Muiruri (Suing as the legal representative of the Estate of Muiruri Homba - Deceased) & another v Chepkwony (Land Case E022 of 2025) [2025] KEELC 6305 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6305 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

LAND CASE E022 OF 2025

MC OUNDO, J

SEPTEMBER 25, 2025

REPUBLIC OF KENYA IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA LAND CASE E022 OF 2025 MC OUNDO, J SEPTEMBER 25, 20

BETWEEN

AUGUSTINE NJUNGE MUIRURI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUIRURI HOMBA - DECEASED) ..... 1ST PLAINTIFF

JOSEPH KIBIRA MUIRURI ..... 2ND PLAINTIFF

AND

SAMUEL K. ARAP CHEPKWONY ..... DEFENDANT

RULING

1. Coming up for determination is a Notice of Motion Application dated 15th April, 2025 brought pursuant to the provisions of Sections 1A, 1B, 3 A of the *Civil Procedure Act*, Order 40 and 51 of the Civil Procedure Rules and all other enabling provisions of law wherein the Applicants have sought for orders compelling the Respondent, his servants or representatives to vacate from their parcel of land Reference Number 10242/3 and for an order restraining the Respondent, his servants, or representatives from trespassing on the parcel of land Reference Number 10242/3, pending the hearing and determination of the suit. They also seek for costs.

2. The said application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by Augustine Njunge Muiruri, the 1st Plaintiff herein, one of the administrators of the estate of the late Muiruri Homba who deponed that the late Muiruri Homba was the registered proprietor of all that parcel of land known as Reference Number 10242/3 situated at Kongasis Area Oljorai Elementaita within Nakuru County.

3. That the Respondent owned one of the adjoining parcels of land, situated across the road from the deceased's said parcel of land. That initially there had been perennial land and boundary disputes in the

area ther having been no clear beacons defining the respective parcels in the area wherein subsequently, comprehensive beaconing officiated by the Land Registrar and the Land Surveyor of Naivasha District had been done on the 31st March 2022.

4. That vide a report dated the 8th April 2022, the Naivasha District Land Surveyor had established that there had existed a road between the Applicants/Plaintiffs' parcel of land and parcel No. Oljorai Phase 11/12.

5. THAT on or the year 2019, the Defendant had annexed the said road and encroached onto the Plaintiffs' parcel of land Reference Number 10242/3 where he has been farming and tilling without their permission and/or t transferring or sharing any benefits with the estate of the deceased owner, thus his actions amount to trespass.

6. That their effort to stop him including using the local administration has been futile thus denying the deceased's estate the benefit of their property. That the said actions had also constituted intermeddling with the estate of a deceased person and which acts were criminal in nature and should therefore be stopped by the honorable court. They thus beseeched the court to grant the prayers sought in their application to facilitate peaceful and beneficial occupation of the land by the estate of the registered owner thereof.

7. In response and in opposition to the Plaintiffs/Applicants' Application, the Defendant/Respondent filed his Replying Affidavit dated 23rd May 2025 wherein he denied having encroached and occupied the Applicants' land reference No.10242/3 and therefore the any orders issued to compel him, his servants and or representatives to vacate from or restrain him, his servants and or representatives from trespassing from the said parcel of land would be in vain, needless and of no consequence.as he had no interest whatsoever on the said land parcel.

8. That whereas he did not know the Applicants personally, he was aware that they were the proprietors of LR No.10242/3 which neighbors his land No. LR No. Naivasha/Ol-jorai Phase 11/12 which he had subdivided into four portions for his own use and use of his family.

9. He confirmed that the land in the area had been beaconed in a comprehensive and consultative process and that there existed a road between his land parcel and that of the Applicants which he denied having encroached on thus violating the applicants' proprietary rights and interests over their land parcel.

10. That after the Government through the Land Registrar and the Land Surveyor Naivasha had visited the land parcels, confirmed the boundaries, marked, placed the beacons and mapped the proper placement of the road in its actual place, the same had moved from the temporary side on his land to its actual place between their two land parcels.

