



Njau v Gitau & 2 others (Environment & Land Case E005 of 2023) [2024] KEELC 4113 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E005 OF 2023**

LN GACHERU, J

MAY 9, 2024

BETWEEN

JOHNSON NDUNG’U NJAU PLAINTIFF

AND

MONICA WAMBUI GITAU 1ST DEFENDANT

COUNTY LAND SURVEY, MURANG’A 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The Plaintiff/Applicant brought this Notice of Motion Application dated 5th September 2023, brought under Sections 1A, 1B, 3A and 63(c), of the Civil Procedure Act, Order 40 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, wherein he sought for the following orders;
 - i. A temporary order of injunction restraining the 1st Defendant/Respondent, her agents, servants and/or employees from selling, mortgaging and/or in any other manner from disposing, abusing, putting up any construction and/or in any other manner from dealing with all that parcel of land known as LR No. Makuyu/ Kimorori/ Block 111/ 21, registered in the name of the Plaintiff pending the hearing and determination of this suit.
 - ii. An order of mandatory injunction do issue compelling the 1st Defendant, her agents, servants and/or employees to forthwith allow the Plaintiff access into his property accompanied by a quantity surveyor for the purposes of carrying out a survey report on the current state of all the property known as LR No. Makuyu/ Kimorori/ Block 111/21.
 - iii. An order of mandatory injunction do issue compelling the 1st Defendant, her agents, servants and/or employees to forthwith vacate and give vacant possession to all the property known as



LR Makuyu/ Kimorori/ Block111/21, registered in the name of the Plaintiff to the Plaintiff pending the hearing and determination of the suit;

- iv. That costs of this Application be in the cause.
2. This Application is supported by the annexed Affidavit of the Applicant, Johnson Ndungu Njau, and on the grounds stated on the face thereof.
3. Among these grounds are;
 - i. That the Plaintiff/Applicant is the registered and beneficial owner of all that parcel of land known as LR NO Makuyu/ Kimorori Block 111/21;
 - ii. That the Plaintiff has been in possession and actual occupation of all the land parcel for the last approx. 18 years since he acquired it in the year 2006;
 - iii. That in July 2023, the Chief of Makuyu/Kimorori Location, together with 2nd Defendant and/or his representatives, the Kenol Police Station and together with his representatives with armed Police Officers accompanied by the 1st Defendant and other people without consent of the Plaintiff forcefully trespassed unto the suit property and started to carry out survey work;
 - iv. That the 1st Defendant/Respondent unlawfully cut down trees and unlawfully fenced the suit land and also plundered the Plaintiff's/Applicant's land;
 - v. That if the 1st Defendant/Respondent is not restrained, he will continue to cut down the trees and commit more plunders;
 - vi. Further, that the 1st Defendant/Respondent may dispose off the Plaintiff's/Applicant's land to third parties or in any other manner that would adversely affect the and defeat the Plaintiff's/Applicant's vested rights;
 - vii. He urged the court to grant the orders sought.
4. In his Supporting Affidavit, the Applicant Johnson Ndungu Njau reiterated the contents of the grounds in support and further stated that though the 1st Defendant/Respondent alleged that there was a Court Order, he was not a party to the said case being Thika D.O Case No. 69 of 2007, which was between (Patrick Kangethe & Monica Wambui Gitau vs Geoffrey Kiragu, wherein the order issued thereon was in respect of LR Makuyu/ Kimorori/ Block III/ 22, and not the suit land;
5. Further that his land parcel which he has been in actual possession and physical occupation for the approx. 18 years since March 2006, is separate and distinct from LR Makuyu/ Kimorori/ BlockIII/22;
6. He also averred that the two land parcels are located in two different locations, which are several kilometres apart, and do not share spatial location and thus cannot be overlaid over each other.
7. It was his further averments that the unlawful commission and omission of the 1st and 2nd Defendants/ Respondents are aimed at dispossessing the Applicant of his lawful property, which he has been denied access to.
8. That he was apprehensive that if the Defendants are not restrained, they may continue to cut down the trees and commit more plunder of his properties by putting up all manner of development, which would further cause loss and damages.
9. He also averred that he was apprehensive that if the Respondents are not restrained the 1st Defendant/ Respondent may dispose of the said parcel of land to third parties by way of mortgage, sale and / or



in any other manner that may adversely affect his vested rights therein. He urged the court to allow the instant Application.

