



REPUBLIC OF KENYA



**Delta Connections Limited v Deche (Environment & Land Case
16 of 2019) [2024] KEELC 339 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2019
FM NJOROGE, J
FEBRUARY 1, 2024**

BETWEEN

DELTA CONNECTIONS LIMITED PLAINTIFF

AND

ALFRED MWARINGA DECHE DEFENDANT

RULING

1. By a notice of motion application dated September 22, 2023, the defendant/applicant sought orders that: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the plaintiffs, its agents, proxies, servants or assigns from trespassing on, accessing, alienating, subdividing, undertaking survey or related activities thereof, selling, disposing off, marketing or advertising or offering for sale, cultivating, destroying, damaging, dealing, interfering with portion of land known as Plot Number 42, 43 67 Group No.1 Takaungu.
 - d. That service of the orders issued be effected upon the land registrar- Mombasa and the District Land Surveyor Kilifi/Mombasa county and the OCS Kijipwa Police Station to ensure compliance.
 - e. That the costs of this application be provided for.
2. The notice of motion was based on the grounds on the face of the application and the supporting affidavit sworn by the defendant on September 22, 2023. The defendant deposed that the issue in dispute in this case is ownership of the said Plot Number 42, 43 66 And 67 Group No 1 Takaungu (the



suit property) which he is in actual possession thereof; that the plaintiff has invaded the suit property causing destruction of vegetation, digging of trenches, carrying out of survey and subdivisions thereon and advertising the same for sale without any color of right; that due to the plaintiff's actions, he has been unable to enjoy quiet possession. The defendant was apprehensive that if an injunction is not granted against the plaintiff, he will be rendered homeless together with his entire family.

3. The plaintiff opposed the application. It filed grounds of opposition dated October 9, 2023 and a Replying Affidavit sworn by the plaintiff's director Moses Waweru Ndung'u on the even date. The said Mr Ndung'u deposed that the defendant is only in occupation of a portion of the suit property being 0.5 acres of plot no. 67 while the plaintiff is in possession of the remainder which is duly fenced. He contested that the fence complained of has been in existence for several years and the said trenches were dug over 2 years ago by the contractors of the Mombasa-Malindi highway. Mr Ndung'u averred that the plaintiff is the registered owner of the suit property and since the defendant's claim was anchored on adverse possession, the plaintiff has every right to develop its property.
4. In rebuttal, the defendant filed a further affidavit on October 23, 2023 which I have carefully considered.
5. The court directed that the application be canvassed by way of written submissions. The defendant filed submissions on November 21, 2023 while the plaintiff did so on 23/1/24.
6. Counsel for the defendant submitted that the law on granting temporary injunctions is found under order 40 rule 1 (a) and (b) of the *Civil Procedure Rules*, 2010 and the conditions established in the case of *Giella v Cassman Brown Co. Ltd* [1973] EA 360; that firstly, an applicant must establish a prima facie case with probability of success as was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR. He argued that since the defendant has shown that his entire family is in occupation of the suit property, he has effectively established a prima facie case and that the balance of convenience tilts in his favour.
7. He added that as a person in active use and occupation of the suit property which is his home, the defendant is faced with irreparable loss and damage by the plaintiff's actions. Counsel relied on the cases of *Paul Gitonga Wanjau v Gatbuti Tea Factory Co. Ltd & 2 others* [2016] eKLR and ELC at Siaya, *Charles Otieno Gem & another v Nicholas Omondi Jura & 3 others*.
8. The plaintiff in his submissions urged that the defendant's application is premised on the claim that his father is the bona fide owner of the property and that the plaintiff has illegally invaded the property and committed waste thereon which claim is denied by the plaintiff who refers to a certificate of postal search and avers that it has been farming thereon for a lengthy period without seeking the permission of the defendant or any other person. In addition, the plaintiff avers that it has not interfered with the small portion of about half an acre which the defendant occupies and that the defendant has however destroyed a portion of the plaintiff's wood fence.
9. The plaintiff submits that the principles in *Giella vs Cassman Brown* have not been satisfied and that the defendant is guilty of material non-disclosure and deliberate concealment and distortion of facts to mislead the court which disentitles him to equitable remedies. He avers that the surveyors' report marked as annexure "MWN 1" and the defendant further amended defence seeking a declaration of ownership of only the occupied portion. Further the plaintiff draws the court attention to document no 2 in the defendant's list of documents, the proceedings of the Land Disputes Tribunal as showing that the defendant's father purchased trees and only occupied a small portion of land which the tribunal requested the registered owner to transfer to the defendant's father. Those are the facts alleged to have been concealed by the defendant. Citing *Aloy's Kaveen Chepkwony v Alice Holtensiah Githu* 2012 eKLR the plaintiff submitted that an interlocutory injunction is an equitable as well as a



discretionary remedy and so on the basis of lack of candour on the part of the defendant, the application ought to fail. The plaintiff avers that the defendant occupies the portion of the land illegally though he admits that he has not interfered with that small portion and that it is content with waiting for the hearing and determination of the case which the defendant has not controverted.

