



**Wambua v Thairu & 2 others (Suing on Behalf of Dynamic Community School) (Civil Appeal 501 of 2019) [2023] KEHC 21360 (KLR) (Civ) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21360 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 501 OF 2019**

**CW MEOLI, J**

**AUGUST 3, 2023**

**BETWEEN**

**SIMON WAMBUA ..... APPELLANT**

**AND**

**JOSEPH GITHINJI THAIRU ..... 1<sup>ST</sup> RESPONDENT**

**COLLINS JUMA ODERA ..... 2<sup>ND</sup> RESPONDENT**

**OLIVER OMONDI PONGE OKOTH ..... 3<sup>RD</sup> RESPONDENT**

**SUING ON BEHALF OF DYNAMIC COMMUNITY SCHOOL**

*(Being an appeal against the ruling and order of Honourable G.A. Mmasi,  
SPM delivered on 31st July, 2019 in Milimani CMCC No. 3150 of 2019)*

**JUDGMENT**

1. This appeal emanates from the ruling delivered on 31<sup>st</sup> July, 2019 in Milimani CMCC No. 3150 of 2019. The background facts are that Joseph Githinji Thairu, Collins Juma Odera and Oliver Omondi Ponge Okoth (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents/ Respondents) lodged the suit on behalf of Dynamic Community School (hereafter the School) by a plaint dated 9<sup>th</sup> May, 2019 seeking permanent injunctive orders, damages, and costs of the suit against Simon Wambua (hereafter the Appellant) in respect to two (2) parcels of land located in Nairobi East, Viwandani Location Lunga Lunga village (the subject properties) and ownership of the School.
2. The plaint was accompanied by the Notice of Motion dated 9<sup>th</sup> May, 2019 (the first application) wherein the Respondents sought inter alia, a temporary injunction to restrain the Appellant him from interfering with the subject properties or the learning process of the School. The first application was anchored on the grounds on its face and the facts stated in the affidavit of the 1<sup>st</sup> Respondent, who



stated that the Respondents were the bona fide owners of the School as well as the subject properties, by way of a partnership contract dated 15<sup>th</sup> July, 2015.

3. That at the completion of the contract, the Appellant was appointed to act as a treasurer for the Respondents who had earlier on purchased the subject properties. That the Appellant later on went into the School premises and locked it, purporting to be the owner thereof and thereby denying students and teachers access to the School. It was stated that unless the injunctive orders sought were granted, learning would be disrupted, thereby causing the students to suffer irreparable harm.
4. The Appellant opposed the first application by swearing a reply on 23<sup>rd</sup> May, 2019 wherein he stated that he is the registered owner and proprietor of the School while the Respondents were merely employees since the year 2012. He deposed that the Respondents were initially assigned the mandate of running the School on his behalf but that he is the person responsible for making all the necessary purchases on behalf of the School. At one point, he asserted, the Respondents broke into the School premises and stole items, following which they purported to start running a new institution near the School using the School name and uniform. That any allegations by the Respondents to the effect that the Appellant is merely a treasurer of the School are false and that the documents tendered by the Respondents to support their suit were obtained fraudulently. That the Respondents had come to court with unclean hands.
5. Subsequently, the Appellant filed the Notice of Motion dated 20<sup>th</sup> May, 2019 (the second application) seeking various orders including an injunctive order barring the Respondents from contacting or in any way dealing with the pupils and parents of the School or trading in the name of the school, pending the hearing and determination of the suit; an order directing the Respondents to avail all documents and records within their custody in respect to the School; and an order for review and/or varying of the ex parte orders earlier issued by the lower court on 6<sup>th</sup> May, 2019. The grounds on the face of the application were amplified in the supporting affidavit of the Appellant, primarily echoing the averments made in his replying affidavit.
6. The two (2) applications were heard together and the trial court by way of the ruling delivered on 31<sup>st</sup> July, 2019 allowed the first application by granting the temporary injunctive orders, while declining to grant the orders sought in the second application. The ruling provoked the instant appeal, brought via the memorandum of appeal dated 16<sup>th</sup> August, 2019 based on the following grounds:
  - “ 1. That the Learned Magistrate erred in law by failing to have due regard, take into account and appreciate the substantive issue of law and fact raised by the Appellant’s Counsel during the hearing of the Respondent’s Application, its response and in the submissions, Authorities and other documents on record.
  2. That the Learned Magistrate erred in law by not taking into account of the Appellant’s application dated 20 May 2019 which clearly showed that there was a prima facie case to grant such interim orders.
  3. That the Learned Magistrate erred in law by disregarding the legal principles governing applications for injunctions and wrongly exercised her discretion in making her order.
  4. That the Learned Magistrate erred in fact by misapprehending that the Respondents’/Plaintiff’s had a prima facie case as Dynamic Community School while their alleged ongoing registration was known as Dynamic Community Based Organization with each being separate and distinct.



