



**Ikiao & another v Kamencu (Environment & Land Case E008 of 2022)
[2022] KEELC 14819 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2022
CK NZILI, J
NOVEMBER 16, 2022**

BETWEEN

JENNIFER KANARIO IKIAO 1ST PLAINTIFF

DOUGLAS KINYUA IKAMATI 2ND PLAINTIFF

AND

VERSUS KAMENCU DEFENDANT

RULING

A. The Application

1. The court by an application dated May 26, 2022 is asked by the plaintiffs to issue temporary orders of injunction barring and restraining the defendant from entering, remaining, constructing on Plot No's 133 and 134 Kianjai, pending the hearing and determination of this suit. The application is based on the grounds on its face, the supporting and supplementary affidavits sworn by Jennifer Kanario Ikiao on May 26, 2022 and August 2, 2022 respectively.
2. The plaintiffs have attached copies of applications for development, approvals, minutes of allocation, receipt of rates payments and various correspondence with the County Government of Meru as annexures marked JKI 1-7 respectively.
3. The application was opposed through a replying affidavit by the respondent sworn on July 26, 2022. In the said affidavit, the respondent averred that he was the rightful owner of Plot No. 92 Kianjai Market where he has been constructing for long and denied any encroachment into the plaintiffs plots as alleged or at all.
4. Further, the defendant averred that he was a bonafide owner of the land land as per annexure marked ZK "1", that no boundary records from the county surveyor or physical planner had been attached to



- prove any trespass and that the application was coming too late almost when his buildings are at the roofing stage.
5. Additionally, the defendant averred that he had already received deposits from potential tenants to his building. Further, the respondent claimed that all the issues raised by the plaintiffs and the county wide his annexures marked ZK “4” were reported to the police vide annexures marked ZK “5” and investigated which established that he obtained all the necessary approvals for his developments as per annexures marked ZK “7” Therefore, the defendant averred that the plaintiffs were not entitled to the orders sought.
 6. With leave of court, parties opted to dispose of the application by way of written submissions dated August 4, 2022 and August 18, 2022 respectively.
 7. The plaintiffs submitted that as the *bonafide* owners of Plot No’s. 133 and 134 Kianjai market as per the annexures hereto, which adjoins the defendant’s Plot No. 92, they were entitled to the orders sought given that the defendant had unlawfully trespassed into their plots and erected buildings therein. Therefore, the plaintiff submitted that they have satisfied the *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358 principles.
 8. The respondent submitted the application should fail since no prima facie case had been established with a probability of success as held in *Giella supra* and in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, *Aden Hussein Mabad & another vs Christine Kanini Mbuko & 5 others* (2022) eKLR, given that the plaintiffs have provided no documents as prove of trespass to their parcels of land.
 9. On irreparable harm, the defendant submitted that the plaintiffs do not stand to suffer any harm if the prayers sought are not granted since they have not shown any encroachment into their plots. Reliance is placed on *Tritex Industries Ltd & 3 others vs NHC & another* (2014) eKLR. On the contrary, the defendant submitted that he was the one to suffer harm since his tenants will not be able to enjoy the premises.
 10. Concerning the balance of convenience, again the defendant submitted it tilted into his favour for he stood to lose more than the plaintiffs should the application be allowed. The court is urged to be guided by *Ann Kinyua vs Nyayo Tea Zones Development Corporation and 3 others* (2013) eKLR.
 11. The defendant submitted he obtained all the requisite approvals and licenses before commencing construction on his plot; incurred a lot of resources to develop his plot which was nearing completion; had taken up deposits from potential customers or tenants and lastly out of the previous litigation he had incurred huge losses which outweighed any inconveniences that the plaintiffs would have suffered.
 12. Further, the defendant submitted that the plaintiffs were not in a position to compensate him for the loss should the court grant the orders sought for the expected monthly rent. He urged the court to dismiss the application and order the plaintiffs to deposit Kshs.636,000/= as security to cover the loss suffered out of the temporary orders in the previous suit.

