



REPUBLIC OF KENYA



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**Karanja v Isaac (Environment & Land Case 28 of 2022)
[2023] KEELC 16706 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 28 OF 2022**

**LN GACHERU, J
MARCH 28, 2023**

BETWEEN

HILDA MWIHAKI KARANJA PLAINTIFF

AND

GEOFFREY MWANGI ISAAC DEFENDANT

RULING

1. Vide an Application dated 15th December 2022, the Plaintiff/Applicant sought for the following orders:
 1. That the Plaintiff/Applicant be allowed to amend the Complaint as per the attached Amended Complaint and the same be deemed as duly filed upon the payment of the court fees payable;
 2. That pending the inter-partes hearing of this application, a temporary injunction do issue restraining the Defendant/Respondent, his agents, employees and or servants or anyone claiming under him from disposing and or selling off, or from trespassing onto, taking possession of or remaining on, interfering with and/or dealing in any way with the plaintiff's property measuring 5 acres that is now constituted in Title No. Makuyu/Kimorori/Block IV/384 and the subsequent sub plots resulting from its subdivision being Title No. Makuyu/Kimorori/Block IV/2294, 2295, 2296, 2297, 2298, 2299 2300, 2301, 2302 and 2303 in the Respondent's names;
 3. That a temporary injunction does issue restraining the Defendant/Respondent, his agents, employees and or servants or anyone claiming under him from disposing and or selling off, or from trespassing onto, taking possession of or remaining on, interfering with and/or dealing in any way with the Plaintiffs property measuring 5 acres that is now constituted in Title No. Makuyu/Kimorori/Block IV/384 and the subsequent sub plots resulting from its subdivision being Title No Makuyu/Kimorori/Block IV/2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301,



2302 and 2303 in the Defendant/Respondent's names pending the hearing and determination of this suit;

4. That the costs of this Application be provided for;
 5. That this Honourable Court be pleased to make such further or other orders, as it may deem just and expedient in the circumstances of this case.
2. The Application is premised on the grounds set out on the face of the same and on the Supporting Affidavit of Hilda Mwhaki Karanja, the Plaintiff/Applicant, who averred that she is the registered owner of the land parcel Title No. Makuyu/Kimorori/Block IV/144 (the suit property) measuring 3.9 Ha (9.6369 acres). She further averred that the Defendant/Respondent encroached on 5 acres of the suit property in May 2021, claiming that it was his parcel of land.
 3. It is the Applicant's contention that she inherited the suit property from her late husband Samuel Njama Karanja, who had purchased two plots from two members of Gaichanjiru Self Help Farm in 1981. That her late husband took possession of the two combined plots, fenced them off and occupied the same until his demise. Further, that the Plaintiff/Applicant's late husband was issued with a title deed for the 3.9 Ha of land registered as Title No. Makuyu/Kimorori/Block IV/144. The Plaintiff/Applicant further averred that following her husband's death, she instituted a succession cause and inherited the suit property.
 4. The Applicant further stated that sometime in April 2021, she was informed by the Chief that the Defendant/Respondent had laid claim to the suit property and requested her to attend to his office to resolve the matter. The Applicant also averred that she learnt that the Defendant/Respondent claimed 5 acres of the suit property and began fencing off the same, cutting down trees using force and threats of violence. Further, the Applicant averred that the Defendant/Respondent has sub-divided and built permanent structures on the suit property despite there being a pending court case. The Applicant prays that an injunction be granted to preserve the suit property and that she be permitted to amend her Complaint to include the suit property and the plots resulting from the sub-division.
 5. The Defendant/Respondent opposed the application through his Replying Affidavit dated 25th January 2023. It is the Defendant/Respondent's contention that he is the registered proprietor of land parcel No. Makuyu/Kimorori/Block 1V/384, whereas the Plaintiff/Applicant is the registered owner of Makuyu/Kimorori/Block 1V/144. The Respondent avers that he has resided on his property since 1988, when a surveyor pointed out the beacons to his property and the Defendant/Applicant's husband property. That there were no issue with the Defendant/Applicant's husband until his demise when the Applicant started claiming the land was hers. The Respondent further avers that despite the attempts to resolve the dispute amicably, the Applicant has remained adamant. The Defendant/Respondent has deposed to sub-dividing the suit property and selling off parcels to third parties.
 6. Lastly, the Respondent averred that it would be an unjust for a Court to grant the Applicant's an injunction against his own suit property Makuyu/Kimorori/Block 1V/2294-2303 which are resultant subdivisions of Makuyu/Kimorori/Block 1V/384. He further averred that the sub-divisions was conducted in June 2021, on Makuyu/ /Kimorori/Block 1V/384 resulting in Makuyu/Kimorori/Block 1V/2294-2303, while the Applicant property namely Makuyu/Kimorori/Block 1V/144, remained untouched.
 7. The Applicant filed a Supplementary Affidavit dated 24th February 2023, and averred that the Defendant/Respondent has admitted to selling off the sub-divisions despite the ongoing suit. She also averred that she has used the suit property as security on various occasions, which would not be possible if she was not the registered owner.



