



REPUBLIC OF KENYA



Tonui & another v Sigei & 2 others (Environment and Land Case Civil Suit E022 of 2022) [2023] KEELC 18520 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE CIVIL SUIT E022 OF 2022**

MC OUNDO, J

JULY 6, 2023

BETWEEN

JULIUS KIPKEMOI TONU I 1ST PLAINTIFF

JOHN KIPNGETICH ROP 2ND PLAINTIFF

AND

LILY SIGEI 1ST DEFENDANT

EMANUEL SIGEI 2ND DEFENDANT

DOREEN SIGEI 3RD DEFENDANT

RULING

1. By Plaintiff dated 6th December 2022, the Plaintiffs herein had sought for the following orders.
 - i. A permanent injunction barring the Defendants, their servants and/or agents from trespassing, fencing of, erecting any building or structure or in any way interfering with the public access road leading to land reference numbers Kericho/Kapsuer 6802/4749/1728/1529/2719 & 4748.
 - ii. Damages for trespass
 - iii. Specific damages for loss of income over the Plaintiffs' properties.
 - iv. Cost of the suit including interest on (ii) (iii) and (iv) above.
 - v. Such further orders as may be expedient in the interest of justice.
2. Alongside the Plaintiff, the Plaintiffs had also sought in a Notice of Motion under Certificate of Urgency, interim orders seeking an injunction against the Defendants, for reason that they had blocked the access road leading to the property and other adjacent properties by erecting a fence and blocking the road



thereby denying the Plaintiffs, the public and the owners of the other properties from accessing their properties. They had also sought that the OCS Nyagacho Police Station do supervise the compliance of the interim orders.

3. On the 24th January 2023, the court directed the Defendants to file a response to the application seeking interim Orders wherein upon service the Defendants had filed a Preliminary Objection dated 21st February 2023 to the effect that the Plaintiffs had no locus standi to institute the suit against them as parcel No. Kericho/Kapsuser/ 1529 was registered to John Kaila who passed away in the year 2002 and the Plaintiffs were not legal representatives to his estate. That the suit was fatally defective and ought to be struck out.
4. On the 23rd February 2023, by consent parties received directions to dispose of both the applications by way of written submissions wherein the Plaintiff filed their written submissions dated 20th March 2022 to the effect that they were the registered proprietors of all that property known as Land Reference Number Kericho/Kapsuser 6802 and 4749 situate in Kipchebor Ward Kericho County. That the Defendants had blocked the access road leading to the property and other adjacent properties by erecting a fence and blocking the road thereby denying them, the public and the owners of the properties from accessing their properties. That they had also threatened to unleash violence on them. That the Police had been reluctant to enforce the law against the Defendants.
5. That in support of the allegations, they had they had annexed a survey map and a National Land Commission report as proof that there existed a public access road leading to their properties which road the Defendants had fenced off without any right. It was their submission that they had proved a prima facie case to warrant the orders sought.
6. On the issue of the Preliminary Objection raised by the Defendant, it was Plaintiffs' submission that the Defendants had been sued in their personal capacity as persons who had denied them access to the public road which was also indicated in the National Land Commission report. That the said road did not form part of the property known as Kericho/ Kapsuser/1529 and the suit did not in any way involve any right over the said property, but that of an access road adjacent to the property. That the Preliminary Objection should therefore be dismissed.

Defendants' written submissions.

7. The Defendants' submission was to the effect that the court must determine whether their objection qualified to be a Preliminary Objection as was described in the case of *Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited* 1969 EA 696.
8. They then framed their issues for determination as follows;
 - i. Whether the Plaintiffs have no locus standi to institute this suit against the Defendants.
 - ii. Whether the Plaintiffs are entitled to the reliefs sought.
9. The Defendants then proceeded to submit that there was no competent suit before the court that could go to full trial as Plaintiffs were neither legal representatives and/or administrators of the estate of the deceased John Kalia who died in 2002 and who was the proprietor of the parcel of land L/R No. Kericho/Kapsuser/1529. That as such, the instant suit was a non-starter since the court could not issue orders on the property which was not registered in the name of a party.
10. That the Plaintiffs came to court with unclean hands seeking an injunction barring the Defendants, their servants and or agents from trespassing, fencing of, erecting any building or structure or in any way interfering with the public access road leading to land reference numbers Kericho/



Kapsuser/6802/4749/1728/1529/2719 & 4748 purporting that parcels number 6802 and 4749 belonged to them whereas parcel numbers Kericho/Kapsuser/1529 belonged to the late John Kalis. That the Plaintiffs had also not established the ownership of the parcels No's. Kericho/Kapsuser/1728, 2719 and 4748 and it was not also clear whether they were the owners of parcels No's 6802 and 4749.