B. Analysis and determination

13. The basis of the plaintiff’s case is the plaint dated May 26, 2022, where it was averred that the 1st & 2nd plaintiffs were registered allottees of plot No’s 133 and 134 Kianjai market by the defunct Nyambene County Council *vide* minutes of the town planning and market committee minutes No. TP & M 13/2007A (b) 4 and TP & M 13/2007 A (b) 3 respectively. They have attached the minutes, receipts, correspondence, rates and rents payment receipts, complaint and a response letter from the County Government of Meru regarding the alleged encroachment of their plots by the defendant.



14. The defendant was served with summons to enter appearance, filed a memorandum of appearance but has to date not filed a statement of defence despite the expiry of the mandatory period after the entry of appearance. Therefore, the plaint as at the filing of this application remained uncontroverted by the defendant.
15. The purpose of temporary injunction as held in *American Cyanamid vs Ethicon Limited* [1975] AC 396 is to protect an applicant against injury or damage arising out of violation of his right to property for which he may not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.
16. The court went on to state that the applicant's need for protection must be weighed against the corresponding need of the respondent to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the applicant's undertaking in damages if the uncertainty were resolved in the respondent's favour at the trial.
17. What amounts to a prima facie case was defined in *Mrao Ltd vs First American Bank of Kenya Ltd* (*supra*) as a genuine and arguable case which makes a court 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.
18. The power to grant an injunction is discretionary in nature and is exercised on the basis of the law and evidence. The evidential burden of proof is on the applicant to demonstrate that he or she is entitled to the order of temporary injunction based on the known principles as set out in *Giella vs Cassman Brown* (*supra*).
19. The plaintiff's case is that they both own Plot No's 133 and 134 Kianjai Market by virtue of minutes of allocation by the defunct Nyambene County Council, currently succeeded by the County Government of Meru.
20. The applicants have filed a bundle of rates and rents payment receipts and letters showing that they sought for the approval of building plans.
21. Their complaint is that the defendant who is a neighbour and owner of Plot No. 92 trespassed into or encroached upon a portion of their plots in late March 2020 and embarked on putting up buildings, which they reported to the County, who advised the defendant to cease such works *vide* a letter dated April 20, 2020.
22. On the other hand, the defendant denied the claim, stated that he validly owns the plot vide allocation minutes, receipts of rates payment, approved building plans and permits from the relevant government agencies. He submitted that the plaintiffs have no documentary evidence by way of county land surveyors and physical planners report over the alleged encroachment on their plots.
23. In a rejoinder, through a supplementary affidavit sworn on August 2, 2022, the plaintiffs averred that the defendant's plot is behind their plots and that the defendant has erroneously erected buildings on it believing he is constructing on Plot No. 92 contrary to the advice by relevant authorities and in particular, the memo dated April 29, 2021 which attached a surveyor's report.
24. Trespass is defined under Section 3 (1) of the *Trespass Act* (Cap 294) as intrusion into, remaining on, erection of structures and developing of someone's land without the consent of the owner thereof.
25. In this suit, the plaintiffs rely on minutes from Town and Markets Committee of the defunct Nyambene County Council, while the defendant relies on minutes or documents from County Council of Meru. Both are the predecessors of the County Government of Meru.