8. This application was canvassed by way of written submissions. The Plaintiff/Applicant through the Law Firm of H.T & Associates Advocates, filed her submissions in support of the application on 28th February 2023. The Applicant submitted that the Respondent has encroached on her suit property, sub-divided the same and began selling off parcels of land. She submitted that she sought for an injunction order to prevent the disposal of the properties, pending the hearing and determination of this suit. She relied on the case of Kenya Finance Co. Ltd vs. Afraha Education Society and Others – Civil Appeal No. 142 of 1999, where the court restated the principles to consider for grant of temporary injunction as:
- i. A prima facie case with probability of success;
 - ii. That the Applicant might suffer irreparable injury if the injunction is not granted;
 - iii. Should the court be in doubt it will decide an application on the balance of probabilities.
9. The Plaintiff/Applicant also submitted that she had a prima facie case with a probability of success having established that she is the registered owner of the suit property, and having indicated that the Defendant/Respondent has fenced off her property and is selling it off to third parties.
10. The Applicant further submitted that she stands to suffer irreparable loss if the orders are not granted. Lastly, the Applicant submitted that on a balance of convenience, the injunction ought to be granted to maintain the suit property. She relied on the case of Augustine Njagi vs. Diocese of Meru Trustees (Registered) Civil Appeal No. 14 of 1997, wherein the Court held that an injunction to restrain the appellant from interfering with the Respondent’s property had been properly granted based on *Giella vs. Cassman Brown* 1973 E.A. 358. The Applicant prays that the application be allowed.
11. The Defendant/Respondent through the Law Firm of Kiarie Joshua & Co. Advocates filed his written submissions dated 2nd March 2023, opposing the application. It was the Respondent’s submissions that in order for an injunction to issue, one must establish the principles set under the case of *Giella v. Cassman Brown Ltd* (1973) EA 348, which are:
1. Establish a prima facie case;
 2. Consider whether the Applicant will suffer irreparable damage unless the injunction is issued; and
 3. Where the balance of convenience lies.
12. The Defendant/Respondent submitted that the Applicant failed to establish the prerequisites criteria set above, for the granting of injunction. He also submitted that there were two distinct parcels of land belonging to the Plaintiff/Applicant and Defendant/Respondent respectively, and that the Court could not impose an injunction on his property. He further submitted that the Applicant did not stand to suffer any irreparable loss as the Respondent was only selling parcels of land sub-divided off his suit property.
13. Lastly, on the issue of where the balance of convenience lies, the Defendant/Respondent submitted that the court ought to opt for the lower rather than higher risk of injustice. He relied on the case of *Nguruman Ltd v. Jan Bonde Nielsen & 2 Others* (2014) eKLR, wherein it was held:

