



Ngao v Third Engineering Bureau of China City Construction Company & another (Environment and Land Case E053 of 2023) [2024] KEELC 1009 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E053 OF 2023
NA MATHEKA, J
FEBRUARY 28, 2024**

BETWEEN

NGAO MWANDIGO NGAO PLAINTIFF

AND

**THE THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION
COMPANY 1ST DEFENDANT**

KENYA NATIONAL HIGHWAY AUTHORITY 2ND DEFENDANT

RULING

1. The application is dated 21st December 2023 and is brought under order 8 rule 1 and rule 7 order 40 rule 1(a) of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya Article 48 and 159 2(d) of the Constitution of Kenya 2010 seeking the following orders;
 1. That this motion be certified urgent and service be dispensed with at the first instance and the application be heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to issue, a temporary injunction restraining the defendants whether by themselves, their servants and or agents, assignees, employees from trespassing, disposing of, transferring or interfering in any way with the suit land known as number CR. 83384 pursuant to a transfer registered 8285/01 being subdivision no. 2874 (Original number 272N/MN) (Herein after referred to as the suit property) pending the hearing and determination of this application.
 3. That this Honorable Court be pleased to issue a temporary injunction restraining the defendant whether by themselves, their servants and/or agents, assignees, employees from trespassing, disposing of, transferring or interfering in any way with the suit property pending the hearing and determination of this suit.



4. That costs of the application in the cause.
2. It is based on the supporting affidavit of Ngao Mwadingo Ngao and the grounds that the plaintiff is the legal owner of the suit property herein being number CR.83384 pursuant to a transfer registered as CR 8285/01 being subdivision No.2874 (Original Number 272/V/MN). That sometime in November 2023, the defendants/respondent illegally trespassed/encroached and took possession of the suit property and have since began construction of a dual carriage road through the suit property without express authorization by the plaintiff/applicant. That there has never been any compensation whatsoever as required by the law before private land can be used for the construction of a road. That the Plaintiff/Applicant stands to suffer continued loss and damage from the continued excavation and dumping of waste materials on the suit property and destruction of the land. That as a result of the actions of the Defendants/respondents the plaintiff/applicant is prevented from the enjoyment of the right to exclusive possession and use of the suit property. That unless the orders sought herein are granted, the plaintiff will suffer great loss and damage as a result of the actions of the defendants.
3. This court has considered the application, supporting affidavit and the annexures therein. The prayer for temporary injunction is well discussed in the celebrated case of *Giella v Cassman Brown* (1973) EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR 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.

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”.

4. The plaintiff claims that he is the legal owner of the suit property herein being number CR.83384 pursuant to a transfer registered as CR 8285/01 being subdivision No.2874 (Original Number 272/V/ MN). That sometime in November 2023, the defendants/respondent illegally trespassed/encroached and took possession of the suit property and have since began construction of a dual carriage road through the suit property without express authorization by the plaintiff/applicant. Section 26 of the [Land Registration Act](#) states as follows;
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”



5. On the 2nd pillar of temporary injunctions, the plaintiff is required to show irreparable injury and I am guided by *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR where court held;

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.”

6. The plaintiff in his supporting affidavit has alleged that sometime in November 2023, the defendants/respondent illegally trespassed/encroached and took possession of the suit property and have since began construction of a dual carriage road through the suit property without express authorization by the plaintiff/applicant. That there has never been any compensation whatsoever as required by the law before private land can be used for the construction of a road (annexed and marked “NMN-4” are photos of the encroachment and construction by the defendant). I have perused the survey report and it states that it is a topo-cadastral surveys on plot 272/R/V/MN registered owner Amin Mohammedali Dato and Nurbanu Popat Walji. The searches attached dated 8th September 2022 and 2nd March 2023, refer to Plot No. 272/V/MN and the registered owner is the plaintiff, both indicate that there is a caveat by the Registrar of Titles claiming ownership of a portion by compulsory acquisition of 0.297 HA of the said plot. With this information the court cannot determine ownership at this preliminary stage and the plaintiff has not established a prima facie case.

7. The 3rd pillar which is the balance of convenience. In *Pius Kipchirchir Kogo* case (*Supra*) the court held;

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.

8. 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”.
9. The Applicant has attached a surveyor’s report which states that the defendants have trespassed on the plaintiff’s suit property and there is a new dual carriage road cutting through the subject property. This means the road is already under construction. I find that this application is not merited and is dismissed with no orders as to costs as it was undefended. Parties are advised to comply with order 11 and fix the matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

