



**Kiptala & 3 others v Kisang (Environment and Land Appeal E011 of 2024) [2025] KEELC 4197 (KLR) (26 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4197 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E011 OF 2024**

**L WAITHAKA, J  
MAY 26, 2025**

**BETWEEN**

**TIMOTHY KIPKOECH KIPTALA ..... 1<sup>ST</sup> APPELLANT  
BENARD KIPKURUI KIPTALA ..... 2<sup>ND</sup> APPELLANT  
REUBEN KIPYEGO KIPTALA ..... 3<sup>RD</sup> APPELLANT  
DANIEL KANDIE CHEMWONO ..... 4<sup>TH</sup> APPELLANT**

**AND**

**CHARLES KIPKEMBOI KISANG ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. E Kigen (PM)  
delivered on 2nd July 2024 in Iten MCELC E012 of 2024)*

**JUDGMENT**

**Introduction**

1. By a plaint dated 28<sup>th</sup> February 2024, the plaintiff (now respondent), instituted a suit in the lower court to wit Iten SPM ELC Case No. 12 of 2024 seeking judgment against the defendants (now appellants), for a permanent injunction restraining the defendants, jointly and severally, either acting by themselves, their servants, agents and/or assigns from in any way interfering with the plaintiff’s quiet possession, use and/or occupation, construction, building, fencing, ploughing, tilling, planting and/or carrying out any act that is inconsistent with the plaintiff’s right as the legal owner of the parcel of land known as Moiben/ Chebara/723 measuring 8.5 hectares (herein after suit property).
2. Simultaneously with the plaint, the plaintiff filed a notice of motion of an even date seeking an order of temporary injunction restraining the defendants, jointly and severally, either acting by themselves, their servants, agents and/or assigns from in any way interfering with the plaintiff’s quiet possession, use and/or occupation, construction, building, fencing, ploughing, tilling, planting and/or carrying



out any act that is inconsistent with the plaintiff's right as the legal owner of the parcel of land known as Moiben/Chebara/723 measuring 8.5 hectares pending the hearing and determination of the application and the suit.

3. As can be discerned from the averments in the plaint and the affidavit sworn in support of the motion, the suit and the application are premised on the ground that the plaintiff is legal/lawful owner of the suit property and that the plaintiff had been enjoying peaceful possession of the suit property until recently when the defendants started trespassing and/or interfering with the plaintiff's quiet possession of the suit property.
4. The defendants filed a statement of defence and an undated replying affidavit contending that they are the ones in use and possession of the suit property.
5. In a ruling delivered on 2<sup>nd</sup> July 2024 in respect of the plaintiff's application for temporary injunction, the learned trial magistrate determined that the application was merited and allowed it as prayed. In allowing the application, the learned trial magistrate stated: -

“The court has carefully considered the matters in issue in this application. The issue for determination for this court is whether the applicant has made a case for this court to issue the order being sought herein.

Guided by the principles laid in the case of *Giella vs. Cassman Brown Ltd* (1973) 358 which states: .....

Guided by the above and considering the application herein together with the affidavits and annexures and submissions on record, it my considered view that the application is merited and the same is hereby allowed as prayed.”

6. Dissatisfied with the decision of the trial court/magistrate, the defendants appealed to this court on the grounds that the learned trial magistrate erred by:-
  - i. Delivering the ruling against the principles of Order 21 of the Civil Procedures Rules, 2010;
  - ii. Granting injunctive orders when the plaintiff had failed to meet the threshold for granting injunctive orders;
  - iii. Failing to observe that the appellants had constructed and were cultivating hence the principles of the doctrine of *lis pendes* was applicable;
  - iv. Failing to observe that the issuance of injunctive orders amounted to eviction orders against the appellants who were in occupation;
  - v. Failing to observe and find that the appropriate order under the circumstances was an order of *status quo*.
  - vi. Rendering a decision that was contrary to the law and facts and the rules of natural justice.
7. The appellants urge the court to allow the appeal, set aside the impugned ruling of the trial court and substitute it with an order of *status quo*. The appellants also pray that the costs of the appeal be awarded to them.
8. Pursuant to directions given on 27<sup>th</sup> January 2025, the appeal was disposed of by way of written submissions.



