Ngui & another v County Government of Kitui & 2 others (Environment and Land Case E001 of 2023) [2025] KEELC 7472 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7472 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND CASE E001 OF 2023

A KANIARU, J

OCTOBER 30, 2025

BETWEEN

SAID HAILE NGUI .... 1ST PLAINTIFF

ALICE KOKI NGUI .... 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF KITUI .... 1ST DEFENDANT

GIDEON KITILI .... 2ND DEFENDANT

KILUNDO KIMANTHI .... 3RD DEFENDANT

RULING

1. The application before me for determination is a notice of motion dated 2/8/2024 and expressed to be brought under Section 1A and 3A of the *Civil Procedure Act* (Cap 21), Order 40 Rules 1 and 2 and Order 5 Rule 1 of Civil Procedure Rules. The application came with five (5) prayers but at this stage, not all of them are up for consideration. Some, like prayers (a), (b) and (c), were for consideration at the ex-parte stage. They are therefore spent and the prayers now for consideration are two - prayers (d) and (e) – and they are as follows:

    Prayer (d):

    "That a temporary order of injunction restraining the plaintiffs/respondents, whether by themselves, agents, servants, family or relatives, from trespassing on, blocking access, wasting, constructing on, excavating, digging graves, fencing, subdividing, disposing, selling, transferring, alienating, or otherwise interfering, or dealing with or by any other way howsoever interfering with land parcels numbers 1 & 2 situate at Endau (Herein after the "suit properties") pending the hearing and determination of this application and the entire suit.

Prayer (e):

That the cost of this application be provided for.

2. The application is premised on grounds, inter alia, that the disputed land is vested in and held by 1st applicant in trust for the people resident in Endau. This prevailing state of affairs is envisaged to be so until the adjudication process is complete. It was further averred that the respondents had started digging a grave on the land with a view to burying the remains of their elder brother – Makiti Ngui – on the property. The respondents were said to be without right or justification to bury the body of their brother on the land. The court was urged to grant the restraining orders as the respondents are incapable of self-restraint.

3. The grounds in support of the application are expounded in the supporting affidavit that accompanied the application.

4. The respondents responded to the application vide a replying affidavit dated 9/9/2024. According to them, the application is misleading and meant to vex or annoy at a time of grief. The averment that the respondents intended to bury the remains of their dead brother on the disputed land were said to speculative and inaccurate. The remains were said to have buried at the respondents' homestead which is not on the disputed land. The applicants were even said to the aware of the fact of the burial of the respondents' brother at another place. The application herein was therefore said to be in bad faith and meant to harass the respondents.

5. The application was canvassed by way of written submissions. The applicant's submissions are dated 11/10/2024 while those of the respondents are dated 25/11/2024.

6. The applicants submitted that they have met the threshold set in Giella -vs- Cassman Brown & Ltd [1973] EA 358 which requires that an applicant who desires to get a temporary restraining order has to show first that he has a prima facie case with a probability of success; secondly that he stand to suffer irreparable loss not compensable with damages if a restraining order is not granted and, thirdly and finally, that where the court is in doubt as to demonstration of the first two, then it has to consider the balance of convenience.

7. According to the applicant's a prima facie case as defined in Mrao Ltd. -vs- First American Bank of Kenya & 2 Others [2003] eKLR has been shown as the respondents have no good claim to the land and are merely trying "to grab" it. The land was said to be held by the 1st applicant and earmarked for establishment of Government Offices and allotment to other residents of the area. The applicant's own case was therefore said to be stronger and has a higher probability of success.

8. The applicants were further said to have "invested heavily" in the disputed land for the benefit of the "larger Endau Market residents and users." They averred that they have been in actual possession and occupation of the land for over twenty (20) years. There is educational and administrative infrastructure on the site surrounded by a perimeter wall and all this is said to be at risk of being destroyed if the order sought is not granted. It was submitted that all this would amount to irreparable loss.

9. On the issue of balance of convenience, the applicants were said to be likely to suffer the greater harm or inconvenience if a restraining order is not granted as they are the ones in possession and/ or occupation. They averred that they have education and administrative offices on the land and the balance of convenience therefore tilts in favour of granting them a restraining order.

10. The respondents on the hand submitted that the applicants are not deserving of the orders sought as they have not met the requisite threshold. They were said to be guilty of misrepresentation and material non-disclosure. The entire application was said to be "premised on a factually inaccurate grounding" as there were no intentions of conducting any burial on the land.

