



**Gitau v Gichohi & 9 others (Environment & Land Case  
175 of 2022) [2023] KEELC 868 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 868 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 175 OF 2022**

**J OMANGE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**SAMUEL WANGARU GITAU ..... PLAINTIFF**

**AND**

**HEZEKIA W. GICHOHI ..... 1<sup>ST</sup> DEFENDANT**

**ESTHER NJERI KAGIO ..... 2<sup>ND</sup> DEFENDANT**

**HUMPHREY MAINA WAMBUGU ..... 3<sup>RD</sup> DEFENDANT**

**ROSE WAKIURI WAMBUGU ..... 4<sup>TH</sup> DEFENDANT**

**KENNEDY KIMATHI WAMBUGU ..... 5<sup>TH</sup> DEFENDANT**

**PAULINE NJAMBI MWANGI ..... 6<sup>TH</sup> DEFENDANT**

**ALEX MAINA JOHN ..... 7<sup>TH</sup> DEFENDANT**

**DAVID MWANGI NGUNYI ..... 8<sup>TH</sup> DEFENDANT**

**GEORGE KAGO WACHIRA ..... 9<sup>TH</sup> DEFENDANT**

**DAVID MUHORO WACHIRA ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated May 17, 2022 is brought in respect of the property LR No 209 /276/35 on which is constructed a building known as Kugeria house(the Suit Property).
2. The application prays for the following reliefs:
  - a. Spent.



- b. That upon inter partes hearing this Honourable Court do give an interlocutory injunction to restrain the Defendants, their representatives, employees, servants, agents or anybody claiming through them or any manner whatsoever from disposing, entering in encroachment on or in any manner interfering with the plaintiffs use and quiet possession of the land known as LR No 209/276/35 pending the hearing and determination of the Application;
  - c. That upon inter partes hearing this Honourable Court do give an interlocutory injunction to restrain the Defendants, their representatives, employees, servants, agents or anybody claiming through them or any manner whatsoever from disposing, entering in encroachment on or in any manner interfering with the plaintiffs use and quiet possession of the land known as LR No 209/276/35 pending the hearing and determination of the suit;
  - d. That the court do give such other or alternative order as meets the interest of justice.
  - e. That the costs of this Application be provided for.
3. The Application is based on the grounds inter alia that the Plaintiff purchased the suit property and has been in possession of the same for the last 12 years while awaiting issuance of Letters of administration to the Respondents so as to complete the sale. That upon successfully obtaining letters of administration the respondents have now threatened to evict him instead of transferring the property to him.
  4. The Application is supported Plaintiff's Affidavit sworn on May 14, 2022 in which he deponed that vide a sale agreement dated February 18, 2010 he purchased the suit property from the defendants predecessors in title. The purchase price was then agreed upon as Kshs 25,000,000 out of which an initial deposit of 10% was to be paid. The sale could not be concluded as parties had not obtained a confirmed grant for one of the deceased estates. Furthermore one of the proprietors had passed away on July 5, 2010 after executing the agreement.
  5. In view of these new developments, the parties executed a Deed of Variation in which it was agreed that the deposit be increased to Kshs 12 million and that the plaintiff take possession of the property and pay an amount of Kshs 74,000 for the early possession. The plaintiff insists that he has dutifully paid this amount. It is the plaintiffs case that once all the Defendants obtained letters of administration, he requested them to execute the transfer so that he could pay the balance of the purchase price. They refused and instead threatened to evict him necessitating the filing of this suit.
  6. The Defendants through the 1<sup>st</sup> Defendant who is the receiver responsible for dissolution of the partnership to a large extent confirmed the averments by the plaintiff. The only contention according to him was the value of the land. He also raised the issue of whether the initial sale agreement was void as it was executed by parties who had no authority to do so as they had not obtained letters of administration. The 1<sup>st</sup> Defendant further averred that the relationship between the plaintiff and defendants was that of licensor and licensee.
  7. On the October 12, 2022 the court directed that the matter be canvassed by way of written submissions.
  8. Parties filed their respective written submissions. The Plaintiff's was dated August 17, 2022 while the Defendants' October 7, 2022.
  9. Other than the factual matrices outlined above, the Plaintiff submitted to distinguish the case of Estate of John Gakunga Succession Cause No 256 of 2018 where it had been held that a contract entered into between a purchaser and beneficiaries of an estate prior to issuance of a grant was intermeddling. He submitted that a person who purchased from a beneficiary without the involvement of the personal



representatives could not succeed against the personal representatives, however, a purchaser who did so can maintain an action against the beneficiary who sold the property to him. The Plaintiff therefore submitted that in this case, one of the vendors was alive at the time of the Agreement, and the beneficiaries ultimately became the administrators.

10. The Plaintiff placed reliance on the case of *Estate of Stone Kathuli Muinder* [2016]eKLR where it was held that ownership of estate property as between the estate and 3<sup>rd</sup> party should be resolved in civil proceedings in the High Court or this Court.
11. The Plaintiff submitted that compensation for early possession is money paid to cushion the seller from loss of bargain that would result from escalation of the value of the property over time and the same should not be considered as license fees. On the statute of limitation, he submitted that the cause of action ran from the time of the alleged breach and not the time of execution of the contract. He submitted that his time started to run on April 26, 2022 when the Defendants rejected his completion notice and preferred valuation. All the above, he submitted that he had established a prima facie case. Submissions were also made on irreparable harm and balance of convenience.
12. On the other hand, the Defendants submitted, reiterating the invalidity of the Sale Agreement and the Deed of variation, insisting that letters of administration intestate become effective from the date of the issuance of the grant and does not apply retrospectively. He relied on the case of *re Estate of Barasa Kanenje Manyi (Deceased)* (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) where it had been held that a transaction entered into with a person who was yet to be appointed as an administrator would be null and void as the estate would not have vested in such a person. They also relied on other authorities aligned to this position.
13. The Defendants' submission was that the Court ought not to allow an invalid/ fraudulent transaction to stand once the illegality has been brought to the Court's attention. As such, they submitted that the Defendants have no rights to establish a *prima facie* case, and therefore, there is no need to consider the other factors for grant of an injunction.

## Analysis

14. The law on granting interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the *Civil Procedure Rules* as follows:

“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 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.”



15. The principles for grant of injunction are well settled by decision of *Giella v Cassman Brown & Company Limited* [1973] EA 358, where the court stated thus:-

“First, an 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

16. In this case, it is not in contention that there was a sale agreement in respect of the subject property and that an amount of Kshs 13 million exchanged hands. It is also not in dispute that the Plaintiff has been paying an amount of Kshs 74,000 monthly to the Defendants. It is also common ground that he is currently in possession of the suit property. The Defendants while not disputing they executed the contracts herein now allege that they had no capacity to do so. This is countered by the Plaintiff who avers that when the contract was signed at least one of the partners was alive and able to bind the other partners. There is also the question of the Defendants who do not deny having received consideration from the plaintiff in respect of the suit property.

17. Taking into consideration the above, I am satisfied that the plaintiff has an arguable case and hence the test set out in *Nguruman Limited v Jan Bonde Nielsen & 2 others* has been met. In this case the Court of Appeal had this to say-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...”

On this basis, this Court is persuaded that the Plaintiff has established a prima facie case with a probability of success.

18. The second limb is on the concept of irreparable injury. In order to prove that the Plaintiff risks suffering irreparable injury, he must demonstrate that the injury cannot be compensated adequately by an award of damages. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, the court sated as follows;

“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.”

19. In this case, the plaintiff has been in possession of the property for over 12 years. I am satisfied that if he were to be evicted, he would suffer more harm than the Defendants who have not had possession of the property for the last 12 years. The Balance of Convenience is thus tilted in favour of the plaintiff.

20. The Defendants have raised the issue of Limitation of Actions. This is guided by the date the cause of action took place. According to the uncontested evidence of the plaintiff, the cause of action arose at the point at which the Defendants had obtained letters of administration and refused to execute the transfers. I concur.



21. The upshot of the foregoing is that the Plaintiff's Application has merit, and is allowed in the following terms:
- a. That an interlocutory injunction is hereby granted to restrain the Defendants, their representatives, employees, servants, agents or anybody claiming through them or any manner whatsoever from disposing, entering in encroachment on or in any manner interfering with the plaintiffs use and quiet possession of the land known as LR No 209/276/35 pending the hearing and determination of the suit.
  - b. The costs of this Application shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

**Ms Maua holding brief for Mr. Mbigi for Plaintiff**

**Steve - Court Assistant**

