



**Ndungu v Wanjiku & 3 others (Environment & Land Case
E371 of 2022) [2023] KEELC 16132 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E371 OF 2022**

JA MOGENI, J

MARCH 9, 2023

BETWEEN

**CLEMENT STEPHEN NDUNGU WANYOIKE ALIAS DANIEL K.
KIBIRIO PETITIONER**

AND

**JOEL WANYOIKE WANJIKU 1ST RESPONDENT
AGNES WANJIKU NYOIKE 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
THE HON. ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. Before this Court for determination is a Notice of motion dated September 8, 2022 brought pursuant to order 40 rule 1 (a), order 51 rule 1 of the *Civil Procedure Rules*, Section 1A, 1B and 3A of the *Civil Procedure Act*, article 10 of the *Constitution of Kenya*, order 5 rule 17 (1), Section 3 (1) of the *Trespass Act* and all other enabling provisions of the law. The Applicant seeks the following orders:
 1. Spent.
 2. Spent.
 3. That pending the inter-parties hearing and determination of this application, a temporary injunction do issue restraining the 1st and 2nd Respondent, their agents and/or employees or otherwise howsoever, from advertising for sale, trespassing, selling, transferring, occupying, leasing, disposing, alienating or otherwise interfering with the Applicant's parcel of land known as title No LOC.11 / Gaitega/213.



4. That the cost of this application be in cause.
 5. Any other remedy that this Honourable Court may deem fit and just at this interim stage.
2. The Application was supported on the grounds stated in paragraph (1) – (5) on the face of the Application, the annexed affidavit sworn on September 8, 2022 by Clement Stephen Ndungu Wanyoike, the Applicant herein. I do not need to reproduce them here.
 3. The Application is not opposed. The Applicant served this Application upon the Defendants on November 21, 2022 and filed a return of service on November 23, 2022. When the matter came up for directions on 7/12/2022, the Court directed that counsel for the 1st and 2nd Respondents, Mr. Matu regularizes his appearance and filed his response to the application within 7 days. The same was not done.
 4. The Court gave directions on filing of written submissions and a Ruling date was reserved. By the time of writing this Ruling, no party had filed written submissions.
 5. I in turn have had time to analyze the emerging issues therein. The instant Application relates to the grant of temporary injunctive relief pending the hearing and determination of this application.
 6. The substantive law on this matter is Order 40 Rule 1(a) of the [Civil Procedure Rules 2010](#) which provides:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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.”
 7. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a *prima facie* case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who’s favour the balance of convenience tilted. These principles were established in [Giella vs. Cassman Brown & Co. Ltd](#) supra.
 8. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in [Nguruman Ltd v. Jan Bonde Nielsen & 2 Others](#), [2014] eKLR observed that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

 - a. establish his case only at a *prima facie* level,
 - b. demonstrate 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.



9. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a *prima facie* case. A *prima facie* case was defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, where Bosire, JA stated as follows:

“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.”

10. The Court of Appeal deliberating what amounted to a *prima facie* case in *Nguruman* (supra) made the following comments:-

“We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

11. Now that the school of judicial thought I ought to abide is clearly established, I now shift to consider the circumstances of the instant application. I am also aware that in considering the application I should tread carefully to ensure that I do not by any chance delve into the intricacies of the case as that is a preserve of the substantive suit.
12. In my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the application, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.
13. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavit, it is the view of the court that the applicant has established a *prima facie* case with a probability of success against the Respondents. As regards irreparable damage, I take the view that should the injunction not be granted the substratum of this case will be destroyed and the plaintiff/applicant will suffer irreparable loss which may not be quantified in damages. The balance of convenience if I had doubt, would tilt in favor of the plaintiff/applicant in order to safeguard the current status quo of the subject matter of the application pending hearing and determination.
14. Arising from all the above, I find merit in the application. Accordingly, I allow the Notice of Motion dated September 8, 2022 in terms of prayer 3 and 4.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 9th Day MARCH 2022.

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MOGENI J



JUDGE

