



**Maelo aka Ambassador v Barasa & another (Environment and Land Appeal E001 of 2024) [2024] KEELC 13989 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13989 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
EC CHERONO, J  
DECEMBER 17, 2024**

**BETWEEN**

**ELIUD MAELO AKA AMBASSADOR ..... APPELLANT**

**AND**

**GEOFFREY WANYONYI BARASA ..... 1<sup>ST</sup> RESPONDENT**

**BEN SIMIYU MAKHANU ..... 2<sup>ND</sup> RESPONDENT**

*(From the ruling of Hon. T.M.Olando (PM) in Bungoma  
ELC Case No. E020 of 2024 delivered on 11/04/2024)*

**JUDGMENT**

1. The Appellant herein was the 4<sup>th</sup> defendant in the primary suit while the Respondents were the plaintiffs therein.
2. This appeal seeks to set aside the ruling and order by Hon. T.M.Olando delivered on 25/4/2024 in Bungoma CM-ELC No. E020 of 2024 and to have the appeal allowed and orders of the trial court set aside with costs to the 4<sup>th</sup> Defendant/Appellant.
3. In the impugned judgment, the trial magistrate directed that the land Registrar and County surveyor to visit the land in the presence of the court to determine the cause of the road. It was also directed that parties were free to engage their private surveyors during the exercise. Being aggrieved by the said Order/ ruling, the Appellant herein preferred this appeal vide the memorandum of appeal dated 16/07/2024. The Grounds of appeal as can be discerned from the said Memorandum of Appeal are summarized as follows;
  - a. That the learned trial magistrate erred in law and in fact in making an erroneous inference that the issue for determination was whether the defendant veered off the road when the fundamental issue for determination ought to have been whether the applicants had satisfied



the threshold enunciated in the notorious hackneyed, yet hallowed jurisprudence in *Giella vs. Casman Brown* (1973).

- b. That the learned trial magistrate erred in law and in fact in ignoring to make a finding that the acts complained of as a basis for seeking the order of injunction to wit, damage to house, household goods, bananas for sale, barbed wire and bricks would value was clearly quantified and claimed had already been executed and could not therefore be undone by injunction.
  - c. The learned trial magistrate erred in law and in fact in ignoring the legal precept that an injunction would not ideally issue where the contemplated damage will be compensable by an award of damages.
  - d. The learned trial magistrate erred in law and in fact in issuing injunctive orders in the first instance and then ordering for a site visit to determine the course of the road presumably so as to find justification for a wrong decision that had already been granted.
  - e. The learned trial magistrate erred in law and in fact in arrogating to himself the role of descending into the arena of conflict by participating in the investigation to justify an order that he had already granted.
  - f. The granting of injunctive orders was against evidence and manifestly clear principles on granting of injunctions which principles did not even merit a mention by the learned trial magistrate in his ruling.
4. In order to contextualise the basis of the present appeal, it is necessary to briefly set out the facts of the case before the trial Court.
  5. It is not in contestation that the Respondent filed a notice of motion dated 19/02/2024 seeking the following orders;
    - a. That this honourable court be pleased to certify this application urgent and proceed to issue appropriate ex parte orders accordingly.
    - b. That this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon demolishing and or in any manner whatsoever interfering with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicants exclusive and quiet possession of all those (respective) land parcel numbers E.BUKUSU/W.SANG'ALO/9251(new number) resulting from Parcel No. E.BUKUSU/W.SANG'ALO/278 measuring approximately 2 ¼ Acres and E.BUKUSU/W.SANG'AL/3141 measuring approximately 0.2Ha. Pending hearing and determination of this application inter parties.
    - c. That this honourable court be pleased to issue a temporary order of injunction staying the ongoing construction of Musikiti-Lancaster-Kitanda Road pending the hearing and determination of this application inter parties.
    - d. That this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves their agents and or servants from harassing, threatening, intimidating, trespassing upon demolishing and or in any manner whatsoever interfering with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicants exclusive and quiet possession of all those (respective) land parcel numbers E.BUKUSU/W.SANG'ALO/9251(new number) resulting from Parcel No. E.BUKUSU/W.SANG'ALO/278 measuring approximately 2 ¼ Acres and E.BUKUSU/



W.SANG'AL/3141 measuring approximately 0.2Ha. Pending the hearing and determination of this suit.

