



**Kirimi v Mutegi & another (Environment & Land Case E011 of 2024)
[2024] KEELC 13290 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E011 OF 2024**

**CK YANO, J
NOVEMBER 20, 2024**

BETWEEN

IDAH KANYUA KIRIMI APPELLANT

AND

SALESIO KIRIMI MUTEGI 1ST RESPONDENT

FLORENCE KAGENDO BARINE 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 11th July, 2024, the applicant is seeking for orders of temporary injunction restraining the respondents by themselves or agents from evicting, entering, demolishing the structures and perimeter wall or in any way interfering with the applicant's use and occupation of LR. No. Mwimbi/Chogoria/7237 and/or maintenance of the currently prevailing status quo pending the hearing of the application and the appeal plus costs. The application is brought under Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* and Order 40 rule 1, 2 and 4 of the Civil Procedure Rules and is premised the grounds in the face of motion and supported by the affidavits of Idah Kanyua Kirimi dated 11th July, 2024 and supplementary affidavit dated 14th August, 2024.
2. The applicant avers that she is the registered proprietor of the suit land and the respondents are on the verge of taking and interfering with the applicant's right to possession and use of the suit premises and have since started demolishing the perimeter wall.
3. The applicant states that she had filed Chuka CM ELC No. E040 of 2023 claiming that the respondents had without notification trespassed on her land and illegally demolished part of the perimeter wall. That the respondents filed a Notice of Preliminary Objection dated 30th October, 2023 arguing that the suit offended the express provisions of Section 18(2) of the *Land Registration Act* and hence the court lacked the requisite jurisdiction to entertain the suit. That the trial court vide its ruling dated 7th June 2024 upheld the preliminary objection and dismissed the suit with costs, stating



that the suit was prematurely before court. It is the applicant's contention that the suit was based on trespass and not boundaries for reasons that the applicant's land has clearly marked boundaries and the applicant had developed it since 2020.

4. The applicant states that the respondents have proceeded and issued her with a letter dated 8th July, 2024 demanding that the applicant removes any structure and perimeter wall on the land within 7 days from the date of the letter.
5. It is the applicant's contention that this court's intervention is necessary so that the status quo is maintained, so that the applicant's property can be preserved until the court is able to hear and dispose of the appeal. That the respondents will not be prejudiced if the orders sought are granted as they have their parcel of land with established boundaries. The applicant denied receiving the letter dated 22nd August, 2023 from the National County Surveyor.
6. In her supporting affidavit, the applicant has annexed copies of the plaint, the title deed and map sheet, a photograph, OB number, the preliminary objection and the ruling, a letter dated 8th July, 2024 and the memorandum of appeal.
7. In opposing the application, the respondents filed a replying affidavit dated 26th July, 2024 wherein they have also annexed copies of a letter of authority, the plaint and the ruling.
8. It is the respondents' contention that the applicant's suit was rightly dismissed by the trial court because the court lacked the requisite jurisdiction to deal with the dispute which related to the establishment of boundaries and was brought before court prematurely before it could be handled by the Land Registrar and the district surveyor who have the technical expertise and resources to determine boundary issues. The respondents reiterate that the only remedy to solve the dispute is by fixing the existing boundary between the applicant's Land Parcel No. Mwimbi/Chogoria/7237 and the respondents' land parcel No. Mwimbi/Chogoria/1157. They state that they have no interest whatsoever to trespass and/or encroach upon the applicant's land which borders their land.
9. The respondents state that they have been living peacefully with their neighbours until the applicant acquired the suit land that borders the respondents' land and he started bringing issues of boundary that never existed before. That since the issue is a boundary, the same can only be fixed by the relevant land officials.
10. The respondents reiterated that since the real issue is a boundary dispute, the suit and the appeal as well as the entire proceedings offend Section 18 (2) of the *Land Registration Act*, hence the court lacks jurisdiction to entertain the matter. The respondents accuse the applicant of interfering with the boundary by trespassing into the respondents' land and building a perimeter wall, thus creating an unnecessary confrontation and quarrels. The respondents aver that vide a letter dated 22nd August 2023, the applicant was invited and/or summoned by surveyors through the area assistant Chief in order to have the boundary issue resolved, but she ignored and opted to file the suit which was dismissed.
11. It is the respondents' contention that the application herein and the appeal is frivolous, vexatious and an abuse of the court process and is devoid of merit and should be dismissed with costs to the respondents.
12. The application was canvassed by way of written submissions which were duly filed by both parties. The applicant filed her submissions dated 13th August 2024 through the firm of Otieno A. & Co. Advocates while the respondents filed theirs through the firm of Ojwang Sombe & Co. Advocates.