10. The Application is opposed by the 1st Defendant/ Respondent, Monica Wambui Gitau, who filed her Replying Affidavit sworn on 24th October 2023, and averred that she is the administrator and the beneficiary of the estate of the late Patrick Kange’the, who was prior to his demise the registered proprietor of the land parcel No Makuyu/ Kimorori Block III/ 22.
11. It was her averment that their family was allocated the suit land Makuyu/ Kimorori Block III/ 22, in 1988, and it appears in the Cadastral Map Sheet No. 2, and the title deed was issued on 1st July 1988, and they have since been cultivating the said land parcel.
12. Further, she averred that they later learnt of an attempt to dispossess them of the suit land by substituting the Cadastral Map Sheet No. 2, which had formed the basis of allotment and that attempt had placed their parcel of land in a totally different Map Sheet, thus breaking the sequence of parcellation.
13. Consequently, her son filed a land dispute case at the tribunal being LDT CASE NO 69 OF 2007, and the tribunal found in his favour, and the said award of the tribunal was adopted by the court at Thika Chief Magistrates Court, as its Judgement.
14. Subsequently, they petitioned the Survey Department to demarcate the boundaries, and the Surveyor sought specificity in the Court Order which Order was granted on 6th March 2023, as is evident from annexure MWG3.
15. Further, she alleged that the Director of Survey, through the Muranga County Surveyor, implemented the said order on 5th JULY 2023, after notifying the owners of the adjoining properties, the Applicant herein included. She attached a copy of the notice as annexure MWG4 dated 26th May 2023.
16. It was her allegations that after the exercise was concluded in the presence of the Applicant herein, he later filed an application for review of the Court Order in LDT Case No. 69 of 2007, which Application is still pending before the court. Therefore, it is dishonest for the Applicant to aver that he is not a party in the said matter.
17. She claimed that the Applicant herein sole purpose is to vex her with several court cases, with the hope of tiring her given that she is of advanced age. She referred to HCCC NO. 919 OF 2007, which matter was never prosecuted to its logical conclusion. Further, that the Applicant had also filed an Originating Summons at Nyeri being HCCC NO. 55 OF 2009, which case was also not prosecuted to its conclusion.
18. It was her contention that though the Applicant seeks for orders to be allowed access and vacant possession of land title no. Makuyu/ Kimorori/ Block III/21, her parcel of land is Makuyu/ Kimorori/ Block III/22, whose boundaries were delimited and thus, she has not in any way infringed on the Applicant’s property.
19. The deponent deposed that the boundaries were demarcated by the office mandated to carry out the survey, which exercise was done procedurally and legally, and therefore, the Applicant has no claim.
20. The 1st Respondent also averred that she has been advised by her advocate that this suit offends section 6 of the Civil Procedure Act, and the prayers sought are not tenable. She urged the court to dismiss the instant suit with costs.
21. The Office of Attorney General through M/s Mwhaki Ndundu, a Senior State Counsel filed a Statement of Defence to the main suit, but not a response to the instant Notice of Motion.



22. The Application was canvassed by way of written submission and brief highlighting of the same by the respective advocates.
23. The Plaintiff/ Applicant filed the submissions on 2nd November 2023, through Gikandi & Company Advocates, and urged the court to allow the said Application as sought.
24. It was the Applicant's submissions that he purchased the suit property from Henry Kiragu Waweru on 28th March 2006, vide a sale agreement even dated. The purchased property was LR. Makuyu/ Kimorori/ Block III/21. He submitted that his title deed was issued on 31st July 2006.
25. He also submitted that upon purchase, he took immediate possession of the said property and has been in exclusive possession and actual occupation thereof. Further, that the Applicant has been carrying on farming on the suit land for an income.
26. It was his submissions that he is the rightful owner of the suit land as provided by section 26(I) of the Land Registration Act, which states;
 26.
 - (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.
27. He also submitted that as a registered proprietor, he is eligible to enjoy the rights of such proprietor as provided for in Section 24 of Land Registration Act. He relied on several cases among them the case of Samuel Ambasa & 3 others vs Stella Ingasia(2022) eKLR, which cited the case of Dr Joseph Arap Ngok vs Justice Moijo Ole Keiwua & 5 others, Civil Appeal No. 60 of 1997, where the court held;

“Section 23(1) of the Act gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title, In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.
28. Further, he reiterated that he is the registered owner of land parcel No Makuyu/ Kimorori/Block III/21, whereas the 1st Defendant owns Block III/22, and therefore the 1st Respondent has been confusing her land parcel with that of the Applicant
29. The Applicant also relied on the case of Timsales Ltd vs Harun Thuo Ndungu (2010) eKLR, Giella vs Cassman BROWN & CO Ltd(1973) E.A 358, Mrao vs First American Bank of Kenya Ltd & 2 others(2003) eKLR and Nguruman Ltd vs Jan Bonde Nielsen & 2 others (2014) eKLR.



