



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Lime Products Limited v Kalunde & 9 others (Environment & Land  
Case 17 of 2021) [2024] KEELC 990 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 990 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 17 OF 2021  
TW MURIGI, J  
FEBRUARY 21, 2024**

**BETWEEN**

**KENYA LIME PRODUCTS LIMITED ..... PLAINTIFF**

**AND**

**ALFRED KITUKU KALUNDE ..... 1<sup>ST</sup> DEFENDANT**  
**PASTOR TETEH ..... 2<sup>ND</sup> DEFENDANT**  
**NYAMAI MAKAU ..... 3<sup>RD</sup> DEFENDANT**  
**KIHO KAMOLO ..... 4<sup>TH</sup> DEFENDANT**  
**NZUI MWALIMU ..... 5<sup>TH</sup> DEFENDANT**  
**BEN MWALIMU NZUI ..... 6<sup>TH</sup> DEFENDANT**  
**CHARLES NDUNDA ..... 7<sup>TH</sup> DEFENDANT**  
**JANE MUSUI ..... 8<sup>TH</sup> DEFENDANT**  
**SAMSON MAINGA ..... 9<sup>TH</sup> DEFENDANT**  
**SAMUEL MUSILA ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 23<sup>rd</sup> June, 2021 brought under Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 68 of the [Land Registration Act](#), 2012 and all other enabling provisions of the land in which the Plaintiff/Applicant seeks the following orders: -

1. Spent.



2. That this Honourable Court be pleased to grant an order of temporary injunction restraining the Defendants either by themselves or through their agents, servants, employees and/or any other person claiming under them from entering upon, trespassing, damaging, demolishing, building, constructing, wasting, developing or in any other manner whatsoever making use of land known as LR No. 1425 Makindu within Makueni County (hereinafter referred to as ‘the suit property’) pending the hearing and determination of this application.
  3. That this Honourable Court be pleased to grant an order of temporary injunction restraining the Defendants either by themselves or through their agents, servants, employees and/or any other person claiming under them from entering upon, trespassing, damaging, demolishing, building, constructing, wasting, developing or in any other manner whatsoever making use of land known as LR No. 1425 Makindu within Makueni County (hereinafter referred to as ‘the suit property’) pending the hearing and determination of this suit.
  4. That this Honourable Court be pleased to grant an order of inhibition, inhibiting the registration of any transfer, charge, lease or any other dealings whatsoever over LR No. 1425 Makindu within Makueni County pending the hearing and determination of this application.
  5. That the OCS Makindu Police Station do enforce compliance of the orders issued by the court.
  6. That the Honourable Court be pleased to make any such further orders as may be appropriate to meet the ends of justice in this suit.
  7. 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 Leonard Mutua Musyoka sworn on even date.

### **The Applicant’s Case**

3. The deponent, the Managing Director of the Plaintiff company averred that they acquired the suit property on 18/6/1999 via a transfer of shares from Shantilal Ashabhai Patel the former Directors of the Plaintiff’s company.
4. That after the purchase of the suit property, the Plaintiff issued a notice to vacate dated 10/6/1999 to all those who were in occupation and that they complied with the said notice. That on 23/8/1999, they made an application to the Commissioner of Lands requesting for extension of the lease in respect of the suit property. That the Ministry of Lands responded to the request vide its letter dated 8/9/2010 advising the Plaintiff to forward the application for extension of lease to the relevant local authority.
5. He further averred that on 20/4/2011, the County Council of Makueni issued a letter of no objection for extension of the lease and further directed that a re-establishment of boundaries would commence on 27/4/2011. He averred that the Plaintiff has been carrying out large scale farming of watermelons, butternuts among other farm produce as captured in the Planning Brief submitted to the County Government of Makueni.
6. That on or about 17/6/2021 the Defendants unlawfully entered into the Plaintiff’s land and demolished the fence together with a permanent dwelling house thereon. That upon inquiry, the Defendants stated that the suit property belongs to the County Government of Makueni and that they had ownership documents for the same. He stated that the Defendants had not only prevented the Plaintiff from accessing the suit property but had also threatened to invade the entire suit property.



7. He further averred that he had made reports to Makindu Police Station and to the Area Chief about the matter. He stated that the Plaintiff has been paying the necessary rates and rents in respect of the suit property. According to him, the Defendants' actions not only constitute trespass to private land but also amounts to gross violation of the Plaintiff's right to property. The deponent averred that the Plaintiff stands to suffer irreparable loss and damage if the orders sought are not granted.

### **The 10<sup>th</sup> Respondent's Case**

8. The 10<sup>th</sup> Defendant filed a replying affidavit dated 16/07/2021 in opposition to the application. He averred that the Plaintiff does not have locus standi to file the suit herein since the lease issued to it in respect of the suit property expired over 8 years ago. He averred he is a neighbour to Plaintiff's for more than forty years and denied having trespassed into the suit property.
9. According to him, the Plaintiff is not the owner of the suit property and is therefore not entitled to the orders sought. He urged the Court to dismiss the application with costs.
10. The application was canvassed by way of written submissions.

### **The Plaintiff/Applicant's Submissions**

11. The Plaintiff's submissions were filed on 8<sup>th</sup> May, 2022. On its behalf, Counsel identified the following issues for the court's determination:
  - i. Whether the Plaintiff is entitled to the orders sought in the application dated 23<sup>rd</sup> June 2021.
  - ii. Who should bear the costs and interest of the application filed herein.
12. Counsel submitted that the Applicant has satisfied the conditions for the grant of an injunction as set out in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 as follows:-
  - i. An Applicant must show a prima facie case with a probability of success.
  - ii. 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 in damages
  - iii. If the court is in doubt it will decide an application on the balance of convenience
13. On the first condition, Counsel submitted that the Plaintiff has established a prima facie case because it has demonstrated that its right of ownership has been threatened or that it was at risk of being violated.
14. On the second condition, Counsel submitted the Plaintiff will suffer irreparable loss and damage if the orders sought are not granted since the suit property forms the substratum of the suit herein.
15. On the last condition, Counsel submitted that the Defendants will not suffer any prejudice if the orders sought are granted. Concluding his submissions, Counsel urged the Court to allow the application as prayed. None of the authorities cited by Counsel were availed for the court's perusal.

