



REPUBLIC OF KENYA



**Mutio & 2 others v Mukuthi (Environment & Land Case E015 of 2022)
[2023] KEELC 15779 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E015 OF 2022
TW MURIGI, J
FEBRUARY 22, 2023**

BETWEEN

BETTY MUTIO 1ST PLAINTIFF

MARGARET KANINI MUTUA 2ND PLAINTIFF

ROSE NDUNGE MUTUA 3RD PLAINTIFF

AND

DOMITILLA MUTUNGI MUKUTHI DEFENDANT

RULING

1. By a Notice of Motion application dated June 21, 2022, brought pursuant to the provisions of Section 26 of the *Environment and Land Court Act*, Articles 23(2), 169(1)(a)(2) of the *Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rule 1 of the *Civil Procedure Rules 2010* and all other enabling provisions of the law, the Applicants seek the following orders:-
 1. Spent.
 2. That an order of temporary injunction be granted to the Respondent, her agents, servants or anyone acting or claiming through them from trespassing, entering, evicting or in any other manner interfering with the parcel of land number Makueni/Nguu Ranch/1894 pending the hearing and determination of this application.
 3. That an order of temporary injunction be granted against the Respondent, her agents, servants and or anyone claiming through them from trespassing, entering, evicting or in any other manner interfering with the parcel of land number Makueni/Nguu Ranch/1894 pending the hearing and determination of this suit.
 4. That the costs be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Rose Ndunge Mutua sworn on the even date.

The Applicants' Case

3. The Applicants averred that they are the Administrators of the Estate of the late Joshua Mutua, the registered owner of the suit property. They further averred that they were allocated land parcel No Makueni/Nguu Ranch/1894 pursuant to the confirmed grant in Makueni Succession Cause No 61 of 2017. That before they could register the confirmed grant, the Defendant started constructing a house on the suit property as well as selling some portions to third parties. They further averred that despite attempts to resolve the dispute amicably, the Respondent has continued to trespass on the suit property hence the present application.

The Respondent's Case

4. Opposing the application, the Respondent vide her replying affidavit sworn on July 28, 2022 averred that during his lifetime, the late Joshua Mutua did not claim ownership over the suit property nor file a suit to evict her therefrom. She further averred that her late husband was a member of Nguu Ranching Co-operative Society Ltd and that they have been in possession of the suit property since 1996 where they put up their matrimonial home.
5. She argued that the NLC has recommended that the status quo be maintained in Nguu Ranch pending the verification and identification of the beneficiaries.
6. She contended that she does not know the Plaintiffs nor have they lived in the suit property. She argued that she will be prejudiced if the orders sought are granted since she is in possession of the suit property.
7. The application was canvassed by way of written submissions.

The Plaintiffs Submissions

8. The Applicants submissions were filed in Court on November 15, 2022.
9. Counsel for the Applicants submitted that the law governing injunctions is founded on Order 40 Rule 1(a) and (b) of the *Civil Procedure Rules* while the conditions to be met were enunciated in the celebrated case of *Giella vs Cassman Brown & Co Ltd & Co Ltd* [1973] EA 358.
10. Counsel submitted that the Applicants have established a prima facie case with a probability of success as they have demonstrated that the suit property is registered in the name of the late Joshua Mutua. Counsel went on to submit that the Respondent has trespassed on the suit property and has built a house thereon.
11. In addition, Counsel submitted that the Respondent's acts of trespass have infringed the Applicants proprietary rights over the suit property. Counsel argued that the Respondent has not demonstrated that she has been in occupation of the suit property since 1996.
12. On whether the Applicants stand to suffer irreparable loss if the orders sought are not granted, Counsel submitted that the Respondent's illegal invasion of the suit property has prevented them from implementing the confirmed grant.
13. On balance of convenience, Counsel submitted that the transmission of the Estate of the late Joshua to the Applicants has been hindered by the Respondent's acts of trespass on the suit property.
14. To buttress his submissions Counsel placed reliance on the following authorities: -



1. [*Robert Mugo Wa Karanja vs Eco Bank \(Kenya\) Limited & Another*](#) (2019) eKLR.
2. [*Unga Group PLC vs Maureen Wanjira Wanyaga*](#) (2021) eKLR.

The Respondent's Submissions

15. The Respondent's submissions were filed in Court on September 30, 2022.
16. The Respondent submitted that the suit property belongs to her late husband Daniel Ndambuki Mutua. She further submitted that after the suit property was allocated and identified by Surveyors from Makueni lands in 1996, they took possession and built their matrimonial home thereon. She argued that the late Joshua Mutua did not claim ownership over the suit property before he passed on. She urged the Court to dismiss the application.

