



Mboi (Suing as a legal representative of the Estate Of Abiud Macharia Chege (Deceased) v Mae (Environment & Land Case 69 of 2022) [2023] KEELC 20779 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 69 OF 2022
LL NAIKUNI, J
OCTOBER 9, 2023**

BETWEEN

**MARY MBOI (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF
ABIUD MACHARIA CHEGE (DECEASED) PLAINTIFF**

AND

CECIL MAE DEFENDANT

RULING

I. Introduction

1. The application before this Honorable Court for hearing and determination is the Notice of Motion dated 23rd June, 2022 brought under a certificate of urgency by the Plaintiff/Applicant. It is brought by the Applicant under the provisions of Sections 1A, 1B and 3A, 63(e) of the *Civil Procedure Act* (Cap 21) and Order 40 Rule 1 and 2, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 40 of *the Constitution* of Kenya.
2. Upon service, the Defendant/Respondent herein filed its replies accordingly in opposition of the said application.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of the suit herein, the Respondent be restrained by orders of injunction, by himself and any other person whomsoever acting under him or at his behest from in any way forcefully



and violently entering, occupying, remaining, erecting structures or in any other way howsoever interfering with land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County.

- d. The Officer Commanding Bamburi Police station (OCS) does ensure compliance with the orders of this Court by the Respondent and all of the Respondent's proxies.
- e. The costs of this Application be provided for.
 - a. The application by the Plaintiff/Applicant is premised on the grounds, facts and testimony on the face of the application and further supported by the 15 paragraphed annexed affidavit of MARY MBOI one of the Plaintiff/Applicant herein. The Plaintiff/Applicant averred that:
 - b. The parcel of land known as land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County was registered in the names of her late husband Abiud Macharia Chege and one David Nguti Gitau (one deceased).
 - c. The Plaintiff/Applicant is the legal representative of the estate of the late Abiud Macharia Chege.
 - d. The Defendant/Respondent's actions of violently entering the aforesaid property assisted by armed goons and chasing away the Plaintiff/Applicant with the intention of taking possession and eventually divesting ownership thereof had not only rendered the Applicant homeless but violated the ownership rights of as enshrined in Article 40 of *the Constitution* of Kenya, 2010.
 - e. The Defendant/Respondent's actions of literally robbing the Plaintiff/Applicant of their land by use of force are not only despicable but unacceptable in a democratic state.
 - f. The Defendant/Respondent had no rights or interests whatsoever over the parcel of land and his action was completely unlawful and uncalled for.
 - g. The Defendant/Respondent appeared undeterred in his actions which were clearly aimed at eventually assuming illegal ownership of the suit property hence call for the intervention of this Honourable Court.
 - h. The Plaintiff/Applicant was apprehensive that unless the Defendant/Respondent was restrained by this Honourable Court, he would not cease his unlawful activities which would occasion the Plaintiff/Applicant loss of their property which loss was irredeemable by way of damages.
 - i. The Plaintiff/Applicant had moved the court without any hesitation hence there had been no delay in bringing this application.
 - j. Unless the Defendant/Respondent was restrained by orders of this Honourable court, the suit property would be totally wasted to the Applicant's detriment.

III. The Defendant/Respondent's case

4. On 28th September, 2022, the Defendant filed 11 paragraphed Replying Affidavit sworn by the CECIL MAE, in opposition of the application where she averred: -



- a. The facts and matters deposed to herein were derived partly from her knowledge and partly from information and advice received by her from her advocates.
- b. The Application was frivolous, vexatious, a witch hunt and an abuse of the court process and that the same should be struck out with costs.
- c. She was a complete stranger to the depositions made by the Plaintiff/Applicant in Paragraph 2 of the Supporting Affidavit.
- d. She was guilty of the acts complained of at Paragraphs 7 and 8 of the supporting affidavit. In any event, the Plaintiff/Applicant had not laid any evidence before this court showing that she was responsible for the said unlawful acts and disturbances.
- e. She confirmed that she lived on the nearby plot known as subdivision No. 11286/I/MN where she had erected a residential home. She was therefore aware that the suit property-subdivision No. 11285/I/MN was occupied by hundreds of squatters.
- f. She was therefore perturbed as to why the Plaintiff/Applicant herein had filed the present claim against her and was seeking the orders in the said application against her and not the occupants of the suit property. Indeed, the said application was a witch hunt engineered by the Plaintiff/Applicant to unlawfully evict the occupants of the suit property.
- g. According, it was his humble view that the Plaintiff/Applicant's interests would be better served by citing and suing the correct people being the occupants of the suit property who in his opinion would be directly affected by the orders sought by the applicant in the said application and Plaintiff herein.
- h. The said application was bereft of any proper basis, and it was therefore fair and in the interests of justice that the said application be peremptorily struck out with costs.

