



**Njeru v King'ang'i (Environment & Land Case E012 of 2022)  
[2023] KEELC 15927 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15927 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E012 OF 2022  
A KANIARU, J  
FEBRUARY 22, 2023**

**BETWEEN**

**DAVID MUNENE NJERU ..... PLAINTIFF**

**AND**

**NYAGA KING'ANG'I ..... DEFENDANT**

**RULING**

1. I am called upon to determine a notice of motion dated March 17, 2022 and filed on March 25, 2022. It was contemporaneously filed with a suit of even date. The suit is the motion's substratum. The applicant is David Munene Njeru and the respondent is Nyaga King'ang'i. The two parties are plaintiff and defendant in the suit respectively. The motion came with four (4) prayers but at this stage, prayers 1 and 2 are moot as they were for consideration, and were actually considered, at the exparte stage. The prayers for consideration therefore are two – prayers 3 and 4 – and they are as follows:
  - 3) That the respondent by himself, his agents or servants or anybody acting on their (sic) authority or otherwise howsoever be restrained by an order of injunction from entering, constructing or dealing with the applicant's title No Mbeere/Kirima/3158 pending hearing and determination of the suit.
  - 4) Costs be provided for.
2. The application is anchored on the grounds that the applicant is the registered owner of title No Mbeere/Kirima/3158 and has been in possession of the same since the year 2009; that the respondent has trespassed and started constructing on the land; and that the applicant is being denied use of the land which in effect exposes him to suffer irreparable loss.
3. The application came with a supporting affidavit in which the applicant deposes, inter alia, that he is the registered owner of the land; that he took possession after being allocated it in the year 2009 but has not developed it as he lives in Nairobi; that he got information that the respondent had started constructing



- on the land and he travelled to the place and confirmed it was true; that as the respondent was hostile, he couldn't discuss anything with him; and that the respondent deliberately wants to convert the land to become his own yet he has land that lies idle elsewhere.
4. The respondent responded to the application via a replying affidavit dated April 19, 2022 filed in court on the same date. According to him, land parcel No 3158 resulted from subdivision of the then larger parcel known as Mbeere/Kirima/2244 which belonged to many clans including the respondent's own Marigu clan. Land parcel No 2244 was then subdivided among the 17 clans entitled to it but the applicant's Mururi clan was said to have been wrongly allocated 'Gatwekeri' land which belonged to Marigu clan. The respondent deposed that he occupied 10 acres part of which falls in parcel No 3158 registered currently in the applicant's name.
  5. As Mururi clan to which the applicant belong was allocated land belonging to Marigu clan, members of Marigu clan, the respondent included, filed Embu ELC Case No 254 of 2014 contesting the allocation. The applicant is among those sued. The suit is still pending before this court. The respondent does not deny the occupation of the land. It is clear from his response that he is in occupation and has made developments on the land. According to him, he has been on the land since 1985 and has six (6) permanent houses for his children. He is also cultivating it. He further deposed that he has been constructing the house the applicant is complaining of for the last three years; it is nearing completion; and as the rainy season is coming, it might be completely destroyed if he is restrained from roofing it. The respondent averred that that land is part of his ancestral land and he is in occupation as of right.
  6. The response filed by the respondent provoked the filing of a further affidavit by the applicant on May 6, 2022. The replying affidavit filed by the respondent was said to be false and misleading to the extent that it alleges existence of six permanent houses on the land. The truth, the applicant deposed, is that there is only the one house that the respondent is trying to construct. The applicant also deposed that Embu ELC No 254 of 2014 is about parcel No 2244 which is non-existent as title was closed in the year 2009 after subdivision. Further, the settlement or occupation by the respondent on the 'larger land' that was subdivided and allocated to various clans' was said to be temporary and the respondent ought to have ceased such occupation or settlement after demarcation.
  7. The application was canvassed by way of written submissions. The applicant's submissions were filed on June 20, 2022. The submissions give a background and some antecedents surrounding the case. The cases of *Giella vs Cassman Brown & Co LTD [1973] EA 358*, *Pius Kipchirchir Kogo vs Frank Kimeli Tenai: ELC 221 of 2017*, and *Catherine Nasimiyyu Khisa & Another vs Jacob wangila Wanyama & Another ELC Appeal No 42 of 2019* were cited to provide legal anchorage and guidance in the determination of the application. From the cases, it is clear the court is required to establish whether a prima facie case with a probability of success has been established; whether the applicant is likely to suffer irreparable loss; and/or where the balance of convenience lies if doubts arise as to the proof of the first two requirements.
  8. The applicant was said to have 'established a prima facie case by producing a copy of certificate of title that is registered in his favour'. He was also said to have demonstrated irreparable harm 'as the construction by the respondent on his parcel of land is a clear infringement to his right to property'. On the balance of convenience, the submissions were that 'The applicant would encounter great inconveniences in light of the fact that the respondent's (sic) would construct on his property and upon determination of the suit if in favour of the applicant the process of demolition and eviction would be quite costly.'
  9. The respondent's submissions were filed on December 9, 2022. The respondent submitted, inter alia, that the applicant has not denied that land parcel No 3158 is derived from the larger parcel No 2244



which is the subject matter of ELC No 254 of 2014, Embu. Further, the fact of both parties in this case being also parties in that other case was said not to be denied.

