



**Isaya v Limiri & 3 others (Environment and Land Appeal E008 of 2023)
[2024] KEELC 13221 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E008 OF 2023
CK NZILI, J
NOVEMBER 13, 2024**

BETWEEN

DOMINIC ISAYA APPELLANT

AND

STANLEY M'MARIO LIMIRI 1ST RESPONDENT

**THE MINISTRY OF LANDS AND SETTLEMENT TIGANIA
EAST 2ND RESPONDENT**

OFFICE OF SURVEY & PHYSICAL PLANNING 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

*(Being an appeal from the ruling of Hon. F.K Munyi – PM
in Tigania PMCC No. 53 of 2022 delivered on 13.1.2023)*

JUDGMENT

1. The appellant, as the plaintiff at the lower court, had sued the respondent as the defendant by a plaint dated 11.7.2023. He had averred that he was the registered owner of L.R No. Tigania East/ Ankamia/11875 measuring approximately one acre located at Kangara area Amugaa, Antuamburi Mikinduri, Tigania East which he has occupied and developed since 2011. It was averred that in July 2022, the 1st respondent, his agents, servants and or employees trespassed into his land and attempted to fence it. Upon visiting the lands office at Urru to check his land status, the appellant averred that he discovered that it fell under Map Sheet No.18/4. At the same time, on the ground position, the appellant averred that the same had been registered in the name of the 1st respondent, given Parcel No. 10062 vide Sheet No. 9/13, while his parcel's locality had allegedly been shifted to an area called Kamanyine Kunati, yet he does not occupy and the ground therein did not belong to him.



2. The appellant averred that whereas the suit land was registered correctly, the area maps were erroneously amended so that his title number did not tally with the ground occupation, whose immediate neighbours were M'Itabari Nkori, David Thiribu, Gorge Maingi and a river on the other side of a river. The appellant blamed the 2nd and 3rd respondents for creating the said map to move his land to another locality, through collusion with the 1st respondent, to make him lose his land.
3. Again, the appellant averred that before the titling of his land, he had no arbitration, objection or appeal cases over the same with the 1st respondent or any other person.
4. Therefore, the appellant prayed for:
 - a. An order directing the District Land Surveyor Tigania East Sub-County to correct/amend the map so as to align it with the ground locality of his land at Kangara area, Amunga Antuamburi, currently mapped as Parcel No. Tigania/East Ankamia/10062.
 - b. Permanent injunction restraining the 1st respondent from interfering with the ground occupation of the land measuring one acre at Kangara area, Amugaa Tigania/East Sub-County currently mapped as in Title No. Tigania/East/Ankamia/10062.
5. Alongside the plaint, the appellant filed an application dated 14.7.2022 seeking a temporary injunction.
6. The 1st respondent opposed the suit through a statement of defence dated 28.9.2022, terming the same as incurably defective in law and disclosing no reasonable cause of action.
7. Moreso, the 1st respondent denied any illegality or irregularities attributed to him in paragraphs 7-12 of the plaint. On the contrary, the 1st respondent averred that he bought L.R. No. Tigania East/Ankamia/10062, from the late Francis Michubu, which was correctly mapped in the map sheet and neighboured David Thithimba and Triposa Nkoro, and that he had owned the land for ten years hence his title was indefeasible.
8. The 1st respondent admitted the jurisdiction of the court. The 1st respondent equally opposed the application for a temporary injunction through a replying affidavit of Stanley M'Maria Limiri sworn on 28.9.2022. In reply to the defence dated 29.9.2022, the appellant averred that the 1st respondent was colluding with the 2nd – 4th respondent defraud or swindle his land. There is no indication if the 2nd and 4th respondents filed any statement of defence to the suit.
9. By a ruling dated 24.2.2023 the trial court found the application for interim injunction lacking merits. Aggrieved by the ruling dated 13.1.2023, the appellant faults the trial court for:
 - i. Disallowing his application.
 - ii. Failing to consider the claim before it.
 - iii. Failing to consider that the 2nd and 4th respondents had not given any justification for their actions complained about in the suit.
 - iv. Failing to find the annexures to the supporting affidavit had shown his developments on the land, unlike the 1st respondent.
 - v. Refusing to consider all the facts deponed as to the ground location of the land.
 - vi. Failing to appreciate and take into account that what was in issue was ground occupation and not the titles and or mapping, as that was to be proved at the trial.