IV. Plaintiff/Applicant's Further Affidavit

5. On 7th November, 2022 the Plaintiff/Applicant herein through a 13th Paragraphed further affidavit dated 4th November, 2022 where she averred that:
 - a. The Defendant/Respondent was a person well known to her having severally had to rebuff his attempts at invading the suit property using armed goons.
 - b. It was not true that the Defendant/Respondent was an innocent neighbour as he wanted the Court to believe. To the contrary, the Respondent is the master mind of the illegal and unlawful entry into her property assisted by armed goons whom he was now hiding behind to make it look like an invasion by squatters, a scheme cleverly hatched to unlawfully acquire her property at the guise of squatters yet these were people assembled by the Defendant/Respondent for his own benefit.
 - c. Indeed, the Defendant/Respondent had been severally been summoned by the Police following her complaints on the subject but always ends up colluding with the police to defeat my claim and at no point did he claim to be an innocent neighbour.
 - d. Following the illegal entry, the Defendant/Respondent had, despite court orders stopping the illegal entry been, undeterred in his activities and has in the process been alternating different people to the property in order to make it difficult for me to pinpoint who exactly is in the property.



- e. The Defendant/Respondent's assertions that her interest would be served if the persons on the property were sued instead was only meant to make it impossible to deal with his unlawful actions given that he kept alternating the people he had been using in the illegal entry in order to defeat the course of justice.
- f. Given that the said persons had been acting at the Defendant/Respondent's behest, and that the Defendant/Respondent had tactfully made it impossible to pinpoint who was who in the property by constantly changing the persons on the property, she truly believed that her cause of action lies against the Defendant/Respondent who was fully responsible for the illegal entry which he had in any event not denied.
- g. It was hardly surprising that the Defendant/Respondent was quick to allege that the persons on her property were squatters which assertions clearly speak to the Respondent's motive whereby the Respondent had invaded her property using goons in a scheme designed to look like its squatters but when in actual sense it's a handful of goons hired by the Defendant/Respondent.
- h. The claim that the persons on her property were squatters numbering in the hundreds was completely false and meant to hoodwink the Honourable Court. The correct position was that the persons were just a handful who keep alternating every now and then at the behest of the Defendant/Respondent whose ultimate intention was to take away her property.

V. Submissions

- 6. On 29th September, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 23rd June, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 10th November, 2022 a ruling date was reserved on Notice by Court accordingly on notice.

A. The Written Submission by the Plaintiff

- 7. On 7th November, 2022 the Plaintiff/Applicant through the firm of Messrs. Muumbi & Co. Advocates filed their submissions dated 4th November, 2022. Mr. Muumbi Advocate commenced the submission by providing a brief introduction and facts to the matter thereof. He stated before the Honourable Court is a notice of motion Application by the Plaintiff/ Applicant dated 23rd June, 2022 wherein the Applicant has sought the following substantive prayer:

“Pending the hearing and determination of the suit herein, the Respondent be restrained by orders of injunction, by himself and any other person whomsoever acting under him or at his behest from in any way forcefully and violently entering, occupying, remaining, erecting structures or in any other way howsoever interfering with land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County.”

- 8. The Learned Counsel submitted that the Application was opposed by the Defendant/Respondent through a Replying Affidavit dated 27th September 2022. The Plaintiff/Applicant also filed a Supplementary Affidavit dated 4th November 2022. The Learned Counsel submitted that the falling for determination was the sole issue of whether the application had met the threshold for grant of orders for injunction. The conditions for grant of an injunction were well settled in our jurisdiction. They are;



- a. The Applicant must establish a prima facie case with a probability of success;
 - b. The Applicant must demonstrate that, if injunction is refused, it stands to suffer harm for which compensation in damages is inadequate remedy;
 - c. The Applicant must demonstrate that the balance of convenience tilts in its favour.
9. In the case of:- “Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR”, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

“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.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

10. In the case of:- “Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR” (cited with approval in “Nguruman Limited (supra)”, the court fashioned a definition for “prima facie case”, in civil cases in the following words:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

