



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE NO. 193 OF 2014

DAVID GIKONYO NJIIRI (Suing as the Legal representative and administrator of the estate of the late WILSON NJIIRI GIKONYO –DECEASED)..... PLAINTIFF

VERSUS

RUTH MARY WANGUI & 7 OTHERS..... DEFENDANTS

RULING

1. The Applicant vide the application dated **18/8/ 2021** and filed on **9/9/2021** seeks the following orders:

1. Spent.

2. Spent.

3. That this honourable court be pleased to review Order No. 1 of its orders issued on 22/6/2021 concerning service of my application dated 5/10/2020.

4. That this honourable court be pleased to amend/rectify/ correct/harmonize its proceedings of 22/6/2021 concerning service of my application dated 5/10/2020 to N. Ikua & Co. Advocates, counsel for the 2nd, 3rd, 4th, 6th & 7th defendants.

5. That this honourable court be pleased to issue temporary injunction restraining all the defendants (1st – 8th), their servants, agents or any one acting under their authority from trespassing, transferring, excising/sub-dividing and/or in any way interfering or dealing with the suit property being land parcel No. NJORO/NGATA BLOCK 1/61 also known as:

No. Plot/Title No. Registered Proprietor

- | | | |
|-----------|-------------|--------------------------------|
| 1 | 6268 | Family Shade Africa Ltd |
| 2 | 6269 | Family Shade Africa Ltd |
| 3 | 6270 | Family Shade Africa Ltd |
| 4 | 6271 | Family Shade Africa Ltd |
| 5 | 6272 | Family Shade Africa Ltd |
| 6 | 6273 | Family Shade Africa Ltd |
| 7 | 6274 | Family Shade Africa Ltd |
| 8 | 6275 | Family Shade Africa Ltd |
| 9 | 6276 | Family Shade Africa Ltd |
| 10 | 6277 | Family Shade Africa Ltd |

- 11 6278 Family Shade Africa Ltd
- 12 6279 Family Shade Africa Ltd
- 13 6280 Family Shade Africa Ltd
- 14 6281 Keren Jepchumba Ayabei
- 15 6282 Family Shade Africa Ltd
- 16 6283 Family Shade Africa Ltd
- 17 6284 William Wanjohi Mureithi
- 18 6285 Keren Jepchumba Ayabei
- 19 6286 Godfrey Michael Otieno Nyamai
- 20 6287 Daniel Owuor Onyango
- 21 6288 Daniel Owuor Onyango
- 22 6289 William Wanjohi Mureithi
- 23 6290 Family Shade Africa Ltd
- 24 6291 Family Shade Africa Ltd
- 25 6292 Family Shade Africa Ltd
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- 27 6294 Family Shade Africa Ltd
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- 30 6297 Family Shade Africa Ltd
- 31 6298 Family Shade Africa Ltd
- 32 6299 Family Shade Africa Ltd
- 33 6300 Family Shade Africa Ltd
- 34 6301 Family Shade Africa Ltd
- 35 6302 Family Shade Africa Ltd
- 36 6303 Family Shade Africa Ltd
- 37 6304 Family Shade Africa Ltd
- 38 6305 Family Shade Africa Ltd
- 39 6306 Family Shade Africa Ltd
- 40 6307 Family Shade Africa Ltd
- 41 6308 Family Shade Africa Ltd
- 42 6309 Family Shade Africa Ltd

43	6310	ElijahMbaruNdung'u
44	6311	ElijahMbaruNdung'u
45	6312	ElijahMbaruNdung'u
46	6313	ElijahMbaruNdung'u

pending the hearing and determination of this application, my other two applications dated 5th October, 2020 and 29th March, 2021 and the hearing and determination of this suit.

6. THAT this honourable court be pleased to order the 7 defendant herein to remove the fence he erected at the suit property sometime around 16th June, 2021 within 30 days from the date of this application or before the hearing of 22nd September, 2021 of both my applications dated 5th October, 2020 and 29th March, 2021 and his compliance with this order be confirmed by this honourable court default of which this honourable court orders for removal of his fence from the suit property with costs.

