



**Kanga v Abdullahi (Environment & Land Case E013 of 2024)  
[2024] KEELC 5441 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5441 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E013 OF 2024**

**NA MATHEKA, J**

**JULY 24, 2024**

**BETWEEN**

**JACQUELINE KANGA MBANDI AKA JACKLINE MBANDI AKA  
JACQUELINE KANGA FUNK ..... PLAINTIFF**

**AND**

**MULIKI ABDULLAHI ..... DEFENDANT**

**RULING**

1. The application is dated 14<sup>th</sup> February 2024 and is brought under Section 13 and 19 of the *Environmental and Land Act* Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders;
  1. That this matter be certified as urgent and be heard in the first instance exparte.
  2. That this Honourable Court be pleased to issue a temporal order of injunction restraining the Defendant, her agents, workers and or relatives from trespassing onto and or proceeding in any manner whatsoever with the construction, development or building any structures and or buildings on the Plaintiff's property known as Mainland North/Section V11756-Utange-Mombasa Municipality pending the hearing and determination of this Application interparte.
  3. That this Honourable Court be pleased to issue a temporal order of injunction restraining the Defendant, her agents, workers and or relatives from trespassing onto and or proceeding in any manner whatsoever with the illegal and or unlawful construction, development or building any structures on the Plaintiff's property known as Mainland North/Section 1/11756-Utange-Mombasa Municipality pending the hearing and determination of the suit.
  4. Costs of the suit be borne by the Defendant/ Respondent.



5. Any other or further orders as the Court may deem fit to grant.
2. It is grounded on the Supporting Affidavit of Judith Karungi Mbandi, the following grounds that the Plaintiff is the registered owner of Plot No. Mainland North/ Section 1/11756. The Defendant/ Respondent has without any color of right trespassed on the suit property and commenced the construction of illegal structures thereon. The illegal structures, in addition to wasting the Plaintiff's property violates the Plaintiff's constitutional right to own and use her property. Unless the Defendant is restrained by an order of this Honourable Court, the Defendant will continue with the illegal structures thereby occasioning the Plaintiff. It is in the interest of justice that the orders sought be granted.
3. This court has considered the application and the submissions therein. The first issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella vs Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a 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”.

4. Consequently, the Plaintiff ought to, first, establish a prima facie case. In the case of *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

5. In support of their application, the Plaintiff has attached copies of documents of title to the suit property. She has attached a search certificate to show she is the owner of owner of Plot No. 11756/11/ MN. She also attached a surveyor's report dated 30<sup>th</sup> October 2023 stating that there is an ongoing high rise building construction works on the said plot and attached a ground situation plan. I find that the applicant has established a prima facie case.
6. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

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.

7. The Plaintiff has deponed on how she is the registered owner of Plot No. Mainland North/ Section 1/11756. That the Defendant/ Respondent has without any color of right trespassed on the suit property and commenced the construction of illegal structures thereon. She has attached photos of a high rise building under construction. In my view, therefore, the inability to access and use the suit property is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.
8. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as;

‘The meaning of balance of convenience will favour 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 Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

9. In the case of *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

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.”

10. The Plaintiff/Applicant contends that the balance of convenience tilts in her favour because she is the owner of the suit property. The Respondent in his replying affidavit states that he is the registered owner of plot No 11755/11/MN together with Eman Jama Mohammed. That they acquired the suit property from Richard Kiboi Kimunya after conducting due diligence in 2021. They attached the sale agreement, registered transfer of land and a copy of the search certificate. That he embarked on the development which is now at 7 floors. That looking at the deed plan this points at a boundary issue as the plots border each other.



11. The decision of *Amir Suleiman vs Amboseli Resort Limited* (2004) eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated that;

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

12. I find that, there is a lower risk in granting orders of temporary injunction than not granting them, at this stage. This is especially so because I have not had opportunity to to consider the matter on its merit. In view of the foregoing, I find that the Plaintiffs/ Applicants have established a prima facie case and I order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF JULY 2024.**

**N.A. MATHEKA**

**JUDGE**