- vii. Ruling against the weight of the available evidence.
10. With leave of court, parties canvassed the appeal through written submissions. The appellant relied on written submissions dated 4.10.2024, urging the court to find that he was entitled to the relief of the temporary injunction. Reliance was placed on, *Re-estate of Gedion Kibitok Tarus (Deceased)* (2021) eKLR and *Mburu v Kibara & others* (ELC No. 237 of 2021 (2022) KEELC 3226 (KLR) (28th July 2022) (Ruling).
 11. The mandate of this court is to look at the record of the trial court with a fresh perspective and come up with independent findings on both facts and the law. In *Peters v Sunday Post Ltd* (1958) E.A 424, the court observed that an appellant court has jurisdiction to review the evidence to determine whether the conclusion of the trial court should stand.
 12. In *Mutisya v Helmuth* (Civil Appeal E056 of 2021 (2024) KECA 750 (KLR) (21st June 2024) (Judgment), the court cited *Abok James Odera v JP Machira* (2013) eKLR, that the court has to re-evaluate and re-assess the extracts of the record and then determine whether the conclusions reached by the trial court are to stand or not and give reasons either way.
 13. Having carefully read the lower court record, the single issue for my determination is whether the trial court was correct to decline to issue a temporary injunction pending hearing and determination of the suit. The parameters to consider as to whether to grant a temporary injunction were set out in *Giella v Cassman Brown & Co Ltd* (1973) E.A 358 and *Mrao Ltd v First v First American Bank of Kenya Ltd & others* (2003) KLR 125.
 14. An applicant must demonstrate a prima facie case with a possibility of success to be tried at the main suit. Secondly, he must show that he will suffer irreparable harm, incapable of being compensated by way of damages.
 15. Thirdly, an applicant has to show that the balance of convenience tilts in favour of granting the temporary injunction. To grant or not to grant a temporary injunction is the discretion of the trial court. Such discretion may only be interfered with where there was a misunderstanding of the law or the evidence before it. It may be interfered with, if it can be demonstrated that particular facts existed or did not exist.
 16. In *Esso (K) Ltd v Mark Makwata Okiya* Civil Appeal No. 69 of 1991, the court said that it ought to look into the allegations in the affidavit of the parties and weigh whether there was a possibility of the plaintiff succeeding or whether there was a possibility of quantifying damages. In *Virginia Edith Wambui v Joash Ochieng Ougo* (1987) eKLR, the court observed that the general principle is that where there are severe conflicts of facts, the trial court should maintain the status quo until the dispute is decided on a trial.
 17. In *Mrao Ltd (supra)*, a prima facie case was said to be established, where a reasonable tribunal, looking at the law and the evidence, a right has been infringed to call for a rebuttal from the opposite side.
 18. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, irreparable damage was defined as an injury that cannot be adequately compensated for in damages, if the injunction is not granted and that there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
 19. As to balance of convenience, the court said it means that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiffs will be more



- significant than that which could be caused to the defendants, if the injunction was granted but the suit was ultimately dismissed.
20. Applying the foregoing guiding principles, did the trial court abide by the law and its principles? What the applicant had averred at the trial court is that he is a registered owner of L.R No. Tigania East/ Ankamia/11875 measuring 0.46 ha as per a title deed issued on 2.11.2021, in Map Sheet No. 18/4, which he has occupied, developed and utilized since 2011. He attached a copy as annexures marked D "1" and map sheets D "2".
 21. In reply to the application, the 1st respondent filed a replying affidavit dated 28.9.2022, in which he attached a title deed for L.R No. Tigania East/Ankamia/10062, issued on 2.11.2021, measuring 0.2 ha in Map Sheet No. 9/13. In paragraphs 6-10, 13 & 14, of the replying affidavit dated 28.9.2022, the 1st respondent admitted that the appellant was the one who has been in occupation of the suit land on the ground.
 22. Both the appellant and 1st respondent hold title deeds that appear to lie on different map sheets. The suit before the trial court sought to have the district land surveyor relook at the map sheet and have the ground location realigned with the survey record. None of the two parties herein had displayed registry index maps duly published by Director of Surveys.
 23. A party seeking temporary injunction has to establish a prima facie case, irreparable damage and a balance of convenience. The appellant is in occupation of the land. The 1st respondent has no expert report ascertaining and verifying that the appellant's land falls elsewhere and the occupation is unlawful.
 24. The 1st respondent had not pleaded when he bought the land, took vacant possession, verified its ground locality and or gave notice to the appellant to vacate the land as different from its ground locality as per the published survey maps. Trespass is illegal entry into and commission of destructive acts on private land under Section 3 (2) of the Trespass Act.
 25. Article 40 of the Constitution grants an owner the right to protection from being deprived of his land. Sections 21, 25, 26 and 27 of the Land Registration Act grant a registered owner of land all rights and privileges. The two title deeds held by the appellant and the 1st respondent were issued on the same day. They, however, fall on different map sheets. When a court is faced with two or more titles over the same land, it has to make investigations to discover which of the two should be upheld. See Herbert L. Martin & others v Margaret J Kamar and others (2016) eKLR. Similarly, when two equities are equal, the first in time prevails. See Gitwany Investment Ltd v Tajmal Ltd & others (2006) eKLR.
 26. Order 40 1 (a) & (b) of the Civil Procedure Rules provides that where a property is in danger of being wasted, damaged, destroyed or alienated by any party to the suit, is under the threat of the defendant a court may grant or issue interim order of injunction. See Paul Gitonga Wanjau v Gathuthis Tea Factory Co. Ltd & others Nyeri HCC NO. 28 of 2015.
 27. A temporary injunction is issued to preserve the property in dispute. There are serious conflicts and facts between the appellant and the 1st respondent both parties. The 2nd & 4th respondents have not helped the situation by ascertaining the correct locality of the two title holders.
 28. The trial court based its findings on uncertain and unpublished maps. I think the appellant would suffer more if an injunction is not issued to preserve the land than it would to the 1st respondent if it is not granted. The upshot is that I allow the appeal. Costs to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH NOVEMBER, 2024



In presence of

C.A Kananu

Miss Kaume for appellant

Anguche for the 1st respondent

HON. C K NZILI

JUDGE