30. The Applicant submitted that it is in the interest of justice that the Court should grant the orders sought, plus costs and interests thereon.
31. The 1st Defendant/Respondent filed her submissions through Nelson Gatungo & Company Advocates, and urged the court to dismiss the instant Application with costs thereon.
32. It was the 1st Respondent submissions that the Applicant has offended Section 6 of the Civil Procedure Act, which states;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”
33. She relied on the case of KNCHR vs Attorney General; IEBC & 16 Others (2002) eKLR, wherein the Supreme court held as follows;

“The purpose of the subjudice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them, over the same subject matter, so as to avoid abuse of the Court process and diminish the chances of Court with competent Jurisdiction, issuing conflicting decisions over the same subject matter”.
34. Further, she submitted that the Applicant is out to harass the 1st Respondent who is 89 years old, and that the Applicant has not come to court with clean hands.
35. It was also submitted that since each of them has a valid title deed, the question of who is the rightful owner of the suit land is not valid. That the dispute herein is over demarcation and sections 18 and 19 of the Land Act, offer guidance in this respect, and that the primary determinant of disputes over boundaries is the Land Registrar and the authority responsible for survey.
36. The 1st Respondent also submitted that the dispute is not over the ownership of the two properties, but over demarcation, which question has already been determined by the Land Disputes Tribunal (LDT), whose Award was later adopted by a Thika Magistrates Court, as its judgement.
37. Further, that the 1st Respondent has acted within the law, has followed the due procedure and she has not trespassed on the Applicant’s parcel of land at all. She relied on the case of Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001 vol 1 E.A 86, where it was held;

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles”



38. It was also her further submissions that the Applicant has invited the court to give vacant possession in an Interlocutory Application. She relied on the case of *Airland Tours & travel ltd vs NIC Bank HCCC No. 1234 of 2000*, where the court held;

“that in an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence, or disputed proposition of law”.

39. The 1st Respondent also submitted that the Application herein is lacking of merit and she urged the court to dismiss it with costs.

40. The above are the pleadings and the rival written submissions of the parties herein, which this court has carefully read and considered, and renders itself as follows;

41. The Applicant has sought for both temporary and mandatory injunctions, which are equitable remedies and the said orders are granted at the discretion of the court. However, the said discretion should be exercised judiciously. See the case of *CMC Motors Group Ltd & Another vs Evans Kageche Boro Civil Appeal No. 295 of 2001* where the Court held;

“In granting the injunctive reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judicially.....”

42. The application herein is anchored under Order 40 rule 1 of the Civil Procedure Rules, which states;

“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 is 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.”

43. Therefore, the Applicant has a duty to prove that the land in dispute is in danger of being wasted, damaged or alienated and the court may then proceed to decide on whether it can issue restraining orders to prevent such wasting, damaging, alienation, sale, removal and/ or disposition for purposes of preserving the said land.

44. Further, the application is brought under Section 3A of the Civil Procedure Act, which section of the law provides that the court has unfettered discretion to grant or issue orders that are necessary for the end of justice and prevent abuse of the court process.

45. With the above provisions of law in mind, the court will proceed to consider the available evidence and then determines whether the Applicant is deserving of the orders sought.



46. In this court's view, the main issue for determination is whether the Plaintiff/Applicant has established and demonstrated the criteria for grant of temporary and mandatory injunctions.
47. On whether the Applicant has met the threshold for grant of orders for temporary injunction, the guiding principles are well laid down in the case of *Giella vs Cassman Brown*(supra), which principles have been repeated in many other decided cases.
48. In the case of *Nguruman Ltd vs Jan Bonde Nielsen*(supra) the Court of Appeal held;
- “in an application for interlocutory injunction, the applicant has to satisfy the triple requirements;
- a) to establish his case only at the 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.”
49. Therefore, the Plaintiff/ Applicant herein ought to first establish a prima facie case with probability of success at the trial. Prima facie case was well laid out in the case of *Mrao Ltd vs First American Bank of Kenya ltd*(supra) where the court held;
- “A case in 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”.
50. It was the Plaintiff/ Applicant's claim that the Respondents herein led by 1st Respondent entered into the Plaintiff/Applicant land being Makuyu/ Kimorori Bloc III/21 in July 2023, and trespassed on it by carrying out survey work. That they cut down trees and put up a fence, thus unlawfully plundering the Plaintiff's land.
51. These allegations were denied by the 1st Respondent who is the owner of Land parcel No. Makuyu/ Kimorori /Block III/22. Both the Applicant and 1st Respondent have title deeds for their respective parcels of land, and there is no dispute each one of them is entitled to his/her land and enjoyment of quite possession.
52. Indeed, the Applicant owns land parcel No Makuyu/ Kimorori/ Block III/ 21 and the 1st Respondent owns Block III/22. The dispute is not over ownership of the land parcel No Makuyu/ Kimorori/ Block III/21, owned by the Applicant, but on whether, there was a proper demarcation of the same.
53. The 1st Respondent confirmed that she did engage a Surveyor in boundary delimitation, but she did so in compliance with a court order on LDT CASE No. 69 of 2007, which orders were issued by a Court at Thika CMS court. Therefore, this Court cannot hold that the 1st Respondent was engaging in an illegal activity, as there was a court order which had not been reviewed and/or set aside.
54. If the Plaintiff/Applicant was unhappy with the order of the Magistrates' court issued on 5th July 2023, he should have appealed against it instead of filing a fresh suit challenging enforcement of an order of a