11. In the case of:- “Nguruman Limited (supra)” the court in adopting the above holding went on to state:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

12. By her notice of motion, the Supporting Affidavit and the supplementary affidavit thereto, the Plaintiff/Applicant deponed that her late husband Abiud Macharia Chege on whose behalf the suit herein was brought together with one David Nguti Gitau were, prior to their demise, the registered joint owners of lease hold interest in land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County. That by grant of representation issued and confirmed on 20th June, 2018, in Mombasa High Court Succession Cause No. 308 of 2015, the Applicant was appointed the Legal representative of the estate of her late husband late Abiud Macharia Chege but she yet to administer the estate of the deceased. That prior to his demise, the Applicant’s late husband had caused to be



developed on the property, a home comprising in a two-bedroom house, toilet, worker's house, toilet, a well and other amenity ordinarily found in a homestead. Also after the Plaintiff/Applicant's husband's demise in the year 2015, the remains of her late husband were also buried on the property and the Plaintiff/Applicant together with her children and a farm worker, continued living on the property, carrying out activities therein for their sustenance.

13. The Learned Counsel submitted that recently, the Defendant/Respondent assisted by persons armed with machetes/pangas and other crude weapons, forcefully entered the suit property and violently chased the Plaintiff/Applicant away after which the Defendant/Respondent and his goons destroyed the Plaintiff/Applicant's homestead, pulled down the fence erected around the property and stole all valuables on the property. On the same day, the Defendant/Respondent began rapidly putting up illegal structures scattered all over the property and started bringing to the property, persons, whom he alternates every day, to occupy the structures developed on the property by the Defendant. That prior to this, there were no persons other than the Plaintiff/Applicant's family living on the property and no structures existed on the property apart from those belonging to the Plaintiff/Applicant's family. That also prior to this, there were few attempts by the Defendant/Respondent to forcefully enter the suit property which attempts they thwarted, one way or another but the Defendant/Respondent finally came back emboldened and violently took charge of the property. That as a result, the Defendant/Respondent's unlawful actions had been variously reported to the Bamburi Police station and various OB Numbers issued as 45 of 12th May, 2022, 31 of 19th May, 2022 and others that got lost during the violently entry by the Defendant/Respondent yet the police had not been of much assistance for want of court order.
14. By his Replying Affidavit dated 27th September 2022, the Respondent denied the Plaintiff/Applicant's claims, simply stating that he was only a neighbour to the Plaintiff/Applicant residing on land parcel 11285/I/MN where he had put a residential house but never attached any evidence in support of this.
15. The Learned Counsel averred that it was clear from the foregoing that the Plaintiff/Applicant's proprietary rights had been interfered with by the Defendant/Respondent who had been forcefully trespassing onto the Plaintiff/Applicant's property and attempting to erect illegal structures on the said property in blatant violation of the Plaintiff/Applicant's proprietary rights.
16. On the second limb, the court in "Nguruman Limited (supra)" went on to hold:

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."
17. The contention by the Learned Counsel was that failure to grant the above order, would occasion the Applicant to suffer irreparable harm that could not be compensated by way of damages. On this point, he cited the case of: "Samuel Ng'ang'a Kiambuthi v Eric Munene Gitonga & 4 others [2020] eKLR"



L.GACHERU quoted the case of “Niaz Mohammed Janmohammed v Commissioner for Lands & 4 Others [1996] eKLR”, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”

18. The Plaintiff/Applicant’s claim was that the Defendant/Respondent was in the process of forcefully and illegally invading her property using armed goons. That the Defendant/Respondent had not destroyed the Plaintiff/Applicant’s homestead but had been attempting to put up illegal structures on the property. It was not disputable that the nature of the injury to be suffered if the Defendant/Respondent was allowed to carry on with the illegal activities, was one, incapable of compensation by way of damages. The Learned Counsel therefore submitted that the Plaintiff/Applicant had met the second consideration for grant of the orders sought.
19. On whether the balance of convenience tilts in favour of the Plaintiff/Applicant, the Learned Counsel averred that in case the Court was in doubt on the first two considerations; it must arrive at the inevitable conclusion that the balance of convenience must tilt in favour of stopping the Defendant/Respondent from his interferences. As amply demonstrated, the Plaintiff/Applicant had been in uninterrupted the Defendant/Respondent purported to forcefully enter the property with the assistance of armed goons. Indeed, it was not disputed that the Plaintiff/Applicant’s home was on the suit property which is clearly admitted by the Defendant/Respondent when he deponed that he was a neighbor to the Plaintiff/Applicant. However, the Plaintiff/Applicant and her family member were now unable to make use of the property owing to interference by the Defendant/Respondent.
20. As a general rule, in determining the balance of convenience, the court should look at which party would suffer the greater harm with the outcome of the motion. The Learned Counsel argued that the Plaintiff/Applicant, having ownership, use and possession of the said land, the balance of convenience tilted in favour of granting the Application herein as was in the position of the case of:- “Samuel Ng’ang’a Kiambuthi (Supra)”. Further, if the application was allowed, the Defendant/Respondent would not be prejudiced in any way.
21. On the question of who bears the costs of the suit, the Learned Counsel assertion was that it was a cardinal principle in law that costs follow the event. The Plaintiff/Applicant was entitled to costs of the application herein. In conclusion, it was the Learned Counsel’s submissions that the Honourable Court should allow the Application dated 23rd June, 2022.

