



REPUBLIC OF KENYA



KENYA LAW
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**Mulandi v Kithuku & 2 others (Environment & Land Case
E020 of 2023) [2024] KEELC 516 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E020 OF 2023
TW MURIGI, J
JANUARY 31, 2024**

BETWEEN

FRANCIS MAILU MULANDI PLAINTIFF

AND

MWENDE KITHUKU 1ST DEFENDANT

JOHN MAWEU KITHUKU 2ND DEFENDANT

BENARD KIOKO KITHUKU 3RD DEFENDANT

RULING

1. This ruling is with respect of the Notice of Motion dated 7th June 2023 brought under Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law in which the Applicant seeks the following orders:-
 1. Spent.
 2. That an order of temporary injunction do issue restraining the Respondents, their agents, servants, employees and/or anyone acting on their behalf from trespassing, entering, cultivating, planting, cutting down trees and grass or in any other way from interfering with the Applicant's parcel of land being Mbitini/Mutyambua/658 pending the hearing and determination of this application.
 3. That an order of temporary injunction do issue restraining the Respondents, their agents, servants, employees and/or anyone acting on their behalf from trespassing, entering, cultivating, planting, cutting down trees and grass or in any other way from interfering with the Applicant's land parcel of land being Mbitini/Mutyambua/658 pending the hearing and determination of this suit.
 4. That the OCS Emali Police Station do oversee the compliance of these orders.



5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Francis Mailu Mulandi sworn on even date.

The Applicant's Case

3. The Applicant averred that he is the registered owner of the suit property. He further averred that he has been in continuous possession of the suit property since the year 1975 when he purchased the same. He asserted that the Respondents have not been in possession of the suit property. He further averred that the 1st Respondent instituted ELC Case No. E003 of 2023 against him claiming adverse possession of the suit property. He went on to state that on 6/6/2023 the Respondents without any colour of right trespassed onto the suit property and caused wanton destruction thereon. In urging the court to grant the orders sought, the Applicant contended that he will suffer irreparable loss unless the Defendants are restrained by an order of injunction.

The Respondents' case

4. The application was opposed by the Respondents through the affidavit of John Maweu Kithuku sworn on his own behalf and that of his co-defendants.
5. The deponent averred that the Plaintiff's suit and application herein is an abuse of the court process since it is a response to the 1st Defendant's Originating Summons.
6. He further averred that the 1st Defendant peacefully entered the suit property in the year 1995 after it was vacated by the Plaintiff's licensee and has always been in continuous and uninterrupted possession thereof. The deponent argued that the Plaintiff having discontinued his possession of the suit property attempted to regain possession of the same by lodging a forcible detainer charge against the 3rd Defendant. The Respondents denied the allegations of trespass on the suit property and insisted that they have been in possession for the last 28 years.
7. The application was canvassed by way of written submissions.

The Plaintiff's Applicant's Submissions

8. The Plaintiff/Applicant's submissions were filed on 13th July 2023.
9. On his behalf, Counsel outlined the following issues for the court's determination:-
 1. Whether the Defendants are entitled to the suit property by adverse possession.
 2. Whether the Plaintiff has met the threshold set out in the *Giela v Cassman Brown & Co. Ltd*(1973) EA 358..
10. On the first issue, Counsel submitted that the Plaintiff has been in possession of the suit property since the year 1995. Counsel submitted that the Defendant's entry into the suit property is contested as evidenced by the certificate of official search, the charge sheet and the judgment in PM Court Machakos dated 11/3/1998. In addition, Counsel submitted that the 3rd Defendant was charged in Makindu Criminal Case No. E192 of 2022 in respect of the suit property. Counsel argued that the Defendants have not produced any document to demonstrate that they have been in occupation of the suit property since the year 1995 nor adduced evidence to show that they dispossessed the Plaintiff of the suit property.



