



**Ngummo (Kenya) Limited v Kiagi (Environment & Land Case
E032 of 2024) [2024] KEELC 6118 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E032 OF 2024
NA MATHEKA, J
SEPTEMBER 26, 2024**

BETWEEN

NGUMMO (KENYA) LIMITED PLAINTIFF

AND

PAUL ONYANGO KIAGI DEFENDANT

RULING

1. The application is dated 29th April 2024 and is brought under Sections 1A and 34 of the Civil Procedure Ad and Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 seeking the following orders;
 1. This application be certified as urgent and heard ex-parte in the first instance.
 2. Pending hearing and determination of this application, there be and is hereby issued an order of temporary injunction to restrain the Defendant, his employees, assigns, agents or any other person acting on his behalf and instructions from encroaching on, blocking, using or dumping on the access road linking the Plaintiff's property Land Reference No. Mainland North/ [Section 1/1722](#) with the beach.
 3. Pending hearing and determination of this suit, there be and is hereby issued an order of temporary injunction to restrain the Defendant, his employees, assigns, agents or any other person acting on his behalf and instructions from encroaching on, blocking, using or dumping on the access road linking the Plaintiff's property Land Reference No. Mainland North/ [Section 1/1722](#) with the beach.
 4. Pending hearing and determination of this suit, there be and is hereby issued an order of mandatory injunction to compel the Defendant to clear, remove the debris, materials and/ or any other items from the access road linking the Plaintiff's Property Land Reference No.



Mainland North/Section [1/1722](#) to the beach and to clear the same of any debris and such other and all materials within seven (7) days of this order.

5. Costs of this application be borne by the Defendants jointly and severally.
2. It is based on the grounds that the Plaintiff is the registered owner of the property known as Land Reference No. Mainland North/Section [1/1722](#) (MN/I/1722). The Defendant is the registered owner of the property known as Land Reference No. Mainland North/Section [1/1724](#) (MN/I/1724). The Plaintiff's property and the Defendant's property neighbor each other and are only separated by one property known as MN/I/1723. The Defendant's property is on the beach front while the Plaintiff's property is on secondary row from the beach. There exists a wide access road which connects the Plaintiff's property to the beach and which is used by the Plaintiff and other neighboring plots that are on secondary row to access the beach. The Defendant undertaking demolition of the single dwelling residential unit on his property to pave way for his development of multiple dwelling apartments. In the process of demolishing the single dwelling unit, the Defendant has encroached on, trespassed on and blocked the common access road connecting the Plaintiff's property to the beach. The Defendant is using the access road to dump the debris arising from the demolition as well as to store his building materials. The Defendant's action of blocking the access road to the beach amounts to trespass and is illegal and unlawful. By reason of the Defendant's trespass and encroachment, the Plaintiff's access to the beach has been impeded and impaired. The Plaintiff has a constitutional right to use and enjoy its property which rights include free ingress thereto and egress therefrom without any impediments. Further, the Plaintiffs use and enjoyment of its property include free and uninhibited access to the beach which has now been impeded by the Defendant without just or legal cause and basis.
3. The Defendant states that the said application is frivolous vexatious and on abuse or the court process. That the applicant is guilty of material non- disclosure and for misleading the Honourable Court. That the plaintiff's ownership of the property known as Land Reference No. Mainland North/Section [1/1722](#) (MN/I/1722) is in dispute, since they have not produced a current postal search showing current ownership. That he is the duly registered owner of all that parcel of land known as Land Reference No. Mainland North/Section 1/4 724 (MN/I/G 724). That his property is on the beachfront though they do not share any boundary with the plaintiff. That there is an access road which can only be accessed by foot that is used by several plots including mine to access the beach. That he has not blocked the access road. That he applied to the County Government of Mombasa for a dumping permit on Plot No. MN/I/1721 and MN/I/1724 and was issued with a permit to do so. That despite having a licence to dump on the access road have not blocked anybody's access to the beach including the plaintiff.
4. 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”.

5. 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) EKLRL* 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.”

6. In support of their application, the Plaintiff has attached copies of documents of title to the suit property, Land Reference No. Mainland North/*Section 1/1722* (MN/I/1722).

7. 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.

8. The Plaintiff has deponed The Defendant is the registered owner of the property known as Land Reference No. Mainland North/*Section 1/1724* (MN/I/1724). The Plaintiff's property and the Defendant's property neighbor each other and are only separated by one property known as MN/I/1723. The Defendant's property is on the beach front while the Plaintiff's property is on secondary row from the beach. There exists a wide access road which connects the Plaintiff's property to the beach and which is used by the Plaintiff and other neighboring plots that are on secondary row to access the beach. The Defendant undertaking demolition of the single dwelling residential unit on his property to pave way for his development of multiple dwelling apartments. In the process of demolishing the single dwelling unit, the Defendant has encroached on, trespassed on and blocked the common access road connecting the Plaintiff's property to the beach. The Plaintiff operates on its property hospitality business known as Swahili Beach Apartments and the Plaintiff's clients and patrons rare not able to enjoy the beach freely. In my view, therefore, the inability to access and use the suit property is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

9. Thirdly, the Plaintiff's have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLRL* 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 Plaintiff's, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendant's 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 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”.

10. 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.”

11. The Defendant stated that the plaintiff’s ownership of the property known as Land Reference No. Mainland North/Section [1/1722](#) (MN/I/1722) is in dispute, since they have not produced a current postal search showing current ownership. That he is the registered owner of all that parcel of land known as Land Reference No. Mainland North/Section 1/4 724 (MN/I/G 724). That his property is on the beachfront though they do not share any boundary with the plaintiff. That there is an access road which can only be accessed by foot that is used by several plots including mine to access the beach. That he has not blocked the access road.

12. 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.”

13. I find that, there is a lower risk in granting orders of temporary injunction than not granting them, at this stage. The Plaintiff insists the access road if blocked and the Defendant denies that same and states it is only a footpath. 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 Plaintiff/Applicant has established a prima facie case and I make the following orders;

1. Pending hearing and determination of this suit, there be and is hereby issued an order of mandatory injunction to compel the Defendant to clear, remove the debris, materials and/ or any other items from the access road linking the Plaintiffs Property Land Reference No. Mainland North/Section [1/1722](#) to the beach.
2. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.



N.A. MATHEKA
JUDGE