5. That the Learned Magistrate having misapprehended the facts and the law gave orders that would bar a bonafide owner of Dynamic Community School from accessing and or managing the school that he clearly is in possession of and allows the respondents the right to interfere with the appellant's school.
6. That in all the circumstances of the case, the Learned Magistrate failed to render justice to the Appellant." (sic)
7. Directions were given for the appeal to be canvassed by way of written submissions. However, the record shows that the Respondents did not participate in the hearing of the appeal or file any documents in that respect, despite service. On his part, the Appellant's counsel anchored his submissions on the principles governing the grant of interlocutory injunctions as enunciated in the renowned case of *Giella v Cassman Brown* [1973] E.A 358 and restated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002 and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR. To argue that the Respondents did not satisfy the relevant principles entitling them to the grant of a temporary injunction and hence the trial court fell into error by finding in their favour.
8. Further, counsel contended that the Respondents did not establish a prima facie case or demonstrate how they stood to suffer irreparable harm, while the balance of convenience did not tilt in their favour. It was similarly argued by counsel that the trial court erred in holding that the ex parte orders issued by the lower court on 10<sup>th</sup> May, 2019 had not automatically lapsed by operation of the law, citing the proviso to Order 40, Rule 4 of the Civil Procedure Rules in that regard which proviso as interpreted by the court in *Eric Ochieng v Fredrick Aila Onyango & another* [2018] eKLR. For those reasons, the court was urged to allow the appeal as prayed.
9. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* [2000] 2EA 212, *Peters v Sunday Post Ltd* [1958] EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278.
10. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

“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.
11. To be determined in the present appeal is the key question whether the trial court arrived at a correct finding in respect to the first and second applications respectively. Consequently, the court will address the six (6) grounds of appeal contemporaneously under the following three limbs.
12. The first limb of the appeal relates to the question whether the trial court properly granted the ex parte temporary injunctive order issued on 10<sup>th</sup> May, 2019. The applicable provision in this respect therefore is Order 40, Rule 4 of the Civil Procedure Rules, 2010. The same provides as follows:



Rule 4(1):

“Where the court is satisfied for reasons to be recorded that the objective of granting the injunction would be defeated by the delay, it may hear the application *ex parte*.”

Rule 4(2):

“An *ex parte* injunction may be granted only once for not more than 14 days and shall not be extended thereafter except once by consent of parties or by the order of court for a period not exceeding fourteen days.”

Rule 4(3):

“In any case where the court grants an *ex parte* injunction the applicant shall within three days from the date of issue of the order, serve the order, the application, and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”

13. From the record of the trial court, upon the Respondents filing the first application, the lower court on 10<sup>th</sup> May, 2019 granted an *ex parte* temporary injunction pending interparties hearing of the said application slated for 24<sup>th</sup> May, 2019 and the Respondents were further directed to serve the first application upon the Appellant. It is apparent from the record that the Appellant was served with the first application and the hearing notice and on 24<sup>th</sup> May 2019 the Appellant’s counsel had attended court for hearing of the first and second application, the latter which was filed on 20<sup>th</sup> May, 2019.
14. On the said hearing date, the Respondents were not in attendance and the trial court was equally not sitting. Resultantly, the parties were given another hearing date. In its ruling, the trial court while allowing the first application, held that the temporary injunction issued on 10<sup>th</sup> May, 2019 would remain in force until the determination of the suit.
15. From the foregoing, it is apparent that while temporary injunctive orders were issued *ex parte* at the first instance and in line with Order 40, Rule 4(1) (*supra*), service thereof was effected upon the Appellant pursuant to Order 40, Rule 4(3) (*supra*) and who thereafter attended court and participated in the hearing. In the premises and from its reading and understanding of the foregoing provisions, the court disagrees with the argument advanced by the Appellant that there was an automatic lapse of the temporary injunctive orders, and finds no fault on the part of the trial court in deciding to extend the temporary injunctive orders initially issued on 10<sup>th</sup> May, 2019. Consequently, this ground of the appeal fails.
16. The second limb of the appeal touches on whether the trial court acted correctly in granting or confirming the temporary injunctive orders sought in the first application, while rejecting the second application. From the record of the trial court, it is evident that the first application was expressed to be brought *inter alia*, under Sections 3 and 63 of the *Civil Procedure Act* and Order 40, Rule 1(a) and (b) of the Civil Procedure Rules. While the second application was expressed to be brought *inter alia*, under Section 63 (c) and (e) of the *Civil Procedure Act* and Orders 1, Rule 10(2); 40, Rules 1, 2 and 4(1) and 51, Rule 1 of the Civil Procedure Rules.
17. The prayers in the two applications as well as the averments made in support thereof and in opposition thereto have already been set out in the earlier portion of this judgment. In granting the temporary injunctive orders sought in the first application, the trial court reasoned that the Respondents had demonstrated that they had a *prima facie* case with probability of success, and that they had shown



