Kakuli & 2 others v Kakuli (Environment and Land Case E007 of 2025)
[2025] KEELC 18380 (KLR) (18 December 2025) (Ruling)

Neutral citation: [2025] KEELC 18380 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND CASE E007 OF 2025

NA MATHEKA, J

DECEMBER 18, 2025

BETWEEN

RAPHAEL MULI KAKULI ..... 1ST PLAINTIFF

NZIOKA KAKULI ..... 2ND PLAINTIFF

MWANZIA KAKULI ..... 3RD PLAINTIFF

AND

JOHN KINGOO KAKULI ..... DEFENDANT

RULING

1. The application is dated 24th February 2025 and is brought under Order 40 r 1 and 2 of the Civil Procedure Rules 2010, Section 3A and 63E of the *Civil Procedure Act* Cap 21 seeking the following orders;

   i. The application herein be certified urgent and orders issued ex-parte in terms of prayer ii herein.

   ii. Pending the hearing of this application the Honourable Court be pleased to issue a conservatory order of injunction against the Defendant/Respondent from entering, evicting, selling and/or interfering with the Applicant's use and possession of land parcel numbers Kithimani/Kithimani 'A'/3609 and 6268 pending the hearing and determination of the application.

   iii. Pending the hearing of this application the Honourable Court be pleased to issue a conservatory order of injunction against the Defendant/Respondent from entering, evicting, selling and/or interfering with the Applicant's use and possession of land parcel numbers Kithimani/Kithimani 'A'/3609 and 6268 pending the hearing and determination of the suit/ summons.

iv. The court herein be pleased to issue any other or further orders to prevent the ends of justice being defeated.

v. Costs be provided for:-

2. It is based on the following grounds that the Applicants have been in possession of the subject matter uninterrupted and exclusive possession for more than 30 years. The Applicants have cultivated and developed the property by building permanent homes. The Respondent has never settled in the property but has obtained a title deed to the property. The Applicant has acquired title to the property by way of adverse possession as against the Respondents. It is just and mete that orders herein be granted.

3. The Respondent stated that the suit properties belonged to his mother one Musiala Kakuli now deceased. That they took out letters of administration to the estate of his mother and transferred the suit properties to his name. That there was a case before the land adjudication and settlement officer and a decision was made. That after the said decision the applicants encroached on his land and destroyed the boundaries and illegally cultivated that part of the land. That the Applicants are his step brothers.

4. 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".

5. Consequently, the Plaintiff ought to, first, establish a prima facie case. In 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."

6. In support of his application, the Plaintiff/Applicant stated the Applicants have been in possession of the subject matter uninterrupted and exclusive possession for more than 30 years.

7. Secondly, The Plaintiffs have 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.

8. The Applicants stated that they have cultivated and developed the property by building permanent homes.

9. Thirdly, the Plaintiffs have 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".

10. 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."

11. The Applicants contend that the balance of convenience tilts in their favour because the Respondent has never settled in the property but has obtained a title deed to the property.

12. 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."

13. The 1st Defendant/Respondent submitted that the Plaintiffs have no recognisable rights in the suit property that is capable of infringement. That the Applicants are his step brothers and are encroaching on his land and cultivating the same. He attached in his replying affidavit the title deed, a letter by the Director of Land and Settlement stating the subdivision and a Surveyors report on the size of the parcels.

14. Bearing this in mind, I am convinced that there is a 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 annexures therein.

15. 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..."

16. In view of the foregoing, I find that the application is not merited and I dismiss it with costs.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF DECEMBER 2025.

N.A. MATHEKA

JUDGE