Analysis And Determination

17. Having considered the application, the affidavits and the rival submissions, I find that that the only issue that arises for determination is whether the Applicants have established the legal threshold for the grant of an injunction.
18. The law that governs applications for injunction is outlined under Order 40 Rule 1 of the [*Civil Procedure Rules, 2010*](#) which provides as follows: -

1. Where in any suit it is proved by affidavit or otherwise-
 - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

19. The principles applicable in an application for an injunction are well settled. In the celebrated case of [*Giella vs Cassman Brown & Co Ltd*](#) [1973] EA 358 the Court laid down the conditions as follows: -First the Applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
20. I will first determine whether the Applicants have established a prima facie case with a probability of success.
21. In the case of [*Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others*](#) [2003] eKLR the Court of Appeal defined a *prima facie* case as follows: -

“A prima facie case in a civil application includes but is not confined to a “genuine and 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 call for an explanation or rebuttal from the latter.”

22. The Applicants averred that they are the Administrators of the Estate of the late Joshua Mutua. They further averred that their late father is the registered owner of the suit property. In this regard they produced a certificate of title in respect to the suit property (annexure RNM 1). They averred that they were allocated the suit property in the confirmed grant issued on April 28, 2021.
23. According to the certificate of confirmation of a grant, issued on April 28, 2021 in Makueni Succession Cause No 61 of 2017, the suit property was to be registered in the names of the Applicants herein.
24. The Applicants argued that before they could register the confirmed grant, the Defendant started constructing a house as well as selling portions of the suit property to third parties. The Applicants annexed photographs of houses being constructed to their supporting affidavit.
25. On the other hand, the Respondent averred that her late husband was a member of Nguu ranch. She produced a membership certificate from Nguu Ranching Co-operative Society issued to Daniel Ndambuki (annexure DMM 1). She further averred that the suit property was allocated to her late husband. She went on to state that she has been in possession and occupation of the suit since 1996. She argued that the NLC had directed that status should be maintained in Nguu Ranch pending the verification and identification of the beneficiaries. In this regard she produced an undated letter from NLC (annexure DMM 2).
26. According to the Certificate of title (annexure RNM 1), the suit property herein is registered in the names of Joshua Mutua deceased.
27. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration while Section 25 of the [Land Registration Act](#) provides for the rights of a proprietor. These provisions vest on the registered owner of land with rights and privileges.
28. It is not in dispute that the suit property is registered in the name of Joshua Mutua (Deceased). It is also not in dispute that the Applicants are the legal Administrators of the Estate of Joshua Mutua (Deceased). According to the certificate of confirmation of grant issued on April 28, 2021, the suit property is to be registered in the names of the Applicants herein. Other than the membership certificate for Nguu Ranching Society Limited, the Respondent did not present any documentary evidence to demonstrate that the suit property is registered in her name or that of her late husband. The card merely indicates the number of shares that the late Daniel Ndambuki purchased. It is crystal clear that the suit property belongs to the Applicants.
29. On the basis of the material placed before me, I find that the Applicants have established a *prima facie* case with a probability of success.
30. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.
31. The Court of Appeal in [Nguruman Limited v Bonde Nielsen & 2 Others](#) (2014) eKLR held that: -

“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of



temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

32. On whether the Applicant will suffer irreparable harm which cannot be adequately be compensated by an award of damages, it is not in dispute that the suit property belongs to the Applicants. The Applicants averred that they are unable to implement the confirmed grant due to the Respondent’s acts of trespass on the suit property. The Respondent on the other hand maintains that she will be prejudiced if the orders sought are granted since she is in occupation of the suit property Although it is clear that the Applicants are not in occupation of the suit property I find that they will suffer loss if the confirmed grant is not implemented.
33. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction, against the hardship to be borne by the Respondents by granting the injunction.
34. The balance of convenience herein tilts in favour of maintaining the *status quo* to preserve the suit property.
35. The upshot of the foregoing is that the application dated June 21, 2022 is merited and I hereby allowed it in the following terms:-
 1. That an order of temporary injunction be and is hereby granted restraining the Respondents, her agents servants and or anyone acting or claiming through them from trespassing, entering, evicting or in any other manner interfering with parcel of land number Makueni/Nguu Ranch/1894 pending the hearing and determination of this suit.
 2. That Status quo be maintained in the following terms: -
 1. The Applicants are the owners of the suit property. However, they are restrained from selling, alienating or transferring the suit property pending the hearing and determination of this suit.
 2. Parties to set down the main suit for hearing expeditiously.
 3. Costs shall be in the cause.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms Kyalo for the Applicant.

