



REPUBLIC OF KENYA



**Kiplombe Farm & 8 others v Kenya Defence Forces & 5 others (Environment & Land Case 78 of 2019) [2022] KEELC 14748 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14748 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 78 OF 2019  
SM KIBUNJA, J  
NOVEMBER 9, 2022**

**BETWEEN**

**KIPLOMBE FARM ..... 1<sup>ST</sup> PLAINTIFF  
KAPKEBEN FARM ..... 2<sup>ND</sup> PLAINTIFF  
KANETIK FARM ..... 3<sup>RD</sup> PLAINTIFF  
SONGOLIET FARM ..... 4<sup>TH</sup> PLAINTIFF  
EMDIN FARM ..... 5<sup>TH</sup> PLAINTIFF  
TIGITIO FARM ..... 6<sup>TH</sup> PLAINTIFF  
JEMELI FARM ..... 7<sup>TH</sup> PLAINTIFF  
KAPNGETUNY FARM ..... 8<sup>TH</sup> PLAINTIFF  
BUHEBA FARM ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**KENYA DEFENCE FORCES ..... 1<sup>ST</sup> DEFENDANT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT  
COUNTY LAND REGISTRAR, UASIN GISHU COUNTY ..... 4<sup>TH</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT  
DIRECTOR OF SURVEYS ..... 6<sup>TH</sup> DEFENDANT**



## RULING

1. Vide an application dated December 27, 2021, the plaintiffs moved the court for orders;
  1. Spent.
  2. Spent.
  3. Spent.
  4. Spent.
  5. That pending the hearing and final determination of this suit, a temporary injunction be and is hereby issued restraining the defendants/respondents by themselves, their agents or servants from trespassing, encroaching, surveying, affixing beacons, digging trenches, ploughing, processing title deeds or acting in whatever manner that affects the substratum of the suit herein or in any manner whatsoever interfering the suit parcel numbers namely, LR No 8406/2, 9578, 11040, 8406/3, 8936, 889/2/2, 8406/5, 8406/1 and 8406/6.
  6. Such other orders be made as are just and expedient.
  7. That the costs of this application be in the cause.

The application is based on the eleven (11) grounds on its face, among them that the plaintiffs represent over 19,000 residents of Kiplombe, Kapkeben, Kanetik, Songoliet, Emdin, Tigitio, Jemeli, Kapng'etuny and Buheba farms, which are currently LR No 8406/2, 9578, 11040, 8406/3, 8936, 889/2/2, 8406/5, 8406/1 and 8406/6, measuring a total of 5,339 acres, whose occupation stretches from the 1970s; that though the land was compulsorily acquired by the government, the portion of land measuring 5,339 acres was reverted back to the residents on the directive of former President Moi; that whereas there are interim orders for maintenance of *status quo*, the 1<sup>st</sup> defendant led a battalion of 20 armed officers on the December 25, 2021, and invaded the land, forcefully erected beacons in the guise of surveying, and in the process shot and killed two civilians who were part of the residents who inquired about the exercise; that other people were injured and received medication at Moi Teaching and Referral Hospital; that the said actions of violence were intended at subverting the cause of justice, and rendering the suit nugatory; that unless restrained by a permanent injunction, the defendants will proceed to interfere with the plaintiffs' quiet enjoyment of the suit property; that further, the titles will be processed while the orders of *status quo* are in place; that it is in the interests of justice to preserve the subject matter and that this court should issue a restraining order against the 1<sup>st</sup> defendant stopping it from interfering with the suit property pending the hearing and determination of the suit.

2. The application is supported by a supporting affidavit sworn by Joseph Kaptingei Tororei, Chairman of the 1<sup>st</sup> plaintiff, on the December 27, 2021, deposing *inter alia* that the right to life and to own property as espoused in articles 26 and 40 of the [Constitution of Kenya, 2010](#) ought to be protected by this court since the actions of the 1<sup>st</sup> defendant are illegal and amount to gross interference with the aforesaid rights; that the 1<sup>st</sup> defendant is capable of using excessive force, impunity and malicious damage to property which will deprive them of their property, homes and livelihoods and that it is necessary to have the orders sought issued by this court. The plaintiffs annexed photographs of the alleged invasion and the damage caused by the 1<sup>st</sup> defendant, as well as the affidavit of Major George Otieno sworn on October 30, 2018 in a matter before the National Land Commission.



