



**Kimani v Mwai & another (Environment & Land Case E36 of 2023)
[2023] KEELC 19840 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19840 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E36 OF 2023
FM NJOROGE, J
SEPTEMBER 19, 2023**

BETWEEN

RACHAEL WANJIRU KIMANI PLAINTIFF

AND

JOHN MWAI 1ST DEFENDANT

KIAMBU NYAKINYUA FARMERS CO. LTD 2ND DEFENDANT

RULING

1. This ruling is with respect of the plaintiff's Notice of Motion application dated 5/05/2023 and the 1st defendant's Notice of Motion application dated 16/05/2023.
2. The plaintiff's Notice of Motion application dated 5/05/2023 was expressed to be brought under Article 48 of the Constitution, Order 40 rule 1, 2, 4 and 5, Order 51 rule 1 & 13 of the Civil Procedure Rules, Sections 1A & B, 3A, 63(e) of the Civil Procedure Act which sought the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, this honorable court be and is hereby pleased to issue an order restraining the Defendants herein whether acting by themselves and/or their agents, servants, employees, affiliates, subordinates, assigns, family member(s) and/or whosoever from entering, being in, building in, cultivating, leasing, offering for sale, selling, alienating, fencing, hindering the plaintiff's access to and/or in any other way interfering with the subject property herein to wit Longonot/Kijabe Block 6/781.
 - d. That the Officer Commanding Station (OCS) Utheri Wa Lari Police Station and/or the officer commanding police division (OCPD) thereof be and is hereby directed to oversee the enforcement of the orders herein and to ensure that peace and tranquility prevail.



- e. Any other or further orders and/or directions as this honorable court deems just and expedient.
- f. That the costs of this application be provided for.
3. The application is supported by the sworn affidavit of the plaintiff. The grounds on the face of the application and the supporting affidavit were that the plaintiff is the registered owner of land parcel No. Longonot/Kijabe Block 6/781; that she purchased the suit property from the 2nd defendant and was registered as owner ten years ago; that she had been in peaceful possession of the suit property since the year 2013 to date; that recently the 1st defendant entered the suit property claiming ownership; that he intends to build a permanent house thereon; that the 1st defendant also put building materials on the land; that the 1st defendant has denied the plaintiff access to her property and that unless the orders sought herein are granted, the 1st defendant will grab the plaintiff's land.
4. In response to the application, the 1st defendant filed a replying affidavit on 17/05/2023 sworn on 16/05/2023. He deposed that he has not claimed land parcel No. Longonot/Kijabe Block 6/781 or taken possession of it; that he was aware that the suit property was in the possession of the late Murugi Mwai Kariuki; that the administrator of her estate one James Ngigi Mwai filed ELC case No. E41 of 2023 James Ngigi Mwai vs Rachael Wanjiru Kimani & 3 others over the suit property and so he sought that the orders issued against him be vacated and the court to consider his application seeking that his name be struck out of these proceedings.
5. The plaintiff filed a supplementary affidavit sworn on 22/05/2023. She reiterated that she has been in peaceful occupation of the suit property since October 2012; that the 1st defendant transferred the building materials from another property to her property after the owner raised an alarm; that before filing the present suit, she had several confrontations with the 1st defendant who used to call her through her phone number; that they have both visited the 2nd defendant's offices to seek redress for the said continued trespass; that upon service of the present proceedings on the 1st defendant, he caused his brother James Ngigi Mwai to file another suit; that his other brother is not an administrator of the said estate because the alleged grant of letters of administration intestate issued on 29/08/2014 were never confirmed and were revoked on 03/09/2018; that it is only fair and just that her application dated 5/5/2023 be allowed.
6. The 2nd defendant filed a replying affidavit sworn on 6/06/2023 on 07/06/2023 by George Kagunya Muiro. He deposed that the 2nd defendant has no interest in suit parcel No. Longonot/Kijabe Block 6/781; that it has never entered the suit property; that the suit property was legally transferred to the plaintiff after which the company had no further dealings with it and that the company is not a party to any of the allegations in the application.
7. The 1st defendant filed a supplementary affidavit sworn on 15/06/2023 on 19/06/2023. He deposed that he has never met the plaintiff herein and reiterated that he has not claimed the suit property; that he had not deposited any building material on the suit property; that the suit property is owned and claimed by the Estate of the late Murugi Mwai; that his brother James Ngigi Mwai is the administrator of the said estate; that he is aware that his brother James Ngigi Mwai in his capacity as the administrator of the said estate filed ELC Suit No. E41 of 2023 against the plaintiff concerning the ownership of Longonot/Kijabe Block 6/781; that his brother is the one in possession of the suit property; that his brother's grant to their mother's estate in Succession Cause No. 104 of 2014 in the estate of Murugi Mwai Kariuki was re-instated; that the plaintiff's quarrel is therefore with his brother James Ngigi Mwai in his capacity as the administrator of the Estate of the late Murugi Mwai and not him; that as such any orders against him will have no effect and will not affect his brother's possession of the suit property;



that he is not a necessary party to the present suit and he therefore seeks that the said application be dismissed with costs.

8. In response to the 1st defendant's supplementary affidavit, the plaintiff filed an affidavit sworn on 4/07/2023 on 06/07/2023. She reiterated that she knew the 1st defendant and that he is the one who has trespassed onto the suit property. She also reiterated that she has had meetings with him at the Deputy County Commissioner's office and the 2nd defendant's offices; that the 1st defendant has always insisted that he intends to build on the suit property and that it is surprising that he is now denying that he is the one who has trespassed onto the suit property; that she has been in possession of the suit property to date; that on 21/06/2023 she accompanied her father Stephen Kimani to the area Assistant Chief one James Ndungu who had written the letter dated 16/6/2023 annexed to the 1st defendant's affidavit; that the said Assistant Chief was shocked to learn that he had been misguided by the 1st defendant; that on 21/06/2023 she took aerial photographs of the suit property to confirm that there was no human settlement in the land contrary to the Chief's letter dated 16/6/2023; that the said photographs confirm that she has been possession of the suit property through cultivation which was stopped by the 1st defendant in ELC E41 of 2023; that in ELC E41 of 2023 it is claimed that the defendant's family was issued with parcel 781 which is the suit property and two other parcels but it is yet to be issued with the title to the suit property; that a suit filed without a grant is null and void ab initio and such nullity cannot be cured by obtaining a grant after the filing of the suit and that her claim against the 1st defendant is that of trespass.
9. The 1st defendant in his application dated 16/05/2023 which is expressed to be brought under Order 2 Rule 15 of the *Civil Procedure Rules*, Sections 1A, 1B & 3A of the *Civil Procedure Act* seeks the following orders:
 - a. That this honorable court be pleased to strike out the suit against the 1st defendant and or strike out the name of the 1st defendant from this suit.
 - b. The costs of this application be provided for.
10. The application is supported by the affidavit of John Mwai. The grounds on the face of the application and the supporting affidavit are that the 1st defendant has never claimed ownership of the suit property and that he has no interest in the suit property. The 1st defendant then reiterated the contents of his replying affidavit to the plaintiff's application and stated that the suit against him is scandalous and frivolous; that he is not a necessary party to the suit having been wrongly enjoined and his name should therefore be struck out.
11. In response to the 1st defendant's application, the plaintiff relied on her supporting affidavit to her application dated 5/5/2023.
12. The 1st defendant filed a further affidavit sworn on 15/06/2023 on 19/06/2023 where he reiterated the contents of his supplementary affidavit that was filed on 19/06/2023.

Submissions

13. The plaintiff filed submissions to her application dated 5/5/2023 on 22/05/2023. She submitted on whether an interlocutory injunction should be issued as sought in her application.
14. The plaintiff relied on the cases of *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR, *Moses C Mubia Njoroge & 2 Others vs Jane W Lesaloi & 5 others* (citation not given) among other cases and submitted that since she is the registered owner of the suit property and



since the 1st defendant has invaded her property, she has established a *prima facie* case with a probability of success.

15. The plaintiff also submitted that unless the court grants the injunction, the 1st defendant will construct on the suit property and that the balance of convenience tilts in her favour. The plaintiff then sought that her application be allowed as prayed.
16. The 1st defendant filed his submissions on 19/06/2023 and supplementary submissions on 14/07/2023. In his submissions the 1st defendant relied on Order 1 Rule 10(2) of the *Civil Procedure Rules*, the case of *BWK (of unsound mind suing through the next friend CMK) v Samuel Maina Kung'u & 4 Others* [2021] and submitted that he is not a necessary party to the suit as he is not in possession of the suit property. He also submitted that it is his brother James Ngigi Mwai who is in possession of the suit property and any orders issued against him would be of no consequence. He sought that his application dated 16/05/2023 be allowed as prayed.
17. The 1st defendant in his supplementary submissions reiterated his submissions filed on 15/06/2023 and the contents of his affidavits and sought that his name be struck out from the suit because he has no interest in the suit property and neither has he trespassed on it.

Analysis And Determination

18. I will first address the 1st defendant's application dated 16/05/2023 before addressing the plaintiff's application dated 5/05/2023.
19. After considering the application dated 16/05/2023, it is my view that the only issue that arises for determination is whether the suit against the 1st defendant should be struck out.
20. The 1st defendant alleges that the plaint does not raise any reasonable cause of action against him as he has no interest in the suit property. He also alleges that the suit property belonged to the estate of the late Murugi Mwai Kimani and his brother James Ngigi Mwai is the representative of the said estate. He further alleges that his brother in his capacity as the representative of the said estate filed ELC 41 of 2023 against the plaintiff herein. He argues that it is his brother who has an interest in the suit property and not him.
21. The plaintiff on the other hand argues that it is the 1st defendant who has been in possession of the suit property and that he is the one who was claiming it.
22. Order 2 Rule 15 of the *Civil Procedure Rules* provides as follows:

“ 15.

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”



23. In the case of *D.T. Dobie & Company Kenya Limited Vs Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

24. The court in the case of *Humphrey Mbaka Nandi t/a Nyati Distillers Limited v Equity Bank(K) Ltd & 2 others* [2018] eKLR held as follows:

“In any event, as much as the 1st defendant cited order 1 Rule 10(2), it sought to have its name struck out from the suit because ‘the suit does not raise any reasonable cause of action’ against it. Non-disclosure of a reasonable cause of action or defence in law is one of those grounds prescribed by Order 2 Rule 15 (previously order VI rule 13) for striking out a suit at any stage of the proceedings. What amounts to ‘a reasonable cause of action’ in its technical sense was the central theme in *D.T. Dobbie & Company (Kenya) Ltd* and to this extent that decisions is equally relevant to the present application.”

25. As indicated before, the plaintiff alleges that it is the 1st defendant who trespassed onto the suit property while the 1st defendant alleges that it is his brother who is in possession of the suit property. The 1st defendant also alleges that his brother James Ngigi Mwai who is the representative of the estate of the late Murugi Mwai Kariuki instituted ELC E41 of 2023 against the 1st defendant over the suit property. He attached a letter dated 16/6/2023 written by the Senior Assistant Chief Satellite Sub location over LR No. Longonot Kijabe Block 6/781 (Kiambu Nyakinyua) indicating that it was James Ngigi Mwai who has been in occupation of the suit property for over fifteen years. The 1st defendant is therefore seeking that the suit against him be dismissed for not disclosing a reasonable cause of action. The Plaintiff on the other hand attached photographs which she alleged were of the suit property that indicated that there was no one in physical possession of the suit property. She argued that she was tilling the land and was stopped from tilling by orders that were given in ELC E41 of 2023.

26. In *DT Dobie & Co (K) Ltd vs Muchina*, [1982] KLR, the Court of Appeal defined the term “reasonable cause of action” to mean:

“an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim...”

27. The Court of Appeal in the case of *Crescent Construction Limited vs Kenya Commercial Bank Limited* [2019] eKLR, stated as follows:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”



28. In order to determine whether the suit against the 1st defendant should be struck out, the court has to determine who is in possession of the suit property. As aforementioned, the reason why the 1st defendant wants the suit against him to be dismissed is because he alleges that he is not in possession of the suit property while the plaintiff insists that it is actually the 1st defendant who is in possession. It is my view that at this stage of the proceedings the court cannot make a determination on who is in possession of the suit property. Given the totality of the circumstances of this suit, it is my view that the 1st defendant's application dated 16/05/2023 lacks merit and should be dismissed.
29. I will now address the plaintiff's application dated 5/5/2023. The only issue that arises for determination in the said application is whether an injunction should be issued restraining the defendants from interfering with the suit property.
30. The guiding principles for the grant of orders of temporary injunction are set out in the case of Giella Versus Cassman Brown (1973) EA 358 and reiterated by the Court of Appeal in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where it was 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.”
31. The Plaintiff/Applicant has to first demonstrate that he has a *prima facie* case. The court in the case of Mrao Ltd Versus First American Bank of Kenya Ltd [2003] eKLR stated as follows on what constitutes a *prima facie* case:
- “... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
32. In the present matter, the plaintiff has in support of her case annexed a copy of her title deed to the suit property which in my view has demonstrated that she has established a *prima facie* case.
33. The plaintiff has to secondly demonstrate that irreparable injury will be occasioned to her if an order of temporary injunction is not issued. The court in the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai [2018] eKLR provides an explanation for what is meant by ‘irreparable injury’ and it states:
- “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.”
34. The plaintiff argues that she stands to suffer irreparable injury if the orders sought are not granted as the 1st defendant intends to build a house on the land. The plaintiff also alleges that the 1st defendant has denied her access to the suit property. It is my view therefore that the plaintiff has demonstrated that she may suffer irreparable injury if the orders sought are not granted given that she is allegedly not



able to access the suit property and the fact that she has demonstrated that there are building materials on the land.

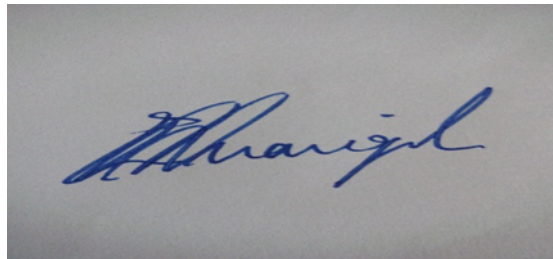
35. In the event there is no *prima facie* case and peril of irreparable injury, the plaintiff has to demonstrate that the balance of convenience tilts in her favour. In the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR the court defined the concept of balance of convenience as follows:

“The meaning of balance of convenience in 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.”

36. It is my view also that the balance of convenience tilts in favour of the plaintiff and her application dated 5/05/2023 therefore succeeds and it is hereby granted in terms of prayers (3) and (4).

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF SEPTEMBER 2023.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

