REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCL CASE NO. E099 OF 2024

DUR DUR TRANSPORTATION CO. LTD:::::::PLAINTIFF/APPLICANT

VERSUS

KENYA POULTRY DEVELOPMENT LIMITED::::::::::::::::::::::::::::::::::::1ST DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR:::::::2ND DEFENDANT/RESPONDENT

RULING

The application is dated 6th November 2024 and is brought under Section 1A, 1B, 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this Application herein be certified as extremely urgent and service thereof on the Respondents be dispensed with in the first instance.
2. That pending the *inter partes* hearing of this Application, this Honourable Court be pleased to issue a temporary injunction restraining the 1st Defendant/Respondent whether by itself, agents, servants and/or employees or any other person from evicting, trespassing, occupying, constructing, damaging its property and/or in any way interfering with the

Plaintiff/Applicant's quiet possession of the property known as LR. No. 337/4798 measuring 34 hectares situate in Mavoko Municipality.

3. That pending the hearing and determination of the suit, this Honourable Court be pleased to issue a temporary injunction restraining the 1st Defendant/Respondent whether by himself, his agents, servants and/or employees or any other person from evicting, trespassing, occupying, constructing, damaging its property and/or in any way interfering with the Plaintiff/Applicant's quiet possession of the property known as L.R. No. 337/4798 measuring 34 hectares situate in Mavoko Municipality.
4. That this Honourable Court be pleased to issue any other orders it deems necessary and fit to issue.
5. That the costs of this Application be in the cause.

It is supported by the annexed affidavit of Mohamed Abdi Samad and is based on the following grounds that the Plaintiff/Applicant is the legal and registered proprietor of all that prime parcel of land known as L.R. No. 337/4798 measuring 34 hectares and was issued with a Certificate of Title dated 21st July 2022 by the 2nd Defendant. That the Applicant acquired the said suit property by way of allocation through Letter of Allotment dated 5th January 1998. The Applicant has been in peaceful occupation of the suit property since then without any interruption. That the Applicant has been in continuous peaceful occupation of the subject property since the allotment of the land in 1998 and

has been carrying on agricultural activities therein since acquisition. That the Applicant's occupation of the subject property has been without contest and/or dispute from any third parties until recently when the 1st Respondent encroached on the suit property seeking to construct a perimeter wall on the southern side of the property. That earlier on in December 2023, the 1st Respondent had attempted to trespass onto the suit property. That the Applicant, through its advocates on record wrote a letter dated 3rd January 2024 demanding it to cease the trespass.

On or around 15th September 2024, four men purporting to be representatives of the 1st Respondent came into the suit property to inquire about the proprietorship of the suit property and the whereabouts of the owners of the property without properly disclosing their purpose of visit. Being a Sunday, they were requested to visit the offices on a working day. That the Applicant is apprehensive that after the visit on 15th September 2024, the 1st Defendant quietly commenced excavation for construction of a boundary wall on the southern side of the suit property immediately after the abovementioned incident on 15th September 2024. That as at 24th October 2024 when the Applicant surveilled the entire property, it discovered that the 1st Defendant had dug out trenches and tunnels in preparation for the laying of the foundation of a permanent wall on the suit property. Owing to the extensive size of the

property, the covert activities of the 1st Respondent went largely unnoticed even with the report against the 1st Respondent being made on 8th October 2024.

The 1st Respondent has exhibited an unwavering intent to illegally dislodge the Applicant from its lawful property, employing unscrupulous and criminal tactics that undermine the Applicant's proprietary rights. These actions reflect a clear disregard for the sanctity of the Applicant's title and due process, further demonstrating the 1st Respondent's determination to unlawfully usurp the Applicant's rightful possession of the property. The Applicant was able to survive the scare after the Officer in Charge of Station at Athi River Police Station dispatched some police officers who restored calm and peace on the suit property.

The 1st Respondent continues to irregularly occupy the southern side of the Applicant's property without any lawful justification thus curtailing the Applicant's right to peacefully enjoy the property. The Applicant stands to suffer irreparable injury from the 1st Respondent's trespass and it is likely that the 1st Respondent's acts of trespass could facilitate the dispossession of the Applicant from the entire property.

The 1st Respondent stated that the property known as L.R. No. 337/4798 was previously owned by KENCHIC Limited which is a sister company to the 1st Respondent having been issued with a certificate of title on 24th January 2013

(that the 1st Respondent proceeded and sold the subdivided parcels to third parties. Marked DS-1). The said property was subsequently transferred to the 1st Respondent on the 28th September 2017. The 1st Respondent applied for subdivision which was approved on the 30th August 2021 and was issued with individual titles after surrendering the original title (Marked DS-2).that the Applicants title is a forgery.

This court has considered the application and the supporting affidavit 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".

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."

In support of his application, the Plaintiff/Applicant stated that the Plaintiff/Applicant is the legal and registered proprietor of all that prime parcel of land known as L.R. No. 337/4798 measuring 34 hectares and was issued with a Certificate of Title dated 21st July 2022 by the 2nd Defendant. That the Applicant acquired the said suit property by way of allocation through Letter of Allotment dated 5th January 1998.

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.

The Applicants stated that On or about the 4th October 2024, the 1st Defendant once again wrongfully entered and trespassed onto the suit property in the company of hired goons and attempted to evict the Plaintiff from its property. These efforts were contained by the Plaintiff and a report of the incident was later made to the Mlolongo Station under OB No. 54/08/10/2024. That the Applicant was able to dispel the 1st Defendant and his goons on 4th October 2024 after the Officer Commanding Station at the Mlolongo Station sent police officers to restore peace and order in the property. Despite the report to the Police and the interventions made, the 1st Respondent came back to the suit property on or about 24th October 2024 and has remained on the southern side of the suit property without any rights whatsoever and in total contravention of the Plaintiff's right to peaceful occupation and enjoyment of its property.

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.

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".

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."

The Applicants contend that the balance of convenience tilts in their favour because if the orders sought herein are not granted the Applicant avers that the they have been in possession of the suit property since 1998. That the entry of the 1st Respondent onto the subject property is unlawful and without legal authority, constituting a trespass upon its property and this is an attempt to illegally evict it therefrom. The Applicant avers that the 1st Respondent's act of trespassing and entering into the property infringes on the Applicant's genuine and legitimate proprietary interest in the suit property. That as at the time of filing this suit, the 1st Respondent had commenced excavation on the southern side of the property in readiness to lay the foundation for the erection of a permanent wall structure on the suit property. I find that without the intervention of this Court, the Applicants herein may suffer irreparable loss and damage.

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."*

It is not in dispute that the Plaintiff has produced a title stating that suit property was registered in the name of the Plaintiff. It is also not in dispute that the 1st Respondent has produced competing titles of the same suit property. The Applicant alleges that they are apprehensive of the 1st Respondent's actions and until he is restrained by this Court, there is real danger that the 1st Respondent will fully evict it from its property. The 1st Respondent stated that the Plaintiffs claim is fraudulent.

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 therein.

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..."

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 24TH DAY OF FEBRUARY 2026.

N.A. MATHEKA

JUDGE