



**Wambua (Suing as the Legal Representative of the Estate of Wilson Wambua Muthiani) v Wanjohi (Official Liquidator) Drumvale Farmers Co-operative Society Ltd & another (Environment and Land Appeal E009 of 2021) [2023] KEELC 813 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 813 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E009 OF 2021  
OA ANGOTE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**JAPHETH SHEM MUTHIANI WAMBUA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILSON WAMBUA MUTHIANI) ..... APPELLANT**

**AND**

**PETER WANJOHI (OFFICIAL LIQUIDATOR) DRUMVALE FARMERS CO-OPERATIVE SOCIETY LTD ..... 1<sup>ST</sup> RESPONDENT  
LAND REGISTRAR, NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant, through an application dated February 25, 2021, has sought the following reliefs from this court:
  - i. That pending the hearing and determination of the appeal, an order of injunction be issued restraining the Respondents herein, their servants, agents, and or employees or whomsoever is acting on their behalf from transferring, selling, taking possession of, leasing, charging, registering, construction of structures or interfering with the frontage of the appellant/applicant's property being LR No Nairobi/ Block 118/1646.
  - ii. Costs of this application be provided for.
2. The grounds of the application, as set out on the face of the application and the Supporting Affidavit sworn by the Appellant, are that in 1995, the deceased purchased LR No Nairobi/ Block 118/1646 which has an open space that is the only entry to the land and that the 1<sup>st</sup> Respondent has illegally grabbed and subdivided the land, and erected beacons in front of the Applicant's premises in accordance with an unapproved map which shows that the Applicant's entry has been blocked.



3. The Plaintiff deposed that the open space is for parking which the 1<sup>st</sup> Respondent, after twenty-five years, is claiming to be a market; that if the orders sought are not granted, the appeal will be rendered nugatory and that the Appellant will suffer as there will be no access to their land and their commercial building.
4. The 1<sup>st</sup> Respondent filed Grounds of Opposition in which it averred that the application lacks merit as it is an attempt by the Applicant, who lost at the lower court, to try his luck once more and that no evidence has been adduced to show that substantive loss may result unless the order is made.
5. It was deposed by the Respondent that while the Appellant/Applicant is the owner of LR No Nairobi/Block 118/1646, LR No Nairobi/Block 118/1640 belongs to the Members of Drumvale Farmers Co-operative Society Ltd in liquidation and has its own boundaries and parking area and has been reserved as marketplace for the members' interests.
6. In his submissions, the Appellant, through his Counsel, relied on the test set out in the case of *Giella vs Cassman Brown & Co Ltd* (1973) EA for injunctive orders.
7. The Appellant's counsel submitted that the Appellant has a prima facie case since the frontage/open space of his property has been converted for parking; that the 1<sup>st</sup> Respondent has not produced evidence to show that LR No Nairobi/Block 118/1640 is registered in the name of Drumvale Farmers Cooperative Society and that the 1<sup>st</sup> Respondent's acts are illegal as the open space is not allocated a number in the original map of 1995.
8. It was counsel's submission that the map that the 1<sup>st</sup> Respondent is relying on is not approved; that there is no entry of LR No Nairobi/Block 118/1646 and that following the Ruling by Hon. Gicheha dated January 29, 2021, the 1<sup>st</sup> Respondent may sale or develop the frontage or parking of LR No Nairobi/Block 118/1/1646.
9. The Appellant's counsel submitted that the 1<sup>st</sup> Respondent's intentions are malicious, and that the Applicant will suffer loss since the development on LR Nairobi/Block 118/1646 is commercial and the open space to the commercial building is the only entry to the property. It was submitted that if the 1<sup>st</sup> Respondent is not restrained, the Applicant's customers will not have access to the building and that such loss cannot be compensated monetarily, and the appeal will be rendered nugatory unless the orders are granted.
10. Lastly, counsel for the Plaintiff submitted that the balance of convenience tilts towards the grant of orders sought herein because the suit will be overtaken by events as it will be difficult to evict a third party should the disputed space be sold.
11. The 1<sup>st</sup> Respondent's Counsel submitted that while the Appellant has a legal right to Nairobi/Block 118/1646, he does not have a legal right to LR Nairobi/Block 118/1640; that as the Plaintiff has no legal ownership to the later property, he cannot prove that he has a prima facie case with a probability of success and that having failed to satisfy the first criteria, it is not possible to proceed and examine the other two criteria as set out in *Giella vs Cassman Brown* [1973] EA 358.

### **Analysis and Determination**

12. This application for injunction was filed alongside an appeal against the decision of the Magistrate's court dated January 29, 2021, where the Honourable magistrate declined to grant the Applicant's motion for injunction.



13. The law on grant of interlocutory injunctions is provided for under Order 40 Rule 1 of the [Civil Procedure Rules, 2010](#) which provides 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 the execution if 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.”

14. The celebrated case of *Giella vs Cassman Brown* (1973) EA 358 sets out the essential conditions to be satisfied for a court to issue injunctive orders:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

15. In *Mrao Ltd vs First American Bank of Kenya and 2 Others*, (2003) KLR 125 which was cited with approval in *Moses C Mubia Njoroge & 2 Others vs Jane W Lesaloi and 5 Others*, (2014) eKLR, the Court of Appeal defined a prima facie case as: -

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16. It is not disputed that Japheth Shem Muthiani Wambua is the legal representative of the estate of Wilson Wambua Muthiani(deceased). It is also not disputed that the late Wilson Wambua Muthiani is the registered owner of LR No Nairobi/ Block 118/1646.
17. It is the Applicant’s case in the lower court that the suit property has an open space which is the only entry to the land; that he has used the open space as a parking area for more than twenty-five years; that the 1<sup>st</sup> Respondent has illegally subdivided the open space and erected beacons in front of his premises, and that if not restrained, the 1<sup>st</sup> Respondent will block the entry to his premises.
18. In support of his claim, the Applicant produced a copy of the unapproved plan by the 1<sup>st</sup> Respondent which he asserts shows that the Applicant has been blocked entry into his property as JSMW4. He also annexed a copy of the approved map dated April 13, 1995 marked JSMW5, in which the disputed frontage of the Applicant’s property does not have a parcel number.



19. When the learned magistrate heard the application for injunction, she dismissed it on the ground that the Appellant had not established a prima facie case with chances of success. According to the learned magistrate, the plot in dispute belonged to the 1<sup>st</sup> Respondent, and the 1<sup>st</sup> Respondent could not be enjoined from using.
20. I have perused the Location Plan that was approved on April 15, 1995. It is clear from the approved subdivision map marked JSMW5 as well as from the unapproved map that the disputed property is not within the Applicant's property, parcel number Nairobi/ Block 118/1646. What is then apparent is that the Applicant, who does not own the disputed area, has informally enjoyed a right of way through the said land.
21. The Applicant has failed to show that the right of way or easement was created in respect of the 1<sup>st</sup> Respondent's land in accordance with Section 143 and 145 of the Land Act, which provides that a communal right of way can only be created upon application. The Applicant has also failed to present evidence to show that other than the space he is claiming, he has no other way of accessing his land parcel number Nairobi/ Block 118/1646.
22. However, it remains unclear whether the disputed area belongs to the 1<sup>st</sup> Respondent or was surrendered to the public as open space. In that respect, it is only prudent for this court to issue orders to preserve the status quo pending hearing and determination of the suit in the lower court.
23. This so because the 1<sup>st</sup> Respondent may dispose of the disputed parcel of land to a third party when the issue of ownership and use is pending hearing and determination.
24. In the circumstances, the Appellant's application dated February 25, 2021 is partially allowed as follows:
  - i. An order be and is hereby issued maintaining the prevailing status quo in respect of the disputed parcel of land in front of the Plaintiff's property LR No Nairobi Block 118/1646 pending the hearing and determination of the appeal.
  - ii. Pursuant to the status quo order herein, the 1<sup>st</sup> Respondent is prohibited from selling, transferring, charging, constructing, blocking, placing beacons or in any other manner alienating or disposing of the said parcel of land.
  - iii. Costs to be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Wachekana for 1<sup>st</sup> Respondent

No appearance for Appellant

**Court Assistant - June**