10. The respondent is one of the plaintiff's in the other case while the applicant is one of the defendants. The plaintiffs in that case are said to be seeking de-registration of several parcels of land including parcel No 3158 from ownership of the defendants in that case and a concomitant registration of the parcels of land in the names of the plaintiffs. According to the respondent, the plaintiff in this case should have filed a counter-claim in that matter. It was pointed out too that the applicant has admitted in his further affidavit that the respondent was in occupation of the land even before demarcation was done. The respondent was further said to have attached photographs to his response to show the permanent houses he has on the land and the cultivation he has been undertaking. It was the respondents submissions that it is him, and not the applicant, who would suffer irreparable harm if a restraining order is issued.
11. For legal effect and/or guidance, the cases of *Mumo Maingey vs Sara Njiva Hillman & 3 Others [2018] Eklr* And *Nguruman Limited vs Jan Bonde Nielson & 2 Others [2014] eKLR* were cited. The first case is authority for the fact the remedy of injunction is one of equity and is a discretionary one. It is usually granted when the subject matter in a case before court is found deserving of protection and/or for maintenance of status quo. The second case emphasises the need to establish all the requirements needed to show the merits for granting a restraining order. It then points out that even in a scenario where the requirements are demonstrated, if the court still finds that damages would be an adequate remedy, no injunction should issue.
12. I have considered the application, the response, counter-response, rival submissions, and the pleadings in the court file generally. When the applicant filed this case on March 25, 2022 he pleaded at paragraph 9 of the plaint that there is 'no previous or pending suit' between him and the respondent. It turns out that there is ELC No 254 of 2014, Embu in which he is one of the defendants while the respondent is one of the plaintiffs. The existence of that case should have been disclosed given that the plaintiffs in that case are seeking to wrest ownership from the defendants of several parcels of land including the one herein. The omission to state that there is such a case amounts to material non-disclosure and it works against the applicant. In my view, the applicant was being less than honest when he pleaded that there was no previous or pending case between him and the respondent.
13. In *Moses Ngenye Kabindo vs Agricultural Finance Corporation: Hcc No 1044/01, Nairobi* Ringera J (as he then was) stated as follows:

' And of course it requires no stressing that as an injunction is a discretionary equitable remedy, and if the applicants conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been' In *B vs Attorney General [2004] 1 KLR 431*, Ojwang J (as he then was) also held thus:

'Once a court is satisfied that an applicant had obtained an order by concealing other relevant material, the court is entitled not to consider the applicant's application any further for the courts must be able to protect themselves from parties who are prepared to deceive.'

There was also the case of *Rev Madara Evans Dondo vs Housing Finance Co Of Kenya: HCC No 262 of 2005* where Kimaru J (as he then was) dismissed an application because the applicant had failed to disclose that he had a previous case.

14. I have cited all these cases in order to show the high premium placed on the virtue of honesty and good faith in matters where the remedies of equity are sought. In this matter, not only is the applicant a



defendant in the pending case but the respondent, who is a plaintiff together with others, are shown to be seeking orders of similar nature as the ones sought in this matter. The order is being sought against the applicant who is clearly a defendant together with others in that matter. When all the relevant information is not made available to court, it becomes possible for the court to issue conflicting or contradictory orders in respect of the same property. That is why it was imperative that existence and pendency of the other case be disclosed to this court.

15. But I am also wondering whether the applicant in this matter can be said to have established a prima facie case simply because he has the paper title. The fact that there is a pending case over the same subject matter shows that that same title is under challenge. In *Munyu Maina vs Hiram Gathima [2013] eKLR* the court of appeal held, inter alia, that where a registered proprietor's title is under challenge, it is not enough to dangle the instrument as proof of ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal, and free from any encumbrances. The applicant in this matter may not readily accept that his title is under challenge. To him, it is parcel No 2244 which is the subject of the pending case mentioned by the respondent. But it is clear from the respondent that what is being challenged is the legality of several titles issued after subdivision of parcel No 2244. This includes the applicant's title.
16. Given the scenario prevailing, I would hesitate to hold that the applicant has demonstrated a prima facie case. In the case of *Nguruman Ltd vs Jan Bonde Nielson & 2 Others: Civil Appeal No 21 of 2014 (UR)*, the Court of Appeal held as follows:

' It is established that all the above three conditions are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co Ltd vs Afraha Education Society [2001] Vol 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the applicant will suffer if injunction is not granted will be irreparable. If prima facie case is not established then irreparable loss and balance of convenience need no consideration.'

The court was making this observation while referring to the principles set out in *Giela vs Cassman Brown & Co LTD [1973] EA 358* which are necessary for proof by an applicant seeking temporary restraining orders.

17. As I have already stated that I am not persuaded that a prima facie case is established, my considered view is that I should not consider irreparable loss or balance of convenience.
18. The upshot is that the merits of the application herein are not demonstrated and I hereby dismiss the application. costs will be in the cause.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22<sup>ND</sup> day of FEBRUARY, 2023.**

In the presence of M/s Ngige for Gatumuta for applicant and Rose Njeru (absent) for respondent.

Court assistant: Leadys

**A.K. KANIARU**

**JUDGE**

