



**Musyoka v King'oto & 2 others (Environment and Land Appeal
27 of 2021) [2022] KEELC 13532 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 27 OF 2021
LG KIMANI, J
OCTOBER 5, 2022
(FORMERLY MACHAKOS ELC APPEAL NO. 5 OF 2020)**

BETWEEN

JOHNNY MWENDWA MUSYOKA APPELLANT

AND

RUTH KING'OTO A.K.A RUTH KYENE 1ST RESPONDENT

**CEM FOR LAND, INFRASTRUCTURE, HOUSING AND
DEVELOPMENT 2ND RESPONDENT**

COUNTY GOVERNMENT OF KITUI 3RD RESPONDENT

*(Being an appeal from the Ruling of the Chief Magistrate Hon. S.
Mbungi Esq, sitting at Kitui in Chief Magistrate's Environment
and Land Court Case Number E20 of 2020 delivered on 22.1.2021)*

JUDGMENT

1. The Appellant was the Plaintiff/Applicant in Chief Magistrate's Environment and Land Court Case Number E20 of 2020. He appeals to this court from the Ruling of the Trial Court delivered on January 22, 2022 and sets forth the following Grounds of Appeal:
 1. That the Learned trial Magistrate erred in law when he based his decision on an alleged survey report whose validity is a contested issue for determination in the main suit.
 2. That the Learned trial Magistrate erred in law when he determined a contested issue in a summary manner at an interlocutory stage.
 3. That the Learned trial Magistrate erred in law when he made a decision that is contrary to the law on temporary injunction.



4. That the Learned trial Magistrate erred in law by making a decision that failed to determine material issues of law arising from the facts pleaded and evidence by affidavit.
 5. That the Learned trial Magistrate erred in law by dating his ruling and purporting to read it in open court on a different date.
 6. That the decision of the court is flawed and contrary to law and ought to be set aside.
2. A summary of facts in the suit before the trial court shows that the Appellant claims to be the registered owner of Land parcel No Mulango/Wikililye/2292 while the 1st Respondent states that she is the registered owner of land parcel No Land Mulango/Wikililye/1862.
 3. The Appellant claimed that the 1st Respondent encroached on his land and removed the perimeter wall from his parcel of Land Mulango/Wikililye/2292 dug a trench and undertook construction. The Appellant claims that he received an enforcement notice from the 2nd and 3rd defendants/Respondents which alleged that he had encroached onto the 1st Respondents land and blocked an access road. He claims that his boundary has been shifted and seeks for permanent orders of injunction to prevent the Respondents from interfering with the suit property.
 4. The Appellant filed an application dated September 23, 2020 seeking to restrain the 1st Defendant/Respondent from continuing and/or maintaining the construction of the building structure and development on the suit property and from interfering in any manner whatsoever with land parcel number Mulango/Wikililye/2292 that may be adverse to his quiet enjoyment of his proprietary rights and interests.
 5. The 1st Respondent filed a replying affidavit dated October 29, 2020 before the trial court where she stated that she was the registered owner of land parcel No Mulango/Wikililye/1862 which is situated across the road from the Plaintiffs land parcel Mulango/Wikililye/2292 and which she was in the process of developing.
 6. She claimed that the Appellants land arose as a result of subdivision of land parcel Mulango/Wikililye/1790 which subdivision led to illegal and/or irregular encroachment onto the road and onto her own land and trespass thereon by the Appellant. That she reported the matter to the police who investigated and requested from the 2nd and 3rd Respondents for maps, mutation forms and all documents to confirm the position of the suit parcels of land. A site visit was conducted and a report made and the boundaries delineated that showed that the Appellant was the one who had encroached on her property. The 1st Respondent claims that she subsequently fenced her property.
 7. The Honourable Trial Magistrate found that from the survey report produced by the Respondents (the Appellant did not produce a survey map), it appeared that the Applicant was the one who has encroached onto the 1st Defendant/Respondent's land. The trial court found that the Appellant had not established a prima facie case. The court also found that in the event after trial it is found that the Applicant's right was infringed, he can be fully compensated in monetary terms and the 1st Defendant's construction can be demolished. Finally, the Court found that the balance of convenience tilts in favour of the 1st Defendant/Respondent since there are survey reports showing that it is the Applicant who has encroached onto the 1st Respondent's land.

Appellant's written submissions

8. The Appellant submits that his application in the lower court was merited and that the trial court was in error when dismissing it. He relied on Order 40 Rule (1)(a) of the [*Civil Procedure Rules \(2010\)*](#) to support his prayer for a temporary injunction where any property in dispute is in danger of being



wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. The Appellant avers that encroaching onto 3 meters of his property and digging up a trench to put up a property amounts to alienation of his property. He has pointed out the magnitude of the 1st Respondent's developments on the suit property as stated in her Replying Affidavit are still in the preliminary stages.

