



REPUBLIC OF KENYA



Mbugua & 7 others v Agricultural Development Corporation & 8 others (Environment & Land Case 101 of 2024) [2024] KEELC 5470 (KLR) (Environment and Land) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 101 OF 2024
MC OUNDO, J
JULY 25, 2024
(FORMERLY NAKURU ELC 12 OF 2024)**

BETWEEN

**JASON KARANJA MBUGUA 1ST PLAINTIFF
GODFREY WAINAINA CHEGE 2ND PLAINTIFF
JOSPHAT KAUNDA MAIKARA 3RD PLAINTIFF
JOSEPH KIPLANGAT KILISIO 4TH PLAINTIFF
JOSEPH MUNGAI KAMANO 5TH PLAINTIFF
EDWIN MAINA 6TH PLAINTIFF
WILLIAM KANGETHE THUKU 7TH PLAINTIFF
GIBSON MWANGI 8TH PLAINTIFF**

AND

**AGRICULTURAL DEVELOPMENT CORPORATION 1ST DEFENDANT
LANDS LIMITED 2ND DEFENDANT
KAUMBA FENCING MASTERS LIMITED 3RD DEFENDANT
NATIONAL YOUTH SERVICE 4TH DEFENDANT
ANTHONY LANGAT MOSONIK 5TH DEFENDANT
DIRECTOR OF SURVEY 6TH DEFENDANT
CHIEF LAND REGISTRAR 7TH DEFENDANT
DIRECTOR OF LAND ADMINISTRATION 8TH DEFENDANT**



RULING

1. Vide a Notice of Motion Application dated 27th February, 2024 brought under the provisions of Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Orders 40 Rule 1 and 51 Rule 1 of the Civil Procedure Rules, the Applicants sought for interim orders restraining the 1st to 5th Respondents either by themselves, agents or servants howsoever entering, trespassing, erecting and or continuing with the erection of, or in any way dealing with parcels of land known and fully described as L.R Nos. Plot No. 20591/117 EX ADC NDABIBI, Plot No. 20591/98 & 99 EX ADC NDABIBI, Plot No. 20591/116 EX ADC NDABIBI, Plot No. 2059/118 EX ADC NDABIBI, L.R 7281/15 and 7281/13 (Originally 7281/12/12) (herein after known as suit properties) as specified in paragraph 10 of the Plaintiff.
2. That the 6th to 8th Respondents be restrained either by themselves, agents or servants howsoever from altering and/or interfering with MAP/RIM S.A. 37/A. III. A. 9 [1331/1] contained in Folio No. 345, Register No. 39, and/or registering any instrument in favour of the 1st to 5th Respondents, their agents, employees, or assigns or in any way dealing with the Plaintiff's parcels of land known and fully described as L.R Nos. Plot No. 20591/117 EX ADC NDABIBI, Plot No. 20591/98 & 99 EX ADC NDABIBI, Plot No. 20591/116 EX ADC NDABIBI, Plot No. 2059/118 EX ADC NDABIBI, L.R 7281/15 and 7281/13 (Originally 7281/12/12) as specified in paragraph 10 of the Plaintiff.
3. They also sought for costs of the Application.
4. The application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Godfrey Wainaina Chege, the 2nd Applicant herein who deponed that the Applicants were the rightful, lawful and beneficial owners of all those parcels of land herein above enumerated by virtue of the annexures herein marked as GWC 2 (a-j), GWC 3 (a-c), GWC 4 (a-e), GWC 5 (a-e), GWC 6 (a-c), GWC 7 (a & b), GWC 8 (a-e), and GWC 9.
5. That the parcels of land were within the same neighborhood and or block as could be discerned from MAP/RIM S.A. 37/A. III. A. 9 [1331/1] contained in Folio No. 345, Register No. 39 annexed as GWC 10.
6. That on or about 13th February, 2024 some individuals, had without any notice or authorizing documentation, invaded their farm wherein they had started erecting a fence claiming that the Applicants had been on the suit properties illegally and that the 1st Defendant herein, was taking over.
7. That they then visited the 1st Respondent's headquarters at Development House on 19th February, 2024 where they had been informed by one Mr. Nicholas Oyugi, the Lands Limited Manager that the 1st Respondent had no idea of the activities taking place on the suit properties since it had not sanctioned the same. He had then advised them to write and address a complaint letter to him
8. The matter had been reported at Kongoni police station on 21st February, 2024 vide OB 9/21/02/2024. That at the site, the group of individuals undertaking fencing work under the supervision of the 4th Respondent's had informed them that they were acting under the instruction of the 5th Respondent. Mr. Mutiso, one of the supervisors had also informed them that they were the 3rd Respondent's employees who had been contracted by the 1st and 4th Respondents to undertake the fencing activities on the suit properties.



