



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC 29 OF 2020**

**PATRICK THUO KAGWI.....1<sup>ST</sup> APPLICANT**

**JOHN KARINA MUCHAI.....2<sup>ND</sup> APPLICANT**

**DANIEL THUMBI MWANGI.....3<sup>RD</sup> APPLICANT**

**JANE BETTY NYAMBURA MACHARIA.....4<sup>TH</sup> APPLICANT**

**CHRISTOPHER MWANGIE GITAU.....5<sup>TH</sup> APPLICANT**

**JOSEPH NJENDU KIMANI.....6<sup>TH</sup> APPLICANT**

**VS**

**KENYA RAILWAY AUTHORITY.....RESPONDENT**

**RULING**

1. The Plaintiffs have brought the application against the Defendant named Kenya Railway Authority. The Defendant has refuted the said name and contend that its correct name is Kenya Railways Corporation. I can discern from the replying affidavit and the submissions of the Defendant that notwithstanding the incorrect name that it has been described, it has proceeded to respond to the application as Kenya Railways Corporation without any ambiguity. In the interest of justice and guided by Article 159(2) (b) of the Constitution that mandates this Court to look into the substance of the case, I shall therefore proceed to determine the application as though the application read the Kenya Railways Corporation.

2. This is a ruling in respect of the Plaintiffs' Application dated 23/10/. In it the Plaintiffs/Applicants sought for the following orders;

a. Spent.

b. Spent.

c. That pending hearing and determination of this suit a temporary injunction do issue restraining the Defendant/Respondent by itself and/or its agents, servants or any other person or entity claiming authority from the Defendant/Respondent from the continued act of trespass, and encroachment by way of fencing and demolition of homes and structures developed on the area marked for fencing by the Defendant/Respondent that affects among others the Plaintiffs' parcel of land numbers LOC 11/MARAGI/8425; LOC 11/MARAGI/10202 (registered for subdivision into 11141-11156); LOC 11/MARAGI/9223; LOC 11/MARAGI/9029; LOC 11/MARAGI/1153 and LOC 11/MARAGI/9222 or in any way whatsoever physically interfering with the current status of the said parcels of land.

d. That any other or further orders do issue as the Court may deem fit and just.

e. That the costs of this Application be provided for.

3. The Application is supported by the Affidavit of Patrick Thuo Kagwi dated 23/10/2020 and the Grounds on the face of the Application that the Applicants are the registered owners of the said parcels of land which the Respondent has been digging holes and erecting concrete poles to put up a fence hence the instant Application.

4. On his own behalf and of the rest of the Applicants, Patrick Thuo Kagwi deponed that they are the registered owners of the parcels of land in question and annexed various documents in support including copies of Title Deed, mutation forms, land certificate and applications for

official search. He averred that the Respondent entered and trespassed on their parcels of land and marked for demolition all the houses and structures thereon and is now in the process of erecting a fence around the suit land.

5. He added that in an effort to amicably settle the dispute with the Respondent, the Applicants wrote to the Murang'a District Surveyor vide a letter dated 18/6/2020 and received by the Respondent on 29/09/2020 with a view of seeking advice on the extent of boundaries of the suit property to no avail.

6. That the District Surveyor responded and advised on the existing boundaries based on the Survey Plan demarcating the suit land as privately owned but the Respondent has in blatant disregard of the same, proceeded to trespass and erected poles for fencing the land with the intention of unlawfully acquiring the same.

7. That in view of the forgoing the Applicants are apprehensive that the Respondent's actions will render them destitute and homeless and therefore it is in the interests of justice that the Respondent be restrained from further interference until the final determination of the suit.

8. The Application is vehemently opposed by the Assistant Legal Manager of the Respondent, Stanley Gitari sworn on 3/11/2020.

9. He averred that the Applicants' Application is ill-conceived and a waste of the Court's time and pointed out that the sued Defendant is a distinct entity altogether and therefore a stranger to the suit. He added that the suit properties fall within the sixty (60) meters Railway reserve and blamed the Applicants for otherwise encroaching and grabbing Kenya Railways Corporation land.

10. He further posited that it is puzzling why the Applicants sought redress in Court in October for an alleged trespass that occurred three months earlier. He also disputes the alleged period of occupation being subdivisions done in 2013 as opposed to the year 1963 claimed by the Applicants in the Grounds of the Notice of Motion.

11. The Respondent also raised the issue of misjoinder of the Plaintiffs/Applicants for diverse reasons e.g. separate acquisition of titles, diverse rights and duties to various parcels of land, location of the disputed land and want of proof of current ownership. In totality the Respondent prayed that the Application be dismissed with costs but extended an invitation to the Honorable Court to visit the site and ascertain the actual position on the ground.

12. On 30/11/2020, directions were taken to canvass the Application by way of written submissions.

13. I have perused the file and note that the Applicants did **not** file their submissions whereas the Respondent filed written submissions dated 8/07/2021.

