



REPUBLIC OF KENYA



**Ndithi v Mbaluka & 7 others (Environment & Land Case E017 of 2023)
[2024] KEELC 6696 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6696 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E017 OF 2023
A KANIARU, J
SEPTEMBER 26, 2024**

BETWEEN

JOHN MBALUKA NDITHI PLAINTIFF

AND

CHARLES MUTUA MBALUKA 1ST RESPONDENT

PETER MBINDYO MBALUKA 2ND RESPONDENT

DONALD MBITHI MBALUKA 3RD RESPONDENT

JOSHUA NZIOKA MBALUKA 4TH RESPONDENT

JANET KALUKI MBALUKA 5TH RESPONDENT

FELISTER MUTHIO MBALUKA 6TH RESPONDENT

THE LAND REGISTRAR, KIRITIRI MBEERE SOUTH 7TH RESPONDENT

**THE DEPUTY COUNTY COMMISSIONER MBEERE SOUTH SUB
COUNTY 8TH RESPONDENT**

RULING

1. Before me for determination is a Notice of Motion dated 18.05.2023 brought under a Certificate of Urgency. The same has been filed by the plaintiff – John Mbaluka Ndithi - and is expressed to be brought under Order 40 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and all enabling laws. The Applicant is seeking the following orders:

1. Spent
2. That this honourable court be pleased to grant a temporary injunction against the respondents to restrain themselves, their agents or any other person from evicting, entering, alienating,



managing or otherwise however from interfering with LR No Mbeti Gachoka/9614 – 9620 pending hearing and determination of this suit.

3. That further this honourable court be pleased to make an order reversing the illegal transfers and registration of parcels Mbeti/Gachoka/9614-9620 registered in the names of the respondents and forming part of the applicant's land to revert to the original parcel no LR Mbeti/Gachoka/375 which was registered in the names of the applicant and the same be served upon the Land Registrar, Kiritiri for compliance.
 4. That this honourable court be pleased to issue any further orders as may meet the ends of justice herein.
 5. That costs of this application be provided for.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn by the applicant stating interalia that; at all material times he has been the original owner of LR No Mbeti/Gachoka/375. That the respondents took advantage of his ill health and illegally subdivided the said land which resulted to LR Mbeti/Gachoka/9614-9620, which parcels of land were transferred and registered in the names of the 1st to 5th respondents by the 6th and 7th respondents. That this was done to the exclusion of his second wife and some of his children and also against his wishes. That the respondents have on diverse dates threatened to evict him and have indeed forcibly evicted him from the land. He urges that this court has a duty to protect his interest as the owner of LR Mbeti/Gachoka/375.
 3. The 1st to 6th respondents opposed the application by way of a replying affidavit filed on 07.06.2023 by the 2nd respondent on their behalf where it was deposed that LR No Mbeti/Gachoka/375 was purchased in the 1970s by their parents, that is, the applicant and the 6th respondent, and is considered matrimonial property. That the applicant allocated portions of the land to his sons, the 1st to 4th respondents in the 1990s, where they built permanent houses on their respective portions on land parcel 375. That in 2020, the applicant fell ill and they all took turns taking care of him and in 2022, he agreed to subdivide the land into portions to reflect what each of them occupied on the ground.
 4. They deposed that the land was subdivided and registered legally and procedurally in their respective names. They deny evicting the applicant and state that he deserted his home. They decry that granting the applicant's prayers would violate their proprietary rights and render them homeless and destitute. They also urge that the applicant is seeking permanent orders in an application which in their view should not be entertained by this court. Ultimately they urged the court to dismiss the application.
 5. It is to be noted that the 7th and 8th respondents were not opposed to the application.
 6. The application was dispensed with by way of written submissions. The Applicant filed his submissions on 12.03.2024 and he laid emphasis on the grounds of his application and submitted that the principles for granting an injunction were laid out in the case of *Giella v Cassman Brown* (1973) EA 358. The said principles are threefold: that a party must show he has a *prima facie* case with a probability of success; that he will suffer irreparable injury which would not be adequately compensated by damages; and finally that when the court is in doubt, it will decide the application on a balance of probabilities. He also gave the definition of a *prima facie* case as was set out in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002. He submitted that he had made out a *prima facie* case to warrant the court to grant the orders sought. That he had also demonstrated that he will suffer substantial loss if the orders are not granted as he is likely to lose his land. That it was notable that the respondents had not disputed his ownership of the original parcel of land or the subdivision of the same.



