



REPUBLIC OF KENYA



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**Gichuki v Kabugwa & another (Civil Appeal E022 of 2023)  
[2024] KEHC 3246 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3246 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E022 OF 2023  
RM MWONGO, J  
MARCH 19, 2024**

**BETWEEN**

**JANE WANJIKU GICHUKI ..... APPELLANT**

**AND**

**EVANSON MURIMI KABUGWA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN MURIMI MULI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The 1<sup>st</sup> Respondent, as plaintiff in the lower court, sued for payment of Kes 200,000/- plus interest from the 2<sup>nd</sup> respondent who was the defendant. The defendant entered appearance and filed a defence. On the hearing date the defendant did not show up. The plaintiff proceeded to prove the debt owed. The court in a judgment dated 26<sup>th</sup> November, 2020, held in favour of the plaintiff and ordered the defendant to pay Kes 200,000/- plus interest.
2. A warrant of attachment for sale of the defendant's land Mwea Tabere/B/5200 was issued on 14/3/2022. A public auction was conducted on 27/5/2022 whereat one Joseph Mungai was declared the purchaser of one (1) acre of the said land.
3. By a Notice of motion dated 5<sup>th</sup> September, 2022, Jane Wanjiku, the Appellant herein, filed an application to be enjoined in the suit arguing that she was a purchaser for value without notice of 0.30 ha in Mwea/Tabere/B/5200; that she was currently in occupation thereof. She sought an injunction against the sale.
4. The appellant's application of 5<sup>th</sup> September, 2022 was heard, and subsequently dismissed with costs by a ruling dated 16<sup>th</sup> March 2023.
5. The present application dated 20<sup>th</sup> March, 2023 seeks orders that:



1. The Court be pleased to issue a temporary injunction against the respondents from trespassing/interfering/selling LR Mwea/Tebere/B/5200 pending the hearing and determination of this application.
2. The Court be pleased to issue a temporary injunction against the respondents from trespassing/interfering/selling LR Mwea/Tebere/B/5200 pending the hearing and determination of this appeal.
3. That cost of the application be provided for.
6. The application is premised on the following grounds:
  - i. The applicant is the one in physical possession of the one acre of LR Mwea/Tebere/B/5200.
  - ii. That unless the temporary injunction is issued the applicant stands to be evicted and her appeal is pending.
  - iii. That the land in question belongs to the applicant having bought it long time as she has the original title deed.
7. The applicant filed a supporting affidavit with the following major averments:
  - i. That a warrant of sale was issued against the 2<sup>nd</sup> respondent.
  - ii. That by the time the warrant was being issued the applicant had already bought the land.
  - iii. That the applicant has been in possession of the original title deed since I bought the land.
  - iv. That when the 2<sup>nd</sup> respondent wanted to transfer the land to the applicant it was found that a caution had been placed by the 1<sup>st</sup> Respondent so no transfer of the applicant's one acre could have been possible.
  - v. That after the applicant bought the one acre from the 2<sup>nd</sup> respondent she took possession and has been developing the land ever since.
  - vi. That the land has 3 acres and where the applicant is in possession is where the 1<sup>st</sup> respondent is insisting to take yet its only one acre and she has developed it.
  - vii. That it is in the interest of justice if her appeal is heard to enable the court give her a chance to prove ownership of the land.
8. The 1<sup>st</sup> respondent deposed a replying affidavit with the following major averments:
  - i. That the claim before Wanguru Law Court in Civil Case No.107 of 2018 was between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent over a claim for Kshs. 200,000.
  - ii. That the 2<sup>nd</sup> Respondent herein defended the claim and filed a defence through his Advocates.
  - iii. That the Honourable Court in Wang'uru Civil Case No.107 of 2018 upon hearing the matter delivered its judgment on 26<sup>th</sup> November, 2020.
  - iv. That in execution of the court decree the court issued prohibitory order, warrants for attached and sale of the 2<sup>nd</sup> Respondent's LR NO. Mwea/Tebere/5200 to be executed by Quickline Auctioneers.
  - v. That during the Public Auction held on 27th May, 2022 one Joseph Mwangi Mungai was the highest bidder of One acre out of land parcel LR No. Mwea/Tebere/B/5200.



