



Njoroge & Muigai (Suing as the Personal Representative of the Estate of Mugai Kimunya Kau -Deceased) v Mwai Limited & 5 others (Environment & Land Case E027 of 2023) [2023] KEELC 21294 (KLR) (3 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E027 OF 2023
A OMBWAYO, J
NOVEMBER 3, 2023**

BETWEEN

DAVID MUIGAI NJOROGE & CHRISTOPHER MUHIKA MUIGAI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MUGAI KIMUNYA KAU -DECEASED) PLAINTIFF

AND

JAMES MATHENGE MWAI, GRACE WACEKE MWAI AND CATHERINE WANGUI MUIGAI (SUED AS ADMINISTRATORS OF THE ESTATE OF ISAAH MWAI MATHENGE - DECEASED) 1ST DEFENDANT
MWAI LIMITED 2ND DEFENDANT
JAMES MATHENGE MWAI 3RD DEFENDANT
GRACE GACHEKE MWAI 4TH DEFENDANT
CATHERINE WANGUI MUIGAI 5TH DEFENDANT
CHIEF LAND REGISTRAR 6TH DEFENDANT

RULING

- David Muigai Njoroge and Christopher Muhika Muigai suing as the personal representatives of the Estate of Muigai Kimunya Kau (Deceased) have sued the defendants claiming the defendants have pushed them out of the suit land that was gifted to the plaintiffs father by a white settler known as S.O.V Hodge. The applicants precisely state that they are the sons of Muigai Kimunya Kau (Deceased) with authority of the entire family of the deceased to file this suit. The applicants state that the deceased was allocated parcel of Land Reference No. 3336/6 by his employer, a white settler as a gift of appreciation for years served at Sidai Farm Limited. The white settler thereafter left Kenya for abroad for purposes



of retirement. The deceased and his family lived on the said parcel of land and cultivated for years. The deceased also buried his mother, the Applicants grandmother in the said property.

2. Soon after the passing of the deceased, the Provincial Commissioner (P.C) then, one Isaiah Mwai Mathenge (also deceased) encroached on this parcel of land and slowly started to push the applicants and other family members out of the property. That later on the Applicants realized that the 1st Respondent Company had transferred to itself their parcel of land.
3. That the 2nd to 4th Respondents have now leased the said parcel of land to strangers who are hostile to the Applicants thereby denying them access thereto. That the said lessees are now cultivating and grazing cattle on the applicants parcel of land. According to the applicants, all efforts to access the land and cultivate the suit land has proved futile and the said lessees caused the Applicants to be arrested.
4. Unless this honorable court intervenes, the Applicants stand to suffer irreparable loss and damage unless the Respondents are restrained from entering, transferring, subdividing, amalgamating, leasing and/or cultivating on the suit parcel of land. The Applicants believe that they have a prima facie case with high chances of success. That if the orders sought herein are not granted, the Plaintiffs and other members of the deceased family stand to suffer irreparable harm which cannot be compensated by way of damages.
5. The applicants by notice of motion dated 28th September 2023 and supported by the affidavit of David Muigai Njoroge and Christopher Muhika Muigai pray for orders that pending the hearing and determination of the suit herein that this honorable court be pleased to issue a temporary injunction restraining the Respondents either by themselves, their agents, servants and/or personal representative from cultivating, leasing, subdividing /demarcating/selling and /or transferring of Land Reference Number 3336/6 and resultant amalgamation and subdivisions that is Land Reference Number 10120/1 and 10120/2.
6. That pending the hearing and determination of this application that this honorable court be pleased to issue an order directing the District Surveyor Nakuru do a ground survey of L.R NO.3336/6 and ascertain the beacons thereon and write a comprehensive report. That pending the hearing and determination of this suit that this honorable court be pleased to issue an order directing the District Surveyor Nakuru do a ground survey of L.R NO. 3336/6 and ascertain the beacons thereon and write a comprehensive report. That the O.C.S Kirengero Police Station be ordered to ensure compliance of the court orders. That the costs of the application be provided for. 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.



7. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

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, ally 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”.

8. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant claimed that they have established a *prima facie* case and relied on the judicial decision of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) EKLK in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

9. Though the application is not opposed, I do decline to grant the orders because the applicants have not demonstrated a prima facie case with a probability of success because there is no document supporting the allegations that they were gifted the land. Moreover, the land is currently registered in the names of the 1st – 5th respondents. They have not established any right or interest in the land.
10. On whether the applicants are likely to suffer irreparable loss that cannot be compensated with damages, I do find that the same has not been demonstrated because the applicants are not in possession of the land and are not the registered owners. The balance of convenience tilts towards the court not granting any injunction. Application is dismissed with costs in the cause.

RULING DATED, SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 3RD DAY OF NOVEMBER 2023.

A. O. OMBWAYO

JUDGE