11. That in any case, the Applicants did not reside on their land but leased portions of their land third parties to farm, which parties used to till the land up to his side of the land before the road had been properly placed by the Government officials wherein, he fenced off his land.

12. That the public now started using the proper road which was graded. The Applicants mistakenly thought that they were trespassing and proceeded to lodge complaints at various offices. A meeting was called by the area District Officer along with the Land Registrar and the Land Surveyor who confirmed that the road had been placed in the right place.

13. That it was strange that the Applicants were only targeting him wherein the road was used by 19 other land owners in the area and would also be affected by any decision in the instant matter. That the area map had clearly pointed out the Applicants' land parcel and his land parcel as well as the main road

that was currently tarmacked and the marram road between the Applicants' land parcel, his land parcel and 18 other land parcels.

14. He thus deponed that the instant application was incompetent, ill 'advised, baseless, an abuse of the court process and had no merit. That there was absolutely no boundary dispute between the applicants and themselves as their land parcels were separated by a public road of passage and it was not possible for him to cross the road and trespass onto the Applicants' parcel of land. That if the Applicants were not satisfied with how the Government had placed the road, they should lodge their complaints with the Government.

15. That one W. Benson who purportedly authored the report dated 8th April, 2022 for the District Surveyor never visited the ground for the purpose of any boundary dispute rather, it had been the District Surveyor one Mr. Kariuki who had been to the ground. That the Application herein dated 15th April, 2025 ought to be dismissed with costs.

16. The Application was disposed of by way of written submissions wherein the Plaintiffs/Applicants vide their submissions dated 11th June 2025 framed one (1) issue for determination to wit; whether or not the application for temporary injunction herein was merited.

17. They then submitted that their application had met all the requisite conditions as had been founded on the famous cases of Giella vs Cassman Brown (1973) EA 358, Hezron Kamau Gichuru v Kianjoya Enterprises Ltd & another [2022] eKLR, and Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR to submit that they has discharged the onus placed on them for which their application was merited for the grant of temporary injunction orders sought.

18. That they had proved a prima facie case with high chances of success that called upon the Respondent to give an explanation on specifically why he would alter and/or change the boundaries, close the road and trespass upon their suit parcel of land without any color of right whatsoever. They placed reliance in the decided case of Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR to submit that they not only had established a prima facie case by proving that the ownership of the suit parcel belonged to the estate of the deceased, by adducing certificate of tittle dated the 15th February 1993, but they had also proved trespass by the Respondent through the annexed photographs which showed the tiling, cultivation and the extent of encroachment which was beyond the road into the Plaintiffs' land.

19. That the Respondent's argument was baseless, contradictory and had been overtaken by events after the dispute on where the road was supposed to pass had been solved by the surveyor's report which had given the exact boundaries of the two adjacent parcels and which report had never been challenged and/or quashed and which report the Respondent had ignored wherein the surveyor had recommended for the court's intervention which was now being sought by the Plaintiffs.

20. That they stood to suffer irreparably were the injunction orders not granted. They placed reliance in the decided case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR. That the encroachment, tilling and cultivating on their land by the Respondent was in itself sufficient demonstration of irreparable injury. That the emotional and mental torture/damage, that they were going through when the Respondent was enjoying their property without any permission and/or arrangement whatsoever, could not be compensated by way of costs. Reliance was placed in the decided case of Ubhi, HSC v Mohamed (Environment & Land Case E039 of 2023) [2024] KEELC 157 (KLR) (24 January 2024) (Ruling) eKLR to submit that the Defendant herein who had no tittle to the suit property and his continuous cultivation stood to alter the substratum of the suit wherein he could even dispose it of thus affecting the beneficiaries of the deceased's estate.

21. That the balance of convenience tilted in their favour as they stood to be more inconvenienced if the injunction was not granted and subsequently the suit was decided in their favor in comparison to how the Respondent would be inconvenienced were the injunction granted and the suit dismissed. They placed reliance in the Pius Kipchirchir Kogo Case (supra) and Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR to submit that in the the deceased and by extension his beneficiaries, had owned and enjoyed the use of the suit property from the year 1993 until the year 2019 when the Respondent started encroaching and tilling thereon. Reliance was placed in the Ubhi, HSC case (supra)

22. In opposition, to the application, the Respondent vide his submissions dated 16th June 2025, also summarized the factual background of the matter and framed one (1) issue for determination to wit; whether the instant application has merit.

