



**Karama v Gachagua & 3 others (Environment & Land Case
9 of 2020) [2024] KEELC 1602 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1602 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 9 OF 2020
A KANIARU, J
FEBRUARY 28, 2024**

BETWEEN

AMINA KARAMA PLAINTIFF

AND

NJAGI GACHAGUA 1ST DEFENDANT

DAVID MUCHIRI KAMAU 2ND DEFENDANT

THE LAND REGISTRAREMBU COUNTY 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The application before me for determination is a Notice of Motion dated 08.05.2023 and filed on 17.05.2023 brought under a Certificate of Urgency. It is expressed to be brought under Order 40 Rule 1 & 2, and Order 51 of the *Civil Procedure Rules*, Section 1A, 1B & 3A of the *Civil Procedure Act*, and all enabling laws. The Applicant – David Muchiri Kamau - is the 2nd Defendant in the main suit whereas the Respondent – Amina Karama - is the Plaintiff. It is essentially an application for orders of Temporary Injunction and the prayers sought are as follows:

1. Spent
2. Spent
3. That after interpartes hearing, a temporary injunction be issued restraining the Plaintiff/ Respondent, her agents, servants, workmen, or anyone claiming through her from selling, alienating, disposing of, invading, constructing and/or in any manner interfering with all that parcel of land known as Embu/Municipality/834 pending the hearing and determination of the suit.



4. That the officer commanding Embu police station supervises that the plaintiff complies with the orders of this honourable court.
5. That costs of this application be provided for.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on 08.05.2023 by the applicant - David Muchiri Kamau- interalia; that he is the legally registered owner of the suit land. That as the registered owner of the suit land, the same ought to be protected by this court from any form of interference pending the determination of the suit. That any form of interference might cause him and the respondent irreparable harm considering that the respondent has put up illegal structures on the land.
3. That also he is apprehensive that the respondent, or third parties claiming through her, might compromise the integrity of the suit and the court ought to arrest any ongoing infringement of property rights. That the respondent has occasioned unreasonable delay in prosecuting her suit.
4. The respondent opposed the application by way of a replying affidavit filed on 03.10.2023. She deposed that she is the legal proprietor or legal beneficial owner of the suit property and in possession of the same for the last 40 years and that she has developed it. That it is trite law that a court cannot issue an injunction to restrain what is already done since she is in actual possession of the suit property where she has constructed rental rooms. That the court cannot issue orders in vain, that is to say, orders that cannot be effected to injunct 'invasion' when she is in possession of the suit property and with a permanent building standing thereon. That the 1st & 2nd defendants have fraudulently registered the suit land in their favour therefore they are not protected by law.
5. She deposed further that she has no ability of interfering with the suit property as she is aware she is not the registered proprietor. That she is aware of an illegal ploy by the defendants to have her and her people at the suit premises evicted. That the delay in prosecuting the suit has been occasioned by her inability to locate and serve court pleadings on the seller of the suit property. That the applicant has not met the requirements for grant of the orders sought and therefore the application ought to be dismissed with costs.
6. It was agreed that the application be disposed of by way of written submissions. The Applicant filed his submissions on 06.12.2023 whereas the Respondent filed her submissions on 04.12.2023.
7. The applicant submitted that the purpose of seeking a temporary injunction is to restrain the other party from doing an act which is intended to dispose of the suit property either by wasting, damaging, selling or otherwise causing injury to the plaintiff and to preserve the suit property until the disposal of the suit or until further orders by the court. He submitted further that he is the registered proprietor of the suit land whereas the Respondent has no title over the suit land.
8. That following the previous court's ruling on the respondents application for an injunction, the court observed that the Respondent had not demonstrated a prima facie case with a probability of success at the trial and that the mere fact that she may have erected some buildings on the suit property does not necessarily mean that she has a legitimate claim thereto. That on this basis, the plaintiff has put up structures on his land without his permission and with no legal right. Therefore, he is blocked from using his own land in the manner he deems fit. He cites the case of *Banis Africa Ventures Ltd v National Land Commission* (Court of Appeal ELC 110 OF 2020) eKLR citing the case of *Joseph Siro Mosioma v Housing Finance Company of kenya Ltd & 3 others* [2008] eKLR.
9. The Respondent on the other hand submitted that the guiding principles for the grant of orders of temporary injunction are well settled and set out in the cases of *Giella v Cassman Brown* [1973] EA 358



