



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ragai v County Government of Kakamega & 3 others (Environment & Land  
Case 1 of 2022) [2022] KEELC 15192 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15192 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 1 OF 2022  
DO OHUNGO, J  
DECEMBER 7, 2022**

**BETWEEN**

**EVANS ANAKAYA RAGAI ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF KAKAMEGA ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF OFFICER, ROADS, ENERGY & PUBLIC WORKS ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF OFFICER, HOUSING, URBAN AREAS & PHYSICAL  
PLANNING ..... 3<sup>RD</sup> DEFENDANT**

**BRIAN MAFUNGA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By notice of motion dated January 31, 2022, the plaintiff seeks the following orders:
  1. [Spent]
  2. [Spent]
  3. That there be an order of temporary injunction restraining the defendants/ respondents jointly and severally whether by their agents, employees or otherwise howsoever from in any way whatsoever interfering, trespassing upon, clearing and grubbing, gravelling, grading, creating a public access road and/ or doing any other thing with the plaintiffs'/applicants quiet possession in all that property known as LR Kakamega/Sergoit/69 pending the hearing and determination of this suit.
  4. That this honorable court be pleased to make such order as it deems mete and just.
  5. That the costs of this application be borne by the defendants/respondents.



2. The application is supported by an affidavit sworn by the applicant who deposed that he is the legal owner of all that parcel of land known as LR Kakamega/ Sergoit /69 measuring approximately 25.5 hectares (suit property) and that on January 28, 2022 at 4:00 pm, the respondents jointly and severally without any colour of right unlawfully encroached and trespassed on the suit property. That the respondents felled exotic and indigenous trees, destroyed live fence, cleared, and grabbed a portion stretching for about 400 metres purporting to create a public access road connecting the main road and the parcel belonging to the third respondent who is the area Member of County Assembly without the applicant's consent.
3. The applicant further deposed that there has been no purchase and or acquisition agreement between the applicant and the respondents and that he is apprehensive that the respondents may unlawfully and illegally create a permanent access road on the said stretch. He added that the respondents' actions are in breach of his constitutional rights to property and concluded by praying that the orders sought be granted to prevent injustice.
4. The first, second and third respondents opposed the application through a replying affidavit sworn by Frederick Mwilitsa, the first respondent's director of survey who deposed that the first, second and third respondents have not in any manner interfered with the suit property but are lawfully gravelling the Aragai Junction – Lunani Cattle Dip road that has always been in existence. That in fulfilment of its constitutional functions, the first respondent contracted a company to construct roads in Likuyani sub-county which included the gravelling of the existing Aragai Junction – Lunani Cattle Dip road which borders the suit property on one side.
5. Frederick Mwilitsa further deposed that that he instructed a surveyor to undertake a survey on the area covering the Aragai Junction – Lunani Cattle Dip road and that upon an inclusive and thorough exercise, the surveyor found that the road as shown on the map is twelve metres wide, which area the contractors limited themselves to and as such the gravelling does not in any way whatsoever interfere or encroach on the suit property and further that public participation exercise was carried out for the project. That the road has always been in existence but has never been gravelled and that it is in the public interest including the applicant's interest that it be gravelled. He further stated that any delays on the project is likely to lead to losses of public funds owing to wasting away of materials on site and penalties for delay.
6. The applicant filed a supplementary affidavit on April 12, 2022 and deposed that the respondents' report's finding that the road on the ground and on the map is 12 metres wide is not drawn to scale as opposed to the applicant's report dated April 4, 2022 which is drawn to scale with a finding confirming encroachment and trespass by the first respondent of two metres inside the suit property.
7. The application was canvassed through written submissions which both sides duly filed. I have considered the application, the affidavits, and the submissions. The sole issue for determination is whether the orders sought should issue.
8. The applicant is seeking an interlocutory injunction. The principles that apply to such an application are that the applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and [\*Nguruman Limited v Jan Bonde Nielsen & 2 Others\* \[2014\] eKLR](#).



9. The applicant has demonstrated that although he is not the registered proprietor of the suit property, he has a property interest in it by virtue of the certificate of confirmation of grant dated October 18, 2002 issued in Succession Cause No 334 of 2001. The said certificate of confirmation of grant states that the applicant and two others are entitled to the suit property as tenants in common with equal shares. Based on the material on record, there is no dispute that the respondents have been constructing the road complained of by the applicant. I am therefore satisfied that the applicant has established a *prima facie* case.
10. However, establishing a *prima facie* case is not all that is required. An injunction will not issue if damages can be an adequate compensation. The Court of Appeal emphasized as much in *Nguruman Limited v Jan Bonde Nielsen & 2 Others (supra)* where it stated:  
  
... 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.
11. I have read the competing survey reports filed by both sides. I note that the road complained of is a gravel road. The dispute revolves around the width of the road, whether it is 10 metres or 12 metres. A gravel road does not constitute a permanent change on the land. Any violation of property rights can be quantified and compensated in damages. The road can be closed if the applicant ultimately succeeds at trial. It has not been shown that the County Government of Kakamega, a devolved unit of the Government of Kenya, would be unable to pay damages, if it ultimately boils down to that. I find that the applicant has not established irreparable injury. The application fails on the second limb of the test in *Giella (supra)*.
12. In view of the foregoing discourse, I find no merit in notice of motion dated January 31, 2022 and I therefore dismiss it. Costs shall be in the cause.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF DECEMBER, 2022.**

**D O OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistant: E Juma