### **The 1<sup>st</sup>-9<sup>th</sup> And 11<sup>th</sup> Respondents Submissions**

16. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> Defendants adopted the opposing position taken by the 8<sup>th</sup> and 10<sup>th</sup> Defendants. In their submissions filed on 13<sup>th</sup> September, 2023, Counsel identified the following issues for the court's determination: -
  - i. Whether the threshold for granting of a temporary injunction has been met?



- ii. Who should bear the costs of the application.
17. On the first issue, Counsel submitted that the following three conditions must be satisfied before the grant of an injunction: -
    - a. The applicant must establish a prima facie case with a probability of success;
    - b. The applicant must establish that he will suffer irreparable injury if an injunction is not granted; and
    - c. If the court is in doubt, it will decide the application on a balance of convenience.
  18. On the first condition, Counsel submitted that the Plaintiff has not established a prima facie case with a probability of success because the lease in respect of the suit property expired in the year 2009 and thus the Plaintiff is not the registered proprietor thereof. Counsel submitted that the lease issued to the Plaintiff has never been extended and hence the suit property reverted back to the County Government of Makueni. Counsel contended that the Plaintiff has no locus standi to bring this suit since it has no proprietary interest in the suit property.
  19. As regards the second condition, Counsel submitted that the Plaintiff is not in possession of the suit property since the land reverted back to the County Government of Makueni in the year 2009 after the expiry of the lease.
  20. On balance of convenience, Counsel submitted that the Plaintiff failed to disclose to the court that the lease in respect of the suit property expired in the year 2009 and that it has no proprietary rights when making the application herein. That being guilty of misrepresentation and concealment of material facts, the Plaintiff is not entitled to the equitable reliefs as sought. Counsel submitted that the balance of convenience does not tilt in favour of the Plaintiff.
  21. Concluding his submissions, Counsel urged the Court to dismiss the Plaintiff's application with costs. To buttress his submissions, Counsel relied on the following authorities: -
    - i. Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR
    - ii. Mrao Ltd V First American Bank of Kenya Ltd & 2 others [2003] eKLR
    - iii. Mary Wambui Kamau & 2 others v Richard Kirimi Kinoti [2015] eKLR
    - iv. Nyeri Chemists Limited v Jane Wanjiku Muriithi & 3 others [2016] eKLR

### **Analysis And Determination**

22. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Plaintiff has established the legal threshold for the grant of a temporary injunction.
23. The law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides as follows: -
  1. Where in any suit it is proved by affidavit or otherwise-
    - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
    - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be



obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

24. Both parties made reference to the case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 which sets out the principles applicable in an application for injunction 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.
25. The first issue for determination is whether the Applicant has made out a prima facie case with a probability of success to warrant the grant of an order of an injunction.
26. A prima facie case was defined by the Court of Appeal in *Mrao Ltd Vs 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.”
27. The Applicant’s claim over the suit property is anchored on the lease issued on 14<sup>th</sup> June, 1913 to one Hilda McDonell. The lessee was to hold the lease for a 99 year period beginning 1<sup>st</sup> September, 1910. The said lease was therefore set to expire sometimes on or about 31<sup>st</sup> August, 1999 as noted under Exhibits “LMM 5” and “LMM 6” annexed to the supporting affidavit.
28. The deponent averred that the Plaintiff is the owner of the suit property and has been paying rates and rents for the same. The Plaintiff did not adduce any evidence to show that it has been paying rent and rates for the suit property. It is not in dispute that the lease in respect of the suit property expired in the year 1999 or thereabouts as per the Applicant’s Exhibit marked “LMM5”. The said lease is pending renewal as per the County Government of Makueni’s letter dated 20/4/2011 and annexed as Exhibit “LMM7”.
29. The Respondents insisted that the Plaintiff has no locus standi to institute this suit since the lease in respect of the suit property has expired. In addition, the Respondents argued that the suit property has since reverted back to the County Government of Makueni. The lease in respect of the suit property having expired, the court can safely conclude that the Plaintiff has no legal interest in the suit property.
30. Based on the evidence placed before me I find that the Plaintiff has not established a prima facie case with a probability of success.
31. The conditions set out in the *Giella Vs Cassman Brown Case* (Supra) are to be considered sequentially.
32. In so finding I am persuaded by the holding in the case of *Nguruman Limited Vs Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court of Appeal stated as follows: -

“...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 stages



are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... 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 are 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.

33. Having found that the Applicant has failed to establish a prima facie case with a probability of success, this court finds that it will be immaterial to delve into the other limbs that are to be considered on grant of a temporary injunction. In so finding, I am persuaded by the holding in the case of Commercial Finance Co. Ltd vs Afraha Education Society & Others C A Civil Appeal No. 142 of 1999 where the court held that:-

“.....the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated that it has a prima facie case with a probability of success no interlocutory injunction would be available.”

34. In the end, I find that the application dated 23<sup>rd</sup> June 2021 is devoid of merit and the same is dismissed with costs to the Respondents.

.....

**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024 VIA MICROSOFT TEAMS.**

In the presence of

Mwangangi holding brief for Nthiwa for the Defendants.

Court assistant Kwemboi.