## Submissions

### Appellants' submissions

9. In their submissions dated 20<sup>th</sup> February 2025, the appellants have identified the following as the issues for the court's determination: -
  - i. Whether the ruling of 2<sup>nd</sup> July was in compliance with the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010;
  - ii. Whether the respondent met the required threshold for granting injunctive orders.
10. On the first issue, the appellants have made reference to the provisions of Order 21 Rule 4 of the Civil Procedure Rules and the decision in the case of Godfrey Gatere Kamau vs. Peter Mwangi Njuguna (2008)e KLR, regarding writing of judgments and rulings in suits and applications that have been opposed and submitted that the ruling delivered in the circumstances of this case did not meet the legal threshold for writing judgments and rulings in defended suits/applications in that the trial magistrate never applied the merits of the grounds of the application and the grounds raised in the response to the application.
11. Owing to none compliance with the requirements set out in Order 21 Rule 4 of the Civil Procedure Rules, the appellants submit that the ruling is defective.
12. On the 2<sup>nd</sup> issue, the appellants have made reference to East African Industries vs. Trufoods (1972) EA 420; Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 and Nguruman Ltd vs. Jan Bonde Nielsen & 2 others (2014) eKLR where the principles which undergird granting of injunctive orders are espoused/expounded and based on the decision in the case of Kenya Commercial Finance Co. Ltd vs. Afraha Education (2001)1 EA, submitted that the three conditions set out in Giella vs. Cassman Brown (supra) for grant of an order of temporary injunction must be applied as separate, distinct and logical hurdles which the applicant is expected to surmount.
13. Based on the averments in the plaintiff's supporting affidavit and the response thereto by the defendants, the appellants submit that the learned trial magistrate ought to have considered the allegations in the affidavits and come out with a conclusion as to whether the respondent had established a prima facie case with probability of success.
14. The defendants acknowledge that the plaintiff has a title deed, which in accordance with the provisions of Section 26 of the *Land Registration Act*, 2012 could form a basis for determination that the plaintiff has made up a prima facie case but based on their allegation and contention that they are the ones in possession of the suit property, the appellants submit that the doctrine of lis pendens espoused in the case of Mawji V US International University & another (1976) KLR 185 and recognized as applicable under section 107 of the *Land Registration Act*, 2012 in the case of Maftali Ruth Kinyua vs. Patrick Muita Gachua & another, submit that the order that commended itself in the circumstances of this case is an order of maintenance of status quo.
15. The appellants fault the learned trial magistrate for having determined that the plaintiff had made up a case for being granted injunctive orders yet he had neither tendered evidence capable of proving that he was the one in possession of the suit property nor demonstrated that unless the orders sought were granted, he would suffer damages incapable of being compensated by award of damages.



## Respondent's submissions

16. In the respondent's submissions dated 5<sup>th</sup> March 2025, the respondent gave a background of the appeal and identified the following as the issues for the court's determination: -
  - i. Whether the respondent met the threshold for granting injunctive orders
  - ii. Whether the appeal is meritorious
17. On the first issue, the respondent submitted that the learned trial magistrate granted the temporary order of injunction on merit and the appellants have failed to demonstrate why the orders should be set aside. He made reference to the provisions of Order 40 Rule 1(a) and (b) of the Civil Procedure Rules and the cases of *Giella vs. Cassman Brown & Co. Ltd* (1973) EA 358, *Mrao Ltd V First American Bank of Kenya Ltd* (2003) eKLR and submitted that the respondent is the registered owner of the suit property whose ownership has never been challenged in court.
18. On irreparable harm, he submitted that the appellants have interfered with his peaceful possession and illegally erected a temporary structure after he filed this suit to mislead the court that they are in occupation. He made reference to the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR and the case of *Amir Suleiman V Amboseli Resort Ltd* (2004) eKLR to demonstrate that the balance of convenience tilts in his favour.
19. On the second issue, the respondents submitted that the appeal to set aside the orders of injunction is baseless and made in bad faith. He submitted that the court should be guided by the principles set out in the case of *Mbogo & Another V Shah* (1968) EA 93 and *Kenya Human Rights Commission & Another V AG & 6 Others Civil Appeal No. 147 Of 2015(2019) eKLR* on when an appellate court may interfere with the discretionary jurisdiction of the trial court. He further submitted that the respondents have never occupied the suit property or ploughed, tilled or utilized it and they have no justification to invoke the doctrine of *lis pendens*.