“In conclusion, we stress that it must be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and



where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

14. This Court has now carefully considered and analyzed the instant Application, the responses, and the rival written submissions herein and finds that the two issues for determination are
 1. Whether the Applicant ought to be allowed to amend her plaint as per the attached Amended Plaint and the same be deemed as duly filed upon the payment of the court fees payable?
 2. Whether the Applicant has met the principles to warrant a temporary injunction?
15. The Court will first deal with the issue of whether to grant the Plaintiff/Applicant’s prayer to amend her Plaint, which prayer is unopposed by the Defendant/Respondent.
16. Amendment of pleadings is provided for under Order 8 of the Civil Procedure Rules which provides for amendment of pleadings with leave as in the present case. it states:

Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”
17. This court places further reliance on the case of Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365, where the court held that: -

”That a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided that there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”
18. Having reviewed the amended Plaint annexed to the present application, which was filed, and having found the said prayer is unopposed and that the amendment is so as to capture the latest issues raised in the amended Plaint which will help in the determination of all the issues in controversy, this Court finds that the said prayer is merited and proceeds to grant the sought order to amend the Plaint.
19. The Plaintiff/Applicant also seeks for a temporary injunction to restrain the Defendant/Respondent or his agents from interfering with land parcel no Makuyu/Kimorori/Block 1V/144, pending the hearing and determination of this suit.
20. The Application was made on the grounds that the Defendant/Respondent is disposing off the sub-divided land parcels namely Title No. Makuyu/Kimorori/Block IV/2294, 2295, 2296, 2297, 2298, 2299 2300, 2301, 2302 and 2303, within the suit property, while a suit has been filed by the Plaintiff/Applicant herein to determine the ownership of the suit property. The Plaintiff/Applicant has alleged that she inherited land parcels Makuyu/Kimorori/Block 1V/144, following the death of her husband in 1998. That her husband had acquired the said Makuyu/Kimorori/Block 1V/144, by purchasing 2 adjacent parcels of land in 1981 from Michael M. Mbugua and Dishon K. Njoroge, thereafter combining the two parcels and acquiring a title deed for the combined properties being Makuyu/Kimorori/Block 1V/144. Lastly, she also alleged that she had been in continuous occupation of Makuyu/Kimorori/Block 1V/144. Therefore, it was her prayer that the temporary injunction be granted to restrain the Defendant/Respondent from selling off the sub-divided parcels of land, pending the determination of the suit.



21. The Defendant/Respondent opposed the application and averred that he is the registered owner of Makuyu/Kimorori/Block 1V/384, since 1988, which is a distinct parcel of land from the Applicant's property namely Makuyu/Kimorori/Block 1V/144. He stated that he would be prejudiced should an injunction be imposed on his suit property, which he purchased and holds title to.

22. The provisions for temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules. It states:

“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 the 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.”

23. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the case of *Giella v Cassman Brown Co. Ltd* 1973 E.A. 358 to wit;

- i. The applicant has to make out the existence of a prima facie case with a probability of success;
- ii. The applicant must demonstrate that he/she will suffer substantial loss which may not be remedied with an award of damages;
- iii. If in doubt to decide on the balance of convenience.

24. The above position has been reiterated in other numerous cases, particularly in the case of *Nguruman Limited Vs. Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR, where the Court of Appeal held that;

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. Alleviate 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”.

25. The circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires proof that any property in dispute in a suit is in a danger of being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree or that



the Defendant threatens or intends to remove or dispose of the property. The court in such a situation is enjoined to grant a temporary injunction to restrain such acts.

26. Therefore, in granting an order of interlocutory injunction, the Court has to satisfy itself that the Applicant has a prima facie case with a probability of success and that the Applicant if not granted the orders sought, will suffer irreparable damage which cannot be compensated by way of damages.

27. A prima facie case was defined in the case of *Mrao Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in the case *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others* (2014) eKLR, where the Court of Appeal defined a prima facie case as:

A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case 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 later.”

28. It is not in doubt that the Plaintiff/Applicant herein is seeking for injunctive orders against the Defendant/Respondent on allegation that the said suit property belongs to her, and that the Respondent has subdivided the same and intends to sell to 3rd parties. She attached a title deed in her name which was issued to her on 8th November 2000, after inheriting the said land parcel Makuyu/Kimorori/Block 1V/144 measuring 3.9 Ha from her late husband, Samuel Njama Karanja, who had purchased the said property and was issued with a title on 1st March 1989.

