



**Kirui & another v Wanyoike; Lonrho Agribusiness East Africa Limited & 5 others (Third party)
(Environment & Land Case 658 of 2012) [2023] KEELC 16114 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 658 OF 2012
JM ONYANGO, J
MARCH 14, 2023
(FORMERLY HCCC NO. 157 OF 2010)**

BETWEEN

ESTHER JELIMO KIRUI 1ST PLAINTIFF

SALLY JEPKOSGEI KIBET 2ND PLAINTIFF

AND

MURIGI WANYOIKE DEFENDANT

AND

LONRHO AGRIBUSINESS EAST AFRICA LIMITED THIRD PARTY

JOSEPH OUMA RASOWO THIRD PARTY

LUKE LUDEYE VICHETI THIRD PARTY

PHILIP RABURU THIRD PARTY

JILINDE SELF HELP GROUP THIRD PARTY

MARGARET MUHONJA MAHUGU THIRD PARTY

RULING

1. This ruling is in respect of the Notice of Motion dated November 30, 2022 filed by the Defendant seeking an order of injunction to restrain the Plaintiffs, their servants, agents and/or other persons acting under their authority from cutting, harvesting or destroying trees and other vegetation situated on the parcel of land known as Pioneer/Ngeria (EATEC) Block 1/662 or otherwise entering or interfering with the suit land pending the hearing of the main suit.



2. The application is based on the grounds set out on the face of the Notice of Motion, which are expounded in the defendant's supporting affidavit sworn on the November 30, 2022.
3. In the grounds in support of the application it is stated that there is pending for determination before this court, the issue of ownership of the suit property which is claimed by the plaintiffs and the defendant. In his supporting affidavit, the defendant deposes that since August 5, 2011 there have been orders whose effect was to maintain the status quo herein pending the hearing and determination of the main suit. He avers that the said orders never gave any party a blank cheque to do as they please on the suit land or allow the Plaintiff to waste the land or harvest and dispose of trees and other vegetation thereon. However, on the night of 11th November, 2022 he went to the site and found men loading logs of the harvested trees onto a lorry and when he confronted them they gave him the number of the person who had sent them. The defendant later found out that the person behind the felling of the trees was one Musa Kimurgong who is the husband of the plaintiffs. On inquiring from him why he was harvesting the trees, he stated that he was doing so in order to recover costs ordered in Eldoret HC Judicial Review Application No. 38 Of 2011.
4. The defendant avers that he reported the matter to Kiambaa Police Station but the illegal harvesting of trees has continued. He contends that he is the one who planted the said trees well before the dispute over ownership of the suit property arose and he stands to suffer irreparable loss if the plaintiffs are not stopped from harvesting the trees.
5. In response to the application, the 1st Plaintiff filed a replying affidavit on her own behalf and on behalf of the 2nd Plaintiff sworn on the December 7, 2022. She avers that the defendant has no *prima facie* case with a probability of success as his Defence and Counterclaim were struck out on the November 13, 2019 and no appeal has been lodged against the decision. She has annexed a copy of the ruling striking out the Defence.
6. She further deposes that the plaintiffs are the sole absolute proprietors of land parcel No. Pioneer/Ngeria (EATEC) Block 1/662 as per the annexed certificate of official search. She adds that on 5th August, 2011 the court issued an injunction restraining the defendant from interfering with the plaintiff's interest in the suit property. The Defendant's application to discharge the ex-parte injunction was dismissed and the defendant has never appealed against the ruling granting the injunction.
7. The 1st Plaintiff avers that the Defendant has no title to the suit land and Musa Kimurgong who is alleged to be responsible for the harvesting of the trees is not a party to this suit and therefore an injunction cannot be issued against him as it would amount to condemning him unheard. She dismisses the defendant's claim that the trees are being harvested to recover costs in a related Judicial Review Application as execution in the said matter is proceeding by way of a Notice to Show Cause why the defendant should not be committed to civil jail. She adds that that the trees being harvested belong to the plaintiffs and they cannot cut them to satisfy costs ordered against the defendant.
8. The plaintiffs contend that the defendant has failed to demonstrate that he stands to suffer irreparable harm if the injunction is not granted and that the balance of convenience does not tilt in his favour.
9. Upon being served with the Replying Affidavit the Defendant filed a Supplementary Affidavit sworn on December 22, 2022 where he reiterated the contents of his supporting affidavit. He deposes that he is a bona fide purchaser as he bought the suit property in the year 2000 and his claim is superior to the plaintiff's claim. He has attached a copy of the sale agreement. He maintains that the court did not give the plaintiffs a lantern light to cut down trees on the suit land but the order was meant to maintain the status quo which has since been breached.



10. The court directed that the application be canvassed by way of written submissions and the Defendant filed his submissions but the Plaintiffs opted not to file any submissions and chose to rely of their Replying affidavit.
11. The singular issue for determination is whether the Defendant is entitled to an order of injunction.
12. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of *Giella V Cassman Brown & Company Ltd* 1973 EA 358 which are as follows:

“First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

In the case of *Mrao V First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated as follows:

“A *prima facie* case is one 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”

13. The first issue I have to determine is whether the defendant has established that he has a *prima facie* case with a probability of success. It is not in dispute that the suit property is currently registered in the name of the Plaintiffs. The defendant filed a defence challenging the validity of the plaintiffs’ title and alleged that the said title was acquired fraudulently. He prayed for cancellation of the plaintiff’s title and rectification of the register in respect of land parcel No. Pioneer/Ngeria (EATEC) Block 1/662.
14. By their application dated November 4, 2010, the plaintiffs sought an injunction to restrain the defendant from interfering the suit property pending the hearing of the main suit. In its ruling dated 5th August, 2011, the court issued an order of injunction against the defendant after satisfying itself that the plaintiffs had met the conditions for injunction. The said order is still in place. The defendant has neither appealed nor sought to have the said orders varied or set aside. Instead, he has now come to court seeking similar orders against the plaintiffs on the grounds that they are harvesting trees that were planted by the defendant on the suit property. Although the issue regarding ownership of the suit property and the trees thereon cannot be determined at this interlocutory stage the court in its ruling on the plaintiff’s application for injunction observed as follows:

“The plaintiffs in my view and so I find on a *prima facie* basis hold a valid title to the suit land. That title to my mind is superior to the defendant’s interest. It is trite that where there are competing interests over title, the interest of the registered proprietor should be protected as against the interests of other claimants.”

In the circumstances, the plaintiff has failed to establish a *prima facie* case with a probability of success.

15. Having stumbled on first hurdle, there is no need to delve into the issue as whether the defendant has demonstrated that he would suffer irreparable loss or whether the balance of convenience tilts in his favour.
16. The other reason that makes it difficult for the court to grant the injunction is that the application is not anchored on the defendant’s Defence and Counterclaim. It is trite law that an injunction cannot



be granted in a vacuum. In the case of *Ernest Mwangi Waigi v National Bank of Kenya Ltd* the Court held as follows:

“ A perusal of the plaint reveals that the plaintiff is primarily challenging the lawfulness of the defendant’s exercise of its statutory power of sale. However, he never included any prayer in the plaint to that effect. In my view and as correctly pointed out by Maina Wachira, the plaintiff should at least have included a prayer for a declaratory order seeking that this court declares the defendant’s intended exercise of its statutory power of sale to be unlawful. In the absence of such prayer, the plaintiff’s prayer for a permanent injunction has no legs to stand on. Prayers for injunction cannot exist in a vacuum”.

Similarly, in the case of *Kileleshwa Service Station v Kenya Shell Limited* (2008) eKLR the Court of Appeal observed that since, the application for injunction was extraneous to the orders of the superior court, it was misconceived.

17. In have carefully considered the pleadings, the application, rival submissions, relevant authorities and the law and on the material placed before me I am unable exercise my discretion in favour of the defendant. It my finding that the application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 14TH DAY OF MARCH 2023

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J.M ONYANGO

JUDGE