3. In response to the application, the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants filed grounds of opposition, stating *inter alia* that the application is misconceived, untenable, frivolous, incompetent and incurably defective, for the reasons that it has unsupported conclusions; that the plaintiffs have not demonstrated what harm they will face if the orders sought are not granted; that the application falls short of the threshold required of injunctive orders as elaborated in the case of *Giella v Cassman Brown* and accordingly, it should be dismissed.
4. Following the directions on filing and exchanging submissions being issued, the learned counsel for the plaintiffs filed their submissions on the March 28, 2022, in which they among others cited the celebrated case of *Giella –v- Cassman Brown & Co Limited* (1973) EA 358, where the principles governing granting of injunctions of *prima facie* case, irreparable loss and balance of convenience were laid down. The plaintiffs submitted that they have established a *prima facie* case. They relied on the case of *Mrao v First American Bank of Kenya Limited & 2 others* (2003) where the court held that a *prima facie* case is one 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. Further reliance was placed on *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR among other authorities.
5. The following are the issues for the court’s determinations:
  - a. Whether the plaintiffs have met the threshold for granting of an order of injunction.
  - b. Who pays the costs of the application.
6. I have considered the grounds on the application, as well as the grounds of opposition, affidavit evidence, as well as the submissions filed, superior courts decisions cited and come to the following findings;
  - a. The guiding principles for the grant of orders of temporary injunction are now well settled in the various judicial decisions, including the cases of *Giella –versus- Cassman Brown* (1973) EA 358, and *Nguruman Limited –versus- Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR cited by the plaintiffs, where the Court of Appeal held that;

"In an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which h the applicant is expected to surmount sequentially”.

The plaintiffs have submitted that they have established a *prima facie* case and cited the case of *Mrao Ltd –versus- First American Bank of Kenya Ltd* (2003) eKLR where the Court of Appeal held as follows:

"... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



That as the respondents have not challenged that the activities captured on the attached photographs took place, the court finds the petitioners have established a *prima facie* case and that they deserve the order sought.

- b. On the second condition that an applicant seeking for an order of temporary injunction has to establish is to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The plaintiffs cited the case of [Pius Kipchirchir Kogo vs Frank Kimeli Tenai](#) (2018) eKLR where the court held as follows;

"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

And submitted that they have been in uninterrupted occupation of the suit property from as far back as 1970s, and owing to the status and nature of the 1<sup>st</sup> defendant, they are apprehensive and fearful that the 1<sup>st</sup> defendant may move with speed and begin the process of processing title deeds, and eventually cause them to move out of the suit property much to their detriment and against the existing law.

- c. On the third condition that an applicant must demonstrate is that the balance of convenience tilts in their favour. The plaintiffs referred to the case of [Pius Kipchirchir Kogo Vs Frank Kimeli Tenai](#) (2018) eKLR in which the court defined the concept of balance of convenience as:

"The meaning of balance of convenience will favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the defendants. Inconvenience be equal, it is the plaintiff who will suffer.

In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

Further, in the case of [Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others](#) (2016) eKLR, the court held that;

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an



injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

And submitted that the balance of convenience tilts in their favour.

- d. That after considering the foregoing, and having analysed the pleadings and documents presented, and further taking note of the case of *Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & another* [2019) eKLR where the court stated that;

”Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

The court comes to the finding that the plaintiffs have met the threshold for the orders of temporary injunction to be issued in their favour. That it is apparent that if the orders sought are not granted, the suit property in dispute would be in danger of being wasted and or its legal status altered to their detriment.

- e. That in the circumstances of this case, the court is of the view that the cost of the application be in the cause, the provision of section 27 of the *Civil Procedure Act* chapter 21 of laws of Kenya notwithstanding.
- f. The court therefore finds merit in the application and orders as follows;
- i. That an order of injunction in terms of prayer (5) is hereby granted, to remain in force for one year pending the hearing and determination of this suit.
- ii. The costs will be in the cause.

It is so ordered.

**S. M. KIBUNJA, J.**

**DATED AND VIRTUALLY DELIVERED THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2022.**

IN THE PRESENCE OF;

PLAINTIFFS .....

DEFENDANTS .....

COUNSEL .....

.....

**WILSON .. COURT ASSITANT.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