9. The Appellant contends that the 2nd and 3rd Respondents have altered the maps to carve out 3 meters of the Appellant's property and submitted that it is still a matter up for determination in the suit. It is the Appellant's submission that the fact that remains to be determined is who the true owner of the property in dispute is since both parties claim that the other has encroached onto their property. They maintain that the property should be preserved in the state that it is in to make re-measuring possible and relied on the authority in the case of *Thomas Mumo Maingey v Sarah Nyiva Hillmans & 3 others*.
10. The Appellant also pointed out that since part of the dispute involves a public access road, it is in public interest that the property be preserved in the state it is in order to protect such interests.

The 1st Respondents Submissions

11. The 1st Respondent filed written submissions dated March 31, 2022 stating that the Appellant had failed to establish a prima facie case with a probability of success. That the Appellant's claim of alleged encroachment onto her land could only have been proved by way of a survey report which he failed to produce. Counsel submitted that the 1st Respondent refuted the assertions made against her by producing a report undertaken by the Ministry of Lands and Physical Planning, Kitui County which confirmed her construction was well within the boundaries and precincts of her property. In the circumstances the trial court found that the Appellant had not established that he had any rights which were being threatened to warrant protection. The 1st Respondent relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125.
12. The 1st Respondent further submitted that the Appellant did not establish that he would suffer irreparable loss if the orders sought were not granted and that the balance of convenience tilted in his favour. He relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) e KLR

The 2nd and 3rd Respondents' Submissions

13. The 2nd and 3rd Respondents submitted that the requirements for the grant of an interlocutory injunction is the criteria set out by *Giella v Cassman Brown*(1973)EA 358 and was reiterated in the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others CA No77 of 2012(2014)eKLR*.
14. They further relied on the holding in the case of *Cyanamid Co v Ethico, Ltd*(1975) AER 504 which set out three elements; that there must be a serious/fair issue to be tried, damages are not an adequate remedy and that the balance of convenience lies in favour of granting or refusing the application. They also quoted the case of *Mrao Ltd v First American Bank of Kenya Ltd (2003) eKLR* and submitted that the Appellants have not satisfied the triple requirements set out the above authorities.
15. The failure of the Appellant to produce any survey reports to support his allegations while the 2nd and 3rd Respondents produced theirs was pointed out as failure to prove that there was encroachment and thus there was no legitimate claim.
16. On the issue of irreparable harm, the 2nd and 3rd Respondents relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai*(2018) eKLR and claimed that the Appellant will not suffer irreparable harm as the construction works being carried out can be demolished if the outcome of the case favours the Appellant. Since it is the 1st Respondent who has borne the cost of constructing on the suit property,



counsel for the 2nd and 3rd Respondents submitted that any inconvenience suffered to the Appellant will not be grave and therefore monetary damages would be an adequate remedy.

17. They concluded that they have the duty to ensure that all buildings are constructed in the prescribed standards and that buildings being erected do not encroach on road reserves. They prayed that the appeal be dismissed and the ruling of the trial court be upheld.

Analysis and Determination

18. As an Appellate Court, this Court has the duty to make its own conclusion after taking into account the evidence produced in the Trial Court as it was held in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] e KLR*;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

19. The Appellant has set out his grounds of appeal in his Memorandum of Appeal dated February 12, 2020 however in his submissions Counsel for the Appellant combined all the grounds and dealt with them as one issue of whether the Appellants application before the trial court was merited. The Respondents’ Counsel in their submissions have also adopted the same format and delved into the question of whether or not the application before the trial court was merited. On my part and I will proceed to combine some of the grounds of appeal as issues for determination hereunder:

- A. Ground 1 and 2: Whether the Learned trial Magistrate erred in law when he based his decision on an alleged survey report whose validity is a contested issue for determination in the main suit and did he determine a contested issue in a summary manner at an interlocutory stage.
- B. Ground 3 4 and 5: Whether the Learned trial Magistrate erred in law when he made a decision that is contrary to the law on temporary injunction and that he made a flawed decision that failed to determine material issues of law arising from the facts pleaded and evidence by affidavit.
- C. Ground 6: Whether the Learned trial Magistrate erred in law by dating his ruling and purporting to read it in open court on a different date.

A. Whether the Learned trial Magistrate erred in law when he based his decision on an alleged survey report whose validity is a contested issue for determination in the main suit and did he determine a contested issue in a summary manner at an interlocutory stage.

20. The Appellant has contended that the Trial Court should not have based the ruling on the survey report produced by the Respondents when its validity was not yet proven. The trial court found that the dispute at hand relates to an alleged encroachment to the Applicants land. The Applicant did not produce any survey report to support his case while the Respondents did. Having looked at the reports the court stated that it appeared that the Applicant was the one who had encroached on the 1st Respondents land. The trial court therefore found that on balance of probability the applicant has no right which is being threatened to warrant protection of the Court.