11. On the second issue, Counsel submitted that the Plaintiff has met the threshold for the grant of an injunction as set out in the case of *Giela v Cassman Brown & Co. Ltd* (1973) EA 358
12. On the first condition, Counsel submitted that the Applicant has established a *prima facie* case with a probability of success as he has demonstrated that he is the registered owner of the suit property. It was submitted that the Plaintiff has been in occupation of the suit property save for interference by the Defendants. That upon the purchase of the suit property the Plaintiff started developing the land and planted mango trees. That the Defendants invaded the land after realizing that he had done immense development on the suit property.
13. On the second condition, Counsel submitted that the Applicant will suffer irreparable damage if the orders sought are not granted as he has done major developments on the suit property.
14. On balance of convenience, Counsel submitted that it tilts in favour of the Plaintiff because he has demonstrated that he is the registered owner of the suit property and is in possession the same.

The Defendants Submissions

15. The Defendants submissions were filed on 5th October 2023.
16. On their behalf, Counsel identified the following issues for the court's determination:-
 1. Whether the Applicant has met the conditions for the grant of a temporary injunction.
 2. Whether the Applicant will suffer irreparable injury.
 3. Where does the balance of convenience tilt to?
17. On the first issue, Counsel reiterated the contents of the Respondent's replying affidavit. On the conditions to be satisfied for the grant of an injunction, Counsel cited the provisions of Order 40(1)(a) and (b) of the [Civil Procedure Rules](#) and the case of *Giela v Cassman Brown & Co Ltd* (1973) EA 358. Counsel further submitted that the Defendants have a right to the suit property by virtue of adverse possession.
18. On the second issue, Counsel submitted that the Applicant will not suffer irreparable loss if the orders sought are not granted since he is not in possession of the suit property. It was submitted that the 1st Respondent would suffer irreparable loss if the orders sought are granted since she would be evicted from the suit property.
19. Concluding his submissions, Counsel submitted that the balance of convenience tilts in favour of the 1st Respondent since she is in possession of the suit property.

Analysis and Determination

20. Having considered the application in light of the pleadings, the respective affidavits and the written submissions, the issue that arises for determination is whether the Applicant has met the threshold for the grant of an order of injunction.
21. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* (1973) EA 358 as follows:-First the 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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.



22. The first issue for determination is whether the Applicant has established that he has a prima facie case with a probability of success.

A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR 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.”

23. It is not in dispute that the Applicant is the registered proprietor of the suit property. This was confirmed by a copy of the title deed (FMM-1) annexed to the Applicant’s supporting affidavit. The Applicant averred that after he purchased the suit property in the year 1995, he took possession and has been in occupation of the same save for interferences from the Defendants. The Applicant argued that the Defendants claim over the suit property is contested as evidenced by a copy of the charge sheet in Makindu Principal Magistrate court and Judgment in criminal case No. 1053 of 1996.
24. The Respondents on the other hand insisted that they are in occupation of the suit property having acquired the same by virtue of adverse possession and denied trespassing on the same.
25. The Applicant’s proprietary claim is based on the certificate of title while the Defendants’ ownership claim is anchored on the doctrine of adverse possession.
26. From the material placed before me, it is crystal clear that both parties are claiming ownership over the suit property. The issues of ownership can only be determined in a full trial where the parties will have the opportunity call evidence and have the same challenged by way of cross examination.
27. At this stage the court is not required to determine the issues which will be canvassed at the trial. The court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy. In the case of *Mbuthia v Jimba credit Corporation Ltd* (1988) KLR the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”

28. Similarly, in the case of *Edwin Kamau Muniu v Barclays Bank of Kenya Ltd* NBI HCCC No 1118 of 2002, the court held that;

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”

29. On the basis of the material placed before me, I find that the Plaintiff/Applicant has not established a prima facie case with a probability of success.



30. For the Plaintiff to succeed in this application, all the three elements must be demonstrated. This was the finding by the Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012 which held thus: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraba 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 respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of 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 case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

31. The Plaintiff having failed to establish a prima facie case, it would be immaterial for me to consider the other principles governing the grant of an injunction enunciated in the case of *Giella v Cassman Brown (Supra)*.

32. The upshot of the foregoing is that application dated 7th June 2023 is dismissed. Costs in the cause.

33. The parties are directed to comply with Order 11 within the next 30 days from the date of this ruling.

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HON. T. MURIGI

JUDGE

RULING DELIVERED DATED AND SIGNED VIA MICROSOFT TEAMS THIS 31ST DAY OF JANUARY 2024

In The Presence Of

Ms Mutuku for the Applicant

Chebi for the Respondent.

Court assistant Kwemboi.