7. THAT this honourable court be pleased to issue conservatory/ preservative/ protective orders it deems just and expedient to preserve the suit property being land parcel no. NJORO/ NGATA BLOCK 1/61 also known as;

No. Plot/Title No. Registered Proprietor

- 1 6268 Family Shade Africa Ltd
- 2 6269 Family Shade Africa Ltd
- 3 6270 Family Shade Africa Ltd
- 4 6271 Family Shade Africa Ltd
- 5 6272 Family Shade Africa Ltd
- 6 6273 Family Shade Africa Ltd
- 7 6274 Family Shade Africa Ltd
- 8 6275 Family Shade Africa Ltd
- 9 6276 Family Shade Africa Ltd
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37 6304 Family Shade Africa Ltd
38 6305 Family Shade Africa Ltd
39 6306 Family Shade Africa Ltd
40 6307 Family Shade Africa Ltd
41 6308 Family Shade Africa Ltd
42 6309 Family Shade Africa Ltd
43 6310 Elijah Mbaru Ndung'u
44 6311 Elijah Mbaru Ndung'u
45 6312 Elijah Mbaru Ndung'u

46
6313
ElijahMbaruNdung'u
pending the hearing and determination of this application, my other two applications dated 5th October, 2020 and 29th March, 2021 and the hearing and determination of this suit.

8. THAT this honourable court be pleased to summon to appear before it, the lady named JANE MUTHONI KANYUIRA, a stranger and non-party to this suit who trespassed the suit property in November & December 2020 and damaged, injured, wasted and altered it while my application dated 5th October, 2020 as well as the hearing and determination of this suit and our family/ estate's application for review of judgment and decree in the other suit Nakuru HCC No. 153 of 2012 O.S — Wilson Njiri Gikonyo vs Ruth Mary Wangui, Daneva Co. Ltd & William Wanjohi Mureithi (which is now ELC 12B of 2021 (O.S)) were and still remain pending.

9. THAT this honourable court be pleased to order an inquiry into the extent of the damages, wastage, injuries of destruction of trees and other alterations at the suit property done by Jane Muthoni Kanyuira in November & December 2020 while she was acting as an agent of the 2nd defendant herein using his authority.

10. THAT this honourable court be pleased to order inspection and authorise entry into the suit property for accounting of the damages, injuries inflicted therein in November & December 2020 and the proceeds of such damages be deposited by the 2nd defendant herein into court or any other bank account to be supervised by this honourable court as security.

11. THAT this honourable court be pleased to order for the attachment of the proceeds of the beans crop planted on the suit property by Jane Muthoni Kanyuira as an agent of the 2nd defendant and the same be deposited into court or any other bank account to be supervised by this honourable court as security.

12. THAT this honourable court be pleased to order compensation of assessed injuries & damages to the suit property to the plaintiff and the estate of the late Wilson Niiri Gikonyo (deceased) either at the conclusion of this application or the hearing and determination of this suit with interest.

13. THAT this honourable court be pleased to issue any other orders it deems just and expedient.

14. THAT costs for this application be provided.

2. In brief the plaintiff's application seeks the following:

a. That the application be disposed of before other applications on record;

b. That this court do review Order No. 1 of its orders issued on 22/6/2021;

c. That this honourable court be pleased to issue temporary injunction restraining all the defendants from interfering with the suit land pending the hearing and determination of this application, my other two applications dated 5th October, 2020 and 29th March, 2021 and the hearing and determination of this suit;

d. An order that the 7 defendant herein remove the fence he erected at the suit property in June, 202.

e. That this honourable court be pleased to summon to appear before it, the lady named Jane Muthoni Kanyuira, a stranger and non-party to this suit who trespassed the suit property in November & December 2020 and damaged, injured, wasted and altered it and that court order an inquiry into the extent of the damages, wastage, injuries of destruction of trees and other alterations at the suit property done by Jane Muthoni Kanyuira in November & December 2020 and the proceeds of such damages be deposited by the 2nd defendant herein into court or any other bank account

f. order for the attachment of the proceeds of the beans crop planted on the suit property by Jane Muthoni Kanyuira

g. an order of compensation of assessed injuries & damages to the suit property to the plaintiff and the estate of the late Wilson Niiri Gikonyo (deceased) either at the conclusion of this application or the hearing and determination of this suit with interest;

3. Following the listing of the prayers as above, it is observable as follows:

i. prayer (a) was granted hence the instant application is currently being given priority over the two older applications filed in the suit.

ii. prayer no (d) can not be granted as prayed as the same may amount to a summary trial of the dispute between the plaintiff and the 7th defendant.

iii. prayer no (e) can not be granted as the said person to whom it would be directed is not a party to the suit as the plaintiff has not established any claim against her in any of the normal methods of commencing suit; consequently the prayer no. (f) can not be entertained in this suit and at the interlocutory stage for the same reasons.

iv. prayer no (g) can not be granted at the interlocutory stage and has to await the hearing and determination of this suit.