that they operated the School at all material times, though the issue of ownership of the School could only be properly determined at the trial. Regarding the second application, the trial court reasoned that the order for a stay of execution of the ex parte orders could not be granted in view of the trial court's decision regarding the first application. The trial court further held that the remaining substantive prayers sought in the second application could only be dealt with upon the trial of the suit.

18. Upon re-examination of the pleadings and material on the lower court record, the court observed that the substantive orders sought at the in the two (2) applications were essentially in the nature of interlocutory injunctions pending the hearing and determination of the suit. It is apparent from the record that while the Appellant also sought an order for review/varying of the ex parte order issued on 10<sup>th</sup> May, 2019 no arguments were advanced to support this prayer.
19. The principles governing the grant of an interlocutory injunction as enunciated in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 are settled. Similarly, as to what constitutes a prima facie case, this was settled too since the decision in *Mrao v First American Bank of Kenya Ltd & 2 others* CA No 39 of 2002 [2003] eKLR. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions including the recent decisions cited in this case by the parties.
20. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR restated the principles governing the grant of interlocutory injunctions enunciated in *Giella's* case and observed that the role of the judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. However, the Court cautioned that such a court ought to exercise care not to determine with finality any issues arising. The court expressed itself as follows:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella's* case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already...by authoritative pronouncements in the precedents, they may be conveniently noted in brief 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.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

21. In addition, the court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the applicant. That is to say, that the applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no prima facie case is established, the court need not investigate the question of irreparable loss or balance of convenience.
22. As to what constitutes a prima facie case, the Court of Appeal delivered itself as follows:

“Recently, this court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 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.”

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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

23. From the impugned ruling, it is apparent that the trial court did not delve into the question of whether the Respondents had demonstrated a prima facie case. Be that as it may, upon re-examining the depositions and submissions made in support of the first application, it appears that the Respondents’ position was that they were the legal operators of the School as well as the legal proprietors of the subject properties, whereas the Appellant had been appointed as treasurer for the purpose of assisting in the purchase of the subject properties, on their behalf. The Respondents also stated that the Appellant had made attempts at interfering with their access to the School as well as the subject properties.
24. In the second application, the Appellant, while stating that he was the bonafide owner of the School, confirmed that the Respondents were in charge of the running and management of the School since 2012, but asserted that they did so on his behalf. It is apparent that among the issues arising was the ownership of the School, which issue the trial court rightly found could only be finally determined at the trial. Upon weighing the rival positions and reviewing the material tendered, against the applicable principles, the court is satisfied that the trial court arrived at a reasonable finding that the Respondents had established a prima facie case.
25. On the question of irreparable harm, the Respondents expressed apprehension that absent temporary injunctive orders, the Appellant would gain total access of the School and subject properties and lock them out of the premises, thereby interfering with the running of the School by the Respondents, and disrupting learning. Upon consideration of the foregoing averments, the court is satisfied that the Respondents had reasonably demonstrated irreparable loss/harm likely to be visited upon them and the community who benefitted from the operation of the School.
26. Hence, the balance of convenience would automatically tilt in favour of the Respondents in that instance. Consequently, the court is satisfied that the trial court acted reasonably by issuing temporary injunctive orders against the Appellant to ensure the smooth and uninterrupted running and management of the School, in the public interest, pending determination of the suit. Moreover, the



court is of the view that once the first application was allowed, the injunctive orders sought in the second application could not be issued.

27. The third and final limb of the appeal relates to the Appellant's complaint that the trial court overlooked the affidavit material, submissions and authorities relied upon by the Appellant in opposing the first application. The impugned ruling, albeit scanty in analysis, does not betray deliberate overlooking by the trial court of the contents of the Appellant's material in arriving at its decision. Ultimately, the court is satisfied that the trial court, upon balancing the rival interests and positions demonstrated in the material of the respective parties herein, and having correctly applied the legal principles arrived at a reasonable finding which need not be disturbed.
28. The upshot therefore is that the appeal is found to be without merit and is hereby dismissed with costs to the Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.**

**C.MEOLI**

**JUDGE**

In the presence of

For the Applicant: Ms. Adhiambo h/b for Mr. Kinyanjui

For the Respondents: N/A

C/A: Carol