7. The 1st to 6th respondents on the other hand submitted that the applicant had not met the requirements set out in the *Giella case* as he had not demonstrated a prima facie case with probability of success. That the applicant does not stand to suffer irreparable injury as the respondents are his family and their rights are superior being the registered proprietors.
8. Having considered the application, the response made to it, and the rival submissions, I find that the issues for determination are whether;
 - a. The applicant is entitled to an order of temporary injunction.
 - b. The applicant is entitled to an order reversing the transfers and registration of the suit parcels of land to the respondents.
 - c. Who is to bear costs of the application.
9. The principles which guide the court when considering an application for a temporary injunction were set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 where the court set out three conditions that ought to be met before grant of a temporary injunction. It was stated:

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
10. A prima facie case was described in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002 as:

“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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
11. The court in Civil Appeal No 77 of 2012, *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR had this to say about a *prima facie* case;

“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.
12. The applicant in this case complains that the 1st to 6th respondents illegally caused his parcel of land to be subdivided and subsequently transferred to themselves against his wishes. As he rightly pointed out, his ownership of the original parcel 375, the subdivision and subsequent registration of the same in favour of the respondents has not been disputed. What is in dispute is whether the subdivision and registration of the resultant parcels of land was done in a legal manner or not. And as has been pointed



out in the above dictum a party need not prove their case at this stage. Neither does their case have to be one that must succeed at judgement. They only need to demonstrate that they have a fair and bona fide question to raise as to the existence of the right which they allege. In my view therefore the applicant has demonstrated a prima facie case with probability of success.

13. But it is not enough for a party to demonstrate a *prima facie* case, he also need to prove the second limb which is that he will suffer irreparable loss that cannot be compensated by damages. The applicant claims that should the orders for an injunction not be granted, then he stands to lose his land. He also claims to have been evicted or has been threatened with eviction from the suit land, a fact which has been denied by the respondents. The 1st to 6th respondents deposed that the applicant allocated them portions of land within the original land parcel 375 where they put up permanent houses and that the subdivision of the original land was done to reflect what each of them occupied on the ground.
14. The resultant subdivisions are also said to have been registered in respect of each person and their individual land parcel. The applicant has not given any evidence that there is any threat of disposing the said parcels of land or the same being interfered with in a manner adverse him. I am therefore not persuaded that there is any injury that he stands to suffer should the orders sought not be granted.
15. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the applicant by refusing to grant the temporary injunction, against the hardship to be borne by the Respondents by granting the same. Having found that the applicant has not demonstrated any irreparable injury that might be occasioned to him, I find that no hardship will be occasioned to him should the orders of injunction not be granted.
16. The applicant also made a prayer for an order reversing the transfers and registration of the suit parcels of land to the 1st to 6th respondents. However the only way for this court to determine whether he is entitled to the said order would be after according each party a hearing on their case and considering their evidence. This can only be done after trial and not at this pre-trial stage.
17. For the foregoing reasons, I find no merit in the applicant's notice of motion application dated May 18, 2023 and hereby dismiss the same in its entirety.
18. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH}} DAY OF SEPTEMBER, 2024.

In the presence of Ngige for Ms Maina for defendant 1st to 6th defendant, Warutere for plaintiff, Kiongo for 7th defendant.

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

26.9.2024

