



**Gatimu v Mukinya (Land Case E009 of 2025) [2025] KEELC 4941 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4941 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA**

**LAND CASE E009 OF 2025**

**JM KAMAU, J**

**JULY 3, 2025**

**BETWEEN**

**JANE GATHIGIA GATIMU ..... PLAINTIFF**

**AND**

**DUNCAN PAUL MUKINYA ..... DEFENDANT**

**RULING**

1. Before his Honourable Court is an Application dated 6<sup>th</sup> March 2025 brought by way of Notice of Motion seeking for Orders:
  1. Spent.
  2. That the status quo prevailing as at 28<sup>th</sup> January 2025 in respect of Titles No. NyandaruaNdemi4188 & 4188 & 4578 being subdivisions of L.R NO. NyandaruaNdemi860 be maintained by both parties pending the hearing and determination of the instant application inter-partes.
  3. That there be a temporary injunction restraining the Plaintiff from entering, remaining, cultivating, demolishing fences and other developments on Titles No. NyandaruaNdemi4188 & 4578 pending the hearing and determination of the instant application inter-partes.
  4. That the temporary injunction restraining the Plaintiff from entering remaining, cultivating, demolishing fences and other developments on Titles No. NyandaruaNdemi4188 & 4578 pending the hearing and determination of instant suit.
  5. That the OCS Kipiriri Police Station to ensure compliance with the court orders herein.
  6. That costs of the application be provided for.
2. The Application is supported by the affidavit of the Defendant Applicant and is based on the grounds that he is the registered proprietor of Title No. NyandaruaNdemi4188 and 4578



which are subdivisions of Title No. NyandaruaNdemi860, which originally adjoined Title No. NyandaruaNdemi570, before subdivision.

3. In the year 2012, the Plaintiff filed a boundary dispute with the Land Registrar, complaining that the DefendantApplicant had encroached onto her land parcel Title No. NyandaruaNdemi570.
4. After the hearing of the said boundary dispute, the Land Registrar in a Ruling dated 10<sup>th</sup> December 2012 concluded that the dispute was a land claim and not a boundary dispute, and therefore advised the parties to move to court for its determination.
5. Instead of moving to court according to the Land Registrar's advice the Plaintiff Appealed to the Chief Land Registrar, who proceeded to hear the Plaintiff to the exclusion of the DefendantApplicant and gave a Ruling dated 10<sup>th</sup> February 2017.
6. Being dissatisfied with the aforesaid Ruling, the DefendantApplicant filed Nyahururu ELC JR No.9 of 2017 to quash the Ruling, which the said Court dismissed on 26<sup>th</sup> April 2018.
7. The DefendantApplicant then appealed against the Decision of the Nyahururu Court vide Court of Appeal at Nakuru Civil Appeal No.52 of 2018.
8. During the pendency of the above stated Appeal, the Plaintiff instituted this suit together with an Interlocutory Application seeking restraining orders against the DefendantApplicant for interfering with his quiet possession of Land Title NyandaruaNdemi570. The said Application was dismissed by this Court on 18<sup>th</sup> February 2019 for being res subjudice and the proceedings herein were stayed pending hearing and determination of Nakuru C.A Civil Appeal No.52 of 2018 and parties were ordered to maintain status quo.
9. Being dissatisfied with the said Ruling, the Plaintiff proceeded to file Nakuru C.A Civil Appeal 23 of 2019.
10. Subsequently, the DefendantApplicant deposed that both Appeals in Nakuru were compromised by both parties' Counsel on record on 28<sup>th</sup> January 2025, that parties will be appear before the ELC Judge for determination on whether the issue is a boundary dispute or a land dispute as they maintain peaceful occupation of their parcels of land and refrain from alienating or subdividing any of the suit land parcels. The said consent order is attached to the Supporting Affidavit of the Applicant.
11. The DefendantApplicant deposes that the Plaintiff in the company of hired goons has gone ahead to enter into the land parcels No. NyandaruaNdemi4188 and 4578, uprooting the perimeter fence that separates the Defendant's said parcels with hers, proceeding to plough on the Defendants' land.
13. The DefendantApplicant is apprehensive that unless the orders sought are granted, the substratum of the instant suit shall be completely destroyed, thereby defeating the orders given by the Court of Appeal in the two Appeals aforesaid.
14. The instant Application was scheduled for hearing inter-partes on 26<sup>th</sup> March 2025, but there was no appearance from the PlaintiffRespondent.
15. The DefendantApplicant filed a supplementary Affidavit sworn on 21<sup>st</sup> March 2025. Therein, he deposes that the instant Application was served upon the PlaintiffApplicant as well as the court's direction thereof, but on 20<sup>th</sup> March 2025, the Plaintiff again entered his land parcels with goons and destroyed the perimeter fence without any court order or lawful excuse.



