



Nyakagwa & 6 others v Nyasiongo Tea Factory & 6 others (Environment & Land Case E007 of 2023) [2023] KEELC 20188 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E007 OF 2023
EM WASHE, J
SEPTEMBER 20, 2023**

BETWEEN

**ISSAC MARUIRE NYAKAGWA 1ST PLAINTIFF
COSMA MOSES KIBOMA 2ND PLAINTIFF
THUNATO NYANGITO MAKURU 3RD PLAINTIFF
CHRISTOPHER OBUYA MAGERO 4TH PLAINTIFF
HOLIVER MINACE ANDIKA 5TH PLAINTIFF
PAULINA NYABOKE NYABERI 6TH PLAINTIFF
ELIJAH NYABUTO OKEYO 7TH PLAINTIFF**

AND

**NYASIONGO TEA FACTORY 1ST DEFENDANT
SANGANYI TEA FACTORY 2ND DEFENDANT
NYANKOBA TEA FACTORY 3RD DEFENDANT
KEBIRGO TEA FACTORY 4TH DEFENDANT
TOMBE TEA FACTORY 5TH DEFENDANT
GIANCHORE TEA FACTORY 6TH DEFENDANT
REGISTRAR OF LANDS-KILGORIS 7TH DEFENDANT**

RULING

1. The 1st to 7th Plaintiffs (herein referred to as “The Applicants”) filed a suit against the 1st to 7th Defendants (hereinafter referred to as “The Respondents”) on the 20th of April 2023.



2. Similarly, the Applicants filed an interlocutory application dated 20th April 2023 which is now the subject of this ruling seeking for the following orders;-
 - a. That this Application be certified as urgent and service be dispensed with the purposes of being heard *ex-parte* in the first instance.
 - b. That this Honourable Court be pleased to issue an order of injunction restraining the Defendants/Respondents by themselves, their agents, servants , employees or whosoever from encroaching, entering, trespassing, surveying and demarcating the already established boundaries and erecting beacons, destroying or otherwise and or doing any act prejudicial to enjoying quite possession of the and known as L.R Transmara / Moyoi/ 517,518 , 519, 520, 521, 522, 523, 524 and 585 till this application is heard and determined.
 - c. That this Honourable Court be pleased to issue an order of injunction restraining the Defendants/Respondents by themselves their agents servants , employees or whosoever from encroaching, entering, trespassing, surveying and demarcating the already established boundaries and erecting beacons, destroying or otherwise and or doing any act prejudicial to enjoying quite possession of the and known as L.R Transmara / Moyoi / 517, 518, 519, 520,521 , 522, 523, 524 and 585 till this suit is heard and determined.
 - d. That costs of this Application be provided for.
3. The main grounds in support of the prayers in the present application can be summarised as follows;-
 - i. The Applicants are the duly registered owners of the properties known as Transmara / Moyoi/ 517, 518, 519, 520,521, 522, 523, 524 and 585 (hereinafter referred to as “the suit properties”).
 - ii. The Applicants are in occupation and use of the suit properties are is provided in law to the exclusion of any other party.
 - iii. However, the 1st - 6th Respondents in the company of the 7th Respondents trespassed into the suit properties and started to resurvey, re-demarcate and or re-establish various boundaries thereby interfering with the proprietary rights of the Applicants.
 - iv. Consequently therefore, the Applicants are seeking this Honourable Court to issue an order prohibiting any re-survey, re-demarcation and/or re-establishment of their suit properties until conclusion of this suit.
4. On the other hand, the Respondents have opposed the entire suit by the Applicant by filing a Statement of Defence and Counter-Claim 18th May 2023.
5. As regards the present Application, the Respondents filed a Replying Affidavit sworn on 4th of May 2023 and a Further Replying Affidavit sworn on the 2nd of June 2023.
6. According to the Replying Affidavit and the Further Replying Affidavit filed on behalf of the Respondents, their response to the present Application can be summarised as follows; -
 - i. The Respondents are the registered and beneficial owners of the property known as L.R.Transmara / Moyoi/8 measuring approximately 149 Hectares by virtue of a title deed issued on the 7th June 2013 and an official search undertaken on the 24.03.2023.
 - ii. The acreage and extent of the Respondent’s property was provided for under Registry Map Sheet No. 13.



- iii. Thereafter, the Respondents took possession of the entire property by planting trees and undertaking other commercial activities.
 - iv. However, the Respondents are now apprehensive and/or came to learn that the Applicants herein are registered owners of the suit properties which seem to be within the Respondents acreage or area of occupation.
 - v. It is based on this knowledge that the Respondents sought the assistance of the 7th Respondent to re-establish, re-demarcate and/or re-survey the boundaries of their property known as L.R.No. Transmara / Moyoi/8 thereof.
 - vi. The 1st to 6th Respondents claim that the Applicants titles to the suit property were obtained by fraud and through superimposition on the 1st to 6th Respondent's property known as L.R.Transmara / Moyoi/8 and should therefore be annulled as sought for in the Counter-Claim filed on the 18th of May 2023.
 - vii. The Respondents therefore are of the view that the present Application should be dismissed with costs.
7. The Applicants did not file any replying to the 1st to 6th Respondents Replying Affidavit or the Further Replying Affidavit herein.
 8. Both the Applicants and the 1st to 6th Respondents filed their submissions on the 13th of June 2023 and 7th June 2023 respectively.
 9. The issue for determination at this stage is whether the Applicants are entitled to an order of injunction as sought or not which is the discretion of this Honourable Court.
 10. The Applicants have expressly invoked the provisions of Order 40 Rules 1, 2 and 3 of the [Civil Procedure Rules](#), 2010.
 11. The principles applied by the Kenyan Courts while considering a prayer of injunction were established in the case of *Giella v Cassman Brown* (1973) EA 358.
 12. In the case of [Nguruman Limited v Jan Bonde Nielsen & 2 Others](#) (CA No.77 of 2012 (2014) eKLR, the Court of Appeal again reiterated the three principles of granting an injunction as follows;-

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, if any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
 13. It is from the three broad principles outlined in the two cited authorities that this Honourable Court will proceed to evaluate the merit of the prayers in this present application.

A. Establishment Of A Prima Facie Case.

14. The Applicants herein through the Plaint filed on the 20th of April 2023 have introduced themselves as the registered and beneficial owners of the suit properties herein.



15. The Applicants have produced copies of the individual title deeds of all the suit properties in their names in support of their ownership.
16. It is this individual title deeds to the suit properties that have also been attached to the present application seeking the Honourable Court to grant temporary injunction against the Respondents.
17. The 1st to 6th Respondents on the other hand have challenged the valid and/or legal sanctity of the Applicants title deeds of the suit property.
18. The 1st to 6th Respondents argue that the creation of the Applicants title deeds to the suit property was fraudulent and/or occasioned a superimposition of these titles to the correct and genuine title known as L.R.No.Transmara / Moyoi/8 which is still intact and existing as provided in the official search undertaken on 24.03.2023.
19. Consequently therefore, the Respondents view is that the Applicants have not legal rights and/or ownership in the suit properties capable of being protected and the present application should be dismissed.
20. The Court of Appeal in the case of *Mrao Limited v First American Bank Of Kenyan* (2003) eKLR pronounced itself on the issue of a *prima facie* case as follows

“ ... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
21. An application of the above finding by the Court of Appeal would then require this Honourable Court to indeed establish if the Applicant has an existing legal right in the first place capable of being infringed by the Respondents.
22. According to the evidence by the Applicants, their existing legal rights can clearly be understood to be those contained in the various title deeds attached in their supporting affidavits.
23. The 1st to 6th Respondents in their Counter-Claim dated 18th May 2023 against the Applicants have specifically alleged that the said attached titles deeds were obtained by fraud and thereafter superimposed on their property known as L.R.No.Transmara / Moyoi/8.
24. In essence therefore, the Applicants legal right on the suit properties have been challenged by the 1st to 6th Respondents herein.
25. Section 26 (1) of the *Land Registration Act*, No. 3 of 2012 provides as follows;-

“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 to by all courts to be *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner.....”
26. Section 35(3) of the *Land Registration Act*, No.3 of 2012 further provides as follows; -

“Every entry or not on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.”



