



**Mungai v Ongaro & another (Environment & Land Case  
E269 of 2021) [2023] KEELC 872 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 872 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E269 OF 2021**

**J OMANGE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**FRANCIS GACHANJA MUNGAI ..... PLAINTIFF**

**AND**

**CLIFFORD NYAKOE ONGARO ..... 1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The subject matter of this suit is the Parcel of Land known as Nairobi Block 105/4471 (the Suit Property).
2. Before this Court is the Plaintiff's Amended Notice of Motion Application dated February 16, 2022 seeking the following reliefs:
  - a. Spent.
  - b. That this Honourable Court be pleased to issue an injunction restraining the Defendants herein, their servants, employees and or agents from trespassing, constructing, entering, damaging, wasting, and/ or interfering in whatsoever manner with the Plaintiff's Parcel of land known as Plot No. P4910 now LR No, Nairobi Block 105/4471 pending the hearing and determination of the Application;
  - c. That this Honourable Court be pleased to issue an injunction restraining the Defendants herein, their servants, employees and or agents from trespassing, constructing, entering, damaging, wasting, and/ or interfering in whatsoever manner with the Plaintiff's Parcel of land known as Plot No. P4910 now LR



No, Nairobi Block 105/4471 pending the hearing and determination of the suit;

- d. That the 2<sup>nd</sup> Defendant be compelled by an order of this Court to identify and allocate the Plaintiff's bonus parcel of land on the ground.
  - e. That an order be issued to the OCS Ruai Police Station to enforce compliance of the orders 2 & 3 herein
  - f. That the costs of this Application be provided for.
3. The Application is based on the grounds inter alia that the Plaintiff, though the owner of the suit property, the 1<sup>st</sup> Defendant with the 2<sup>nd</sup> Defendant's assistance has encroached the suit property with the intention to unlawfully evict him therefrom, and that the 1<sup>st</sup> Defendant has erected a perimeter wall around the suit property, thus in the process of constructing a permanent structure.
  4. The Application is supported by the Plaintiff's Affidavit sworn on 16<sup>th</sup> February 2022 wherein he deponed that in the year 1991, he purchased shares from the 2<sup>nd</sup> Defendant and was issued with a Share certificate number 13533, which entitled him to one Parcel of land from the Plot Number P4910 which was allotted to him, together with a bonus plot to be allocated to him.
  5. According to the Plaintiff, he paid all the fees required to purchase the said parcel of land including for the site visit, but the 2<sup>nd</sup> Defendant failed to allocate the Property to him.
  6. The Plaintiff deponed that by a letter dated 19<sup>th</sup> October 2020 addressed to the Principal Secretary of Lands and Physical Planning by the 2<sup>nd</sup> Defendant, it was confirmed that the suit property belonged to him.
  7. It is the Plaintiff's deposition that despite having no legal claim on the suit property, the 1<sup>st</sup> Defendant has trespassed and constructed a Perimeter wall, and is in the process of constructing a permanent structure. Consequently, he cannot access the Property.
  8. To support his deposition, the Plaintiff attached as exhibit- a copy of the Share Certificate issued by the 2<sup>nd</sup> Defendant, a map, copies of receipts issued on 23<sup>rd</sup> September 1991, 27<sup>th</sup> August 1993 and 19<sup>th</sup> March 2015 by the 2<sup>nd</sup> Defendant. The Plaintiff also relied on the 2<sup>nd</sup> Defendant's letter dated 19<sup>th</sup> October 2020 as well as copies of Photographs of the suit property.
  9. This matter was filed by way of Certificate of Urgency, which came up before my sister; Lady Justice Komingoi who on 23<sup>rd</sup> July 2021 directed the Plaintiffs to serve the Defendants, who were then required to file and serve responses within 21 days. The matter was therefore listed for further directions on 18<sup>th</sup> October 2022.
  10. Thereafter the matter came up before this Honourable Court on various dates, I note from the record that sometimes in November 2021, the Defendants appointed the firm of Mang'era and Gwaro Advocates.
  11. Subsequently, on 18<sup>th</sup> February 2022, this Court directed the Plaintiff to serve his amended Application upon the Defendants, with further directions that they file their responses within 21 days. The Defendants did not file any response, neither did they honour any notices issued by the Plaintiff.
  12. There was no participation by the Defendants by filing responses or attending Court, either by themselves directly or by Counsel. Suffice it to say, despite being served with the subject Application and notices of the Court dates, the Defendants did not file any response. Consequently, the Application proceeded for hearing unopposed.



