



**Tim Tim Holdings Ltd v Aengwo & 2 others (Environment & Land Case E057 of 2024) [2024] KEELC 13815 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13815 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E057 OF 2024  
MAO ODENY, J  
DECEMBER 17, 2024**

**BETWEEN**

**TIM TIM HOLDINGS LTD ..... APPLICANT**

**AND**

**JUSTINE CHELUGO AENGWO ..... 1<sup>ST</sup> RESPONDENT**

**GEOFFREY CHERUIYOT ..... 2<sup>ND</sup> RESPONDENT**

**CHEROTICH MERCY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of two applications, a Notice of Motion dated 26<sup>th</sup> August, 2024 by the Plaintiff/Applicant and another one dated 16<sup>th</sup> September, 2024 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents. The Plaintiff's Application sought the following orders:
  - a. Spent
  - b. Spent
  - c. That this court makes an order for a temporary injunction to restrain the Defendants/ Respondents herein either by themselves, their agents, employees and/or servants or otherwise howsoever from trespassing, occupying, alienating, wasting, damaging, selling, disposing, fencing, erecting any structure or otherwise interfering with Plaintiff/Applicant peaceful occupation with parcel of land known as Nakuru/Olenguruone/Kiptagich/148 (Extension) pending the hearing and determination of this suit.
  - d. That O.C.S Kiptagich Police station do enforce the order of the court.
  - e. That the costs of this application be borne by the Defendants/Respondents.



2. The application was supported by the annexed affidavit of Dinah Jelimo Chelal, the Director of the Plaintiff Company who deponed that the Plaintiff has enjoyed uninterrupted quiet possession of the suit property for the last twenty years until 23<sup>rd</sup> July, 2024 when the 2<sup>nd</sup> Defendant led a team of approximately twenty men who invaded the suit property with crude weapons and chased the workers from the suit property. It was her evidence that the Defendants and their agents destroyed and uprooted approximately 6 acres of tea bushes worth an estimated value of Ksh. 7,600,000/= and put up a temporary timber structure with a pit latrine.
3. It was the deponent's case that on or about 13<sup>th</sup> June, 2024, the 1<sup>st</sup> Defendant purportedly as the registered owner of the suit property sold the same to the 3<sup>rd</sup> Defendant and that unless restrained by this Honourable court, the Defendants will put up a permanent building causing irreparable damage.
4. Justine Chelugo Aengwo, the 1<sup>st</sup> Defendant/Respondent, filed a Replying Affidavit dated 24<sup>th</sup> September, 2024 and deponed that he is the registered owner of the suit property and hence opposed the application dated 26<sup>th</sup> August, 2024. It was his case that the Plaintiff's Director's allegation the land had six acres of tea bushes was contrary to what the Valuer stated to be only one acre.
5. The Respondent further deponed that he is the one who has been in occupation and planted the tea bushes before he left for America. He deponed that the Defendants did not destroy the property and it is Sammy Mwaita through his agents who destroyed the fence.
6. The Plaintiff's Director, Dinah Jelimo Chelal filed a further affidavit sworn on 7<sup>th</sup> October, 2024 where she deponed that the 1<sup>st</sup> Respondent has not challenged the Applicant's valuation report by production of a contrary expert opinion therefore it is in the interest of justice that this application be allowed until the issue of land ownership between the Plaintiff and the Defendant is determined.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Notice of Motion dated 16<sup>th</sup> September, 2024 seeking the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That this Honourable court be pleased to issue orders of status quo
  - e. Costs of the Application.
8. The application was supported by the annexed affidavit of Justine Chelugo Aengwo, the 1<sup>st</sup> Defendant/Respondent who deponed that the ex-parte orders of 29<sup>th</sup> August, 2024 were obtained out of non-disclosure on the part of the Plaintiff and misinformation that the Plaintiff had a title and was in occupation of the suit land. He further deponed that there is a suit between himself and Sammy Mwaita the Defendant in Molo E.L.C No E044 of 2024 involving the suit property and that Sammy Mwaita is one of the Directors and or spouse to the appointed signatory of the Plaintiff.
9. The Plaintiff filed grounds of opposition dated 4<sup>th</sup> November 2024 and stated that the application is misconceived and unmerited and further that the defendants did not disclose the status quo on the suit property and if the temporary injunctive orders are lifted, the Defendants would embark on their illegal activities of damaging the suit property to the detriment of the Plaintiff.



## Plaintiff's Submissions

10. Counsel for the Plaintiff filed submissions dated 18<sup>th</sup> October, 2024 and identified the issues for determination as:
  - a. Whether the Applicant has demonstrated a prima facie case
  - b. Whether the applicant will suffer irreparable loss.
  - c. Who does the balance of convenience lie.
11. On the first issue, Mr. Musembi Ndolo submitted that a comparison between the Applicant's title deed and the one held by the 1<sup>st</sup> Respondent shows the one held by the 1<sup>st</sup> Respondent is fake and/or fraudulently acquired as it lacks security features of a genuine title deed issued by the Ministry of Lands. Counsel submitted that the Plaintiff/Applicant has proven its root of title and relied on the cases of *Giella vs Cassman Brown & Co Ltd (1973) E.A 358*, *Mrao Ltd vs First American Bank (K) Ltd [2003] eKLR* and *Hubert L Martin & 2 others vs Maragaret J Kamau & 5 others [2016] eKLR*.
12. On the second issue, counsel submitted that the Applicant would suffer irreparable loss as the Respondent's financial ability is unknown to repay any damage so far incurred of Ksh 7,600,000/= if this suit were to succeed. On the third issue, counsel submitted that the balance of convenience lies in favour of the Applicant since the Respondent has nothing to lose in case the interim orders are granted.

