



REPUBLIC OF KENYA



**KENYA LAW**  
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**China Henan International Cooperation Group v Mogeni (Environment and Land Appeal E024 of 2021) [2025] KEELC 538 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 538 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E024 OF 2021  
M SILA, J  
FEBRUARY 11, 2025**

**BETWEEN  
CHINA HENAN INTERNATIONAL COOPERATION GROUP ..... APPELLANT  
AND  
REGINA NYABURI MOGENI ..... RESPONDENT**

*(Being an appeal against the ruling of Hon. P. Biwott, Senior Principal Magistrate, delivered on 4 March 2021 in Ogembo SPMCC/ELC No. 20 of 2020)*

**JUDGMENT**

1. At the outset I must say that this is a completely unnecessary appeal.
2. The respondent, through a plaint filed on 21 January 2021, claimed that the appellant had trespassed into her land parcels Majoge/Boochi/5101, 5102 and 5103, and proceeded to excavate murrum for upgrading and maintenance of the Kamagambo/Riosiri-Tabaka-Ikoba-Ogembo road. In the suit, she asked for orders of permanent injunction to restrain the appellant from the suit land; an order to compel the appellant to back-fill the land to its original status; costs and any other relief. Together with the plaint the respondent filed an application for injunction seeking orders to have the appellant restrained from trespassing into her suit lands pending hearing of the suit.
3. The appellant filed a defence categorically denying that she was the entity that excavated murrum from the respondent's land and pointed a finger at a third party who was repairing another road. She opposed the application for injunction on the basis that there has never been and there is no risk of loss to the respondent, and that the entire suit is based on a falsehood.
4. The application was heard culminating in the ruling delivered on 4 November 2021. The trial court was of the view that the respondent has a prima facie case and that she stood to suffer loss unless the order was granted. The court therefore issued the order of injunction and ordered the costs thereof to be in the cause.



5. Aggrieved, the appellant filed this appeal. Eight grounds are listed, inter alia, that the trial court erred by failing to consider that the respondent had not proved trespass; and that the trial court erred in holding that the applicant had demonstrated a prima facie case because she held title deeds without a specific finding that the appellant had trespassed. The appellant wants the ruling of the trial court vacated and in lieu thereof the application for injunction be dismissed together with costs.
6. I directed the appeal to be canvassed through written submissions which I have taken into account.
7. The principles for grant or otherwise of an injunction were well spelt out in the case of *Giella vs Cassman Brown* (1973) EA 358. These are first, that the applicant needs to demonstrate a prima facie case with a probability of success; secondly show that he stands to suffer irreparable loss if the injunction is not granted; and thirdly, if the court is in doubt, the application would be decided on a balance of convenience.
8. In our case, it will be observed that the respondent believes that the appellant is the one who excavated soil on her parcels of land and that is why she asked for an order of injunction. The appellant of course categorically denied ever stepping into the land of the respondent to excavate any material and in fact insinuated not having any intention to enter her land. This was a situation where one party asserted that the other has trespassed and the other insisted that she has not. The evidence that both parties provided appears to me to have been one person's word against the other.
9. It is my considered view that when a court pronounces that the applicant has established a prima facie case, in essence it is saying that the applicant has presented material that demonstrates that he has a high likelihood of success. It is the same as saying that the applicant's likelihood of success is above 50%. When a court holds that a prima facie case has not been established, then it is saying that from the material presented, it is highly unlikely that the applicant will succeed i.e the likelihood of success is below 50%. Sometimes the court may not be too sure, and is in doubt, that means there is a 50% chance of success and 50% chance of failure in equal measure.
10. In the impugned decision, the trial court held that there was a prima facie case established. On my part, I doubt that there was a prima facie case with a probability of success that the respondent made, since, as I have explained, it was a case of one person's word against the other with little tangible proof from either side. That is not to say that no case at all was made out by the respondent. There was material presented that the appellant was operating in the area making roads using material such as murram. It was not therefore superfluous for the respondent to suspect the appellant; there was some sort of circumstantial evidence. Given that scenario, you could not say that the case of the respondent had no likelihood of success, but yet again, there was nothing tangible that you could say that the appellant had presented that one could conclusively say obliterated the denial of the respondent. This, in my opinion, ought to have been a case where the court applies the doubt principle, i.e it was a 50:50 situation, and therefore the case was best decided on a balance of convenience.
11. In my opinion, the balance of convenience would still tilt towards preventing the appellant from entering and excavating soil, for any potential further excavation would have propensity to bring immense loss to the respondent and there was risk of her parcels of land being wasted beyond repair. At the end of the day, this would still be an order to restrain the appellant from the suit land. It may not be based on the fact that a prima facie case is established but based on a balance of convenience given the doubt in establishment of a prima facie case. Either way, an injunction would still issue.
12. What baffles me is if indeed the appellant had no interest in the land of the respondent, then why oppose the application for injunction? She could simply have stated that she has no problem if an order of injunction is issued for reason that she has no interest in the land of the respondent. There



was no need of wasting precious judicial time if at all she never had, and does not have any interest in the land of the respondent. What injury did the appellant suffer with the issuance of the order of injunction if she had, and has, no interest in the land of the appellant ? And what purpose is meant to be served by this appeal ?

13. The purpose of an injunction is mainly to give direction on how the subject matter is to be preserved pending hearing of a suit. The trial court ordered that the appellant should stay away from the land. Again I ask, if the appellant has no interest in the land, why does she feel aggrieved by the order stopping her from entering or interfering with the land of the respondent ? There is no need in engaging court in a mere academic exercise if at all the appellant has no interest in the land of the respondent. All the court did was restrain her from the suit land. Whether or not she had trespassed was going to be determined at the hearing of the suit of which she will have a chance to be heard.
14. The appellant feels that there was no prima facie case established but a prima facie case is merely a preliminary assessment based on the material provided for purposes of giving an order on how the subject matter is to be maintained. It has no bearing on what the court will decide upon hearing of the case.
15. I see nothing to overturn because as I have said for the umpteenth time there is no harm to be suffered by the appellant by an order of injunction if she is not and does not wish to be in the respondent's land. As I have elaborated, I would still issue an injunction based on a balance of convenience.
16. Given the foregoing, I see absolutely no merit in this appeal. The order of injunction as issued by the trial court will remain.
17. I started this judgment by stating that this appeal was completely unnecessary. It was unnecessary because no harm is caused to the appellant by the order of injunction if she is not in the respondent's land and does not intend to be in it. The appeal has done nothing but delay the hearing of the suit before the Magistrate's Court which has remained unheard since 2021.
18. I am not persuaded that this appeal is merited and it is hereby dismissed with costs.
19. Orders accordingly.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF FEBRUARY 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Nyamurongi for the appellant

Mr. Okemwa for the respondent

Court Assistant – Michael Oyuko