- e. That this honourable court be pleased to issue a temporary order of injunction staying the ongoing construction of Musikiti-Lancaster-Kitanda road pending the hearing and determination of this suit.
  - f. That this honourable court be pleased to issue an order to the County Executive member Finance and Planning stopping the process and releasing further payments towards the ongoing construction of the Musikiti-Lancaster-Kitanda road pending the hearing and determination of this application inter-parties.
  - g. That this honourable court be pleased to issue an order to the County Executive member of Finance and Planning stopping the processing and release of any further payments towards the ongoing construction of the Musikiti-Lancaster-Kitanda road pending the hearing and determination of this suit.
  - h. The costs of the application be borne by the respondents.
6. The Respondent's case was that the Appellant and others had embarked on an illegal road construction along Musikiti-Lancaster-Kitanda road. That the said road construction had encroached onto his land and that the contractor had demolished his residential houses and destroyed properties to their detriment. The 2<sup>nd</sup> Respondent averred that he is the registered proprietor of L.R No. E.BUKUSU/W.SANGALO/9521(new number) resulting from LR No. E.BUKUSU/W.SANGALO/278 measuring approximately 2 ¼ acres. That he acquired the property from one Peter Makokha Siundu and Vincent Waswa Siundu who obtained the same after a succession process. That prior to the acquisition, he conducted due diligence and ascertained the boundaries and demarcations which allowed a 9meter road.
  7. That on 05/02/2024, he saw a video posted on a whatsapp group of an MCA flagging the construction of the road in question. That he consulted the Registry Index Map and the properties mutation forms to confirm that his property had not encroached the road reserve. That he was advised later by his brother that the road would most likely encroach onto his land. That he complained to the contractor who disregarded his pleas.
  8. In opposition to the application, one Evelyn Wekesa who is the Chief officer Lands, Urban/Physical Planning, Roads, Transport, Infrastructure and Public Works in Bungoma County filed a replying affidavit sworn on 08/03/2024 and stated that the application was against public interest and functions of the county government. That a public notice was issued via gazette notice dated 31/01/2024 and public participation subsequently conducted on 5//2024. That a tender notice was also issued on 3/11/2023 inviting prospective contractors for road works and that the road involved disclosed and identified. That the process was aimed at repairing existing roads and the demolitions were only done on structures encroaching the road reserve. That at the time of filing this suit, the road construction was complete therefore, the application has been overtaken by events.
  9. The Appellant herein filed grounds of opposition dated 08/03/2024 where he averred that the Respondents had not proved ownership of the land referred to and that they had not disclosed any cause of action against him. That the alleged damage had already been done, quantified and particularized thus the relief sought was ex post facto. The Appellant also filed a replying affidavit sworn on 11/03/2024 where he deposed that his company Ambassador Industrial Suppliers Limited was awarded a tender for maintenance of Musiliti-Langasta-Kitinda road. That a site visit was conducted on 10/11/2023 and he thereafter secured a bid bond of KShs. 500,000/= for performance on 11/11/2023.



