Chigamba v Chigamba; National Land Commission (Interested Party) (Environment and Land Case E005 of 2024) [2025] KEELC 5836 (KLR) (9 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5836 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND CASE E005 OF 2024

LL NAIKUNI, J

JUNE 9, 2025

BETWEEN

MAZERA CHIGAMBA ..... APPLICANT

AND

HARRISON MWANALOMA CHIGAMBA ..... RESPONDENT

AND

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

RULING

I. Introduction

1. The Honourable Court was called upon to make a determination to the Notice of Motion application dated 2nd September, 2024 by Mazera Chigamba, the Claimant/Applicant. It will be noted that the Application was not anchored under any provision of the law.

II. The Claimant/ Applicant's case

2. The Applicant sought for the following orders: -

    a. The Honourable Court be pleased to issue an injunction against the Respondent and the intended interested party, or their agents from actualizing compensation regarding parcels Kwale Chigato 1423, 1414,827, or any actions on selling, leasing or constructing under the suit property, pending the hearing and determination of the suit case.

    b. The application be heard expeditiously during this time of vocation.

    c. The National Land Commission be included as interested parties in the case.

    d. The cost be provided.

3. The application by the Applicant was premised on the grounds, facts and testimony on the face of the application and the averments of the 11 Supporting Affidavit of Mazera Chigamba, the Plaintiff herein. The Deponent averred that:-

    a. He was the Plaintiff and hence conversant with the facts of the case herein.

    b. The parcel in dispute was his property courtesy of inheritance and thus was supposed to be registered in her name.

    c. She had filed a case in Kwale Environment and Land Court, case No. E005 OF 2024seeking to establish the ownership of the suit property.

    d. The parcels Kwale/Kigato 1414, 827 and 1423 had been wrongfully registered in the names of the Defendant [Copy of the title marked as "MC – 1"].

    e. Her property was part of the parcels of land that was among the once seized under compulsory acquisition for the construction of Mwache Dame, and it was currently in the hands of the Government.

    f. She had not been compensated and there had not been any contact with her because the Defendant displaced her from the suit parcel of land. [Chief's letter marked as "MC – 2"].

    g. She was aware, courtesy of the engagement with National Land Commission that they had issued awards for persons including the Defendant.

    h. Should the National Land Commission continue and issued the money, she would be locked out of compensation in the matter been living on the suit parcel of land for the last sixty [60] years.

    i. She was aware that the Defendant herein had received awards and was likely to be paid and benefit from parcel of land suit number.

    j. She wrote an objection letter touching on the contested parcels including No. Kwale Chignto 1423, 1414, 827 but there was no confirmation that the same should be abided by the National Land Commission. [Copy of the letter marked as "MC – 2"].

III. Further Affidavit by the Plaintiff

4. The Plaintiff further supported her application through a 6 Paragraphed affidavit sworn on 23rd September, 2024 by Mazera Chigamba, the Plaintiff herein who averred as follows: -

    a. The parcel in dispute was her property courtesy of inheritance and thus was supposed to be registered in his name.

    b. She had filed a case in Kwale Environment and Land Court, case No. E005 OF 2024 seeking to establish the ownership of the suit property.

    c. The specific parcels in contention in the matter were Kwale/Kigato 1414, 827 and 1423, the same should be corrected in the Plaint.

    d. The full name of the Respondent was Harrison Mwanaloma Chitumbo.

IV. Submissions

5. On 11th March, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 2nd September, 2024 be disposed of by way of written submissions and

all the parties complied. Unfortunately, despite of this, the Honourable Court was not able to access to the submissions from the Judiciary CTS. Thus, the Honourable Court reserved the 9th June, 2025 as the date for the delivery of the Ruling accordingly.

V. Analysis and Determination

6. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the parties herein. In order to arrive at an informed decision, the Honorable Court has framed the following two [2] issues for its determination.

    a. Whether the Notice of Motion dated 2nd September, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Who will bear the Costs of Notice of Motion application 2nd September, 2024.