9. That accordingly, the Applicants were apprehensive that the 1st to 5th Respondents' action was aimed at forcibly taking over and/or acquisition of the suit properties by powerful cartels in the Government in collusion with the 1st to 8th Respondents. That they had been denied peaceable and quiet enjoyment and possession of the suit properties hence they were apprehensive that they would likely be disintitled of their rightful and beneficial ownership of the suit properties.
10. That unless restrained by the court, the 1st to 8th Respondents would continue with their illegal and unlawful actions with a view to fraudulently, illegally, unlawfully, un-procedurally and irregularly take over and/or acquire the suit properties. That they had established a prima facie case with a high probability of success hence they would suffer irreparable loss and damages were the Respondents not restrained for which, the balance of convenient tilted in their favour.
11. The Respondents did not file any response nor submissions.
12. The Applicants' Submissions in compliance with the court's directions and while framing their issue for determination was whether the court should grant interim injunction pending the hearing and determination of the main suit.
13. They then placed reliance on the provisions of Order 40 Rule 1 (a) and (b) as well as the conditions for consideration in granting an injunction as was enumerated in the celebrated case of *Giella Vs. Cassman Brown* (1973) EA 358 to submit that they had had established a prima facie case as was held in the decided case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR in that they were the registered proprietors of the suit properties having purchased the same from the 1st Respondent between the year 1999 and 2023 as evidenced in the copies of the titles attached.
14. That irrespective of the fact that they had since been in possession of their respective parcels of land, the Respondents had threatened and/or violated their constitutional right to quiet and peaceful enjoyment of the said suit properties.
15. They placed reliance on the decided case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR to submit that they would suffer irreparable injury by being disintitled of the suit properties which would render them homeless. That they sought for a temporary injunction to enable them exercise their right to property as enshrined in Article 40 of the *Constitution* as no amount of damages would compensate them were they to be disintitled of the suit properties.
16. That having demonstrated that the actions of the 1st -5th Respondents was aimed at a forceful takeover of their land, the balance of convenience tilted in their favour because they would be more inconvenienced were the court not grant the interim injunction as compared to how the Respondents would be inconvenienced if the suit was to be dismissed entirely. That there was thus a lower risk in granting orders of temporary injunction than not granting them. Reliance was placed in a combination of decisions in the *Pius Kipchirchir Kogo's case* (supra) amongst others. That since they had met the criteria for the grant of orders of temporary injunction, their application be allowed.

Determination.

17. I have considered the Applicants' unopposed application and submissions herein, the authorities cited as well as the applicable law for which I shall determine Application on its merits.
18. The Court has been moved under a Certificate of Urgency, by the Applicants, to issue temporary injunctive orders against the 1st to 5th Respondents restraining them from dealing whatsoever with the Applicants' parcels of land known and fully described as Plot No. 20591/117 EX ADC NDABIBI,



Plot No. 20591/98 & 99 EX ADC NDABIBI, Plot No. 20591/116 EX ADC NDABIBI, Plot No. 2059/118 EX ADC NDABIBI, L.R 7281/15 and 7281/13 (Originally 7281/12/12)

19. The court has also been moved to restrain the 6th to 8th Respondents from altering and/or interfering with MAP/RIM S.A. 37/A. III. A. 9 [1331/1] contained in Folio No. 345, Register No. 39, and/or registering any instrument in favour of the 1st to 5th Respondents or in any way dealing with the said Applicants' parcels of land.
20. Conscious that at this stage, the Court is only required to determine whether the Applicants are deserving of the orders sought, and that the Court is not required to determine the merit of whether the Applicants herein have demonstrated that they have a genuine and arguable case or not. Accordingly, I find the issue that stands out for determination herein being whether the interim order of injunction should issue.
21. The celebrated case of *Giella vs Cassman Brown* (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows: -
 - i. Is there a serious issue to be tried (prima facie case)?
 - ii. Will the Applicant suffer irreparable harm if the injunction is not granted?
 - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").
22. On the first issue as to whether the Applicants in this matter have made out a prima facie case with a probability of success, I am guided by the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, where a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”
23. The Applicants herein have alleged that they are the rightful, lawful and beneficial owners of the suit lands herein above captioned having purchased them from Sharamo Bagaja Roba, Mellen Kerubo, Vivian Areri and the 1st Respondent respectively. That the suit properties are within the same neighborhood and/or block as could be discerned from MAP/RIM S.A. 37/A. III. A. 9 [1331/1] contained in Folio No. 345, Register No. 39.
24. That on or about 13th February, 2024, the 1st to 5th Respondents through their proxies, had without notice or authorizing documentations invaded their suit properties herein where they had embarked on erecting a fence on a claim that the 1st Respondent had taken over the land. That this act had denied the Applicants their peaceful and quiet enjoyment and possession of their suit property hence they were apprehensive that they were likely be disintitled of their rightful and beneficial ownership of the suit land.
25. I have considered the documents herein annexed being Sale Agreements, payment receipts, Land Control Consent Applications and Approvals as well as a Certificate of title dated 12th April 2017 to L.R.No. 20591/117 registered to the 1st Applicant and another Certificate of title to Title No. 7281/13 (Originally 7281/12/12) registered to the 8th Applicant.
26. I have also considered the provisions under Section 26 (1) of the *Land Registration Act*, the fact that the 2nd to 8th Plaintiffs/Applicants were in occupation of the suit properties and lastly that the