10. Regarding irreparable loss, the plaintiff avers that the farming activities complained of by the defendant have been ongoing for a very long time and that the fence was erected long ago which developments are reflected by the surveyor's report which includes photographic evidence marked as annexures "AMD3" and "AMD4" to the supporting affidavit. On the other hand, the photograph attached to the replying affidavit of the plaintiff show stalks of a maize crops that has already been harvested by the plaintiff and a part of the fence destroyed by the defendant. He avers that the order of the injunction sought if granted will give license to the defendant to interfere with the plaintiff's farming activity and will occasion the latter irreparable damage. He also adds that the balance of convenience tilts in favour of the plaintiff as a registered owner of the suit property as the defendant is a squatter with no legal rights capable of protection through equitable remedies. The plaintiff points out that it came to court in 2019 without evicting the defendant using extra judicial means. It avers that it will suffer more if the order of injunction were granted.

Analysis And Determination

11. I have read the application, affidavit in support of the application, replying affidavit, further affidavit and their accompanying annexures. I have also considered the submissions filed and also taken into consideration the judicial decisions cited. The first issue for determination is whether the defendant/applicant has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.
12. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* [*supra*]. This position has been reiterated in numerous decisions in our courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 [2014] eKLR where the Court of Appeal held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

13. As such, the defendant ought to, firstly, establish a prima facie case. The defendant/applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd* [*supra*] in which the Court of Appeal gave a description of a prima facie case. The court stated that: -

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



14. The defendant/applicant attached copies of photographs in support of his allegations. The plaintiff does not also deny that the defendant/applicant resides within the suit property.
15. Secondly, the applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, the court provided an explanation for what is meant by irreparable injury as follows: -

“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.”
16. The defendant/applicant was apprehensive that he might be rendered homeless due to the alleged actions of the plaintiff. The defendant’s claim against the plaintiff is anchored on adverse possession, meaning he is in occupation of the suit property. The plaintiff contests that the defendant and his family are only in occupation of barely 0.5 acres of the entire suit property and that there is no basis to stop the plaintiff from dealing with the entire suit property.
17. The plaintiff’s averment is a clear indication that it intends to deal with the suit property. In *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR the court stated as follows:

“Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires 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 grant a temporary injunction to restrain such acts...”
18. However, it is claimed in the plaintiff’s affidavit evidence that it has been in possession of the suit land for long and that there are features such as fence and continuing agricultural activities to prove this. In the defendant’s further affidavit responding to these claims the defendant avers that the plaintiff’s actions are “recent and ongoing”. This is already an admission that the plaintiff is utilizing the land. The defendant further admits that his father had filed suit and failed to establish his claim in respect of the same suit land in a case in Mombasa, to wit, Msa HCCC No 161 of 1997. He also admits that the plaintiff has in the past levelled accusations against him with the police in connection with his occupation of the suit land.
19. It is correct that it is the plaintiff who approached this court for relief on 9/4/2019 claiming that it is the registered owner of the suit property and that the defendant had trespassed thereon thus interfering with its rights. The claim even at that time was that the defendant occupied only a small portion of the suit property, and was inviting other squatters to the suit land. It stated that there are other persons farming on the suit land with its permission. It sought orders of eviction against the defendant.
20. Though it is admitted that the defendant is in occupation of a portion of the land, it is also admitted by the defendant that the plaintiff is also carrying on activities on the suit land. The plaintiff has attached an expert report to his replying affidavit which puts the size of the area occupied by the defendant as approximately 0.83 acres. There have been allegations and counter allegations of interference from both sides but I hardly think that the defendant has persuaded this court that the plaintiff who has come to this court for justice is inclined to evict the defendant before the termination of the present suit and perchance he does so prior to the termination of this litigation it would be an issue in these very



proceedings. Similarly, the defendant would not be allowed to do anything that changes the status quo before the suit is finalized. The obvious fact is that the defendant must be in occupation of a portion of the suit land, but there are a number of other vital factual issues to be established by way of hearing in the present suit and care should be taken so that substantive issues are not tried with a semblance of finality at this interlocutory stage. In any event I listened to both counsel urging an order of status quo on 12/10/23 when the matter first came before me.

21. Consequently, bearing in mind the sensitivity of the dispute herein, I am convinced that there is a lower risk in ordering that the parties do maintain the present status quo of the land pending the hearing of the the suit on its merits than in issuing any other order of injunction or otherwise as sought by the defendant. I therefore order that all parties shall maintain the present status quo of the suit land pending the hearing and determination of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 1ST DAY OF FEBRUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

