



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E300 OF 2021**

**DORCAS MOGA NDOKO.....PLAINTIFF**

**VERSUS**

**EUNICE WAIRIMU KINUTHIA.....1<sup>ST</sup> DEFENDANT**

**LOICE WAITHERA WACIRA.....2<sup>ND</sup> DEFENDANT**

**NJUGI MBUGUA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is the Application dated 6/08/2021 filed under Section 3A and 63(e) of Civil Procedure Act, Order 40 Rule 1, 2, 3 and 4 and Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Article 159 (d) of the Constitution of Kenya and all other enabling provisions of the law. The Applicant is seeking for the following Orders:-

*1. Spent.*

*2. THAT this honourable court be pleased to issue an order of temporary injunction to restrain the Respondents, their agents and or servants from developing, alienating, disposing, charging, selling and or in any manner whatsoever dealing with all that property Known as L.R.NO. 209/9006/2 pending the hearing and determination of this application.*

*3. THAT this honourable court be pleased to issue an order of temporary injunction to restrain the Respondents, their agents and or servants from alienating, disposing, charging, selling and or in any manner whatsoever dealing with all that property Known as L.R.NO. 209/9006/2 pending the hearing and determination of this suit.*

*4. THAT this honourable court do issue an order of Mandatory injunction to compel the Respondents to demolish, pull down and or remove at his own expense all the structures, developments and or materials deposited and or erected on all that property Known as L.R.NO. 209/9006/2 by the Respondent pending the hearing and determination of this suit.*

*5. THAT costs of this Application be provided for.*

2. The motion is premised on the Supporting Affidavit and Supplementary Affidavit of Dorcas Moga Ndoko and grounds (a) to (f) set out on its face.

3. This Application is opposed. There is a Replying Affidavit sworn on 17/09/2021 by Eunice Wairimu Kinuthia and another Replying Affidavit sworn on 27/09/2021 by Loice Waitthera Wacira.

4. On 1/11/2021, the parties agreed to canvass with the application through written submissions and a Ruling date was reserved.
5. I in turn have had time to analyze the emerging issues therein. The instant Application relates to the grant of temporary injunctive relief pending the hearing and determination of this application and suit.
6. The substantive law on this matter is **Order 40 Rule 1(a) of the Civil Procedure Rules 2010** which provides:-

*"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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."*

7. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in **Giella vs. Cassman Brown & Co. Ltd supra**.

8. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** observed that:

*"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.*

9. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicant has established a prima facie case. A prima facie case was defined in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, where Bosire, JA stated as follows:-

*"So what is a prima facie case" I would say that 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

10. The Court of Appeal deliberating what amounted to a prima facie case in **Nguruman (Supra)** made the following comments:-

*"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

11. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.

12. In my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the application, I find that a greater injustice has been

occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.

**13.** From the record, it is the Applicant's evidence that the Defendants are hostile and are keen to continue with illegal developments on the suit premises without her authority and/or consent. That the 1<sup>st</sup> defendant has been calling more people to acquire portions of the plot and develop the same purporting to be a leader of an illegal development scheme. It is her contention that the aforesaid action will increase more conflict and lead to protracted litigation involving many parties.

**14.** Furthermore, it is the 1<sup>st</sup> Defendant's case that she resides on L.R. 209/9006/4 and not on the suit property. The 2<sup>nd</sup> Defendant's case is one of adverse possession as she alleges to have entered the suit property in 1992. In light of this, the Court finds that no prejudice shall be suffered by the Defendants if status quo is maintained pending hearing and determination of this Suit.

**15.** Having considered the facts that have emerged in this case and the evidence adduced by way of affidavit, it is the view of the court that the plaintiff/applicant has established a prima facie case with a probability of success against the Defendant. As regards irreparable damage, I take the view that should the injunction not be granted the substratum of this case will be destroyed and the plaintiff/applicant will suffer irreparable loss which may not be quantified in damages. The balance of convenience if I had doubt, would tilt in favor of the plaintiff/applicant in order to safeguard the current status quo of the subject matter of the application pending hearing and determination.

**16.** Arising from all the above, I find merit in the application. Accordingly, I allow the Application dated 6/08/2021 in terms of prayer 2 and 3.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH, 2022.**

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**MOGENI J.**

**JUDGE**

**In the presence of**

N/A for the Plaintiff/Applicant

Eunice Wairimu, the 1<sup>st</sup> Defendant/Respondent

Loise Waithera, the 2<sup>nd</sup> Defendant/Respondent

N/A for the 3<sup>rd</sup> Defendant/Respondent

Mr. Vincent Owuor Court Assistant



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