



**Marigat Group Ranch v Kessei (Environment and Land Appeal
E007 of 2023) [2024] KEELC 14190 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 14190 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

L WAITHAKA, J

MAY 15, 2024

BETWEEN

MARIGAT GROUP RANCH APPELLANT

AND

NICHOLAS KIPTOON KESSEI RESPONDENT

*(Being an appeal from the ruling of Hon. J. Wanjala CM delivered
on 13th April 2023 in Kabarnet CMC ELC Case No. E17 of 2022)*

JUDGMENT

1. This appeal arises from the ruling/decision of Hon J. Wanjala CM, delivered on 13th April 2023 in Kabarnet CMC ELC Case No. E017 of 2022.
2. The ruling was in respect of an application by the plaintiff in that suit (now the respondent) dated 21st June 2022. Through the application, the plaintiff/respondent inter alia sought a temporary injunction to restrain the 1st defendant in that suit (now appellant) from interfering, selling, occupying, dealing with or alienating his proprietary right of the suit property.
3. The application was opposed by the 1st defendant.
4. Upon considering the case urged by the plaintiff in support his case and the objection by the 1st defendant, the learned trial magistrate held:-

“...the applicant has established a prima facie case that will require the court to decide on. I therefore find that the applicant has established a prima facie case to warrant granting of a temporary injunction as prayed pending hearing and determination of the suit.”



5. Aggrieved by the decision of the trial court, the 1st respondent appealed to this court on seven grounds that can be reduced to one broad ground namely that the learned trial magistrate erred by allowing the plaintiff/respondent's application for temporary injunction.
6. Pursuant to directions given on 13th December 2023, the appeal was disposed off by way of written submissions.
7. The appellant through its submissions filed on 23rd February 2024, asserts its contention that the learned trial magistrate erred by determining that the plaintiff/ respondent had established a prima facie case with probability of success and granting him an order of temporary injunction pending the hearing and determination of the suit. According to the appellant, the plaintiff did not establish a prima facie case with probability of success as he did not prove that he was a member of the 1st defendant/appellant; that despite having had opportunity to join the 1st defendant as a member or to file objection challenging his alleged omission from registration as a member of the 1st defendant/appellant, the plaintiff/respondent did not join the defendant/appellant.
8. The appellant acknowledges that the plaintiff/respondent is in use and occupation of a portion of the suit land but contends that the plaintiff/respondent entered the portion of the suit land in dispute in 2006 and that it issued him with demand letters to vacate the suit land to no avail.
9. It is the appellant's case that it demonstrated that the respondent had no locus standi to bring the suit as he is not its member nor the legal representative of the estate of Kipkessei Chesang, deceased, (his grandfather) and that he did not seek leave of the court to institute a representative suit and/or obtain a written authority from those he purports to represent.
10. It is the appellant's case/submission that the issue of capacity to sue goes to the root of the suit and that the issue of capacity is not a procedural technicality. Based on the provisions of Order 1 Rule 8 and 13 of the Civil Procedure Rules 2010, the appellant urges this court to find that the respondent did not have capacity to sue.
11. Citing the definition of a prima facie case given in *Mrao Limited v. First American Bank of Kenya Limited & 2 Others* (2003)KLR, the appellant submits that the respondent did not establish that a right exists which had been infringed to warrant an order of temporary injunction being issued in his favour.
12. Terming the order of temporary injunction issued in favour of the respondent prejudicial to it, the appellant laments that it curtailed its mandate to deal with the suit land for the benefit of its members.
13. The appellant further submits that the learned trial magistrate failed to take into account that it has 6000 acres which can still be allocated to the respondent in the event that he succeeds in his suit and that there were glaring jurisprudential issues which militated against the respondent's claim namely limitation and capacity.
14. At the time of writing this judgment, the respondent's submissions were not in the court file.

Analysis and determination

15. From the evidence, pleadings, affidavit evidence adduced before the lower court and the submissions filed in this appeal, it is not in dispute that the plaintiff/respondent and/or the people he represents are in use and occupation of the suit property. According to the appellant, the plaintiff/respondent and/or the people he represents entered the suit land in 2006.



16. The plaintiff/respondent's claim is that they were in use and occupation of the suit property long before the 1st defendant/appellant was incorporated; that despite having been in use and occupation of the suit land they were not registered as members of the 1st defendant and that their attempts to get registered as members of the 1st defendant/appellant or to get the 1st defendant/ appellant recognize their rights and interest in the portion of the suit land they occupy have been futile.
17. Based on the uncontroverted fact that the plaintiff/ respondents are in use and occupation of a portion of the suit land and that they have been in use of that portion for a long period of time (over 15 years from the time they allegedly trespassed in the suit land), and there being evidence that the 1st defendant had plans to donate the land occupied and claimed by the plaintiff to a third party, (a school), I am satisfied that the plaintiff demonstrated sufficient interest (arising from the long period of use and possession of the suit property) that required protection of the court pending the hearing and determination of the suit.
18. My assessment of the peculiar circumstances of this case is that there is certainty as to who the plaintiff is or are. The mere claim by the plaintiff that he has brought the suit on his own behalf and on behalf of other persons not named in the plaint, does not render the suit fatally defective to warrant denying the orders sought.
19. The upshot of the foregoing is that the appeal herein is found to be lacking in merit and is dismissed with costs to the plaintiff/respondent.
20. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 15TH DAY OF MAY, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered electronically in the presence of:-

N/A for the Appellant

N/A for the 1st, 2nd & 4th respondents

Ms. Tigoi for the 3rd & 5th respondents

Court Asst.: Christine Towett