13. Prior to considering the merits of the Plaintiff's Application, this Court must be satisfied that the Defendants were given adequate notice of these proceedings and that they have thereby been given a reasonable opportunity to file their responses.
14. The Plaintiff, filed Affidavits of service to prove service upon the Defendants. I have seen in the Court record, the affidavits of Jacob Kinyili Joseph sworn on 17<sup>th</sup> March 2021, 6<sup>th</sup> April 2022, 17<sup>th</sup> October 2022, 30 November 2022 and 2<sup>nd</sup> December 2021 where he deponed that he served both the Defendants directly, or through their Counsel on record on diverse dates.
15. The Defendants were aware that these proceedings had been filed against them. They appointed Advocates who proceeded to include this matter into their firm's e filing profiles, but failed to file any responses.
16. The Defendants were given an opportunity to participate in the subject application but they did not. When the Application was served upon them and their Advocates, they did not file a response, neither did they attend Court. Service is proved by an Affidavit of service sworn by a duly authorized Court process server or an Advocate of the High Court.
17. Looking at the Affidavits of service filed by the Plaintiff, I am satisfied that the Defendants were duly served with the Application and were afforded sufficient opportunity to file responses, though they chose not to.
18. Nevertheless, this Court, in the interest of justice, is still minded to consider the application on merits. It is certainly not proper that an application be allowed simply because the Defendants did not attend court. In my considered opinion, if this application, or any other, was to be allowed, the court should only grant reliefs on the basis of merit, as opposed to the absence of opposition.

### **Submissions**

19. The Application was canvassed by written submissions. The Plaintiff filed written submissions dated July 22, 2022 in support of the Application. The Plaintiff submits that he has established a prima facie case with the possibility of success against the Defendants.
20. The Plaintiff submitted that having tendered documents to show that the 2<sup>nd</sup> Defendant sold him the suit property and that the 1<sup>st</sup> Defendant had trespassed by erecting the permanent structures on it. He submitted that he had discharged the burden of proof on a burden of probabilities.
21. I have considered the Plaintiff's application, the affidavit, exhibits, the submissions and the authorities cited. The Application primarily seeks interlocutory injunction against the Defendants.

### **Analysis**

22. The law on granting interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the [\*Civil Procedure Rules\*](#) as follows:-

“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 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.”

23. The principles for grant of injunction are well settled by the well known case of *Giella Vs Cassman Brown & Company Limited* [1973] E.A. 358., where the court stated 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.”

24. In this case, the Plaintiff has demonstrated that he purchased the suit property by paying for allotment of shares in the 2<sup>nd</sup> Defendant from as early as the year 1991, and since then, he has not been granted the full benefit of the suit property. That despite confirming that the Plaintiff is the owner of the suit property as per their records, the 2<sup>nd</sup> Defendant have not made any effort to have the Plaintiff secure his interest on the property.

25. I note that the 1<sup>st</sup> Defendant is not a registered owner of the suit property, nothing has been shown to prove his entitlement to the suit property to warrant his action of erecting a permanent structure therein. The 2<sup>nd</sup> Defendant has confirmed that the suit property belongs to the Plaintiff per their records. I therefore find no reason to deny the Plaintiff the right to his property. On this basis, this Court is persuaded that the Plaintiff has established a prima facie case with a probability of success.

26. The second limb is on the concept of irreparable injury. In order to prove that the Plaintiff risks suffering irreparable injury, he must demonstrate that the injury cannot be compensated adequately by an award of damages. In the case of *Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai* [2018] eKLR, the court sated 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.”

27. In this case, all the Plaintiff has cited is that he bought the suit property and has not managed to access it. He has not demonstrated that his injury cannot be remedied by damages. After all, he bought the suit property for value, which value, if quantified in the present day, he may be compensated.

28. However, the fact that a situation can easily be remedied by an award of damages is not a precursor to impunity. In the case of *Said Almed vs. Mannasseh Benga & Another* [2019] eKLR the court held that:

“Where it is clear that the defendant’s act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it”



29. In this matter, the Plaintiff has accused the 1<sup>st</sup> Defendant of trespass into the suit property, attached photographic evidence of the impugned action, despite the Plaintiff holding actual ownership documents to the property.
30. It is my view that if the injunction is not issued, the 1<sup>st</sup> Defendant may continue with construction which may damage or waste the suit property, eventually rendering the suit nugatory. Therefore, I hold that unless the injunction is granted, the Applicant shall suffer irreparable injury that may not be adequately compensated by way of damages.
31. Regarding the prayer for use of the police to effect the court order I find that it would be premature to involve the police at this stage as some of the prayers sought by the applicant can only be determined during the hearing of the main suit.
32. The upshot of the foregoing is that the Plaintiff's Amended Application has merit, and is allowed in the following terms:-
  - a. That an injunction do issue restraining the Defendants herein, their servants, employees and or agents from constructing, damaging, wasting, and/ or interfering with the Parcel of land known as Plot No. P4910 now LR No, Nairobi Block 105/4471 pending the hearing and determination of the suit;
  - b. That the remaining prayers to await the hearing of the main suit
  - c. The costs of this Application shall abide the outcome of the main suit.

**Dated, signed and delivered Via Microsoft Teams this 2<sup>nd</sup> day of February 2023.**

**Judy Omenge**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff

No appearance for the Defendants

Steve - Court Assistant