competent court. This court cannot find and hold that the survey work done in compliance of a court order was an illegal survey work.

55. The dispute in issue is over the position of the two parcels of land, and their boundaries, which dispute cannot be resolved by an order of injunction, but maybe by referring the matter to the Land Registrar and Surveyor as provided by sections 18 and 19 of the Land Registration Act, to fix the boundaries and prepare a report to that effect.
56. From the above analysis, this court finds that the Plaintiff/Applicant has not established that he has a prima facie case with probability of success at the trial.
57. Secondly, the Applicant needed to establish that irreparable damage/ injury will be occasioned, which cannot be adequately compensated by an award of damages if temporary injunction is not granted.
58. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eklr, the court gave an explanation of irreparable injury as;

“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.”

59. The Plaintiff/Applicant deposed that the 1st Respondent while carrying out the illegal survey work, unlawfully cut down his trees and unlawfully plundered the Plaintiff/ Applicants property.
60. The Plaintiff/ Applicant further deposed that he was apprehensive that if not restrained, the 1st Defendant/ Respondent would continue to plunder the land and maybe dispose it to third parties. However, there was no evidence of intention to dispose of the suit properties. The 1st Respondent’s family has been in possession of their land parcel no Block III/ 22, since 1988, as is evident from the copy of the title. The Applicant acquired his land in 2006, long after the 1st Respondent had acquired her parcel of land.
61. Further it is clear from the description of the irreparable injury, that it is injury that cannot be compensated by damages if no injunction is granted and the applicant becomes the successful litigant after trial.
62. The Applicant claim is that the 1st Defendant/Respondent has cut down trees on his parcel of land, thus causing plunder and loss of the Applicant’s trees. These trees can be quantified in the event the Applicant turns out to be the successful litigant and he would adequately be compensated by damages. See the case of Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, where the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

63. It is this court’s view that the alleged damages/ injury that the Plaintiff/ Applicant would suffer, can adequately be compensated by an awarded of damages and this second limb fails too.



64. On the third limb, the Plaintiff/ Applicant needed to demonstrate that the balance of convenience tilts in his favour. The court of Appeal also described the balance of convenience in the case of Pius Kipchirchir Kogo(supra) as;

“The meaning of balance of convenience will favor 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 plaintiff’s’ to show that the inconvenience caused to them would be greater than that which may be caused to the defendant’s. Inconvenience be equal, it is the plaintiff who suffer. In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

65. Further, in the case of Paul Gitonga Wanjau vs Gathuita Tea Factory Co Ltd 2 Others (2016) eKLR, the court stated as follows;

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.”

66. Again in the case of Amir Suleiman vs Amboseli Resort Ltd(2004) eklr, the court elaborated balance of convenience as;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

67. Bearing in mind the above description of balance of convenience and given that each party herein is claiming that it is on its rightful portion of land, and that the 1st Respondent had a court order, which allowed survey work to be carried out, this court finds that the lower risk herein is a decline to grant the temporary orders of injunction, given that at this juncture, this court is not certain whether the survey work was done on the Applicants parcel of land or on the 1st Respondent’s parcel of land.

68. That certainty can be achieved after evidence has been called at the main trial or after the Land Registrar and Surveyor have visited the disputed parcels of land and set out the correct boundaries. At this juncture, this court cannot hold and find that the demarcation exercise was unlawfully done and it affected the Applicant’s land.



69. In the case of Robert Mugo wa Karanja vs Eco Bank(k) ltd & another(2019) eklr, the court held as follows;

“ circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts.....”

70. From the available evidence, it is not evident that if temporary orders of injunction are not granted, the Applicant land Parcel Makuyu/ Kimorori/ Block III/21, would be in danger of being wasted , damaged and or alienated, given that the said land parcel is distinct from the 1st Respondent’s parcel of land Makuyu/ Kimorori/ Block III/22, wherein the court had allowed delimitation of its boundaries.

