actions amounts to land grabbing in the disguise of ancestral land ownership. That there is imminent threat thereof that unless an injunction is issued as sought, the Defendant shall continue with his illegalities unabated, construct on the premises, occasioning the plaintiff irreparable loss and damage. That the property is the Plaintiffs' sole investment with the hope that he will utilize it during their sunset years. That it is fair, just and equitable that the orders sought for in the interim be granted as prayed to preserve the suit property and prevent it from being wasted.
3. This court has considered the application and submissions therein. In a nutshell the Plaintiffs' case is that the Defendant has encroached into the suit property, dug trenches and deposited construction materials. The Plaintiffs are adamant that the Defendant will continue to trespass and construct onto the suit property unless the court restrains his actions. The Defendant has not filed any response to the application despite being served with the on June 29, 2022, which is evident by the affidavit of service sworn by Andericus Otieno Odera and filed on July 1, 2022. The power of court in an application for interlocutory injunction is discretionary, the discretion is judicial and is exercised on the basis of law and evidence. The principles which guide the court in deciding whether or not to grant an interlocutory



injunction are well settled. *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, set out the three requirements that has to be satisfied in an interlocutory injunction application. The applicant has to establish his case only at a *prima facie* level, demonstrate irreparable injury if a temporary injunction is not granted, and where the court has any doubts, it will be decided on a balance of convenience.

4. The Court of Appeal in *Mrao Ltd. vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 defined a prima facie case is. It held

So what is a prima facie case? I would say that in civil cases 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.” The court went further to hold that “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 case upon trial. That is clearly a standard which is higher than an arguable case.”

5. The Applicants have produced and marked ‘A’ a Provisional Certificate issued on June 26, 2013 to the administrators of the Estate of Mwanajuma Mohammed and the title was transferred and registered in the name of the Jabali Chondo Kavuu on December 5, 2014. The 1<sup>st</sup> plaintiff then subdivided the suit property into several subdivisions which he subsequently transferred and registered to other Plaintiffs as follows; David Yamo Ademe Plot No. 14788, David Gudahi No. 14780 on February 4, 2016, Evanson Simon Kinyanjui Plot No. 14781 on March 30, 2016, Said Omar Rajab Plot No 14785 on June 21, 2016, Paul Nzau Kivuva Plot No. 14787 on July 6, 2016, Eshe Salim Awadh Plot No. 14791 on August 2, 2016, Stephen Muange Mutua Plot No. 14789 and 14790 on September 5, 2017 and Yonas Karuiki Moges Plot No. 14795-14801 on March 1, 2018.
6. The Plaintiffs/Applicants submitted that the Defendant in 2019 without any permission or authority encroached onto the said property belonging to the Plaintiffs, and dug trenches with the aim of constructing, has poured therein construction materials and is intent, unless barred by injunction on proceeding with the construction. The 2<sup>nd</sup> plaintiff in his affidavit in support of the application stated that if the Defendant is allowed to continue constructing on the suit property, the deponent will incur more expenses trying to recover the same. He urged court to restrain the Defendant from the continued interference with the sanctity of private property.
7. The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR the court held that,

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

8. It is clear that the alleged trespass occurred way back in 2019 and this suit was filed in 2022. The Applicants/Plaintiffs have not proved that they would suffer irreparable damage and the balance of



convenience is not in their favour. The court in *Nguruman Limited* (*supra*), found that the three conditions and stages have to be applied as separate, distinct and logically. It was held that:

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."

9. Be that as it may, I find that the Plaintiffs/Applicants have established a prima facie case and order that the status quo be maintained pending the hearing and determination of this matter. Costs to be in the cause.

10. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER 2022.**

**N.A. MATHEKA**

**JUDGE**