I have read and considered the said submissions and therefore I need not reproduce the same in this ruling.

13. I have considered the application, the response and the submissions filed. The only issue for determination is whether the applicant is entitled to orders of temporary injunction pending the hearing and determination of the appeal.

14. It is not in dispute that this court in exercise of its appellate jurisdiction has powers to grant a temporary injunction pending appeal where the ends of justice demand so and where the procedure for instituting an appeal has been complied with. The applicable law is Order 42 Rule 6 (6) which provides as follows:

“Notwithstanding anything contained in subrule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

15. In the English case of *Eringford Properties Limited Vs. Cheshire County Council* (1974) 2 ALL ER 448 and which has been reiterated by Kenyan Courts in Several cases including *Madhupaper International Limited Vs. Kerr* [1985]eKLR; *Venture Capital & Credit Ltd Vs. Consolidated Bank of Kenya Limited* (2004) 1 E.A 357; *Patricia Njeru & 3 Others Vs. National Museum of Kenya* [2004]eKLR and *Equip Agencies Ltd. Vs. I & M Bank Limited* [2017]eKLR, it was settled that the power of the court to grant an injunction pending appeal is discretionary and the said discretion should be exercised judicially and not in whimsical or arbitrary fashion by following laid down principles, namely (i) the discretion will be exercised against an applicant whose appeal is frivolous; (ii) the discretion should be refused where it would inflict greater hardship against the respondent than it would avoid; (iii) the applicant must show that to refuse the injunction would render his/her appeal nugatory; and (iv) the court should be guided by the principles in *Giella Vs. Cassman Brown & Company* (1973) EA 358.

16. In the case of *Giella Vs. Cassman Brown* (Supra), the conditions for grant of interlocutory injunction were stated as follows:

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 on application on the balance of convenience.”

17. In *Mrao Ltd. Vs. First American Bank of Kenya Ltd.* [2003]eKLR, the Court of Appeal gave a definition of what a prima facie case is and stated:

“A prima facie case in a civil case include but is not confined to a ‘genuine or 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 all for an explanatory or rebuttal from the latter.”

18. In this case, the applicant has stated that the respondents are trespassers and have encroached her land and demolished a perimeter wall. The respondents state that the dispute is purely a boundary dispute which falls under the mandate of the Land Registrar pursuant to the provisions of Section 18 (2) of the [Land Registration Act](#), hence the trial court was right in upholding the respondents’ preliminary



objection and dismissing the applicant's suit. Whereas it is the applicant's case that she has an arguable appeal with high chances of success, the respondents contend that the appeal is frivolous.

19. I have perused the plaint. In paragraph 4, the applicant has accused the respondents of trespassing on the suit property and illegally demolished part of the perimeter wall on the boundary between the applicant's land LR. No. Mwimbi/Chogoria/7237 and the respondents' land LR. Mwimbi/Chogoria/1157. In both the respondents' replying affidavit and the applicant's supplementary affidavit, the parties have exhibited a letter dated 12th August, 2023 from the National County Surveyor, Chuka inviting the parties to present themselves on the disputed area for purposes of re-establishing the boundary. I have also perused the memorandum of appeal herein. The same revolves around the holding by the learned trial magistrate that the dispute was one of a boundary.
20. In deciding whether or not to grant the injunction, the court would exercise discretion and take into consideration a number of factors, including whether the appeal is frivolous or not and whether granting the injunction would inflict greater hardship against the respondents than it would avoid. The applicant must also show that to refuse the injunction would render the appeal nugatory. In addition, the court should be guided by the principles in the Giella case.
21. Having perused the pleadings, the material on record and the grounds of appeal, in my humble view the applicant has not demonstrated that she has an arguable appeal on the narrow question that the issue is trespass and not a boundary dispute. For the court to determine whether or not the respondents have trespassed onto the applicant's land, first of all the boundary of the applicant's land and the respondents' land must be ascertained. Otherwise, how else will a court determine whether there was trespass or not. It is therefore my view that the appeal is frivolous. Further, the applicant has admitted that the respondents have demolished part of the perimeter wall on her land. Were the applicant to succeed in the appeal, I do not think that the appeal would be rendered nugatory if the prayers sought are not granted because the wall can be valued and /or assessed and an award of damages will be an adequate remedy. The applicant has not suggested, in any event, that the respondents are incapable of paying such damages.
22. For the foregoing reasons, this court finds that the applicant's Notice of Motion dated 11th July, 2024 has no merit and the same is dismissed with costs to the respondents.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF NOVEMBER, 2024.

Court Assistant – Mwangi

Ms. Otieno for Appellant/Applicant

Ms. Ochola for Respondents

C. K. YANO

JUDGE