- vi. That land parcel LR No.Mwea/Tebere/B/5200 is none existence the same having been subdivided by an order of the court and gave resultant parcels of land being LR No.Mwea / Tebere/B/7988 and LR No.Mwea /Tebere/B/7989.
  - vii. That land parcel LR No.Mwea/Tebere/B/7988 was transferred to the highest bidder Joseph Mwangi Mungai and the 2nd Respondent, his agents, servants and anyone cultivating on the one acre was to be removed from it.
  - viii. That from the Applicant's exhibit 2 of land sale agreement the one acre she is alleging she purchased was sold to her by the 2<sup>nd</sup> Respondent hence there is no privity of contract between myself and the Applicant herein.
  - ix. That the Applicant has never applied to review the orders issued on 19<sup>th</sup> July, 2022 hence the present application is res judicata.
9. The 2<sup>nd</sup> respondent deposed to a replying affidavit in support of the said application for the following reasons:
- a. That he sold the suit land to Jane Wanjiku the applicant herein back in 2017.
  - b. That the 1<sup>st</sup> judgment was done in 2020 but he was never served with documents or anything.
  - c. That 1<sup>st</sup> respondent took the land that belongs to Jane Wanjiku and he had already sold it to her and she has developed the land which has trees.
  - d. That by the time they were taking her land and trying to put beacons the land did not belong to him as he had sold it to Jane and there is an agreement this was done before this issue began.
  - e. That finger prints should have been taken to ascertain if there was any agreement we did with the 1<sup>st</sup> respondent.
10. The applicant filed a further affidavit dated 5<sup>th</sup> April, 2023 with the following major averments:
- i. That land parcel Mwea/Tebere/B/5200 is still in existence.
  - ii. That I was never given a right to a fair hearing at least to let the court know that I was the one in occupation of the land and I had already purchased 3/4 of the land that had been sold and have extensively developed it a fact admitted by the 2<sup>nd</sup> respondent.
  - iii. That I was never enjoined in the lower court case number 107/2018 as an interested party or served with any court documents and now am being told to vacate my place to give room to the 1<sup>st</sup> respondent that is unfair.
  - iv. That the land was not sub-divided at the time of sale by auction and therefore the 1<sup>st</sup> respondent claiming one acre of the land is what was sold is and not being truthful to court since there were other people on the land this only amounts to eviction orders being sought in an interim stage without giving an opportunity to the true occupants and owners of the land to be heard.
  - v. That even if the 2<sup>nd</sup> respondent had not officially transferred the land to me he had received the purchase price and given consent to the sale of my 3/4 acre and transfer of the suit property but unfortunately the 1<sup>st</sup> respondent placed a caution on the entire portion of land before it got transferred to me or sub-division was done thus frustrating the transfer.



## **Applicant's Submissions**

11. The applicant submitted that the principles on which the courts will grant an injunction are well known, and cited the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No.77 of 2012 where the court restated those principles as follows;  
  
“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;  
  - a) Establish his case only at a *prima facie* level,
  - b) Demonstrate 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”
  
12. The applicant submitted on the facts that prior to the respondents filing Wang’uru Civil Suit No. 107 of 2018 utilized peacefully 3/4-acre portion of L.R Mwea/Tebere/B/5200 out of the 3 acres. The applicant had purchased ¾ acre of LR Mwea/Tebere/B/5200 from the 2<sup>nd</sup> respondent before even the case was filed she was just waiting for a title deed but was unable to get it since the 1<sup>st</sup> respondent had cautioned the 2<sup>nd</sup> respondent land. The applicant was surprised from nowhere she was told the entire portion of LR Mwea/Tebere/B/5200 was sold without her consent or even being summoned to court. The sale by auction was after the 2<sup>nd</sup> respondent failed to clear a monetary debt owed by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent. The applicant has developed her share and she is still the one in occupation.
  
13. The appeal is yet to be heard therefore she prays that pending the hearing of the appeal this honourable court may issue an injunction to avoid interference with the status quo of the suit property and unnecessary chaos on the ground. The allegations that the land has been sold and there is nothing to claim is a lie we have attached the current search to show the current status of the land since we managed to move to court before implementation of the order for sale.

## **1<sup>st</sup> Respondent Submissions**

14. The respondent submits that in dealing with injunctions a court ought not delve into the merits of the suit, but rather consider whether a prima facie case has been made out and that irreparable loss which cannot be compensated in costs shall be suffered in the event the orders sought are denied. The conditions applicable for granting injunction are as set out in the case of *Geilla v Cassman Brown & Co.Ltd* (1973)EA 358.
  
15. The applicant argues that Order 42 Rule 6 (6) *Civil Procedure Rules* gives the High Court powers to issue a temporary injunction:
  
16. The Appellant was a purchaser and can adequately be compensated by the 2<sup>nd</sup> Respondent who sold to her whatever portion as alleged.
  
17. The 1<sup>st</sup> Respondent submits that this Honourable Court lacks jurisdiction to hear and determine this matter as the same relates to Environment and Land hence not seized of jurisdiction to handle the matter. The Applicant has also failed to demonstrate the conditions set out for stay pending appeal under Order 42 Rule 6 of the *Civil Procedure Rules*.