29. The Defendant/Respondent disputes the Applicant’s claims and avers that there are two distinct properties. He alleged that he purchased Makuyu/Kimorori/Block 1V/384 in 1988. However, this is not corroborated in his response to the Application. It is not in doubt that land parcel No. Makuyu/Kimorori/Block 1V/384, has now sub-divided on application of the Defendant/Respondent on 29th June 2021, as is evident from the Mutation Form marked GMI4.

30. Based on prima facie evidence of ownership presented by the Plaintiff/Applicant, and also the annexed documents which show the root of her title, then this Court finds that the Plaintiff/Applicant has established a prima facie case with probability of success at this trial.

31. On whether the Respondent’s title is genuine or not, that is not an issue that can be determined at this juncture without calling evidence at the main trial. However, it is evident that the Plaintiff/Applicant’s Certificate of title is genuine, on the face of it. The Plaintiff/Applicant’s title being genuine is prima facie evidence that the person named therein is the proprietor of the land as was held in the case of *Bandi v Dzomo & 76 others* (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR) (24 June 2022) (Judgment) as follows;

Section 26 of the [Land Registration Act](#) is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of title has been acquired fraudulently, unprocedurally or through corrupt practice.”

32. The Plaintiff/Applicant has a title deed in her favour over Land Parcel No. Makuyu/Kimorori Block IV/144, and the Defendant/Respondent’s has a title over land Parcel No. Makuyu/Kimorori/ Block IV/384 which he has now subdivided and the resultant subdivisions, being Makuyu/Kimorori/Block IV/2294-2303. The Plaintiff/Applicant has alleged that these new parcels of land are on her land parcel and there is a danger that the said resultant parcels of land might be sold to 3rd parties. For the Court to determine whether the Applicant and Respondents land parcels are distinct, their evidence has to be



called in the main trial. However, there is a danger that the resultant subdivisions might change hands. There is need to preserve substratum of the land in issue.

33. For the above reasons, the Court finds that the Plaintiff/Applicant has established that she had a prima facie case with probability of success at the trial.
34. Secondly the Plaintiff/Applicant must demonstrate that she stands to suffer substantial loss if the injunction is not granted. The case decision 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.”

35. The Plaintiff/Applicant has averred that the Defendant/ Respondent is selling plots resulting from the sub-divisions, which subdivisions are in dispute herein. The Respondent himself provided sale agreements to indicate that he is indeed selling land parcels to third parties. This court finds that the Applicant has established that she stands to suffer substantial loss if the injunction is not granted, as the parcels of land might pass to third parties and it would be difficult to recover the same in the event that she becomes the successful party after trial.
36. Lastly, the Plaintiff/Applicant must demonstrate that the balance of convenience tilts in her favour. The case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLK also defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour the Plaintiff’ 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”.

37. In the case of Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR, Court offered elaboration on what is meant by “balance of convenience” and stated:

The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

38. In the present case, the balance of convenience tilts in the Plaintiff/Applicant’s favour for the reason given above. The sale of the land parcels sub-divided in the suit property ought to cease to allow the main suit to proceed and not be overtaken by events by the sale of parcels of land which are situated on the disputed property to third parties.
39. This Court is convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and



the resultant subdivisions might end up in the hands of third parties and the doctrine of innocent purchasers without notice might set in at the expense of the Plaintiff/Applicant.

40. Having now considered the instant Notice of Motion Application dated 15th December 2022, the Court finds it Merited and the said Application is allowed wholly in terms of prayers No. 2 and No.4 with costs being in the cause.
41. The Plaintiff/Applicant to file the Amended Plaint within a period of 14 days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF MARCH, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo/Mwende - Court Assistants

Mr Thimba for the Plaintiff/Applicant

Mr Kimani H/B for Kiarie Joshua for Defendant/Respondent

L. GACHERU

JUDGE

28/3/2023