16. The DefendantApplicant deposed that the said entry and destruction is clearly intended to alter the substratum of the suit so that the Plaintiff can continue using his land parcel in the pendency of the suit should status quo be ordered, which will be a clear contravention of the Court of Appeal order.
17. The DefendantApplicant therefore prays that the Court issue interim orders in terms of prayers 3 and 5 of the instant Application, to halt the wanton destruction of her property in the suit premises.
18. Further, it is deposed that the PlaintiffRespondent has threatened to demolish her permanent house erected on the portion claimed by her, without any court order, which will render her destitute.
19. The DefendantApplicant filed written submissions to the instant application, noting that the PlaintiffRespondent has not filed a response to the same. Counsel quoted Order 40[1] of the Civil Procedure Rules on circumstances when an injunction may be granted. Counsel also placed reliance on the authority of JM v SMK & 4 others[2022]eKLR where Justice Odunga made reference to well known case law on principles to guide the Court whether or not to grant an interlocutory injunction.
20. It is the Applicant's submission that they have established a prima facie case that his property is being invaded by the Plaintiff and has demonstrated the irreparable injury he will suffer if the orders are not granted, stating that the Plaintiff has altered the locus in such a manner that it will not be possible to tell where the boundary has been it the court were to visit a few months down the line. Counsel further submitted that the balance of convenience lies in the defendantapplicant's favour.
21. On costs, it was submitted that they ordinarily follow the event, noting that the instant application was necessitated by the Plaintiff's actions, and that it is only just and fair that the orders be granted with costs to be borne by the Plaintiff. It is his further prayer that given the combative nature of the Plaintiff, he prays that the O.C.S Kipipiri be ordered to ensure the Plaintiff's compliance with court orders to be issued.
22. Having considered the Application, Affidavits and submissions, I am of the opinion that the following issues beg for determination: -
  - a. Whether the PlaintiffApplicant's Application has met the threshold for grant of injunction established in Giella v Cassman Brown.
  - b. What orders should the court make?
  - c. Who shall bear the costs of the Application?
23. The DefendantApplicant prays for status quo prevailing as at 28<sup>th</sup> January 2025 in respect of the suit titles and a temporary injunction restraining the Plaintiff from entering into and interfering with her parcels of Land, Title Nos. NyandaruaNdemi4188 and 4578, pending the hearing and determination of the instant suit.
24. In order to be granted an injunction by the Court, the principles were well set out in the case of Giella v Cassman Brown & Company Limited [1973] E A 358, where the court expressed itself thus:-

“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 adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”



25. On prima facie case, the DefendantApplicant has established a prima facie case with a probability of success by establishing that there is an ongoing dispute between the parties herein, which has gone up to the Court of Appeal at Nakuru. Regarding whether the Defendantapplicant has established that he has a right that needs protection, he has failed to attach copies of the Titles to land parcels No. NyandaruaNdemi4188 and 4578, that he claims he is the registered owner of. The ownership rights and the nature of the dispute matter can only be ascertained during the full hearing.
26. In the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:
- “In *Habib Bank AGZurichv Eugene Marion Yakub*,CA No.43 Of1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:
- “Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”
27. The same caution was repeated in *National Bank Of Kenya v Duncan Owour Shakali & Another*, CA No. 9 of 1997 when Omolo JA stated:
- “The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”
28. Yet again in *AGIP [K] LTD v Vora*[2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:
- “With reference to ground 19 of the Appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit.” [Emphasis added].”
29. Since we are at the interlocutory stage and the parties cannot yet fully prove the claim, it would be in the best interest of justice to preserve the property until the final hearing and determination of the matter.
30. As to whether the PlaintiffApplicant stands to suffer irreparable injury incapable of being compensated by Damages. The tort of trespass is grave enough to cause irreparable injury if it turned out that the 1<sup>st</sup> DefendantRespondent is trespassing on the Applicant’s parcel of land.
31. In *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR[Supra] it was held as follows by Warsame, J[as he then was ]
- “...that damages is not an automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to



refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

Odunga J in the case of JM v SMK & 4 others [2022] eKLR relied upon by the DefendantApplicant cited with approval the authority of Ringera, J [as he then was] in Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd. Nairobi [Milimani] HCCC No. 360 of 2001:

The remedy of injunction is one of the greatest equitable reliefs. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

32. Since the DefendantApplicant’s ownership of land parcels No. NyandaruaNdemi4188 and 4578 has not been disputed, my view is that there is prima facie proof in his application that he stands to suffer irreparable harm if the said injunction is not granted.
33. Having considered the above, the balance of convenience tilts in the favour of the DefendantApplicant.
34. The parties herein before the Court of Appeal sitting at Nakuru entered a consent on 28<sup>th</sup> January 2025 in no uncertain terms that they will appear before this Court for determination of the dispute, that they will enjoy peaceful occupation of their respective portions of land but will not undertake any action such as subdivision or transfer pending the said determination.
35. This Court must respect and uphold the consent orders of the superior court. I am therefore of the view that the same orders be reiterated herein, with the inclusion of an injunctive order against the PlaintiffRespondent to refrain from entering and interfering with land parcels No. NyandaruaNdemi4188 and 4578 pending the hearing and determination of this suit. The OCS Kipiripiri is hereby ordered to oversee that these orders are adhered to. Costs ordinarily follow the event and the costs of this Application will be in course.

**RULING DATED AND DELIVERED AT NYANDARUA THIS 3RD DAY OF JULY 2025.**

**HON. MUGO KAMAU**

**JUDGE.**

In the presence of: -

Court Assistant –Samson.

Plaintiff’s Counsel - NA.

Defendant’s Counsel – Ms Ndegwa.