10. A performance guarantee of Kshs.339,785 was issued to the company by Rafiki Micro Finance Bank and a public engagement undertaken at the Lancaster road and the road handed over for official works. That he hired machinery and mobilized them on site and the stalling of the project will lead to massive losses and damages in the aggregate of Kshs. 350,000/= per day. He deposed that the works begun on 08/02/2024 and at the time he received the court documents, the road construction had reached 90% completion and has strictly followed the set boundaries and demarcations. He argued that the principles for the grant of an injunction order as set out in the celebrated case of Giella vs. Cassman Brown Company limited (1973) E.A 358 had not been established.
11. The 2<sup>nd</sup> Respondent also filed a supplementary affidavit in opposition to the said application sworn on 20/03/2024 and sought to have the replying affidavit by Evelyn Wekesa struck out for having been commissioned by an unqualified person. It was argued that the notice of 31/01/2024 did not make reference to the road in issue as alleged and that what is referred to as a periodic maintenance was a compulsory land acquisition process had never been maintained having been alienated on 05/02/2022. He argued that the tender notice dated 03/11/2023 erroneously pre-supposed an existing road and that the alleged public participation was a handing over meeting that did not involve the locals.
12. It was deposed that no notice was issued to the affected land owners as required under Section 10 of the Public Road and Roads of Access Act (Cap 399). It was his assertion that the road construction was over 13 metres over the provided 9 meters. The 4<sup>th</sup> respondent filed a response to the supplementary affidavit sworn on 26/03/2024.
13. Directions were taken and parties agreed that the appeal be canvassed by way of submissions.
14. The appellant filed submissions dated 30/07/2024 where it was submitted that the applicable law is Order 40 Rule 1 and 2 of the Civil Procedure Rules and the guiding case is that of Giella vs. Casman Brown (1973) ES 564. It was also submitted that since the acts complained of have been executed and the loss particularized and quantified confirms that the lower risk is to decline the issuance of the orders sought. It was argued that the respondents had not made a case for the orders sought. Reliance was placed in the cases of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others Civil Appeal No. 332 of 2020 and Films Rover International vs. Cannon Films Sales Ltd 3 (ALLER) 772.
15. The respondent's filed their submissions dated 15/05/2024 where they raised five issues. On the first issue, the Respondents submitted that the appellant did not exhaust the remedies under Order 40 Rule 7 for a discharge, variation or setting aside of an injunctive order. The Respondent also submitted that the court was properly guided under Order 40 rule 10 to issue the orders for site visit as it did. The other issues submitted on had no relevance to the current appeal. Reliance was placed on the case of Mohamed Ali Osman vs. Habiba Ali Osman & 3 Others (2022) Eklr and Raila Odinga & 16 Others vs. Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curie) Presidential Elections Petition E005, E002, E003, E004, E007 & E008 of 2022.

### **Legal Analysis And Decision**

16. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and identify the following as the issues that emerge for determination:
  - a. Whether or not the trial court erred in issuing the orders of 25/04/2024.
  - b. What order to make on costs
17. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd.& others* (1968) EA 123



#### **Whether the trial court erred in issue the orders of 25/04/2024.**

18. The impugned ruling was on an application that sought for injunctive orders against an alleged trespass on land parcel numbers E.BUKUSU/W.SANG'ALO/9251(new number) resulting from the subdivision of Land Parcel No. E.BUKUSU/W.SANG'ALO/278 measuring approximately 2 ¼ Acres and E.BUKUSU/W.SANG'AL/3141 measuring approximately 0.2Ha and the funding of a road construction.
19. The celebrated case of *GIELLA versus CASSMAN BROWN* (1973) EA 358 set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald vs. Canada (Attorney General)* [1994] 1 S.C.R. 311 where the three part test of granting an injunction were established as follows: -
  - i. Is there a serious issue to be tried (prima facie case)
  - ii. Will the Applicant suffer irreparable harm if the injunction is not granted;
  - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").
20. The first issue is whether the Plaintiff/Applicant had made out a prima facie case with a probability of success. As to what would amount to a prima facie case, the Court of Appeal had this to say in *Mrao Ltd –vs- First American Bank Ltd & 2 Others* (2003) eKLR: -