26. Article 40 of *the Constitution* presupposes that a person claiming property rights has acquired the property through a legal process.
27. In this suit, none of the parties have produced a letter of allotment, beacons certificate, deed plans, full county council minutes and part development plans which are the essential documents in the allocation of town and market plots under the *Trust Land Act* and the defunct Local Government Act which were mandatory procedures for allocation of plots.
28. Section 107 of the *Land Registration Act, 2012* provides that any right, interest, title, power or obligations, acquired, accrued or established under any repealed Acts, would continue to be governed by the law applicable immediately prior to the commencement of this Act.
29. To that extent, for the plaintiffs to establish a prima facie case as per Mrao Ltd *supra*, they must establish a right which has been infringed by the defendant so as to call for a rebuttal or an explanation and by extension seek for this court's protection by way of an injunction.
30. The plaintiffs maintain that the surveyors report attached to the letter dated April 20, 2020, conclusively settled the facts surrounding Plot No's. 133, 134 & 92 Kianjai market
31. Looking at the said memo dated which is attached as JKK "5" by the respondent, the maker is the County Physical Planning Officer, County Government of Meru. The signatories are the Physical Planner- Mr. Mwongo Geospatial Engineering surveyor -Mr. Njeru and the Assistant Land Administrative Officer - Mr. Mmbai. It clearly indicates the County Government of Meru did not have in their records or possession evidence of transfer of Plot No. 92 to any party since its allocation. It disowns application dated October 15, 1990 Ref. No. Meru C/114213/105 and confirms the legality of minutes dated May 29, 2007 and the approval to application No. 25/179 in favour of the plaintiffs. Further it sets out the beacons for Plot No. 92. The defendant has not disputed the veracity, legality and authenticity of the said report. Annexure marked 2K "1" relates to an authority from the ministry.
32. Given the clear footmarks of the plaintiff's source of ownership documents, my finding is that they have established a right to the plots which has apparently been infringed by the defendant requiring the protection of this court.
33. On the 2nd principle, the applicants have to establish if they will suffer irreparable damage if the injunction is not granted.
34. In *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* (2014) eKLR, the court held the three principles in *Giella vs Cassman Brown* (*supra*) apply separately as distinct and logically, that it is not enough to establish a *prima facie* case, that a party must establish irreparable injury which is injury for which damages revocable at law would not be an adequate remedy and if the court is in doubt, it must consider the balance of convenience. Further, the court held in considering the principles of injunction, the court does not hold a mini-trial but all what is required is to see on the face of it if the person applying for an injunction has a right which has been threatened with violation.
35. As indicated above, the defendant is yet to file a statement of defence and lay out his claim on the suit property.
36. The plaintiffs have pleaded that the defendant has encroached onto their plots and started erecting permanent buildings despite a notice to stop the same by the County Government of Meru dated April 20, 2020 and the site visit report.
37. The defendant on the other hand states he stands to suffer more loss and damage given his genuine ownership documents, approved building plans, permits and potential tenants deposits already



collected and lastly, the almost complete building as per the attached annexures marked 2K “1” – “7” respectively.

38. The court has looked at the defendant’s annexures as opposed to the supporting documents by the plaintiffs. The defendant has not attached any building plans duly approved by the County Government of Meru. There is no site plan, beacons certificate and receipts for payments of building permits, licenses and fees. Similarly, the defendant is out to make a permanent feature on the suit plots. Therefore, the damage the plaintiffs are likely to incur if the court were to find the encroachment and the trespass in their favour would be more than what the defendant is likely to suffer if the buildings were to be stopped and the suit heard on merits. Further, I find the balance of convenience tilts in favour of granting the injunction pending the hearing and determination of the suit.
39. The defendant has not filed any defence or counterclaim. His claim, if any, is yet to be laid out before this court through known pleadings. There is therefore no justification to call the plaintiffs to deposit security before this court more so when the defendant allegedly defied the orders or directives issued by the County Government of Meru on April 20, 2020, to stop any developments on the land until the complaints by the plaintiffs were resolved one way or the other.
40. The defendant is granted leave to put in a defence within 14 days from the date hereof. Parties shall also comply with order 11 Civil Procedure Rules within 60 days from the date hereof and set down the suit for hearing on priority basis.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 16TH DAY OF NOVEMBER, 2022.

In presence of:

C/A: Kananu

Kamencu for respondent

Omari for applicant

HON. C.K. NZILI

ELC JUDGE

elc e008 of 2022 - ruling	0
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