Application was unopposed. I find that all that the Applicants sought was an injunction against the Respondents restraining them from interfering with the suit properties in the ways herein above enumerated, or taking possession of the same, so as to preserve the suit properties pending the hearing and determination of the case. I find that indeed the Applicants had established a prima facie case herein.

27. On the second issue as to whether the Applicants would suffer irreparable harm if the injunction is not granted, I have noted the and given the fact that the 1st to 5th Respondents actually invaded the suit properties, threatened the Applicants' employees before proceeding to erect a fence on the said suit land, indeed it is normal that the Applicants are apprehensive that they would suffer irreparable harm if the injunction was not granted. In *Nguruman Limited Vs. Jan Bonde Nielsen and 2 Others* (2014) eKLR the court of Appeal had observed as follows on irreparable injury:

“..... An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

.....the court must further be satisfied that the injury the Respondent will suffer in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying no interlocutory order of injunction should normally be granted however strong the Applicant's claim may appear at that stage.”

28. I am also persuaded by the decision in the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR where the court in explaining the meaning of irreparable injury held as follows:

“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.

29. In the case of *Paul Gitonga Wanjau Vs Gathuthis Tea Factory Company Ltd & 2 others* (2016) eKLR, the court observed as follows on the issue of balance of convenience:

“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 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 of convenience lies.”

30. There having been no contestation that the Applicants have been in occupation of the suit properties, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, pending the hearing of the suit on its merits. This is especially so in view of the allegations of fraud by the Respondents herein, the court needs to have an opportunity to interrogate all the



documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Applicants as well as hearing the Respondents' evidence on the allegations of fraud.

31. Subsequently, I am convinced that if orders of temporary injunction are not granted in the instant suit, the suit properties might be in danger of being dealt in the manner set out in the application as apprehended by the Applicants, the 1st to 5th Respondents having actually invaded the same wherein they had started erecting a fence thereon.
32. I find that since the Applicants who are in occupation of the suit land and all that they seek is an injunction against the Respondents from interfering with the land in the ways herein above enumerated, or taking possession of the same, so as to preserve the suit land pending the determination of the case, I see no harm in ordering that the parties do maintain the status quo pertaining which order will assist in case management until determination of the case.
33. The Court of Appeal in the case of *Mugab-v-Kunga* [1988] KLR 748, held that in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.
34. With this in mind, and whilst cautioning myself on the preservation of the status quo so as to ensure that no party is prejudiced, I would therefore interfere in a limited manner by clearly defining the status quo herein to the effect that:
 - i. An order of status quo is herein issued to be maintained by all the parties in that it must be understood that the Applicants are in occupation of land in parcel L.R Nos. Plot No. 20591/117 EX ADC NDABIBI, Plot No. 20591/98 & 99 EX ADC NDABIBI, Plot No. 20591/116 EX ADC NDABIBI, Plot No. 2059/118 EX ADC NDABIBI, L.R 7281/15 and 7281/13 (Originally 7281/12/12) as at the time of filing suit.
 - ii. The Applicants shall also not deal with the said parcels of land adversely.
 - iii. There shall not be any interfering with parcel L.R Nos. Plot No. 20591/117 EX ADC NDABIBI, Plot No. 20591/98 & 99 EX ADC NDABIBI, Plot No. 20591/116 EX ADC NDABIBI, Plot No. 2059/118 EX ADC NDABIBI, L.R 7281/15 and 7281/13 (Originally 7281/12/12) by the Respondents.
 - iv. The 6th to 8th Respondents are hereby be restrained either by themselves, agents or servants howsoever from altering and/or interfering with MAP/RIM S.A. 37/A. III. A. 9 [1331/1] contained in Folio No. 345, Register No. 39, and/or registering any instrument in favour of the 1st to 5th Respondents in respect to L.R Nos. Plot No. 20591/117 EX ADC NDABIBI, Plot No. 20591/98 & 99 EX ADC NDABIBI, Plot No. 20591/116 EX ADC NDABIBI, Plot No. 2059/118 EX ADC NDABIBI, L.R 7281/15 and 7281/13 (Originally 7281/12/12)
 - v. Such status quo is to be maintained by all parties until the matter is finally heard and determined.
 - vi. The cost of the application dated the 27th February, 2024 shall be in the cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 25TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