23. That the court had already pronounced itself vide the directions and orders that had been issued on 18th April 2025 where it had rightly held that the orders to vacate the land as sought by the Applicants were final orders which could not be issued at an interim stage. That it was trite law that a person could not be condemned unheard and that orders of eviction could not ensue before parties were heard.

24. With regards to the other orders that had been sought by the Plaintiff/Applicant, he placed reliance in the decided case of Giella vs Cassman Brown (1973) EA 358 to submit that it was trite law that for an injunction to be granted, a party had to establish a prima facie case or alternatively a case on the balance of convenience. That the Applicants had not set out a prima facie case to warrant the issuance of an order of injunction.

25. That parties were in agreement that the deceased's parcel of land No. L.R No. 10242/3 was clearly separated by a public road of passage from his land No. Naivasha/Ol-jorai Phase 11/12. That there had been no evidence adduced by the Applicants to the effect that the Respondent had crossed the road, annexed the same and encroached onto their land parcel.

26. That in any case, the orders that had been sought by the Applicant were effective on L.R No. 10242/3 and did not affect land parcel No. Naivasha/Ol-jorai Phase 11/12. That subsequently, the Applicant had clearly not proved encroachment on their land parcel thus effectively, the said orders could not issue.

27. That the balance of convenience therefore was not in favour of the Applicants as both parties had their own respective land parcels and title deeds wherein said parcels of land were separated by a road.

28. That the act of by-passing a road, blocking the same and/or encroaching on a road was clearly an offence which the Applicant could easily have reported the Respondent to the Government and County offices for their action. That since the Government officials had been to the ground, such misdeeds would have reflected in the report and action could have been taken against the Respondent.

29. That the Applicants had also not proved that they stood to suffer any irreparable damage were the orders of injunction not granted based on the fact that they were on the other side of the road and on their own and parcel of land where there had been no prove of encroachment. That there was therefore no proof of infringement that could result to any damage upon the Applicants.

30. That it was also trite law that orders of injunction could not issue where a party was guilty of laches. That Applicants were guilty of laches having deponed at paragraph 6 of their Supporting Affidavit that he had encroached on their land parcel in the year 2019 wherein they instituted the current suit on 17th April 2025, six (6) years later. That it would therefore be unsafe to issue orders of injunction in such circumstances. That the Application dated 15th April 2025 had no merit and ought to be dismissed with costs.

*** Determination.**

31. I have considered the application herein, its response, the authorities cited, as well as the applicable law, the Applicants herein in their Notice of Motion Application dated 15th April, 2025 seek orders to compel the Respondent, his servants or representatives to vacate from their parcel of land Reference Number 10242/3 and also for an order restraining the Respondent, his servants, or representatives from trespassing on the said parcel of land pending the hearing and determination of the suit. They also seek for costs.

32. The said application is premised on the affidavit sworn by the 1st Applicant to the effect that the Respondent has been farming on and tilling a portion of their land Ref No. 10242/3 which was registered to the late Muiruri Homba, which then amounts to trespass and "intermeddling with the estate of a deceased person. They allege that this encroachment occurred in 2019 when the Respondent annexed a road that existed between their two properties and this despite a comprehensive land beaconing exercise done in March 2022, by the Naivasha District Land Registrar and Surveyor, who had confirmed the correct position of the beacons and the existence of a road separating their properties, as noted in a report dated 8th April 2022. They were thus seeking the court order to stop the Respondent's actions so as to allow the deceased's estate to peacefully occupy and enjoy the proceeds of their land because his activity continued to cause them irreparable damage and harm. That they had established a prima facie case with a probability of success to warrant the orders sought.