VI. Analysis and Determination

22. I have carefully read and considered the pleadings herein and written submission made by the parties, the cited authorities by the Learned Counsels, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
23. In order to arrive at an informed, reasonable, just and equitable decision, the Honorable Court has framed the following three (3) issues for determination.
 - a. Whether the Notice of Motion application dated 23rd June, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - b. Whether the parties were entitled to the reliefs sought.



- c. Who will bear the Costs of Notice of Motion application 4th July, 2022.

Issue No. a). Whether the Notice of Motion dated 23rd June, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

24. Under this sub heading the main issue is on granting temporary injunction. The law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides as follows:-

1. 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 of 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.

25. Thus, I must determine whether the Plaintiff/Applicant is entitled to a temporary injunction orders prayed for. In deciding whether to grant the orders or not it is trite law that I should be guided by the well - established principles enunciated in the locus classicus now famous precedent of “Giella v Cassman Brown [1973] E.A.” Page. 358 whose holding is as follows: -

“The condition 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 be normally 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”.

26. The fundamental issue to ponder is whether the Plaintiff/Applicant has made a “Prima facie” case in his case with a probability of success. In the case of “MRAO v First American Bank of Kenya Ltd. & 2 Others [2003] eKLR”, “Prima facie” case was well described as follows:-

“A prima facie case in a civil application includes but not confined to “a genuine and arguable case”, it is a case which, on material presented to the court a tribunal property 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”



27. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR”,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited v Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

28. Out rightly, as shall be demonstrated herein below, the Honorable Court concludes that the Plaintiff/Applicant has succeeded in establishing “Prima facie” case to be considered for the temporary injunction sought. On arriving at that conclusion, the Honourable Court has relied on the decisions of “Kenya Horticultural Exporters Pg. 1977 Limited v Pape 1986 KLR 705”, “Nguruman Limited v Jan Bonde Neilson (supra)”.

29. The Plaintiff/Applicant contended that by her notice of motion, the supporting affidavit and the supplementary affidavit thereto, the Plaintiff/Applicant deponed that her late husband Abiud Macharia Chege on whose behalf the suit herein is brought together with one David Nguti Gitau were, prior to their demise, the registered joint owners of lease hold interest in land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County. That by grant of representation issued and confirmed on 20/6/2018, in Mombasa High Court Succession Cause No. 308 of 2015, the Applicant was appointed the Legal representative of the estate of her late husband late Abiud Macharia Chege but she yet to administer the estate of the deceased. That prior to his demise, the Plaintiff/Applicant’s late husband had caused to be developed on the property, a home comprising in a two-bedroom house, toilet, worker’s house, toilet, a well and other amenity ordinarily found in a homestead. Also after the Plaintiff/Applicant’s husband’s demise in the year 2015, the remains of my late husband were also buried on the property and the Plaintiff/Applicant together with her children and a farm worker, continued living on the property, carrying out activities therein for their sustenance. Recently, the Defendant/Respondent, assisted by persons armed with machetes/pangas and other crude weapons, forcefully entered the suit property and violently chased the Plaintiff/Applicant away after which the Defendant/Respondent and his goons destroyed the Plaintiff/Applicant’s homestead, pulled down the fence erected around the property and stole all valuables on the property. On the same day, the Defendant/Respondent began rapidly putting up illegal structures scattered all over the property and started bringing to the property, persons, whom he alternates every day, to occupy the structures developed on the property by the Defendant/Respondent. That prior to this, there were no persons other than the Plaintiff/Applicant’s family living on the property and no structures existed on the property apart from those belonging to the Plaintiff/Applicant’s family.