21. In a case with quite similar facts to this one at hand, the Court in *Teresia Wanjiku Kamau & another v John Ngugi Kabogo & 3 others [2021] eKLR* held that: “Applying the said principles to the case at hand, the issue is whether or not parcel 4891 and parcel LOC/Gitura/2317 are overlapping on the ground



and whether parcel LOC/Gitura/2317 is a road reserve. The preliminary survey reports produced by the 1st Respondent shows otherwise. I must state that on the onset that this issue will be clearer when evidence is taken. I am persuaded that the Applicants have not shown any prima facie case as to the position or otherwise of the suit land on the ground at this stage. On the second limb of *Giella v Cassman Brown* that the Applicant must demonstrate that damages will not be an adequate remedy and it suffices to state that none of the parties addressed me on this issue. The balance of convenience tilts in the refusal of the temporary injunction for the reasons given above. In the end the application is without merit. It is dismissed with costs to the Respondents.”

22. In my view, the finding of the trial court did not amount to final determination of a contested issue at an interlocutory stage and neither did it amount to deciding that the survey report presented by the Applicant is undoubtedly true. The finding only determined that the 1st Respondent tabled evidence to show that they might have a right to the disputed portion of land as well, even though the issue is yet to be proven. The Trial Court used the words

“It ‘appeared’ that that it is the Applicant who has encroached onto the 1st Defendant’s/ Respondent’s land.” Appearance is not a final determination of the issue at hand. The case must still go to full trial to determine who has encroached onto whose land if at all.

23. In the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR* Mativo J reasoned that:

“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 injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.”

24. In my opinion, the rights to the parties’ individual titles are not disputed, but the encroachment is denied and therefore the Court must look into where the balance of convenience tilts, which in this case, the Trial Court found that it tilts in favour of the first Respondent. In order for this Appellate Court to determine this, we must look into the law on interlocutory injunctions.

B. Whether the Learned trial Magistrate erred in law when he made a decision that is contrary to the law on temporary injunction and that he made a flawed decision that failed to determine material issues of law arising from the facts pleaded and evidence by affidavit.

25. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the *Civil Procedure Rules, 2010* which provides that: -

“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 [Rev 2012] *Civil Procedure Rules* Cap 21 [Subsidiary] C17 – 165;



- (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."

26. The conditions for consideration in granting an injunction were settled in the celebrated case of where the court *Giella v Cassman Brown & Company Limited (1973) EA 358*, expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

27. On the first criteria the Applicant must establish a prima facie case. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR* the Learned Judges at the Court of Appeal quoted from *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125* which defined a "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."

28. The Court of Appeal in the Nguruman Case(*supra*)held that:

"We adopt that definition save to add the following conditions by way of explaining it. 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

29. The Appellant submits that the suit property ought to be preserved by issuance of the orders of injunction for the reasons first that this will make re-measuring of the parties portions of land possible, secondly on the ground that the dispute relates to a public access road and it is in the public interest that the same be preserved pending the hearing and determination of the suit.

30. In my opinion, it is yet to be established by the Trial Court that the Appellant has a clear and unmistakable right that is being infringed. Both parties have titles to their respective parcels of land



and both lay claim to the portion of land that the 1st Respondent is constructing upon. The Plaintiff / Applicant was in this case the party on whom the burden of proving a prima facie case lies and it was incumbent upon him to show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. Based on the surveyors report that was presented by the Respondents and in absence of a report by an expert presented by the Plaintiff/Applicant the court found that the Applicant had not shown that he had a right being threatened that warranted the protection of the Court. The Appellant did not just seek orders of protection of the disputed portion of land, he sought restraining orders. I find that the trial court did not err in that finding that the Appellant did not discharge the burden placed upon him.

31. Secondly on irreparable loss, the trial court found that the Appellant was capable of being compensated by monetary damages and demolition of the 1st Respondent's structure if they succeeded in proving their case at the trial. On the other hand, the 1st Respondent tabled their intended project on the disputed portion of land and estimated their loss of monthly rental income at Kshs 215, 000 per month if an injunction was to be issued. In my view, the Appellant failed to prove any irreparable loss incapable of being compensated in monetary terms.
32. Finally, regarding the matter of where the balance of convenience tilts, it is clear that since it is the 1st Respondent who stands to lose the most if the injunction was granted owing to the construction I am persuaded that the balance of convenience tilts in her favour.

C. Whether the Learned trial Magistrate erred in law by dating his ruling and purporting to read it in open court on a different date.

33. The Appellant states that the Trial Magistrate dated the ruling January 20, 2021 but delivered the same on January 22, 2021. Apart from listing this as a ground of appeal and stating the issue as a matter of fact, the Appellant did not make any submissions on the ground. Counsel did not point the court to any law that was violated by the act of the trial court and I make no finding on this issue.
34. For the foregoing reasons, I do find that the appeal herein lacks merit and the same is dismissed with costs to the Respondents. The trial courts file to be returned for hearing and final determination of the main suit.

DELIVERED, DATED AND SIGNED AT KITUI THIS 5TH DAY OF OCTOBER, 2022.

HON L G KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of-

Musyoki: Court Assistant

Mwithya Advocate holding brief for Kinyua Musyoki for the Appellant

Onchagwa Advocate holding brief for Nyachoti for the 1st Respondent.

Katisya Advocate for the 2nd and 3rd Respondents

