Mutisya v Mumangi (Environment & Land Case E001 of 2023) [2025] KEELC 2897 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2897 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E001 OF 2023

NA MATHEKA, J

MARCH 25, 2025

BETWEEN

JOSEPH MUNYAO MUTISYA .... APPLICANT

AND

TIMOTHY WAMBUA MUMANGI .... RESPONDENT

RULING

1. The application is dated 15th October 2024 and is brought under Order 40 Rule 1 of the Civil Procedure Rules, Section 3A and Section 63(e) of the *Civil Procedure Act*, Cap 21, Section 18 of the *Land Registration Act* No. 3 of 2012 Laws of Kenya seeking the following orders;
    1. That this Application be certified as extremely urgent and heard at the first instance.
    2. That pending the hearing and determination of this Application a temporary injunction do issue restraining the Respondent by himself, his authorized agents, servants, employees and/or any person acting under his authority from subdividing, selling, transferring or in any other way dealing with all that parcel of land know as land number Ndalani/Ndalani Block 1/3979.
    3. That pending the hearing and determination of this suit a temporary injunction do issue restraining the Respondent by himself, his authorized agents, servants, employees and/or any person acting under his authority from subdividing, selling, transferring or in any other way dealing with all that parcel of land known as land number Ndalani/Ndalani Block 1/3979.
    4. That the orders be enforced by the Matuu Police Station.
    5. That costs of this Application be paid by the Respondent.
2. It is based on the following grounds that the Respondent was originally the owner of land number Ndalani/Ndalani Block 1/386. That he bought the suit land from the Respondent. Later on after payment of the purchase price, the Respondent and Applicant contracted a Surveyor to subdivide the

land number Ndalani/Ndalani Block 1/386 which subdivision was presented to the County Surveyor on the 5th January, 2015 as per the mutation form and the following new numbers were proposed to be given. (Annexed is a copy of the mutation form and corresponding sketch map and marked JM3).

3. That the Respondent even executed the blank application forms for Land Control Board Consent to subdivide and to transfer. That before the mutations could be approved and before they could proceed to the Land Control Board for the consent to subdivide/transfer, the Respondent informed the Surveyor and Applicant that the original Title Deed for Ndalani/Ndalani Block 1/386 had gotten lost and that marked the start of the delay in effecting the transfer. The Respondent reported to the police the loss of title and was issued with a police abstract to enable him replace the lost title. The Respondent equally swore a statutory affidavit on 4th December, 2017 concerning the loss to enable him gazette the lost title.

4. The lost title was gazetted in the local dailies which is a precondition for re-issuance of the lost tittle. That after gazettement, the Respondent started taking the Applicant round in circles and was not willing to pursue the re-issuance of the lost title despite giving him money severally for the exercise. That sometimes in October, 2022, the Applicant discovered that the original title for land number Ndalani/Ndalani Block 1/386 was not actually lost but the Respondent had given it as a security for an unpaid medical bill in a hospital which was incurred by the Respondent's sick wife. That the Respondent has been trying to evict the Applicant leading to the filing of this case. That on 10th October, 2024, the Applicant discovered that the Plaintiff had gone ahead, subdivided the suit property and obtained new titles. That the Respondent has obtained a title of the portion he is occupying which is title number Ndalani/Ndalani Block 1/3979. The Respondent has been bringing potential buyers and he has threatened to sell the Applicant's portions for a second time and evict him.

5. This court has considered the application and the submissions therein. Temporary injunctions have been provided under Order 40 of the Civil Procedure Rules and also in Nguruman Limited vs Jan Bonde Nielsen, Herman Philipus Steyn Also Known as Hermannus Phillipus Steyn & Hedda Steyn (2014) KECA 606 (KLR) where the court of appeal stated:

6. In Giella case (supra) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

7. 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."

8. In the above case the Court of Appeal cited with approval Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001) Vol. 1 EA 86 where they stated;

9. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

10. Prima facie case is described in Mrao Ltd. vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125 where the court stated;

11. 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."

12. The Applicant's case is that the Respondent by various agreements sold to the Applicant a portion measuring approximately 0.80 Hectares or so to be excised from Ndalani/Ndalani Block 1/386 as follows: Agreement dated 27th May,2001 …….. 2 acres for Kshs. 80,000/=; Agreement dated 19th September, 2001…. additional land for Kshs. 200,000/-. The Applicant was granted immediate possession and use of the part of the land measuring approximately 0.80 Hectares or so when he first purchased on the 27th May, 2001, he fenced, planted trees and he has been in exclusive and quite possession of the land since then up to today.

13. The Respondent objects to the said agreements and state that they do not specifically relate to the land. The Respondent in his replying affidavits acknowledges receiving kshs. 80,000/ but this was for his wife's medical bills. Be that as it may, I find that the plaintiff has established a prima facie case.

14. On the balance of convenience, it was discussed in Pius Kipchirchir Kogo case (Supra) where the court held;

> The meaning of balance of convenience will 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."

15. The Applicant stated that he was allocated the portion measuring approximately 0.80 Hectares as plot number Ndalani/Ndalani Block 1/ 1881 in the proposed subdivision and which corresponds with the portion he purchased, took possession and planted trees. I find that the balance of convenience falls in favour of the Applicant. I find that the application is merited and I order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH 2025.

N.A. MATHEKA

JUDGE