Githegi (Suing as a legal representative of the estate of Grace Muthoni Githegi and Saamuel Githegi Mbugua (Deceased) v Loise Nduta Mbugua t/ a Green Acorn Kindergarten and Day Care (Environment & Land Case 1095 of 2016) [2022] KEELC 4767 (KLR) (8 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4767 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1095 OF 2016

EK WABWOTO, J

SEPTEMBER 8, 2022

BETWEEN

DANIEL MUKIRI GITHEGI ..... APPLICANT

SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF GRACE MUTHONI GITHEGI AND SAAMUEL GITHEGI MBUGUA (DECEASED

AND

LOISE NDUTA MBUGUA T/A GREEN ACORN KINDERGARTEN AND DAY CARE ..... RESPONDENT

RULING

1. This is a ruling on a notice of motion dated August 1, 2022 wherein the applicant seeks for the following orders: -

    i. Spent.

    ii. That the honourable court be pleased to issue an order of temporary injunction restraining the defendant/respondent by herself, her agents, servants or assigns from alienating, wasting, constructing unauthorized structure on the suit property known as LR No 27/9 (originally number 27/1/3) pending the hearing and determination of this suit.

    iii. That costs of this application be provided for.

2. The grounds upon which the application was premised were that the suit property belonged to the estate of Grace Muthoni Githegi and Samuel Githegi (deceased) who died on July 27, 2019 and that the respondent has without any consent from trustees of the estate of the deceased continued to construct

an unauthorized structure in the said property and in the circumstances, it is only fair and just that an injunction be granted.

3. The application was opposed by the respondent vide a replying affidavit sworn by Loise Nduta Mbugua on August 11, 2022. The respondent deposed that the suit property LR No 27/13 Ridgeways is also the subject matter of a matrimonial property suit in civil suit No 38 of 2016 where the court had issued an injunction on September 14, 2016 restraining her parents in law and any other person acting on their behalf from evicting and or interfering in any way with that property pending the hearing and determination of that suit.

4. The applicants also filed a supplementary affidavit where it was deposed that the matrimonial suit abated when the deceased defendants passed on in 2020 and that there was no valid suit for determination before the said court. The applicants also averred that this suit was filed as a result of breach of tenancy agreement and further that this court has no jurisdiction to entertain issues of matrimonial property raised by the respondent since this suit was filed before the matrimonial suit in the High Court.

5. On August 1, 2022, the court directed that the application be canvassed by way of written submissions. Both parties complied. The applicants submissions dated August 5, 2022 were filed by Ngure Mbugua Advocates while the respondent's written submissions were filed by Musyimi and Company Advocates and were dated August 12, 2022.

6. I have considered the application, the affidavits in support and opposition to it and all annexures thereto and the written submissions on record. I have also considered the law and case law relied upon by the parties. I find two issues for determination in this matter. These being, whether the applicant has satisfied the principles of grant of a temporary injunction and what orders can issue as to costs. I will proceed to deal with the said issues sequentially.

7. The remedy for injunction being an equitable remedy is a discretionary remedy to any court. The discretion must be exercised judiciously. This is what every court should bear in mind when dealing with such kind of an application. In the cases of *Kahoho v Secretary General*, EACJ application No 5 of 2012 and *Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others* (2016) eKLR, courts held that the grant or not of an order of injunction is upon the discretion of the court which discretion must be exercised judiciously. In *Farah Awad Gullet v CMC Motors Group Limited* (2018) eKLR, the Court of Appeal repeated the same position and went on to state that it means it is ...

> " ..... without caprice or whom and on sound reasoning".

8. In order for a party to succeed in an application for a temporary injunction, he/she has to pass the test that was set out in the case of *Giella v Cassman Brown* (1973) EA 358. The test has three limbs to be satisfied. These are:-

   a. Whether the applicant has established a *prima facie* case.

   b. whether he or she would suffer irreparable loss that may not be compensated by damages.

   c. That if the court is in doubt, it may rule on a balance of convenience.

9. On the issue of *prima facie* case, counsel for the applicants submitted that the applicants (deceased parents) are the registered proprietors of the suit property and pursuant to section 24 of the *Land Registration Act*, rights of a registered proprietor are protected in law. Reference was also made to the cases of *Nyayo Embakasi Residents Association v NSSF & another* (2015) eKLR and civil application No 312 of 2005 *Hutching Bieber Ltd v Barclays Bank of Kenya Ltd & another*.

10. Counsel for the respondent on the other hand submitted that no *prima facie* case had been made to warrant the grant of injunction since the matter herein constitutes matrimonial property of the respondent and further she has been in exclusive use of the property since 1987.

11. On the aspect of *prima facie* case, the applicants main contention is that the respondent is constructing illegal structures on the suit property. The respondent in her affidavit sworn on August 11, 2022 deposed that the said property is matrimonial property of which she has been in occupation from 1987. Having considered the oral averments, I am not convinced that the applicants have shown a *prima facie* case herein since the respondent has demonstrated that she had been in the suit property since the year 1987 and the constructions being undertaken have the necessary approvals and further they were commenced in the year 2016.

12. On the aspect of irreparable loss, that would be suffered should the injunction not be granted, the applicants submitted that the respondent is a tenant at the premises pursuant to a tenancy agreement dated October 8, 2003 for a period of 50 years and that she has refused to pay rent which has accumulated to millions of shillings as demanded on the plaint. Counsel relied on the case of *Tritex Industries Limited & 3 others v National Housing & 3 others v National Housing Corporates and another* (2014) eKLR in support of the said position.

13. The respondent's counsel submitted that no irreparable harm would be suffered since the ongoing construction had been approved by the relevant authorities and it commenced in 2016. Counsel also argued that the value of the property will always appreciate causing no prejudice to the applicants. Counsel also submitted that issuance of an injunction will be contrary to public interest since the property has a school which has a capacity of over 500 children and about 70 employees and hence therefore if an injunction is issued and construction stopped, the children's education will be prejudiced.

14. Irreparable harm means that the result of the actions of the adverse party if left un-attended to by a court order halting them will be such that the other party is not likely to be compensated adequately by damages. It is not enough to show a *prima facie* case. The applicants must demonstrate that the effect of the actions of the respondent is so grievous that when all is said and done, he or she will not be in the same position as was originally. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, the court stated as follows:

> " .....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 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".

15. As regards to irreparable loss, I should state that the applicants claim is quantifiable and compensable by an award of damages. I am saying this fully aware that an injunction will not be refused solely on the basis that damages are an adequate remedy to the applicants claim. This was explicated by Ringera J (as he then was) in the case of *Waithaka v Industries Commercial Development Corporation* (2001) KLR page 381, where he stated as follows:

> " As regards damages, I must say that in my understanding of the law, it is not inexorable rule that where damages may be an appropriate remedy an interlocutory injunction should not issue. If that were the rule, the law would unduly lean on favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but would also be

seen to be unjust. I thank that is why the East African Court of Appeal couched the second condition on very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy".

16. In this case, it is clear that the applicants have failed to satisfy the conditions necessary for the grant for a temporary injunction and in the circumstances, the notice of motion dated August 1, 2022 lacks merit and is hereby dismissed with no orders as to costs. The suit will proceed for hearing on October 3, 2022 as earlier scheduled.

DATED, SIGNED AND DELIVERED AT NAIROBI BY EMAIL THIS 8TH DAY OF SEPTEMBER 2022

E.K.WABWOTO

JUDGE