



**Gituku v Waithaka & another (Environment & Land Case
E055 of 2024) [2024] KEELC 4928 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E055 OF 2024**

**JA MOGENI, J
JUNE 24, 2024**

BETWEEN

PATRICK KING'OI GITUKU PLAINTIFF

AND

CHARLES NG'ANG'A WAIHAKA 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 9/02/2024. It is brought under Order 40 rule 1, the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of Law.
2. It seeks orders;
 1. Spent
 2. Spent
 3. That this Honorable Court do an order compelling the 2nd defendant/respondent to produce/ provide the transaction History on the parcels known as Nairobi Block 117/272 now converted to Nairobi Block 7866/117/272
 4. That the 1st defendant/respondent their servants and or employees or anyone claiming under them be restrained by an injunction from resurveying, alienating, charging, occupying, erecting any fence, structure and or developing, interfering disposing off all those parcel known as Nairobi Block 117/272 now converted to Nairobi Block 7866/117/272 pending the hearing and determination of this suit or further directions.
 5. That the orders issued herein be supervised by the Officer Commanding Kasarani Police Station.



6. That costs of this application be provided for.
3. The grounds are on the face of the application and are as follows;
 - i. The Applicant is the registered and beneficial owner of all those parcels known as That the 2nd Defendant/Respondent has Nairobi Block 117/272 now converted to Nairobi Block 7866/117/272 having purchased the same from the Kamiti Farmers Company Limited in the 1990
 - ii. That the 1st defendant is in the process of alienating, disposing the aforesaid land and has fraudulently transferred the land to himself without any justifiable cause or reason.
 - iii. That the 2nd defendant though without being aware of the deceit and fraud involved is in the process of issuing a certificate of title of the aforesaid parcel to the 1st defendant.
 - iv. That the 1st defendant is using his connection as a land surveyor to commit an illegality by transferring the suit property to himself fraudulently
 - v. That the Applicant will suffer immense loss and damages if the Honorable Court does not intervene.
4. The application is supported by the affidavit of Patrick Kingoi Gituku, the Plaintiff/Applicant herein sworn on the 09/02/2024.
5. The application is opposed. There is a replying affidavit sworn by Charles Ng'ang'a Waithaka, the 1st Defendant/Respondent, sworn on the 08/04/2024.
6. On the 18/06/2024 it was agreed between the parties that the application be canvassed by way of filing written submissions. Submissions were filed and a date for ruling was given.
7. It is the Plaintiff's case that it purchased and paid the requisite fees and obtained receipts and beacons were established and transfer documents handed to him of the suit property from Kamiti Farmers Company on 9/09/1990 comprising Nairobi Block 117/272 now converted to Nairobi Block 7866/117/272
8. That he then subdivided the suit property into parcels sold the portions and plots to willing buyers including the 1st defendant who have since developed their respective parcels by erecting, permanent flats and structures. He states that when he sought to transfer the suit property to himself he was informed that the 1st defendant was in the process of transferring the suit property to himself fraudulently and illegally because the 1st defendant only purchased a portion to himself and not the whole parcel of land.
9. That the plaintiff reported the matter to the DCI and that he is apprehensive that the 1st defendant may take the opportunity and undue advantage and take over the other buyers if the title is transferred to him alone. That if the title is issued to the 1st defendant the plaintiff will suffer irreparable financial loss and damages
10. The plaintiff has listed the Particulars of Fraud and Deceit on the 1st Defendant as follows:
 - a. Using deceit and fraud to claim parcels Nairobi Block 117/272 now converted to Nairobi Block 7866/117/272
 - b. Distorting the area map to grab the aforesaid plots
 - c. Acting in cohorts with some directors of the 2nd defendant to lay a claim to the parcel of land



- d. Using force and tricking to transfer the said parcel
11. The plaintiff seeks to have the suit property to be declared to belong to him against the defendants and a permanent injunction issued against the 1st defendant.
 12. It is the 1st defendant's case that the Plaintiff has failed to establish a prima facie case with a probability of success at the trial. That on 15.05/2008 the 1st defendant purchased 2 subplots comprised in the property Nairobi Block 117/272 but that since then the plaintiff has frustrated his proprietary rights by failing to effect transfer of the purchased subplots in his favor and in favor of 5 other purchasers.
 13. That he is not the subject of any criminal investigations as alleged by the plaintiff/applicant since vide a letter dated 04/05/2023 Kamiti Farmers Company Limited wrote a letter to the Ministry of Lands stating that the 1st defendant and 5 others not party to the suit were rightful owners of subplots comprising the suit property.
 14. At the same time the 1st defendant referred the court to annexure CN4 which is the Deed of Trusteeship which is executed by the applicant/plaintiff setting out the ownership of the subdivided plots including one subplot for the 1st defendant. It is the 1st defendant's averment that the 2nd defendant issued a certificate of lease in his name as a result of the clearance Letter by the Kamiti Farmers.
 15. The 1st defendant contends that the plaintiff has brought this suit to spite him for refusing to pay to the applicant/plaintiff title processing fees which he paid to Kamiti Farmers. Thus the applicant has not demonstrated a prima facie case to satisfy the requirements of *Giella vs Cassman & Co. Ltd (1973) EA*. That the application lacks merit and should be dismissed with costs. That the Plaintiff has no legal or equitable right which requires protection by injunction.
 16. The 2nd defendant did not enter appearance nor file and pleading in response to the application despite having been served. The direction on disposal of the suit property by way of written submissions was agreed with the Counsels for the plaintiff Mr Lumwaji, Counsel for the 1st defendant/respondent Mr Kinyua and Counsel for the 2nd defendant Ms Nyawira all present on 07/05/2024.
 17. The plaintiff filed their written submission dated 6/05/2024 and the 1st defendant filed their written submissions dated 27/05/2024 which I have read and considered including the authorities cited in arriving at the decision I have made here-below.

