



**Mwangi v Muhuhi & another (Civil Suit E9 of 2024)
[2024] KEMC 141 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEMC 141 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E9 OF 2024
PA NDEGE, SPM
JULY 30, 2024**

BETWEEN

STEPHEN KAGURI MWANGI PLAINTIFF

AND

JUSTUS KIRAGU MUHUHI 1ST DEFENDANT

COUNTY GOVERNMENT OF NAKURU 2ND DEFENDANT

RULING

1. This application is based on a Notice of Motion dated 13th of January 2024, supplemented by a supporting affidavit dated 24th of January 2024, and brought pursuant to the Civil Procedure Rules, Orders 40, rule 1 and 51 and the *Civil Procedure Act*, sections 1A, 1B and 3A. The notice of motion by the plaintiff sought orders for a temporary injunction restraining the defendant whether by himself, his servants, agents and /or anyone acting under his authority from dealing, entering, remaining, constructing, selling, alienating, trespassing, interfering, charging and/or any other way dealing with all the parcel of land known as PLOT NO.40 in Mbaruk Shopping Centre, pending the hearing and determination of this suit.

Summary Of The Plaintiff's Case

2. The plaintiff has been the legal allottee and beneficial owner of the parcel of land known as Plot No40 at Mbaruk Shopping Centre (herein referred to as the "suit property") having been allotted the same by the county council of Nakuru on 21st September, 2011. The plaintiff took possession of his property after paying the requisite fees and shown the beacons to his property by the county surveyor.
3. It is the plaintiff's case that he built a pit latrine on the property but unknown to him, the defendant herein without any color of right and through fraudulent means caused himself to acquire and trespass onto the said property, caused some malicious destructions therein and he is thus apprehensive that unless restrained by way of an injunction, the defendant may in an attempt to defeat the plaintiff/



applicant's claim, end up selling the said suit land to third parties and which will render this suit moot and a mere academic exercise.

Summary Of Defendants Case

4. The 1st defendant responded to the application by way of his Replying Affidavit sworn at Nakuru on 14/02/2024. His response is mainly that the plaintiff is confusing his plot with Plot No. 41 which was allocated to him by the defunct County Council of Nakuru in 1978 as per the attached copy of allocation letter dated 15/08/1978. The defendant emphasizes that his plot is NO.41 and not plot NO.40 and that the plaintiff is confusing the position of plot NO.40 with that of plot NO.41 or that the plaintiff is simply being malicious.

Analysis And Determination

5. With regards to the application herein for an order of temporary injunction, there are prerequisite principles guiding the grant of the same. As held by the court in *Hezron Kamau Gichuru v Kianjoya Enterprises Limited and Another* [2022] eKLR, the principles for granting a temporary injunction are set out in the decision of *Giella V Cassman Brown* [1973] EA 358.

In *Giella v Cassman Brown* [1973] EA 358 the court held that

“In an interlocutor injunction application the Applicant has to satisfy the triple requirement to (a) established his case at prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) ally any doubts as to be by showing that the balance of convenience is in his favour.”

6. The position has been reiterated in several decision from Kenyan courts, particularly in the case of *Nguruman Limited v Jan Bonde Nielsen and 2 others* [CA No.77 of 2012](#) [2014] eKLR where the court of appeal held that;

“In an interlocutor injunction application the Applicant has to satisfy the triple requirement to (a) established his case at prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) ally any doubts as to be by showing that the balance of convenience is in his favour.”

7. The above mentioned three pillars lay the foundation of any order of injunction, interlocutory or permanent. The court in the matter above, *Nguruman Ltd v Jan Bonde Nielsen* (supra), stated that all the three conditions above have to be applied as separate, distinct and logical hurdles which the applicant ought to surmount sequentially. Thus the issue for determination herein then is, whether or not the Applicant/plaintiff has met the set-out conditions stated above, to warrant a grant for interlocutory injunction.

Prima Facie Case

8. As a consequence, the plaintiff is under obligation to, first establish a prima facie case. The Applicant herein submitted that they have established a prima faice case and have made reliance on the Judicial



decision of *Mrao Ltd V First American Bank of Kenya Ltd* [2003] ECLR in which the court of appeal gave a definition of a prima facie case. The court stated that,

“... in civil cases, it is a case 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.”