71. Having analysed the evidence as above, this court finds and holds that the Plaintiff/ Applicant has not met the criteria for grant of temporary injunction.

72. On whether the Plaintiff/Applicant has met the criteria for grant of Mandatory Injunction, the prayers sought are mandatory injunction to compel the 1st Defendant/ Respondent to allow the Plaintiff/ Applicant and/ or his agents access to his parcel of land for purposes of carrying out survey work.

73. The second prayer is mandatory injunction to compel the 1st Defendant/Respondent to give him vacant possession for with. These prayers are final orders which ought to be granted once the Court has established that indeed, the 1st Respondent has encroached and/ or trespassed unto the Applicant’s suit property. This demonstration can be done through calling of evidence at the main trial.

74. The principles to be considered in the grant of Mandatory injunction were laid down in the case of Kenya Breweries Ltd & Another vs Washington O. okeyo (2002) eklr, where the court stated;

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.

75. These principles were later reaffirmed in the case of the case of Locabail International Finance Ltd V. Agro-Export and Another [1986] 1 ALL ER 901 as follows:

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”



See also the case of Kamau Mucuha vs. The Ripples Ltd (Civil Application No. Nai. 186 of 1992 (unreported), where Cockar JA. stated after referring to Locaball case as follows:

“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned judge, granting the prohibitory and mandatory injunctions ought not to be disturbed at this stage.”

76. The Plaintiff/ Applicant has sought for orders to compel the 1st Respondent to give him access to his parcel of land Makuyu/ Kimorori/ Block 111/ 21. However, there is no evidence adduced so far to the effect that the 1st Respondent has blocked access to the Applicant's parcel land, while noting that the 1st Respondent is the owner of LR Makuyu/ Kimorori Block 111/ 22. Before issuing such compelling orders, this court has to be satisfied that indeed, the 1st Respondent has blocked the Applicant's access to his parcel of land.
77. Again, the Applicant has sought for order compelling the 1st Defendant/ Respondent to give him vacant possession. Vacant possession is granted after establishing that the person seeking such order is the owner of the suit land and the Respondent is a trespasser. Such evidence and order of vacant possession cannot be granted at interlocutory stage without calling of evidence, unless in very special circumstances exist.
78. At this juncture, this court is not convinced that special circumstances exist in this matter to warrant grant of mandatory injunction. This court is not also convinced that this is a clear case that ought to be decided at once. There are competing claims that the Applicant and 1st Respondent are each occupying the location of their genuine parcel of land. These competing claims require further interrogation in main hearing, but not through Affidavit evidence.
79. This Court at this point cannot tell whether the 1st Respondent has trespassed on the Applicant's land or not. This is an issue that can be resolved by the Land Registrar and County Surveyor, but not the rival Affidavits evidence of the parties herein. This court therefore declines to grant mandatory injunction as sought by Plaintiff/ the Applicant herein.
80. On who should bear costs of the Application, this court will take refuge in the provisions of Section 27 of the Civil Procedure Act, which provides that costs are granted at the discretion of the court, but costs follow the event. However, ordinarily costs are granted to the successful party. The 1st Respondent is the successful party herein and should have costs of this application.
81. Consequently, the court finds that the Plaintiff/Applicant's Application dated 5th September 2023, is not merited and the same is dismissed entirely with costs to the 1st Defendant/ Respondent.
82. Further, this court finds that it has unfettered discretion under Section 3A of the Civil Procedure Act, to issue orders that are necessary for the end of justice and to prevent abuse of the court process. Further, section 1A& 1B of the same Act, mandate the court to facilitate the just and expeditious resolutions of disputes before it, which are the Overriding Interests of the Act.
83. Given that the issue in dispute is demarcation of the boundaries of the two parcels of land, the court directs the Land Registrar, Muranga, together with the County Land Surveyor to visit the two parcels of land and prepare a Report, which should be filed in court within a period of 60 days from the date hereof.



84. In the meantime, the instant Notice of Motion Application dated 5th September 2023, is dismissed wholly with costs to the 1st Defendant/ Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF MAY, 2024

L. GACHERU

JUDGE.

Delivered online in the presence of;

Mr Kabebe for the Plaintiff/ Applicant

Mr Gatungo for the 1st Defendant/ Respondent

2nd Defendant/ Respondent

Absent 3rd Defendant/ Respondent

4th Defendant/ Respondent

Joel Njonjo - Court Assistant L. Gacheru

JUDGE.

9/5/2024

