Oketch v Kasui (Environment & Land Case E038 of 2025)
[2025] KEELC 4696 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4696 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E038 OF 2025

NA MATHEKA, J

JUNE 25, 2025

BETWEEN

JAMES OTIEO OKETCH ..... PLAINTIFF

AND

SAMMY KASUI ..... DEFENDANT

RULING

1. The application is dated 28th March 2025 and is brought under Order 12 Rule 7, Order 17, and Order 51 Rule 1 and Rule 15 of the Civil Procedure Rules 2010 and seeks the following orders;

    a. That the Application be certified as urgent and be heard on first instance.

    b. That pending the hearing and determination of the suit inter parties, this Honourable Court be pleased to issue a temporary injunction retraining the Respondent/Defendant either by himself, his agents, servants, assigns or any other person other than the Applicant from entering, encroaching, trespassing, working, developing, or construction the suit property so as to preserve the substratum of the suit.

    c. That the costs of the Application be provided for.

2. It is grounded on the following grounds that via the Sale Agreement dated 27th April, 2018 the Plaintiff purchased Plot No. Donyo Sabuk/Komarock Block 1/18094 from Victor David Maina Kingetta. That after the said purchase the Plaintiff took possession and obtained a Title dated 20th September, 2018. That on or January, 2024, the Defendant without color of right began to erect illegal structures on the Plaintiff's land, the said structures were erected between the Plaintiff's parcel of land and the adjacent wayleave. That the Plaintiff has on numerous occasions questioned the Defendant about the aforementioned illegal structures but in vain. That the Defendant has continued to erect illegal structures on the Plaintiff's parcel of land which is inconsistent with the Plaintiff/Applicant's use

and enjoyment of his land. That this Application will not occasion any prejudice to the Defendant/ Respondent. That this Application has been made without unreasonable/inordinate delay.

3. This court has considered the application and the submissions therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella vs Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR where the Court of Appeal held that;

> "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially."

4. Consequently, the Plaintiff ought to, first, establish a prima facie case. In the case of Mrao Ltd vs First American Bank of Kenya Ltd (2003) eKLR the Court of Appeal gave a determination on a prima facie case. The court stated that;

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

5. In support of his application, the Plaintiff/Applicant stated that via the Sale Agreement dated 27th April, 2018 the Plaintiff purchased Plot No. Donyo Sabuk/Komarock Block 1/18094 from Victor David Maina Kingetta. That after the said purchase the Plaintiff took possession and obtained a Title dated 20th September, 2018. That on or January, 2024, the Defendant without color of right began to erect illegal structures on the Applicant's land, the said structures were erected between the Plaintiff's parcel of land and the adjacent wayleave.

6. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

> "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 Applicant 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.

7. The Applicant stated that the Respondent has illegally erected structures on his parcel of land registered as Plot No. Donyo Sabuk/Komarock Block 1/18094. That the Applicant has further learnt the Respondent continues erecting illegal structures despite the objection being brought to his attention.

8. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will 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 Defendants 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
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> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting."

9. In the case of Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

> " 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 the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

10. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because if the orders sought herein are not granted there is danger of the Respondent continuing to put up structures on suit land to the detriment of the Applicant which will in turn lead to the violation of the Applicant's proprietary rights. That without the intervention of this Court, the Applicant herein may suffer irreparable loss and damage.

11. The decision of Amir Suleiman vs Amboseli Resort Limited (2004) eKLR where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated;

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

12. It is not in dispute that the suit land belongs to the Applicant. The Applicant alleges that the Respondent has encroached and continues to do so. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the current situation on the ground. I have also not had the opportunity to interrogate the annextures to therein.

13. In Robert Mugo Wa Karanja vs Ecobank (Kenya) Limited & Another (2019) eKLR where the court in deciding on an injunction application stated;

> " circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

14. In view of the foregoing, I find that the application is merited and order that the status quo be maintained pending the hearing and determination of this suit. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF JUNE 2025.

N.A. MATHEKA

JUDGE