9. The plaintiff herein has provided proof of ownership of the suit property in question vide the annexed receipts of payment for ground rent. On the other hand the first defendant has only provided proof of ownership of a different allotted parcel namely (MBARUK 41 GBUS). This is a different allocated parcel from the one in question and with respect to (PLOT NO.40) which is the suit property, the defendants have not shown ownership of the same. Furthermore the 1st defendant has not provided proof of allotment via an allotment letter unlike the plaintiff who has produced the same dated 20th September 2011. So it is this courts findings that the plaintiff herein has forwarded a prima facie case before this court with a higher probability of sources. The plaintiff has also provided evidence of a notice of allotment which stood to revoke any previous ownership by prior allottee due to failure of the in-ground rent.
10. The Applicant has further given undisputed evidence that he took possession of the suit property soon after paying the requisite statutory fees and that he took occupation thereof by building a pit latrine in his said land. The Applicant thereafter has sworn in his affidavit stating that the 1st defendant demolished his pit latrine and proceeded to erect a fence around his land. This has not been disputed at all by the 1st defendant.
11. It is the applicants further undisputed evidence that to date, he is unable to access his land since the 1st respondent fenced it off and therefore stopped him from having any access to the land herein.
12. The applicant has established a prima facie case against the 1st defendant herein and reasonable grounds for a temporary injunction be issued against the defendant until the case is heard and determined. Let me not comment much on the evidence at this stage. The applicant has thus clearly established that there exists a right which has apparently been infringed by the respondents as to call for an explanation or rebuttal from the defendants who allege that he sits on plot NO.41 and not 40 being claimed by the Applicant. Clearly, the Applicant has proved he has a prima facie case against the respondent.

Irreparable Damage

13. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eCLR, the meaning of irreparable injury was construed to be;

“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 court pronounced itself that an 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.”

14. In this matter, the applicant is apprehensive that should the prayers sought herein not be granted, the Respondents may attempt to sell the suit land to third parties that will render the suit a mere academic exercise. Having confirmed that the defendant is in occupation of the suit land, it is thus in interest of justice that the court allows the prayer for temporary injunction sought herein pending the hearing and determination of this matter.



Balance Of Convenience

15. In *Nguruman Ltd v Jan Bonde Nielsen* (supra), stated that all the three conditions above have to be applied as separate, distinct and logical hurdles which the applicant ought to surmount sequentially.
16. In *Chebii Kipkoech v Barnabas Tuitoek Bargoria and Another* [2019] eKLR, where it was held that;

“...the meaning of balance of convenience in favor of the plaintiff is that if an Injunction is not granted and the suit is ultimately decided in favor of the plaintiff, the inconvenience caused to them would be greater than that caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”
17. Similarly in the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Limited and 2 Others* [2016] eKLR, the court expressed itself on the issue of balance of convenience, stating that,

“If an 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.”
18. In a nutshell, the essence of the condition of balance of convenience is promised on the need to maintain the status quo. The applicant in this case has demonstrated by way of evidence the need for this court to issue a temporary injunction on the suit land pending the hearing of the case herein.
19. The court will further note that the applicants allegations in his supporting affidavit have not been disputed to at all by the respondent, that the 1st respondent fraudulently, irregularly and illegally trespassed onto the plaintiffs land. Thus clearly, the injunctive orders sought will be in favour of the applicant who prays that his interests in this matter be safeguarded.
20. In light of the findings above, the court holds that the Applicant/Plaintiff has satisfied the requisite conditions and ingredients informing the foundation for the grant of a temporary injunction against the interests of the party herein. Therefore, in the premise of the aforementioned, I grant the following orders: -
 - a. Pending the hearing and determination of the suit herein, an order of temporary injunction be and is hereby issued restraining the Defendant/ Respondent whether by himself, his servants, agents and/or anyone acting under his authority from dealing, entering, remaining, constructing, selling, alienating, trespassing, interfering, charging and/or any other way dealing with all the parcel of land known as PLOT NO.40 in Mbaruk Shopping Centre.
 - b. Costs of this application be borne by the Defendant/ Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF JULY, 2024.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Karungu for the Plaintiff/ Applicant

n/a for the Defendant/ Respondent.