- & *Nguruman Ltd v Jan Bonde Nielsen & 2 others* CA no. 77 of 2012 [2014] eKLR. That the Applicant has not demonstrated a prima facie case to warrant the disturbing of the Respondents occupation at an interlocutory stage an occupation which she has enjoyed for over 40 years.
10. That the Applicant has to demonstrate that irreparable injury will be occasioned to him if an order of temporary injunction is not issued to him. That the cases of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR & *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR address the issue of irreparable injury. That the applicant is not at the risk of suffering irreparable injury because he has for the last 40 years never had possession or access to the suit property or benefitted on rental income and cannot therefore claim to incur any loss of rent or harm whatsoever.
 11. That further, the respondent has not interfered or will not interfere with the suit property and in any case, she is the one to suffer if the structures thereon are demolished as she incurred costs in putting them up. That the respondent is the one that has the title to the property and therefore the respondent does not have the liberty to apply to charge or develop the said property and therefore the applicant's apprehensions are misplaced. No irreparable harm or injury will be occasioned to the applicant therefore.
 12. It was submitted further, that the applicant has to demonstrate that the balance of convenience tilts in his favour. That the respondent has the legal and beneficial interest in the suit property and as such her rights are the ones that have been violated. That if the orders are granted, there is a likely misuse of the same and it is the respondent who will incur loss and damage if her permanent structures are demolished or is she is evicted. She urges that the application has been brought in bad faith and that the same should be dismissed with costs to her.
 13. She cites the cases of *Habiba Ali Mursal & 4 Others v Mariam Noor Abdi* [2018] eKLR, *David Kiptum korir v Kenya Commercial Bank & Anor* citing the case of *Reid, Hewitt & Co v Joseph*, AIR 1918 Cal 717 & *Myres v Defries* [1880] 5 Ex D 180, *Party of Independent Candidate of Kenya & Anor v Mutula Kilonzo & 2 others* (2013) eKLR citing the case of *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227.
 14. I have considered the application, the responses made to it and the rival submissions. The issue for determination is whether the Applicant is entitled to an order of temporary injunction.
 15. The principles which guide the court when considering an application for a temporary injunction were set out in the case of *Giella v Cassman Brown* [1973] EA 358 where the court set out three conditions that ought to be met before grant of a temporary injunction. It was stated:

“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.”
 16. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, described a prima facie case as:

“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 right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”



17. The dispute herein is over the suit land, the same being land parcel no Embu/Municipality/834, which both the Applicant and the respondent are claiming ownership. The said property is said to have been sold to the parties by a person called Mutahi Wachira. The respondent claims that she has been in actual occupation of the property for over 40 years and has made developments thereon by building permanent rental structures. The Applicant on the other hand claims to be the registered owner of the property and has in his possession a letter of allotment, a lease and a certificate of lease. The respondent had not too long ago made a similar application as the instant one praying for an order of injunction restraining the defendants from interfering with the suit property.
18. The court in that application found that the applicant had made out a prima facie case with a probability of success at trial as he had in his possession documents to prove ownership of the suit land. The court observed that the respondent had not made out a similar case as she had no documents to prove ownership apart from an agreement for sale whose date was incomplete. The court further observed that, that conclusion itself was only arrived at, preliminary and that the respondent was still at liberty to prove well her claim at the trial. I will not take a different view as the facts of this case have not changed. I do find that for similar reasons that the applicant has made out a prima facie case with probability of success.
19. However, the Applicant also has a duty to demonstrate that should the orders sought not be granted, he stands to suffer irreparable loss and damage that cannot be compensated with damages. The applicant asked this court to protect the suit land from any interference pending the determination of suit. He however did not demonstrate what interference had been made, if any, on the property to require this court's protection. It is not in dispute that there already exists structures on the suit land belonging to the respondent. If the applicant claims that there have been any more construction than already exists, it is his duty to bring into court evidence of the same, which has not been done. Again, being the registered owner of the suit land, he will remain to be so should the court find in his favour at trial. Also, he is in possession of the ownership documents and unless otherwise persuaded, I do not see how the respondent would be able to dispose of the suit property.
20. As was observed in the case of *Jan Bonde Nielsen v Nguruman Limited & 2 others* [2016] eKLR the applicant has the duty to show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained.

The court of appeal stated as follows;

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damages that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put, on a preponderance of probabilities”.



21. This court is therefore not persuaded that there exists any right of the applicant that is at the risk of being violated. This court is therefore not convinced that the applicant stands to suffer any irreparable injury.
22. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the temporary injunction, against the hardship to be borne by the Respondents by granting the same. Having found that the applicant has not demonstrated any irreparable injury that might be occasioned to him, I find that no hardship will be occasioned to him should the orders of injunction not be granted.
23. The upshot of the above is that I find no merit in the notice of motion application dated 08.05.2023 and hereby dismiss it in its entirety.
24. The respondent shall have the costs of the application.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28TH DAY OF FEBRUARY, 2024.

In the presence of;

Mutua for Kiongo for 3rd defendant – present

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

28.2.2024