27. Referring to these two provisions of the *Land Registration Act*, No. 3 of 2012, the question that begs to be answered is who between the Applicants and the 1st to 6th Respondents have proved their legal rights to the satisfaction of this Honourable Court capable of being infringed?
28. The Applicants admittedly have placed before the Honourable Court their individual title deeds for all the suit properties but failed to present any official Search by the 7th Respondent to conclusively ascertain their rights.
29. On the other hand, the 1st to 6th Respondents not only provided their Certificate of Title but also presented an official search and/or extract of the Register of their property known as L.R.NO. Transmara / Moyoi /8 issued on the 24.03.2023.
30. The Applicants upon service of the 1st to 6th Respondents Replying Affidavit dated 4th May 2023 did not deny or challenge the contents thereof.
31. In conclusion therefore, the Honourable Court is not satisfied that the Applicants have established a *prima facie* case against the Respondents herein from undertaking the exercise of re-establishing, re-demarcating and/or re-surveying their property known as L.R.No.Transmara / Moyoi/8.

B. Irreparable Injury And/or Loss.

32. The second principle to be considered is whether the acts which the Honourable Court is being sought to injunct will cause irreparable injury and loss if the same is not indeed injuncted.
33. In the case of *Pius Kipchirchir Kogov v Frank Kimeli Tenai* (2018) eKLR, the Court of Appeal had this to say about the principle of irreparable injury;-

“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.

34. Applying this principle to the present Application, the Applicants are seeking the prohibition of the 1st to 6th Respondents re-survey, re-establishment and/or re-demarcation of the boundaries relating to the property known as L.R.No.Transmara / Moyoi/8.
35. The reason is that this re-survey, re-establishment and/or re-demarcation of L.R.NO. Transmara / Moyoi/8 would interfere with the quite enjoyment and/or possession of the suit properties belonging to the Applicants.
36. Section 20(1) of the *Land Registration Act*, No. 3 of 2012 provides as follows;-

“Every proprietor of land shall maintain in good order the fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries pursuant to the requirement of any written law.”
37. According to the pleadings in the present application, this was what the 1st to 6th Respondents were seeking to achieve through the offices of the 7th Respondent.
38. So far, the only reason that the Applicants have presented before the Honourable Court is that such an action will interfere with their rights provided in the title deeds of the suit properties.



39. However, in the Honourable Court's considered view, the action by the 1st to 6th Defendants can not cause an irreparable loss or injury to the Applicants as Section 18 of the Land Registration Act, No. 3 of 2012 relating to boundary disputes would come into play and a determination made accordingly.
40. In essence therefore, this Honourable Court is not convinced that the Applicants will suffer irreparable loss and/or injury by the re-establishment, re-survey and/or re-demarcation of the 1st to 6th Respondent's property known as L.R.No.Transmara / Moyoi/8.

C) Balance Of Convenience

41. The last principle is that where the Honourable Court is in doubt of the principle of irreparable loss and/or injury, then it would consider the application on a balance of convenience.
42. However, in the present application, the Honourable Court has made clear determination on the initial two principles and therefore the balance of convenience can only tilt in favour of the Respondents herein.

Conclusion.

43. In conclusion therefore, the Honourable Court is of the view that the Applicants have failed to meet the threshold of granting the temporary injunction sought in the present application and the following orders are hereby pronounced; -
- A. The Notice Of Motion Application Dated 20th April 2023 Be And Is Hereby Dismissed.
 - B. The Interim Orders Issued On The 20th Of April 2023 Be And Are Hereby Set-aside Forthwith.
 - C. The Applicants Will Bear The Costs Of Application.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 20TH OF SEPTEMBER 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of :

Advocates For The Applicants: Maenge

Advocates For The Respondent: Kwamboka H/b For Nyambega