30. That also prior to this, there were few attempts by the Defendant/Respondent to forcefully enter the suit property which attempts we thwarted, one way or another but the Defendant/Respondent finally came back emboldened and violently took charge of the property. That as a result, the Defendant/Respondent's unlawful actions have been variously reported to the Bamburi Police station and various OB Numbers issued as 45 of 12/05/2022, 31 of 19/05/2022 and others that got lost during the violently entry by the Respondent yet the police have not been of much assistance for want of court order.
31. The Defendant/Respondent on the other hand argued that she was a complete stranger to the dispositions made by the Plaintiff/Applicant in Paragraphs 2 to 14 of the supporting affidavit and that she was not guilty of the acts complained of at Paragraphs 7 and 8 of the supporting affidavit. She contended that she lived on the nearby plot known as subdivision No. 11286/I/MN where she has erected a residential home.
32. In the case of “Mbuthia v Jimba credit Corporation Ltd 988 KLR 1”, the court held that:-
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
33. Similarly, in the case of “Edwin Kamau Muniu v Barclays Bank of Kenya Ltd” the court held that;
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
34. Regarding this first condition though, I find that the Plaintiff/Applicant has established that she has a prima facie case with a probability of success.
35. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
36. On the issue whether the Plaintiff/Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Plaintiff/Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It was the Plaintiff/Applicant's claim that the Defendant/Respondent was in the process of forcefully and illegally invading her property using armed goons. That the Defendant/Respondent has not destroyed the Plaintiff/Applicant's homestead but has been attempting to put up illegal structures on the property. It is not disputable that the nature of the injury to be suffered if the Defendant/Respondent is allowed to carry on with the illegal activities, is one, incapable of compensation by way of damages. The judicial decision of “Pius



Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR” provides an explanation for what is meant by irreparable injury and it states:-

“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.”

37. Quite clearly, the Plaintiff/Applicant would not be able to be compensated through damages as she has shown the court that her rights to the suit property and that the injury suffered may not be compensable by damages. She has therefore satisfied the second condition as laid down in “Giella’s case”.

38. Thirdly, the Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in her favour. In the case of “Pius Kipchirchir Kogo (Supra) which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

39. Further to this, in the case of “Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

40. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because she resides on the suit property with her family. The decision of “Amir Suleiman v Amboseli Resort Limited



[2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

41. All said and done, I find that the balance of convenience tilts to the Plaintiff/Applicant as she is the one who is bound to suffer the most irreparable damage.
42. Bearing all this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the suit by the Plaintiff/Applicant. I have also not had the opportunity to interrogate the annexures to the Defendants/Respondents documents.
43. In the case of “Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR” where the court in deciding on an injunction application stated:-

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

44. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/Applicant have met the criteria for grant of orders of temporary injunction.

Issue No. b). Who will bear the Costs of Notice of Motion application 23rd June, 2022.

45. I have well stated in a previous precedence and most especially in “Sagalla Lodge Limited v Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

46. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In this case, as Court finds that the Applicants have fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010, this application shall be deemed to have merit and is hereby allowed with costs to the Plaintiff as against the Defendant.



VII. Conclusion & disposition

47. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant has a case against the Respondent.
48. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 23rd June, 2022 be and is found to have merit and hence be allowed in its entirety.
 - b. That an order of Temporary injunction do issue pending the hearing and determination of the suit herein, the Respondent be restrained by orders of injunction, by himself and any other person whomsoever acting under him or at his behest from in any way forcefully and violently entering, occupying, remaining, erecting structures or in any other way howsoever interfering with land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County.
 - c. That an order do hereby issue that the Officer Commanding Bamburi Police station (OCS) does ensure compliance with the orders of this Court by the Respondent and all of the Respondent's proxies.
 - d. That for expediency sake the matter to be heard on 24th April, 2024. There be a mention date on 31st January, 2024 for confirmation and ascertainment of compliance of this orders and holding a Pre – Trial Conference under the provision of Order 11 of the Civil Procedure Rules, 2010.
 - e. That the cost of this application is awarded to the Plaintiff/Applicant.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MOCROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF OCTOBER 2023.

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HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna Hassan, Court Assistant.**
- b. M/s. Kellen Advocate holding brief for Mr. Muumbi Advocate for the Plaintiff/Applicant.**
- c. No appearance for the Defendant/Respondent**