11. Reliance was placed on the decision by the Court of Appeal in the case of *Alfred Njau & 5 others vs. City Council of Nairobi* [1983] eKLR to elaborate on the definition of locus standi and to submit that the Plaintiffs had no locus standi or capacity to institute the current suit and therefore the same was incompetent and should be struck out.
12. On the application filed by the Plaintiffs seeking interim orders of injunction against them, the Defendants' submissions were to the effect that the main issue for determination was whether the Plaintiffs had made out a case for the granting of orders of temporary injunction. The Defendants relied on the provisions of Order 40(1) (a) and (b) of the *Civil Procedure Rules* and the decision in the celebrated case of *Giella vs. Cassman Brown & Company Limited* (1973) EA 358, to submit that before granting an injunction, the court must establish that there was a prima facie case, that damages were not an adequate remedy and that the balance of convenience lay in favour of granting or refusing the application.
13. That in this case, the Plaintiffs had not disclosed the ownership of the parcel no's Kericho/Kapsuser/6802 /4749 /1728/1529/2719 & 4748 but had just sought for an injunction barring the Defendants from trespassing, fencing of, erecting any building or structure or in any way with interfering with the public access road leading to land referenced parcel numbers, without disclosure of material facts and without enforceable rights on the said parcels of land. That this was not a court case to issue injunctive orders the Plaintiffs not having established the ownership of the impugned parcels of land. The application and the entire suit ought to be struck out with costs.

Determination

14. I have considered both the application for interim orders as well as the Preliminary Objection raised thereto. I have also considered the submissions the relevant law and authorities herein cited and the fact that the court shall not issue orders in vain. The need to preserve the status quo in favour of a client during the tenancy of a suit has ensured the proficiency and popularity of temporary injunctions as one of the interlocutory orders afforded by the modern civil procedure rules. Temporary injunctions come in handy in diverse situations not least in land matters when the suit property has to be preserved either from transfer, encroachment or even demolishing.
15. The often cited case of *Giella vs. Cassman Brown & Company Limited* (1973) EA 358 is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.
16. The rights of a proprietor to land are set out in Section 25 of the *Land Registration Act*, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and



shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

17. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship Section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

18. The Defendants have argued that the Plaintiffs cannot bring suit against them or seek interim orders against them as they have not established proprietorship to the impugned parcels of land being Kericho/Kapsuser/6802 /4749 /1728/1529/2719 & 4748 and rightly so. And it is in this relation that I find that they have not established prima facie that they have any enforceable rights. It is not enough that they should purport to seek an injunction against the Defendants on allegation that they have blocked an access road when they have not even joined the relevant authorities to the suit.

19. A Prima facie case having not been established, I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella vs cassman Brown Ltd* case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of *Kenya Commercial Finance Co. Ltd vs Afraba Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of [*Joseph Wambua Mulusya vs David Kitu & Another*](#) (2014) eKLR observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

20. On the second application in relation to the Preliminary Objection raised by the Defendants, it is trite that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily as was in the case of *Mukisa Biscuits Manufacturing Co. Ltd-v- West End Distributors Limited* (1969) EA. 696 wherein it had been stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of



the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

21. The Defendant’s Preliminary Objection is premised on the allegation that the Plaintiffs had no locus standi to sue them (Defendants) in relation to land parcel No. Kericho/Kapsuer/1529 which is registered to John Kaila who passed away in the year 2002. There was however nothing adduced in support of the allegations herein preferred, no death certificate or title deed had been annexed in support and therefore the said allegation has to be established through evidence. This then makes the objection raised fall outside the ambit of what is legally defined as a Preliminary Objection as herein above stated. This line of argument therefore fails.
22. In the end I find that both the applications dated 6th December 2022 seeking interim orders and the Preliminary Objection dated the 21st February 2023 lack merit and I proceed to dismiss them with no orders as to costs.
23. Parties to comply with the provisions of Order 11 of the [Civil Procedure Rules](#) within the next 21 days for the hearing of the main suit herein.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 6TH DAY OF JULY 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