ISSUE No. a). Whether the Notice of Motion dated 2nd September, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

7. Under this sub–title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

    Order 40, Rule 1

    Where in any suit it is proved by affidavit or otherwise—

    a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

    b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

8. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of "Giella v Cassman Brown & Company Limited [1973) EA 358", where it was stated: -

    > " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

9. The three conditions set out in "Giella [supra]", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of "Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR":-

    > " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited v Afraha Education

Society [2001] Vol. 1 EA 86. 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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

10. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case "MRAO Limited v First American Bank of Kenya Limited & 2 others [2003] KLR 125" of: -,

> " So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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"

11. As the Court previously observed in this ruling, the Applicant stated that parcel in dispute was his property courtesy of inheritance and thus was supposed to be registered in her name. She had filed a case in Kwale Environment and Land Court, case No. E005 of 2024 seeking to establish the ownership of the suit property. The parcels Kwale/Kigato 1414, 827 and 1423 had been wrongfully registered in the names of the Defendant. Her property was part of the parcels of land that was among the once seized under compulsory acquisition for the construction of Mwache Dame, and it was currently in the hands of the Government. She had not been compensated and there had not been any contact with her because the Defendant displaced her from the suit parcel of land. She was aware, courtesy of the engagement with National Land Commission that they had issued awards for persons including the Defendant.

12. In the case of "Mbuthia v Jimba Credit Corporation Limited 988 KLR 1", the Court held that:-

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

13. Similarly, in the case of "Edwin Kamau Muniu v Barclays Bank of Kenya Limited" the Court held that:-

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

14. In the present case, it is clear that the Plaintiff feel threatened by the actions of the Defendant, who according to the Plaintiff she had not been compensated and there had not been any contact with her because the Defendant displaced her from the suit parcel of land. Regarding this first condition though, the Plaintiff has demonstrated a prima facie case with a probability of successat the trial as enunciated in the case of "Giella v Cassman Brown & Co. Ltd [Supra]".

15. The court has further considered the annextures on record against the second principle for the grant of an injunction, that is, whether the Plaintiff might suffer irreparable injury which cannot be adequately

compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in "Nguruman Limited [supra]", held that:-

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

16. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants' property is under risk of being wasted. The judicial decision of "Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR" provides an explanation for what is meant by irreparable injury and it states:-

> " 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."

17. Quite clearly, the Applicant would not be able to be compensated through damages being that this was their home. The Applicant has therefore satisfied the second condition as laid down in "Giella's case".

18. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo v Frank Kimeli Tenai [Supra]" which 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".

19. In the case of "Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

> " 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."

20. The balance of convenience tilts in the favour of the Applicantwho will be prejudiced if the Respondent was to be compensated on the suit property before the suit herein is heard and determined on merit. The decision of "Amir Suleiman v Amboseli Resort Limited [2004] eKLR" where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated; -

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

21. The balance of convenience lies with the Plaintiff in this case. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

22. In the case of:- "Robert Mugo wa Karanja v Ecobank [Kenya] Limited & Another [2019] eKLR" where the court in deciding on an injunction application stated:-

> " 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..."

23. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I strongly find that the Plaintiff has met the criteria for grant of orders of temporary injunction.

24. On the issue of joinder of the interested party; the Application and the suit herein has just been instituted, the Applicant does not need lead to join the Interested Party.

ISSUE c). Who will bear the Costs of Notice of Motion application 2nd September, 2024.

25. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 [1] of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri v Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied

Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

26. I have well stated in previous precedence and most especially in "Sagalla Lodge Limited v Samwuel Mazera Mwamunga & another [Suing as the Executors of Eliud Timothy Mwamunga – Deceased] [2022] eKLR", that:

> " 58. The Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

The provisions of Section 27 [1] of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021."

27. The provision of Section 27 [1] of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of "Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs in the cause.

VI. Conclusion and Disposition

28. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Plaintiff/ Applicant has a case against the Defendant/ Respondent.

29. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated 2nd September, 2024 be and is hereby found to have merit and is allowed with regards to prayer 1 and 2.

    b. That an order of Temporary injunction do issue that the Respondent and the intended interested party, or their agents from actualizing compensation regarding parcels Kwale Chigato 1423, 1414,827, or any actions on selling, leasing or constructing under the suit property, pending the hearing and determination of the suit case.

    c. Mention on 29th July, 2025 and hearing on 11th Nove

    d. That the cost of the Notice of Motion application dated 2nd September, 2024 shall be in the cause.

30. It Is so ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 9TH DAY OF JUNE 2025.

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT, KWALE

Ruling delivered in the presence of:

Mr. Daniel Disii, the Court Assistant.

Mr. Adika Advocate for the Plaintiff.

Mr. Mkan Advocate for the Defendant.