Analysis and Determination

18. I have had time to analyze the emerging issues therein. The instant Application relates to the grant of temporary injunctive relief pending the hearing and determination of this application.
19. The substantive law on this matter is Order 40 Rule 1(a) of the *Civil Procedure Rules* 2010 which provides:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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.”



20. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in *Giella v Cassman Brown & Co. Ltd* (supra.)
21. The court in the case of *The Siskina (Owners of the Cargo Lately On Board) v Distos Compania Naviera SA*: HL 1979 [1979] AC 210, Lord Diplock said:
- “A right to obtain an interlocutory judgment is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment of the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.”
22. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others*, [2014] eKLR observed that:
- “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:
- (a) establish his case only at a prima facie level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.
23. These are the three pillars on which rests 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. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* supra. The court was clear that “...the existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”
24. Drawing positive inspiration from the *Nguruman v Jan Bonde Nielsen & 2 others* [2019] eKLR, the Court of Appeal in *Total Kenya Limited v David Njane t/a Argwings Twin Service Station & 2 others* [2018] eKLR restated the requirement that the three conditions for granting an injunction ought to be considered sequentially. In essence, the Court reasoned that the conditions for irreparable damage and balance of convenience ought not to be considered if a prima facie case had not been established.



25. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a prima facie case. A prima facie case was defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, where Bosire, JA stated as follows:
- “So what is a prima facie case? I would say that in civil cases it is 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.”
26. The Court of Appeal deliberating what amounted to a prima facie case in *Nguruman (Supra)* made the following comments:
- “We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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.”
27. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.
28. In my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.
29. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavits, both parties are making a claim to the whole and part of the suit land which though the land registration number has changed the process of ownership by each seems to attest to having acquired the portion they are each claiming legally. It is evident therefore that the dispute between the parties is the issue of how transfer of the subdivided portion was transferred to the 1st defendant without involvement of the applicant who owns the mother title which he subdivided and sold to willing buyers including the 1st defendant.
30. It is unfortunate that the 2nd defendant who would shade more light as how the 1st defendant ended up applying for title without considering that the approval of the applicant/plaintiff has failed to file a response to this application though duly served.
31. Nevertheless, the nature of the dispute is one which cannot be adjudicated over at this interlocutory stage. The general principle is such that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in trial. Especially where there is fear that the substratum of the suit may be interfered with. This was deliberated in the case of *Ougo & Another vs Otieno Civil Appeal No. 3 of 1987 (1987) KLR*.



- 32. It is apparent that if suit property Nairobi Block 117/272 now converted to Nairobi Block 7866/117/272 which is the land being claimed by the plaintiff then there is need to preserve it as it is until the issues in contention are deliberated and settled. Preservation of status quo is simply a case management strategy that will assist the court in preserving the subject of the suit as it is.
- 33. Since the description and location of the suit property by the plaintiff fits the description and location of the suit property as is claimed by the 1st defendant/respondent then it is important that as Lord Diplock (supra) states ‘....it is prudent to take such measures as are calculated to preserve the status quo....’ Only until the matters are litigated, evidence adduced and finalized.
- 34. It is the view of the court that the applicant has established a prima facie case with a probability of success against the Respondents. At this point the court cannot tell whether the land in question is the same or not the same with what each party is claiming and this can only be adduced at the main trial. As regards irreparable damage, I take the view that should the suit property not be preserved the substratum of this case will be destroyed and the applicant will suffer irreparable loss which may not be quantified in damages.
- 35. The court never acts in vain. Therefore, if I had any doubts, I am now clear in thought and action that the balance of convenience does tilt in favour of the applicant purely for purposes of safeguarding the current status quo of the subject matter of the suit pending hearing and determination.
- 36. Therefore, arising from all the above, I do find merit in the application. However, I decline to issue injunctive orders instead I will issue a status quo order as a case management strategy to preserve the suit property and I also grant prayer 5 of the Application. Meaning the suit property should not be dealt with in a manner that will alienate it in terms of transfer, selling, subdividing, charging or in any way interfering with it until this suit is heard and determined.
- 37. Parties are referred to the Hon. Deputy Registrar for Pre-trial conference on 2/07/2024
It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2024.

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**MOGENI J
JUDGE**

In the presence of:
Mr. Kinyua for the 1st Defendant
No appearance for Plaintiff and 2nd Defendant
Caroline Sagina - Court Assistant

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**MOGENI J
JUDGE**