14. The Respondent has submitted that the Applicants have failed to prove their case to justify the injunctive orders in line with the principles set out in the celebrated case of **Giella v Cassman Brown Co. Ltd (1973) E.A 358**. It is contended that the Applicants have not demonstrated how they stand to suffer any loss or damage in the event that the prayers sought are declined especially because they have not quantified the said loss/damage.

15. In its place, the Respondent argues that grave injustice would be meted on the public who rely on the Nairobi – Nanyuki railway line for its rightful use against the Applicants' illegal occupation of the disputed land should the Application be allowed. In support of the submissions, the following cases were cited **Charity Njeri Kanyua v Trevor Kent [2016] eKLR**, **Naftali Ruthi Kinyua v Patrick Thuita Gichure & another [2015] eKLR** and **Pius Kipchirchir Kago v Frank Kimeli Tenai [2018] eKLR**.

16. In my view, main issue for determination is whether the Court should grant temporary injunction on the suit property pending hearing and determination of the main suit.

17. The Application is premised on Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The legal provision for temporary injunction is found in Order 40 Rule 1 of the Civil Procedure Rules which provides; -

a. '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,

b. 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."

18. As rightly submitted by the Respondent, the relevant principles that guide the Court in considering an application for temporary injunction were laid down in the leading case of **Giella vs Cassman Brown (1973) EA 358**. In the said case the Court stated that the Court needs to consider three principles. First, that an Applicant has to establish a prima facie case with a probability of success, secondly that an injunction will not normally be granted if damages can be a sufficient remedy, and thirdly, if in doubt decide the matter on a balance of probabilities.

19. Before delving into the above principles, it is paramount to define what a prima facie case is. The Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya & 2 Others [2003] eKLR**, Bosire JA observed that; -

(a) “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 will 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”

20. In a nutshell, the Applicants’ case is that the Respondent has trespassed into their land by earmarking the suit land and digging poles for fencing and interfering with their otherwise peaceful and legal occupation as averred in their Supporting Affidavit. Various annexures were attached thereto including Title deeds, land certificates, mutation forms and applications for official search. Photos of the impugned earmarks, poles for erecting a fence and correspondences between the Applicants and District Surveyor to determine the extent of boundaries suit were also attached.

21. On the first limb of the principles set out in the case of **Giella (supra)** the Applicants have deponed that the actions of the Respondent, if not stopped, will lead to demolition of their homes and other structures thereon and eventually render them and their families destitute and homeless.

22. According to the Title Deeds provided in Court the Plaintiffs are registered as owners of the suit land for various periods of time. Section 24 and 25 of the Land Registration Act provides protections to registered proprietors of land. The argument posed by the Respondent that the Applicants have not demonstrated occupation or ownership of the suit land for over 60 years is neither here nor there at this preliminary stage. The Court is not tending to the merits of the suit in the main but whether the Applicants have a prima facie case with a chance of success. I hold that they do.

23. Secondly, I am required to analyze whether damages would be a sufficient remedy in case an injunction is not granted. As stated earlier, the central issue here is the occupation of land by legitimate owners on the face of the Application. In the event that they are evicted before determination of the suit and rendered homeless, damages may not be an adequate remedy in the long run.

24. The last standard calls the Court to decide the matter on a balance of convenience if in doubt. From the first two tests above, it is my view that the Court is not in doubt in light of the present Application. The balance tilts in the Court granting the application.

25. The Respondent challenged the lapse of time before the Applicants filed this suit. I am not persuaded that a period of three months since the alleged cause of action arose, is a long time to impute bad faith or malice on the part of the Applicants. Further there is evidence of correspondence between the Applicants and District Surveyor before filing of suit that was geared to establish actual boundaries.

26. Moreover, before directions were taken in respect of this Application, there was an indication by Counsel of the rival side on attempted out of Court settlement that never saw the light of day.

27. In the end, the application is merited. It is granted in terms of prayer b) of the Application as follows;

a. That pending hearing and determination of this suit a temporary injunction do issue restraining the Defendant/Respondent by itself and/or its agents, servants or any other person or entity claiming authority from the Defendant/Respondent from the continued act of trespass, and encroachment by way of fencing and demolition of homes and structures developed on the area marked for fencing by the Defendant/Respondent that affects among others the Plaintiffs’ parcel of land numbers LOC 11/MARAGI/8425; LOC 11/MARAGI/10202 (registered for subdivision into 11141-11156); LOC 11/MARAGI/9223; LOC 11/MARAGI/9029; LOC 11/MARAGI/1153 and LOC 11/MARAGI/9222 or in any way whatsoever physically interfering with the current status of the said parcels of land.

b. The costs of the application shall be borne by the Respondent.

28. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 4<sup>TH</sup> DAY OF MARCH 2021.**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

**Ms Gachango HB for Ngugi for the 1<sup>st</sup> – 6<sup>th</sup> Applicants**

**Ms Kariithi for the Respondent**

**Court Assistants: Kuyiki & Njeri**