## 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Submissions

13. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions dated 24<sup>th</sup> September 2024 and identified the issue for determination as to whether this Honourable court should issue an order of injunction. Counsel relied on Order 40 Rule 1 of the Civil Procedure Rules and the case of *Giella vs Cassman Brown & Co Ltd 1973 EA 358* and submitted that both the Plaintiff and the 1<sup>st</sup> Defendant have title deeds to the suit property, the Plaintiff's title having been issued on 7<sup>th</sup> August, 2002, while the 1<sup>st</sup> Defendant's title was issued on the 29<sup>th</sup> December, 1999.
14. Counsel submitted that the 1<sup>st</sup> Defendant's title is first in time and as such the issuance of title to the Plaintiff amounted to fraud and breach of due process. It was counsel's further submission that the Defendants have supplied the court with a certified copy of the green card detailing the ownership records of the suit property, which confirms that the 1<sup>st</sup> Defendant is the registered proprietor.
15. Mr. Bitok relied on Section 26 (1) of the *Land Registration Act* and the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) eKLR* and submitted that the Defendants have established a prima facie case against the Plaintiff.
16. On whether the Applicant will suffer irreparable loss, counsel submitted that the 1<sup>st</sup> Defendant stands to suffer irreparable harm and loss should the court not grant him interim orders and protect his rights as envisaged in Article 40 of *the Constitution* of Kenya 2010.
17. On the issue of whose favour the balance of convenience lies, counsel submitted that the 1<sup>st</sup> Defendant being the registered proprietor had prepared the suit property for planting season when the Plaintiff through third parties interfered with his access and use of the property. Counsel submitted that the 1<sup>st</sup> Defendant will suffer more harm should the court fail to restrain the Plaintiff from interfering with his occupation of the said property and relied on the case of *Paul Gitonga Wanjau vs Gathuthis Tea Factory Company Ltd & 2 others (2016) eKLR*.



## Analysis And Determination

18. The issue for determination is whether the Plaintiff/Applicant has met the threshold for the grant of a temporary injunction order. The law governing the grant of temporary injunctions is Order 40 rule (1) (a) and (b) of the Civil Procedure Rules 2010. And the principles set out in the case of *Giella v Cassman Brown* (1973) EA 358.
19. The principles were reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [\*CA No 77 of 2012\*](#) (2014) eKLR where the Court of Appeal held as follows:

“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”
20. This is a case where there are more questions than answers as it is the Applicant’s word against the Respondent’s. There are two titles in respect of the same property and each party is claiming to be in occupation of the suit property.
21. However, from the annexures, the Applicant has attached a copy of a title deed, photographs to show the state of the suit property, the tea bushes, the gazette Notice that degazetted 35.30 Hectares in Eastern Mau Forest, payment receipts, RIM, copy of OB No. 07/24.07/2024 and a Valuation report.
22. The Respondent also filed a Replying affidavit whereby he annexed a copy of title to the suit land issued on 29<sup>th</sup> December 1999 with an entry of a caveat due to court case No. 006 of 2012 in the African Human and Peoples Rights Court, a copy of the green card extract and an order of the CM’s Court dated 3<sup>rd</sup> July 2024 in Molo CMELC No E044 OF 2024.
23. It is incumbent upon the Applicant to prove a prima facie case with a probability of success to enable such party to be granted an order of temporary injunction. The Applicant stated that he is in occupation and that his tea bushes had been destroyed by the respondents. A valuation report has been attached. The court is not concerned with whether the Applicant will ultimately prove its case during the hearing, it is only concerned whether a prima facie case has been established to warrant the court to issue orders to preserve the substratum of the case.
24. In the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

“In the case of *HABIB BANK AG ZURICH V. EUGENE MARION YAKUB*, CA NO. 43 OF 1982 the Court considered the role of the court when determining whether 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.”



25. Similarly, in the case of *Mbuthia v Jimba Credit Corporation Ltd* (1988) KLR where the court stated that:

“In an application for interlocutory injunction, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties’ cases”

26. On the issue whether the Applicant has established that it will suffer irreparable harm not capable of being compensated by way of damages, the Applicant has quantified the amount it has incurred but doubts the Respondent’s financial ability to repay any damage so far incurred should the suit succeed.

27. In the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* [2018] eKLR, the court held as follows what constitutes irreparable injury:

“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.”

28. The Plaintiff’s director in her supporting affidavit to the Notice of Motion Application dated 26<sup>th</sup> August, 2024 deponed that the Plaintiff has enjoyed uninterrupted quiet possession of the suit property for the last twenty years and unless this court intervenes, the Defendants will put up a permanent building causing irreparable damage.

29. The Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in its favour. In *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* [2018] eKLR the court stated as follows on what constitutes a balance of convenience:

“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 Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants 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 Plaintiffs 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”.

30. I have considered two applications by the Applicant and the Respondent and conclude that given the facts and circumstances of this case, the balance of convenience tilts in favour of granting an order of injunction. I therefore issue the following orders:

- a. A temporary injunction is hereby issued restraining the Defendants/Respondents herein either by themselves, their agents, employees and/or servants or otherwise howsoever from trespassing, occupying, alienating, wasting, damaging, selling, disposing, fencing, erecting any structure or otherwise interfering with Plaintiff/Applicant peaceful occupation with parcel of land known as Nakuru/Olenguruone/Kiptagich/148 (Extension) pending the hearing and determination of this suit.



- b. The O.C.S Kiptagich Police Station shall enforce this court order.
- c. The Notice of Motion application dated 16<sup>th</sup> September, 2024 is hereby dismissed with no orders as to costs.
- d. Costs of the application dated 26<sup>th</sup> August, 2024 shall be in the cause.

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

**M. A. ODENY**

**JUDGE**