33. In response, the Respondent denies all claims of encroachment and/or trespass, confirming that indeed a comprehensive beaconing process had been carried out where a public road had been properly placed between his land, Naivasha/Ol-jorai Phase II/12, and the Applicants' property having been moved from a temporary location in his land, to its correct position wherein he had thus fenced off his land.

34. That the Applicants mistakenly believe that he was trespassing because they were used to their lessees tilling the land up to his property before the road was formally established. The Respondent further argues that the Application is baseless because the two properties are separated by a public road, making trespass impossible. He also notes that the road is used by 19 other landowners, where in a meeting with local officials the position of the road was confirmed. The Respondent also challenged the validity of the April 8th 2022, report, stating that the purported author, a Mr. W. Benson, never visited the site, and that it had been the land surveyor Mr. Kariuki who had actually visited the site. He thus sought for the court to dismiss the Application stating that the Applicant's had not established a prima facie case and were guilty of laches the cause of action having started in the year 2019 wherein they had filed suit 6 years later, hence the application ought to be dismissed with costs.

35. The celebrated case of Giella vs Cassman Brown (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows: -

    i. Is there a serious issue to be tried (prima facie case)?

    ii. Will the Applicant suffer irreparable harm if the injunction is not granted;

    iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

36. On the first issue as to whether the Plaintiffs/Applicants in this matter have made out a prima facie case with a probability of success, I am guided by the case of Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125, where a prima facie case was described as follows:

> 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."

37. The Court has been moved under a Certificate of Urgency, by the Applicants, to issue temporary injunction against the Respondent. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought. The Court is not required to determine on merit as to whether the Applicants herein have demonstrated that they have a genuine and arguable case or not.

38. I shall frame my issues for determination therein applying the principles as set in the Giella case (supra).

39. As to whether the Applicants have made out a prima facie case, I have considered the present application and the documents adduced in evidence in support thereof vis a vis the Respondent's Replying affidavit. Both parties are in agreement that they hold titles to their respective parcels of land which are separated by a road pursuant to the beaconing and comprehensive consultation by all land owners in the area, following several boundary disputes that had arisen.

40. I have considered the surveyor's report dated the 8th April 2022 annexed by the Applicants in support of their application as ''AJ4'' where at paragraph 4 of the report, the contents are clear to the effect that both the properties No. Oljorai Settlement Scheme Phase II/13 and the Applicant's property LR No. 10242 have encroached on the road wherein consent to open the road was denied by the proprietor of Oljorai Settlement scheme Phase II/13 upon incitement by members of the public.

41. I have further looked at the photographs herein annexed as "AJ 5" which photographs depict a road, a fenced parcel of land and a foot path separating two parcels of land and which pictures in my view are not of much assistance. No report has been availed to court to depict that the position has changed following the report of 8th April 2022 that had confirmed the parties' parcels of land as having encroached on the road and which report would then support the allegations by the Applicants.

42. Lastly, it is not in dispute the Respondent's alleged impugned activities started in the year 2019, wherein the Applicants now seek his eviction after 6 years and at an interim stage. It is trite that an Applicant who is guilty of laches generally cannot seek an interim injunction. This is because laches is a flexible equitable doctrine and a good defence that considers all the facts and circumstances of the case thereby preventing a party from enforcing a claim due to an unreasonable delay without an explanation. An interim injunction is an equitable remedy, and courts follow the maxim, "Equity aids the vigilant, not those who slumber on their rights."

43. Having considered the circumstance of the application, I find that the Applicants herein have not made out a prima facie case as was held in the case of Mrao vs First American Bank of Kenya Limited (supra), and therefore I need not consider the other two conditions for the grant of temporary injunction as established in the Giella –vs- cassman Brown Ltd case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless it was entertaining a doubt as to whether or not a prima facie case had been established.

44. The Court of Appeal in the case of Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86 cited by Gitumbi, J (as she then was) with approval in the case of Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR observed as follows: -

> " The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".

45. Consequently, I dismiss the application dated 15th April, 2025 with costs to the Respondent. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

Dated and delivered via Microsoft Teams at Naivasha this 25th day of September 2025

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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