11. Further, it was pointed out that even the interim orders granted to the applicants were not merited because the respondents had failed to disclose some material facts. Various decided cases – including that of Gabriel Kariuki Gitonga & 2 others –vs- Redken Wells Ltd. & 11 others [2021] eKLR – were cited and quoted to make the point that where material non-disclosure is found to exist the orders granted are discharged or set aside.

12. Finally, it was submitted that in an earlier application where the respondents themselves were the applicants, the court declined to grant restraining order for the reason, inter alia, that the area was under adjudication and the issue of ownership was not yet settled. The area is still under adjudication and for that same reason, the restraining orders sought in the application now before court should be declined.

13. I have considered the application, the response made to it, and the rival submissions. I have had a look also into the court record generally.

14. The threshold to be met in deciding whether or not to grant restraining orders was set out in the locus classicus case of Giella –vs- Cassman Brown & Company Limited [1973] E.A. 358 where the court observed thus:

> " First, an applicant must show a prima facie case, with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

15. But Giella's case (supra) has often been supplemented by other relevant observations in some decided cases. For instance, in Kenya Hotels Limited –vs- Kenya Commercial Bank Ltd. & Another [2004] 1 KLR 80, the court held, inter alia, that an injunction is an equitable remedy and the court may, while remaining guided by the principles in Giella's case, also look at all circumstances including the conduct of the parties.

16. And relating to how the court should approach the issue of demonstrating the threshold set in Giella's case (supra), the observation made in Nguruman Ltd. –vs- Jan Bonde Nielson & 2 others: Civil Appeal No. 21 of 2014 (UR) in instructive. The court stated as follows while referring to the threshold:

> " It is established that all the above three conditions are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd. –vs- Afraha Education Society: [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the applicant will suffer if the injunction is not granted will be irreparable.
>
> In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie does

not permit "leap – frogging" by the applicant to injunction directly without hurdles in between."

17. I think it is also useful to point out that an injunction will not normally be granted if the danger or harm alleged is merely apprehended or conjectural. The harm or danger is required to be real, actual, substantial, and with a high degree of probability that it will occur. Sometimes, the court may act on a threat but even then, the applicant must show that the threat is real, imminent, grave and capable of causing injury that damages cannot sufficiently compensate. Additionally, an injunction will not issue if what is complained of is overtaken by events.

18. A look at the applicant's applications show that the main reason for seeking a temporary restraining order is that the remains of the deceased brother of the respondents might be buried on the disputed land. The prayer for injunction seeks to restrain many things including the burial but the grounds on its face clearly show that it is the issue of burial that impelled its filing.

19. The respondents responded to the application and stated inter alia; that they had already buried the body of the deceased brother elsewhere. In fact, the respondents went ahead to allege that the applicants are even aware of this fact. There was no rebuttal from the applicants to this averment by the respondents. This court is therefore inclined to believe it.

20. The application's raison d'etre was that alleged burial. If the burial has already occurred, the reason or purpose of the existence of the application considerably diminishes. Though the prayer sought in the application also seeks to restrain such other things like subdividing, disposing, transferring, alienating, constructing on, or excavating, among others, there is no real or tangible information proffered to show that the respondents were preparing or planning to do these things.

21. My considered view also is that the applicant cannot be said to have met the threshold set in Giella's case (supra) at this stage. It is clearly stated that the area is under adjudication. It is not clear how far the exercise of adjudication has gone in respect of the disputed land. If the applicants could be shown to be the adjudicated or demarcated owners of the land at this stage, it would not be difficult to say that they have a prima facie case. But no records from the adjudication office have been made available to show the true state of affairs. As things stand, it is not possible to tell who the owners are.

22. Concerning the issue of irreparable loss, I don't see any of the things complained of and sought to be restrained that cannot be compensated with damages. The applicants have not shown or even alleged that the respondents cannot pay damages. Further the respondents themselves needed to give an undertaking to pay damages if they ultimately loose the case. They have not given such undertaking.

23. The last issue normally considered is that of the balance of convenience. This one is however considered when the court entertains doubts concerning the first two considerations. I have no such doubts concerning my finding on the first two issues. If anything, I am convinced that the applicants did not do a good job of demonstrating a prima facie case. I am also reasonably sure that damages can be an adequate remedy.

24. The upshot, in light of the foregoing, is that the application herein is for dismissal and I hereby dismiss it. Costs to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 30TH DAY OF OCTOBER, 2025.

In the presence of;

Court Assistant – Musyoki

Maweu for Plaintiff/Respondent

Nduva (absent) for Applicant/Defendant

No party present

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI