



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. E5 OF 2020

GERRISON MUTHOGA 1ST PLAINTIFF
JOHN MWANGI NDAMBIRI 2ND PLAINTIFF
ROBINSON MUGO GATHIRU 3RD PLAINTIFF
ROSE MUTHONI KARIITHI 4TH PLAINTIFF
MBURU MACHARIA 5TH PLAINTIFF
KIMUNYE MBINGA 6TH PLAINTIFF
NDEGWA MBUGI 7TH PLAINTIFF
STANLEY KINYUA MUGO 8TH PLAINTIFF
ALICE WAKUTHII NJOMO 9TH PLAINTIFF
MARY KARUANA MURIUKI 10TH PLAINTIFF
MUKUNGO NJOKA 11TH PLAINTIFF
FELISNAH WANGUI KARIUKI 12TH PLAINTIFF

VERSUS

**KENYA AGRICULTURAL AND
LIVESTOCK RESEARCH ORGANISATION DEFENDANT**

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion dated on 10th May, 2021 on 21st June, 2021 whereby he sought the following orders: -

(a) SPENT

(b) That an order for a temporal injunction do issue restraining the Defendant by themselves, their agents, servant, heirs, legal representatives or any person claiming under them from

interfering, encroaching, trespassing, fencing, obstructing or in any way whatsoever interfering Land Parcel Nos. Mwea/Tebera/B/1032, 1047, 960, 1407, 2797, 1181 and 1027 respectively pending hearing and final determination of this suit.

(c) That the OCS Wang'uru Police Station do supervise compliance of the orders herein.

(d) That the Respondent do bear the costs of this application.

2. The application was premised on the following grounds on the face of the application: -

- a. The applicants are the registered owners of land parcels Nos. Mwea/Tebere/B/1032, 1047, 960, 1407, 2797, 1181 and 1027 respectively.
- b. The Applicants have been in peaceful possession and cultivating their respective land parcels without any interference whatsoever since 1993.
- c. That the Respondent is in the process of erecting fences through the Applicants' access and use of their land parcels.
- d. The Applicants' stand to suffer irreparable loss if the orders sought are not granted as they have planted various crops for this season.
- e. The Respondent shall suffer no prejudice if this application is allowed.
- f. It is therefore in the interest of justice that this Honourable Court grants the orders sought.

APPLICANTS' CASE

3. The application is supported with the Affidavit and Supplementary Affidavit both sworn by the 2nd Plaintiff/Applicant herein, John Mwangi Ndambiri, on 10th May, 2021 and 3rd August, 2021 respectively.

4. In the said affidavit the applicants depone that they are the registered proprietors of Land Parcel Nos. Mwea/Tebere/B/1032, 1047, 960, 1407, 2797, 1181 and 1027 respectively and furnished the Title deeds thereof which are marked as JMN1.

5. The applicants stated that they have been in peaceful possession cultivating the said parcels of land without any interference since 1993 and have planted Pishori rice and French beans thereon for the current crop season. They furnished copies of photographs thereof which have been marked as JMN3.

6. They deponed that on or about 8th May, 2021, the respondent started erecting fences around the suit lands while issuing threats and intentions to forcefully evict the Applicants from their respective land parcels and thus they are apprehensive of being denied access to their lands due to the said threats.

7. They further stated that unless the respondent is restrained by way of a temporary injunction from interfering with their parcels of land then they stand to suffer irreparable loss.

RESPONDENT'S CASE

8. The Respondent opposed the application by way of Grounds of opposition date 21st July, 2021 and a Replying Affidavit sworn on 21st July, 2021.

9. The Respondent's case is that it is securing its parcel of land being all that piece of land situate in the S.W of Embu Municipality in Kirinyaga District being L.R No. 31884, I.R 2108877 delienated on Land Survey Plan Number 426561 measuring approximately 84.24 hectares or thereabouts, for the purposes of discharging its public mandate being a statutory public body.

10. The Respondent denied that it is erecting fences around the Plaintiffs' claimed parcels of land as alleged in Paragraph 4 of the Supporting Affidavit or at all and stated that it is the Plaintiffs jointly and severally who have been using, occupying and cultivating the same illegally, unlawfully and without its consent and or approval.

11. The Respondent further stated that the said land has at all times been reserved for and used for agricultural research purposes and that it is still intact and the same has not been subdivided and or allocated to any private individuals including the plaintiffs.

12. The Respondent further stated that the said land is public land which it lawfully holds and uses and occupies and the same cannot be acquired and or alienated without following due process in accordance with *Article 40 of the Constitution of Kenya* as read together with the *Land Act, 2012*.

13. It further stated that through a public meeting chaired by the Deputy County Commissioner, Mwea East held on 10/03/2020 which was attended by the Plaintiffs and a letter dated 25th August 2020, the Plaintiff were reminded of their illegal occupation and were given notice to stop cultivating and planting any crops thereon and to stop trespass and vacate the land.

14. Further, it stated that the applicants' suit does not establish a prima facie case against the Defendant and in any event the balance of convenience tilts in favour of the Defendant and thus prayed that the application be dismissed summarily.

PARTIES' SUBMISSIONS

15. When the application came up for hearing on 22ND July, 2021, the parties agreed through their advocates on record to have that application disposed of by way of written submissions.

16. The Applicants filed their submissions on 18th August 2021 the Respondent filed her submissions on September 2021.

APPLICANTS' SUBMISSIONS

17. The applicants submitted that they have established a prima facie case with a probability of success as their titles date back to 1993 – 2018 and have been in occupation thereof and therefore cannot be labelled as trespassers as they have a right to own and use their respective parcels as per *Article 40 of the Constitution*.

18. The applicants also submitted that the respondent had not demonstrated that the plaintiffs' parcels of land are within the land parcels KARI was allocated to by the Ministry of Agriculture.

19. The applicants further submitted that the Respondent has been using threats in evicting them and erected fences around the plaintiffs' parcels.

20. They also submitted that they cultivate on their respective parcels and have planted rice and French beans which is their main source of livelihood therefore if the Defendant erects a fence around the Applicants' parcels, they will suffer irreparably.

21. They relied on the cases of *Olympic Sports House Ltd Vs School Equipment Centre Ltd (2012) e K.L.R* and *Nairobi ELC Case No. 68 of 2020 Registered Trustees of Fountain Gate Church Vs Olosho Security Services Limited & Another* and prayed that their application be allowed as prayed.

RESPONDENT'S SUBMISSIONS

22. The Respondent submitted that the applicants' application does not satisfy the triple requirements for grant of an interlocutory injunction.

23. It submitted that the applicants had not established a prima facie case as it is the registered owner of all that piece of land situate in the S.W of Embu Municipality in Kirinyaga District being L.R No. 31884, I.R 2108877 delineated on Land Survey Plan Number 426561.

24. They submitted that the applicants had not demonstrated that the applicants' parcels of land are comprised in the said parcel of land and that they had not tendered any evidence establishing their occupation and use of any portion of the Defendant's said parcel of land.

25. It also submitted that its title and ownership of all that piece of land situate in the S.W of Embu Municipality in Kirinyaga District being L.R No. 31884, I.R 2108877 delineated on Land Survey Plan Number 426561 is superior to the claim of the plaintiffs and the same cannot be impeached prima facie by the title documents issued to them as they have been challenged by way of counter claim.

26. It also submitted that the said land is held for public purposes and thus cannot be alienated, transferred or used in any other way than for public purposes.

27. It submitted that there is no proof or irreparable damage to be suffered by the plaintiffs as the same can be adequately compensated by an award of damages as it is a public body which is capable of paying damages awarded against it.

28. It also submitted that the balance of convenience lies in its favour as it has been in occupation of the suit property and uses the same for its public mandate and that the plaintiffs are not in occupation of all that piece of land situate in the S.W of Embu Municipality in Kirinyaga District being L.R No. 31884, I.R 2108877 delineated on Land Survey Plan Number 426561 and that they will not suffer inconvenience if the orders are not granted.

29. It thus prayed that the applicants' application be dismissed with costs.

ANALYSIS

30. The applicants have brought this application under **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** 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.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. (2) The

court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

3. (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto. (3) An application under this rule shall be made by notice of motion in the same suit.

31. The prerequisites for the grant of the orders sought by the applicants have been set out in the classic case of **Giella Vs Cassman Brown (1973) E.A 358** whereby the court held as follows;

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

32. Firstly, the applicants are mandated to demonstrate that they have a prima facie case with the probability of success.

33. A prima facie case was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 K.L.R 125** where the Honourable Court held that:-

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case 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 as to call for an explanation or rebuttal from the latter”.

34. From the material placed before this Honourable Court the applicants’ case is that they are the registered proprietors of Land Parcel Nos. Mwea/Tebere/B/1032, 1047, 960, 1407, 2797, 1181 and 1027 respectively. They have demonstrated this by furnishing the Title deeds thereof which are marked as JMN1 in the supporting affidavit.

35. On the part of the respondent, its claim is that all that piece of land situate in the S.W of Embu Municipality in Kirinyaga District being L.R No. 31884, I.R 2108877 delineated on Land Survey Plan Number 426561 belongs to it and is for public use. Further that title and ownership of the said land is superior to the claim of the plaintiffs and the same cannot be impeached prima facie by the title documents issued to them as they have been challenged by way of counter claim.

36. The respondent has furnished the certificate of title of all that piece of land situate in the S.W of Embu Municipality in Kirinyaga District being L.R No. 31884, I.R 2108877 delineated on Land Survey Plan Number 426561 which indicates that it belongs to it.

37. **Section 26 (1) of the Land Registration Act 2012** provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship(1) 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 by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the

certificate, and the title of that proprietor shall not be subject to challenge, except—(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or(b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”

38. From the documents by the two competing sides, it is apparent that they both hold certificates of title which are prima facie evidence of ownership.

39. First, it is not lawful to issue more than one title in respect of one parcel of land. One of them must have been obtained either by fraud, misrepresentation or acquired illegally un-procedurally or through a corrupt scheme. Until the Court interrogates the two competing titles during the main trial, it would be difficult to determine the genuine title at an interlocutory stage.

40. In view of the matters stated herein above, the instruments of ownership presented by the Applicant cannot therefore be taken as prima facie evidence. I therefore find that the Applicants have not demonstrated the first ground for the issuance of the injunction orders.

41. Secondly, the Applicants are supposed to prove that they will suffer irreparable loss or damage if the interlocutory orders are not issued. In the case of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) e K.L.R**, it was held:-

“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 applicants 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”.

42. In this case, the Applicants have stated that they have been in occupation of the suit land since 1993 and are cultivating the same as their main source of livelihood and have currently planted Pishuri Rice and French beans. The Applicants have not stated that there is no alternative remedy if the orders sought are not granted. On the second issue, I also find that the Applicants have not shown that they are likely to suffer irreparable injury which cannot be compensated by an award of damages.

43. The third and last principle is that where the first or second or both have not been established, the Court may decide the matter on a balance of convenience. In the case of **Pius Kipchirchir Kogo Vs Frank Kimeti Tenai** (supra), the Court also discussed the balance of convenience and stated as follows:-

“The meaning of balance of convenience in 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 defendant 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 be greater than that which may be caused to the defendant’s inconvenience be equal, it is the plaintiff who suffer”.

44. Having found that the Applicant has not established the first two principles and deciding this case on the third principle, I find that the balance of convenience tilts in disallowing the application.

CONCLUSION

45. The upshot of my findings is that the Notice of Motion dated 10th May 2021 lack merit and the same is hereby dismissed with costs to be in the cause.

Ruling READ, DELIVERED in open Court at Kerugoya and SIGNED this 5th day of November, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Orengo holding brief for Wauna
2. Ms Kimata
3. Kabuta, Court clerk.