“.....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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
21. Expounding further on that definition of a prima facie case as stated in the *Mrao Ltd* case (supra) in *Nguruman Ltd –vs- Jan Bonde Nielsen* (2014) eKLR, the Court of Appeal expressed itself as follows: -

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”
22. Further in the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the court expounded and stated as follows:

“In *HABIB BANK AG ZURICH V. EUGENE MARION YAKUB*,CA NO. 43 OF 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus: “Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”
23. The Respondents on their part submitted that they were the owners of land parcel numbers E.BUKUSU/W.SANG'ALO/9251(new number) resulting from Land Parcel No. E.BUKUSU/W.SANG'ALO/278 measuring approximately 2 ¼ Acres and E.BUKUSU/W.SANG'AL/3141 measuring approximately 0.2Ha and that the Appellant and his co-defendants had encroached into their land, taken down trees and fence and caused the construction of a road thereby causing their families mental anguish and psychological torture. They sought to have the Appellant and his co-



defendants restrained from trespassing thereon and interrupting their exclusive and quiet occupation and for the co-defendants to stop the funding of the project pending the hearing and determination of the main suit.

24. The Respondent who is the contractor in his sworn affidavits stated that he was contracted to perform a periodic maintenance on the road in issue after successfully bidding for the works. He stated that proper processes were followed before the works begun including a public notice, tender advertisement, public participation and handing over. It was his contention that the works were strictly aimed at maintaining an existing road and that in performance of the works, he followed the already set boundaries and demarcations. It was also his argument that the construction works as it stands are 90% complete. He submitted that the interim injunction orders in place were causing him momentous damages as he has hired the machinery for the construction works. He further stated that the Respondent's case had been overtaken by events as the damages complained of have been particularized and quantified. Lastly, he urged that the requirements for granting of the orders sought in the application had not been met.
25. I have perused the documents annexed by the parties in their respective affidavits. I have also had a chance to peruse the Respondent's plaint. It is clear from the attached copy of certificate of title that the Respondents are the legal owners of the suit properties. It is not also in contestation that some trees and structure said to belong to the Respondents have been demolished. Further, the Respondents in their plaint have particularized and quantified the alleged damage. It is argued by the appellant that the construction works are 90% complete and that the injunction in place is not favourable to him since he had hired machinery for the construction.
26. From the foregoing and guided by the principles in the above cited cases, this court is of the opinion that the Respondents did not prove that they had a prima facie case with chances of success at the main hearing. I say so because as earlier stated, the Respondent's property had allegedly been destroyed to pave way for the construction of a public road. Therefore, there is basically nothing worth stopping at this stage. Further, from my examination of the prayers sought in the plaint, there is no nexus to the prayers of injunction sought in the application vis-a-vis the Respondents Substantive Orders for damages and Declarations in the plaint.
27. On the second requirement for injunction, the Respondent is expected to demonstrate that he would suffer irreparable loss if an order of injunction was not issued. In Halsbury's Laws of England [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] the learned Author observed :-

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance," [ Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."
28. Having confirmed that their Respondents fence and trees had been cut and pulled down, the Respondents went ahead in paragraph 13 of their plaint to quantify their alleged damages. This simply connotes that the damages claimed can be compensated monetarily.
29. The Appellant's position in my view represent the greater public interest while the Respondent's interest is private in nature. I also find that since the wider public would suffer more if construction of the road was stalled by reason of an injunction having been granted barring its construction, the wider



and greater public good and interest would militate against the court granting an injunction in favour of the Respondents. I therefore find that the Respondent could not suffer irreparable harm.

30. Taking into account all the circumstances of this matter, the balance of convenience in my view tilted against hindering the completion of the construction of the road and therefore the orders of injunction ought not to have been granted.
31. In the upshot, I find this appeal merited and the same is hereby allowed. The Respondent shall bear costs of the appeal.
32. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of

1. Mr. Alovi for the Respondents
2. Mr Wasilwa for the Appellant
3. Bett C/A