## Analysis and determination

20. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the affidavit evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & Another V Associated Motor Boat Co. Ltd* (1968) E.A 123 and *Mwanasokoni V Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga V Kiruga & Another* (1988) KLR 348.
21. As pointed out herein above, the plaintiff (now respondent) instituted this suit complaining that the defendants were interfering with his peaceful possession of the suit property. In the affidavit sworn in support of the application for interlocutory reliefs, the plaintiff averred that the defendants without any colour of right or legal justification started claiming the suit property thereby causing him irreparable loss and damage as he had been unable to utilize the suit property due to the defendants' wrongful acts or weird behavior. Particulars of alleged unlawful actions and weird behavior said to have caused the plaintiff /respondent irreparable loss and damage were not provided. Particulars of irreparable loss and damage suffered were also not provided.
22. In their statement of defence and replying affidavit, the defendants admitted/acknowledged that they were laying claim on the suit property on account of their pleaded interest in it and contended that the orders sought could not be issued against them because they were in possession of the suit property.



23. Despite having indicated that she was guided by the principles set in *Giella v. Cassman Brown Ltd* (supra); the application, the affidavits and annexures thereto and submissions on record, there is no indication how those considerations informed the trial magistrate's decision as what is disclosed is merely the outcome of consideration of the aspects of the application and applicable law said to have been considered. There is no indication as to whether the learned trial magistrate considered the allegation by the defendants that they were in occupation of the suit property and their contention that on account of their being in possession of the suit property, the orders sought against them could not issue against them.
24. I agree with the defendants' submissions that to the extent that the ruling of the learned trial magistrate did not provide reasons for the decision ultimately arrived at, it offends Order 21 Rule 4 of the Civil Procedure Rules, 2010 which provides as follows: -
- “Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”
25. A review of the pleadings filed in this case and the application for interlocutory reliefs indicates that the plaintiff neither provided particulars of the unlawful activities complained about nor provided proof of the alleged irreparable loss and damage he claimed to have suffered on account of the defendants' complained illegal and unlawful dealings.
26. Given that the defendants pleaded that they were in occupation of the suit property and provided affidavit evidence to that effect, which evidence was not controverted by the plaintiff, it was not enough for the learned trial magistrate to determine the case on the mere fact that the plaintiff is the registered owner of the suit property. The trial magistrate ought to have dealt with the question of the defendants' occupation of the suit property which is implicitly acknowledged in the plaintiff's pleadings.
27. In the absence of any evidence adduced by the plaintiff of the alleged irreparable loss and damage occasioned on him on account of the defendants' alleged illegal interference of the suit property, and cognizance of the fact that damages are awardable for trespass to land, it is my considered view that in the circumstances of this case, where the defendants' evidence to the effect that they are in occupation of the suit property was uncontroverted, the balance of convenience tilted in favour of denying the temporary injunction sought because granting the orders could have the unintended consequence of evicting the defendants from the suit property yet the damage, if any, suffered by the plaintiff is compensable by way of award of damages for trespass to land.
28. The upshot of the foregoing is that the appeal has merit and is allowed as prayed.
29. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 26<sup>TH</sup> DAY OF MAY, 2025.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered virtually in the presence of:-

Ms. Rotich holding brief for Mr. Mathai for the Appellant

Mr. Omboto for the Respondent

Court Assistant: Christine

