



**Gathogo v Mbuthia (Environment and Land Case E006 of 2023)
[2024] KEELC 4309 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4309 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND CASE E006 OF 2023**

YM ANGIMA, J

MAY 23, 2024

BETWEEN

ESTHER WAIRIMU GATHOGO PLAINTIFF

AND

REBECCA KABURA MBUTHIA DEFENDANT

RULING

A. Plaintiff's Application

1. By a notice of motion dated 01.11.2023 expressed to be grounded upon Section 3A of the *Civil Procedure Act* (Cap.21), Article 29 of the *Constitution* of Kenya, 2010 and all enabling provisions of the law the Plaintiff sought, inter alia, the following orders pending the hearing of the suit:
 - a. An injunction restraining the Defendant from accessing, invading, trespassing, fencing off, erecting structures or occupying the Plaintiff's residence on Title No. Nyandarua/Ol'Aragwai/68 (the suit property)
 - b. An order for removal of the fences and illegal structures erected by the Defendant on the suit property.
 - c. The OCS Murungaru Police Station or the Superintendent of the Administration Police Murungaru and their designated officers do provide security for the implementation of the orders.
 - d. The Defendant do pay costs of the application.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff sworn on 01.11.2023. It was contended that the Plaintiff was the lawful wife of the late Ibrahim Gathogo Mugambi (the deceased) who was the owner of the



suit property which was the subject of Engineer SPM Succession Cause No. 75 of 2019 (the succession cause) and Naivasha High Court Appeal No. 37 of 2017 (the appeal).

3. The Plaintiff contended that although she had resided on the suit property for over 60 years the Defendant and her agents had on 02.09.2023 and 01.11.2023 invaded and trespassed on the suit property, fenced the same, erected some structures thereon, and destroyed her food crops in the process. It was contended that the Defendant's said actions had caused the Plaintiff massive loss, stress, and inconvenience and that she ought to be restrained by an injunction from continuing with her unlawful actions.

B. Defendant's Response

4. The Defendant filed a replying affidavit sworn at Naivasha on 13.01.2023 in opposition to the application. It was contended that the Plaintiff's suit was res-subjudice the appeal arising from the judgment of the subordinate court in the succession cause. She stated that the suit property was still the subject of distribution in the pending appeal and that she was a beneficiary of the estate of the deceased. She further stated that she had already settled on the suit property and that the Plaintiff was simply seeking to evict her.
5. It was thus the Defendant's case that the Plaintiff's suit was premature as the issue of distribution of the estate of the deceased including the suit property was still pending before the proper forum. As a consequence, the Defendant prayed for dismissal of the Plaintiff's suit with costs.

C. Directions on Submissions

6. When the application was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Defendant's submissions were filed on 07.03.2024 whereas the Plaintiff's submissions were not on record by the time of preparation of the ruling.

D. Issues for Determination

7. The court has perused the Plaintiff's notice of motion dated 01.11.2023, the Defendant's replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the key issues which arise for determination herein:
 - a. Whether the Plaintiff has made out a case for the grant of the interim injunction sought.
 - b. Whether the Plaintiff is entitled to the demolition order sought.
 - c. Who shall bear costs of the application.

E. Analysis and Determination

(a) Whether the Plaintiff has made out a case for the grant of the interim injunction sought

8. The court has considered the material and submissions on record on this issue. The principles for the grant of an injunction were set out in the case of *Giella – v- Cassman Brown & Co. Ltd* [1973] EA 358 as follows:
 - a. First, an applicant must demonstrate a prima facie case with a probability of success at the trial.



- b. Second, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.
 - c. Third, if the court is in doubt on the second principle it shall determine the matter on a balance of convenience.
9. The Plaintiff contended in her application that the Defendant had invaded the suit property, fenced it and constructed some buildings or structures thereon without any lawful justification. It was her case that she had thereby suffered immense loss, stress and inconvenience as a result of the Defendant's actions. The material on record shows that the Defendant's claim as a beneficiary of the estate of the deceased was recognized and allowed in the succession cause. It was the Plaintiff who was aggrieved by the decision in the succession cause hence she filed an appeal against it before the High Court at Naivasha. That appeal is still pending.
 10. The court is thus of the view that the Plaintiff has not demonstrated a prima facie case with a probability of success at the trial since her claim is dependent upon the appeal being successful. There is no guarantee that her appeal is bound to succeed. As matters stand now, the Defendant appears to be a legitimate beneficiary of the estate of the deceased just like the Plaintiff is. The court is thus of the opinion that the Plaintiff has no legitimate cause of action until such time that her appeal is successful and the Defendant is excluded from being a beneficiary of the estate.
 11. The court has also considered the material and submissions on record on the second principle. It is noteworthy that the Plaintiff has not demonstrated, or even alleged, that she stands to suffer irreparable injury in the absence of an interim injunction. The court does not agree that the alleged "immense loss", stress and inconvenience would constitute irreparable injury as known to law. It was not demonstrated that whatever injury the Plaintiff may suffer shall be incapable of monetary quantification or that monetary damages of whatever amount cannot adequately compensate her for the injury. See *Nguruman Limited -s- Jan Bond Nielsen & 4 Others* [2014] eKLR.
 12. Since the Plaintiff has failed to satisfy the court on the first two principles for the grant of an interim injunction, it shall not be necessary to consider the third principle on the balance of convenience. As a result, the court is not inclined to grant the Plaintiff the interim injunction sought in the application.
 13. There is a stronger reason why the court is not inclined to grant the interim injunction sought. It is evident from the Plaintiff's application and supporting affidavit that all the actions complained of have already taken place. The entry, the fencing, and the construction took place in September and November, 2023. The Defendant has already settled on the suit property as things stand now. It would be futile to issue an injunction to restrain a Defendant already in possession from accessing, invading, trespassing, fencing, erecting structures or occupying the suit property. A restraining injunction is forward looking hence it cannot undo what has already taken place. See *Mwakaki Investments Company Ltd - v- David Gikaria & 3 Others* [2021] eKLR.

(b) Whether the Plaintiff is entitled to the demolition order sought

14. The Plaintiff in her application sought an order for demolition and removal of the fence and structures erected by the Defendant. The court has already found and held that the Plaintiff has failed to demonstrate a prima facie case with a probability of success at the trial. The court is also of the view that a demolition order is a final remedy which may be granted only at the conclusion of the suit. As a result, the court is not inclined to grant the order at the interim stage.



(c) Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons – v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. In the case of *Giella - v- Cassman Brown & Co. Ltd (supra)* it was held that the proper order to make in an application for injunction is an order for costs to be in the cause where it is allowed and costs against the applicant where it is dismissed. As a result, the Defendant shall be awarded costs of the application.

F. Conclusion and Disposal Order

16. The upshot of the foregoing is that the court finds no merit in the Plaintiff’s application for interim orders. As a consequence, the court makes the following orders for disposal thereof:

- a. The notice of motion dated 01.11.2023 be and is hereby dismissed in its entirety.
- b. The Defendant is hereby awarded costs of the application.
- c. For the avoidance of doubt, any interim orders in place are hereby vacated.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 23RD DAY OF MAY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. George Kimani for the Plaintiff
Ms. Wanjiru holding brief for Mr. Ngunjiri for the Defendant
C/A - Carol

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Y. M. ANGIMA

JUDGE