4. The remaining prayers which are capable of being addressed by this court are as follows:

I. That this court do review Order No. 1 of its orders issued on 22/6/2021;

II. That this honourable court be pleased to issue temporary injunction restraining all the defendants from interfering with the suit land pending the hearing and determination of this application, my other two applications dated 5th October, 2020 and 29th March, 2021 and the hearing and determination of this suit;

5. What does **Order No. 1** of the orders issued on 22/6/2021 state? It stated as follows:

"1. Mr Njiiri to serve Mr Ikua with the application dated 5th October 2020 within 7 (seven) days from today."

6. Why the objection by the plaintiff? His grounds are that the application had been served and the affidavit of service was on the record. However the record shows that before the order was made, Mr Ikua had stated that he had not been served. There is no record of insistence by the plaintiff on that date that the application had been served or that there was already filed in the record any affidavit of service. I have noted an affidavit of service dated 18/11/2020 in the record sworn by one Manuel Sakayo Markey. However I do not find any attachment to the said affidavit of service that may be regarded as proof that the application was served upon Mr Ikua's firm. The application for review should therefore fail if it were assessed purely on the basis of the evidence provided by the plaintiff. However, I have noted that the replying affidavit filed by Mr Ikua on behalf of his clients now acknowledges that the application was served and therefore it is my considered opinion that that issue should be allowed to rest by virtue of that admission.

7. The second issue is in respect of the injunction order sought. The defendant's submission is that the said prayer is *res judicata* since this court (Munyao J.) had dealt with a similar prayer before and dismissed it on **1/3/2017** whereupon the plaintiff filed **Civil Appeal No 124 of 2017** which still pends before the Court Of Appeal to date. It is stated that the plaintiff has never been in possession of the land and that that was the finding of this court when it heard the application for injunction. It is further stated that for that reason any of the acts done by the defendants who were said to have been in possession long before the instant suit was filed, were lawful. The defendants stated that there are no orders stopping any of them from any act on the land. The defendants blame the plaintiff for filing application after application, changing advocates and blaming the court, hence delaying the hearing and determination of the instant suit.

8. The order given by Justice Munyao is apparently the focus of the appeal in the Court of Appeal filed by the applicant. **Grounds nos 12 and 14 and 22** in the memorandum of appeal demonstrate that the issues of *prima facie* case and *balance of convenience* cropped up in the appeal. They clearly emanated from the ruling appealed against. the ruling of Justice Munyao is reported under the citation **David Gikonyo Njiiri (suing as the legal representative and administrator of the estate of the Late Wilson Njiiri Gikonyo- Deceased) v Ruth Mary Wangui and 7 Others [2017] eKLR** and it stated as follows in part:

“The application before me is that dated 24 December 2015 filed by the plaintiff. It is an amended Notice of Motion, which as drawn, seeks the following substantive prayers which I have paraphrased:

(i) That leave be granted to amend the plaint.

(ii) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a permanent injunction restraining the 1st - 8th defendants from selling, charging, dealing, transferring, trespassing, subdividing and/or in any manner so to do interfering with land parcel Njoro/Ngata Block 1/61 also known as Plots Nos. 6268-6313 in the name of the various respondents herein.

(iii) That pending the hearing and determination of this suit, an order of inhibition be issued against the land parcel Njoro/Ngata Block 1/61 also known as Plot Nos. 6268-6313.

(iv) That this court be pleased to issue such conservatory orders as it deems just to make so as to preserve the subject matter of this suit being land parcel Njoro/Ngata Block 1/61 also known as Plot Nos. 6268-6313.

(v) That costs be provided for.

9. The court case number given in that ruling is **ELC NO.193 OF 2014** which is the instant case. It is now very clear therefore that a similar application for injunction had been lodged in this suit before and it was heard and determined on its merits. Consequently the plea of *res judicata* raised by the defendants has merit.

10. The upshot of the foregoing is that the instant application dated **18/8/2021** lacks merit and it is hereby dismissed with costs to the respondents.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8TH DAY OF DECEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU