



**Ndara B Community v Mwandoe & 7 others (Environment & Land Case E004 of 2024)
[2024] KEELC 4116 (KLR) (Environment and Land) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E004 OF 2024**

EK WABWOTO, J

MAY 9, 2024

BETWEEN

NDARA B COMMUNITY PLAINTIFF

AND

ELIJAH MWANDOE 1ST DEFENDANT

SADIK MOHAMMED 2ND DEFENDANT

BRUNO MWAKIRETI 3RD DEFENDANT

JOHN MGHALU 4TH DEFENDANT

SULEIMAN MNYAPARA 5TH DEFENDANT

CHRISTOPHER MWANGANDA 6TH DEFENDANT

BENARD NYALI KEKE 7TH DEFENDANT

MICHAEL NGAO 8TH DEFENDANT

RULING

1. This Ruling is in respect to the Plaintiff's application dated 11th March 2024 seeking for the following reliefs:-

1. Spent...
2. That pending the hearing and determination of this application, this Honourable Court be pleased to grant an order of temporary injunction barring, prohibiting and/or stopping the Respondents and/or any person whatsoever acting under their instructions from entering into, cutting down



trees, subdividing, and hiving off all the land known as L.R. No. Taita Taveta Sagala/Ndara 'B'/20 situate at Mwatate Subcounty of Taita Taveta County and/or in any way interfering with the Applicants proprietorship and enjoyment of quiet possession.

3. That pending the hearing and determination of the suit herein, this Honourable Court be pleased to grant an order of temporary injunction barring, prohibiting and/or stopping the Respondents and/or any person whatsoever acting under their instructions from entering into, cutting down trees, subdividing, and hiving off all the land known as L. R. No. Taita Taveta/Sagala/Ndara 'B'/20 situate at Mwatate Subcounty of Taita Taveta County and/or in any way interfering with the Applicants proprietorship and enjoyment of quiet possession.
4. That the costs of this application be in the cause.
2. The application was premised on the grounds on its face. The application is supported by the affidavit sworn by Benjamin Mwanda a member of the Ndara B Community Land Management Committee on 11th March 2024. It was deponed that the Plaintiff is the absolute registered proprietor of land known as L. R. No. Taita Taveta Sagala/Ndara 'B'/20 situate at Mwatate Sub County, Taita Taveta County. It was averred that on 30th December 2023, the Defendants entered the suit property and started subdividing the same and erecting illegal beacons against the law. It was also averred that the Plaintiff reported the said trespass and destruction to the police vide Mwatate Police Station Police Occurrence Book Number 51/30/12/2023 but no action has been taken upon the Defendants to date. The Plaintiff further averred that on 6th January 2024 the Defendants again descended on the suit land and cleared vegetation further claiming to subdivide the land amongst squatters which acts were against the law. The said incident was also booked at Mwatate Police Station vide Police Occurrence Book Number 31/6/1/2024.
3. It was contended that the Defendants action if not stopped immediately shall continue wasting their suit property and illegally alter their proprietorship at the land during the pendency of the suit and hence therefore the injunctive orders sought ought to be granted.
4. During the plenary hearing of the application learned counsel for the Plaintiff Mr. Kago submitted that the Plaintiff seeks prayer No. 3 of the application at this stage and that an injunction ought to be issued so that the subdivision should be done according to the law.
5. The application was opposed by the Defendants who were acting in person. The 8 Defendants filed a Replying Affidavit sworn on 5th April 2024. They averred that they are the registered members of Ndara B Community Land and they have the right to use the land with other members as enshrined in the [Community Land Act](#) 2016. They also averred that they have been cultivating the said land since the same has been a source livelihood for their families. It was also averred that no prima facie case has been established to warrant the grant of the orders sought, no substantial loss has been demonstrated that would be suffered by the Applicant and that the Applicant has not demonstrated the rights of the third parties and those of members that would be exposed to damages. It was also averred that the Ndara B Community Land Management Committee has never held any special general meeting nor agreed to sue themselves. They urged the court to dismiss the application.
6. During the plenary hearing of the application, Elijah Mwandoe the 1st Defendant herein made oral submissions on behalf of the other Defendants and he stated that Benjamin Mwanda is not the Plaintiff's Chairperson and further that the activities of the third parties in the suit property were



not consented to by 2/3 of its members. He also stated that the Defendants are not subdividing the property and neither have they cut down any trees. He further stated that the Defendants were only farming on the said property.

7. The court has considered the application together with the affidavits filed and the oral submissions made by Learned Counsel Mr. Kago for the Plaintiff and Mr. Elijah Mwandoe the 1st defendant on behalf of the Defendants.
8. What the Plaintiff has sought in its application is a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and went further to state 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 an urgent necessity to prevent the irreparable damage that may result from the invasion. ...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 threatened with violation... 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. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”
9. The material before court shows that both the Plaintiff and the Defendants are members of Ndara B Community and have been utilizing the suit property in one way or the other. While the Plaintiff has averred that the Defendants have been trespassing and interfering with the property, the Defendants have denied the same save for stating that they are just cultivating the land for purposes of farming which they have been doing over time. Defendants have also disputed the capacity of Mr. Benjamin Mwandaa to depone the affidavit in the manner that he did and on behalf of the Plaintiff for the reasons that he is not the Chairman of the Plaintiff and further that the members of the Plaintiff never consented to them suing each other. It was also stated that there was no evidence that 2/3 of the members had agreed to the filing of the suit either vide a special general meeting or otherwise.
10. From the perusal of the affidavit sworn by Benjamin Mwandaa, it is evident that same is deposed in his capacity as a member of the Plaintiff. It has not been stated whether he is an official or has been authorized to swear the same on behalf of the Plaintiff. The title of the suit property is registered in the name of the Plaintiff for the benefit of all of its members, in the circumstances it is only fair that any orders that should be issued ought to be for the benefit of the members. The Plaintiff did not adduce any evidence of any loss that would be suffered by the third parties to enable the court grant any orders in its favour. The court is not persuaded to grant any injunctive orders in favour of the Plaintiff as sought in its application.



11. As stated earlier, it is also not disputed that the dispute herein purely involves the members of Ndara B Community. This particular position necessitates this court to invoke the provisions of Article 159(2) (c) of *the Constitution* and the Civil Procedure (Court Annexed Mediation) Rules, 2022 and refer this suit to the Court Annexed Mediation failing which the Court will hear and determine the suit.
12. In view of the foregoing, this court proceeds to issue the following orders in respect to the Plaintiff's application dated 11th March 2024:-
 - a. Pending further directions from this court, there shall be no subdivision and or hiving off all the land known as L. R. No. Taita Taveta Sagala/Ndara 'B'/20 by either party.
 - b. This matter be and is hereby referred to Court Annexed Mediation.
 - c. The Deputy Registrar is hereby directed to appoint a duly accredited mediator whose terms of reference shall be to bring the parties together and determine the issues as they appear in the pleadings amongst other issues.
 - d. The matter shall be mentioned thereafter to report on the outcome of the Court Annexed Mediation and or issuance of further directions by this court.

It is so ordered.

DATED, SIGNED AND DELIVERED IN A HYBRID MANNER (BOTH VIRTUALLY AND IN OPEN COURT) AT VOI THIS 9TH DAY OF MAY 2024.

E. K. WABWOTO

JUDGE

In the presence of

Ms. Kimeu h/b for Mr.Kago for the Plaintiff (appearing virtually).

Mr. Elijah Mwandoe the 1st Defendant in person.

Mr. Sadik Mohammed the 2nd Defendant in person.

Mr. Bruno Mwakireti the 3rd Defendant in person.

Mr. John Mghalu the 4th Defendant in person.

Mr. Suleiman Mnyapara the 5th Defendant in person.

Mr. Christopher Mwanganda the 6th Defendant in person.

Mr. Bernad Nyali Keke the 7th Defendant in person.

Mr. Michale Ngao the 8th Defendant in person.

Court Assistant; Mary Ngoira.