## Issues for Determination

18. The issues for determination are:
- a. whether the applicant meets the threshold for grant of a temporary injunction, and whether it should be granted.
  - b. Whether this court lacks jurisdiction because only the ELC court has jurisdiction

## Analysis and Determination

19. The applicant seeks a temporary injunction against the respondents from trespassing/interfering/selling LR Mwea /Tebere/B/5200 pending the hearing and determination of this appeal.
20. The applicant's claim is that prior to the respondents filing Wanguru Civii Suit No. 107 of 2018 she peacefully utilized a  $\frac{3}{4}$  acre portion of L.R Mwea/Tebere/B/5200 out of the 3 acres.
21. The applicant had purchased  $\frac{3}{4}$  acre of LR Mwea/Tebere/B/5200 from the 2<sup>nd</sup> respondent before the case was filed she was just waiting for a title deed but was unable to get it since the 1<sup>st</sup> respondent had filed a cautioned on the 2<sup>nd</sup> respondent's land.
22. The applicant filed an application dated 5<sup>th</sup> September, 2022 seeking for orders of injunction against the respondents from trespassing /interfering/ selling LR Mwea /Tebere/B/5200 pending the hearing and determination of the application.
23. The court dismissed the application in a ruling dated 16<sup>th</sup> March, 2023. And the applicant unsuccessfully appealed the ruling via a memorandum of appeal dated 20<sup>th</sup> March, 2023.

## Whether the court should grant temporary injunction

24. Order 42 Rule 6 (6) Provides as follows:
- “Notwithstanding anything the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court been complied with”
25. This provision grants this court power to issue an injunction. Further, the principles on which the courts will grant an injunction are stated in the *Nguruman Limited case*; viz, that an interlocutory injunction application, the applicant has to satisfy the triple requirements of:
- a) Establishing his case only at a prima facie level,
  - b) Demonstrating irreparable injury if a temporary injunction is not granted and
  - c) Allaying any doubts as to (b) by showing that the balance of convenience is in his favour”

## Prima facie case

26. The applicant deposed that land parcel Mwea/Tebere/B/5200 is still in existence. She attached a copy of search dated 4<sup>th</sup> April, 2023.
27. This is contrary to the 1<sup>st</sup> Respondent's claim that land parcel LR No.Mwea/Tebere/B/5200 is non-existent the same having been subdivided by an order of the court and gave resultant parcels of land being LR No.Mwea/Tebere/B/7988 and LR NO. Mwea/Tebere/B/7989.



28. Further, that the applicant is in physical possession of the suit land, which she has developed and risks losing the same to the 1<sup>st</sup> respondent.
29. In the case of *Mrao Ltd. v. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 a definition for “*prima facie* case” in civil cases is set out in the following words:

“In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
30. The applicant’s right to possession of the suit land is threatened by the respondents and hence there is need for the temporary injunction.

### **ELC Court Jurisdiction**

31. As to the issue of the jurisdiction of the ELC court in this matter, my view is that the question that will arise is whether an agreement for transfer of the land was made. This is because the alleged Land sale agreement concerns a property “measuring 0.30 out of 1.423 ha in Mwea Tabere /B/ 5200 “
32. In other words, the property has or had not yet been transferred under the legal regimen and the question concerns the propriety of an agreement which is in the borderline purview of both the High Court and the ELC. Any of the two courts would be entitled to deal with the question.
33. The Land sale agreement is dated 23<sup>rd</sup> February 2017 whilst the title which is the subject of the agreement was clearly issued one year later on 21<sup>st</sup> February 2018. These are issues which will need to be investigated and vented in the appeal.

Demonstration of irreparable injury if a temporary injunction is not granted
34. The applicant deposes that unless the temporary injunction is issued, she stands to be evicted from the suit land.
35. The 2<sup>nd</sup> respondent deposed that the 1<sup>st</sup> respondent took possession of the part of the land that belongs to Jane Wanjiku (the applicant) and as he had already sold it to her. She has developed the land. Further, the 1<sup>st</sup> Respondent seeks to take possession of the part of the land she has already developed.
36. The court order dated 19<sup>th</sup> July, 2022 ordered that land parcel LR No.Mwea/Tebere/B/5200 be subdivided and one acre be vested in the 1<sup>st</sup> Respondent’s purchaser, Joseph Mwangi Mungai. However, there is no evidence that the order had been effected.
37. Thus, if the statutory sale purchaser takes possession of any part of the allegedly subdivided land including the part developed by the applicant, this will lead to irreparable harm to the applicant, at this stage.
38. Accordingly, I am satisfied that a temporary injunction is properly justified in the circumstances of this case.
39. I therefore order that such injunction be and is hereby issued pending the hearing and determination of the appeal.
40. Orders accordingly.



**DATED AT KERUGOYA THIS 19<sup>TH</sup> DAY OF MARCH, 2024**

.....

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Makazi - for Appellant/Applicant
2. Ombachi - for 1<sup>st</sup> Respondent
3. No representation - Stephen Murimi Muli
4. Mr Murage, Court Assistant

