



**Ndungu v Kingori & another (Environment & Land Case
E5 of 2023) [2023] KEELC 17108 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E5 OF 2023**

A OMBWAYO, J

APRIL 27, 2023

BETWEEN

KAMAU DAVID NDUNGU PLAINTIFF

AND

SERAH NYAMBURA KINGORI 1ST DEFENDANT

DANIEL MAHIRI GICHAGA 2ND DEFENDANT

RULING

1. The plaintiff herein filed the Notice of Motion application dated 2nd March 2023 brought under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 37 Rule 11, Order 40 Rule 1(a) and Order 51 Rule 1 of the *Civil Procedure Rules* and Section 31 of the *Law of Succession Act* seeking for orders that;
 - a. Spent
 - b. That this honourable court be pleased to issue an ex parte temporary injunction for the defendants/respondents to deposit the original title deeds for title number Nakuru/ Moi Ndambi/4262 and title number Nakuru/ Moi Ndambi/4263 in court within 5 days of making of this order, for safe custody pending the hearing and determination of the originating summons filed herewith.
 - c. That this honourable court be pleased to issue a restriction/prohibitory order restraining the defendants/respondents, their servants and/or agents from transferring, leasing or in any way alienating title number Nakuru/Moi Ndambi/4263 pending the hearing and determination of the originating summons filed herewith.
 - d. That this honourable court be pleased to issue directions on the hearing and disposal of the originating summons filed herewith.



- e. That the costs of the application be in the cause.
2. The grounds in support of the application are that the plaintiff is the biological father to the defendants. That sometime in the year 2017, the plaintiff was diagnosed with prostate cancer and has been seeking for medical treatment. That in the year 2014, the Plaintiff had purchased land parcel Number Nakuru/ Moi Ndabi/1286 measuring 4.30 Hectares from Phylis Rotich for a consideration of Kshs. 5,000,000 and was registered as the owner and issued with a title deed on 27th February 2014. That the Plaintiff subdivided Title Number Nakuru/ Moi Ndabi/1286 into 2 parcels of land and was issued with Title Deeds for the same on 25 June, 2020 being Title Number Nakuru/ Moi Ndambi/ 4262 and Title Number Nakuru/ Moi Ndambi/ 4263 measuring 2.254 Hectares each. That the plaintiff gifted the properties to the 1st Defendant herein vide a donation agreement dated 22nd July 2020 in contemplation of death since he was afraid that he was not going to live very long after his diagnosis. That since the plaintiff was diagnosed with prostate cancer in the year 2017, he has exhausted all his sources of income in seeking for treatment. That he requested the 1st defendant to return the suit properties to him so that he can sell them and get money for his treatment but she declined. That the plaintiff later learnt that the 1st defendant had transferred to her brother the 2nd Defendant herein the suit properties as a gift with no consideration given. That the defendants have neglected to support the plaintiff financially and since he is critically ill and in need of urgent medical care, the only way he can be assisted is for him to dispossess the defendants the suit properties and dispose them for consideration.
 3. In his supporting affidavit sworn on 2nd March 2022, the plaintiff reiterated the grounds in support of his application.
 4. In response to the application the defendants filed a preliminary objection dated 21st March 2023 on the grounds that the plaintiff's application has no merit and does not raise a cause of action.
 5. In further response to the application, the 1st defendant filed a replying affidavit sworn on 21st March 2023. She deposed that it is true that their father who is the plaintiff is undergoing treatment for prostate cancer with the support of his family members and friends. She also deposed that the applicant in this matter is not really their father who is the plaintiff but it is his estranged wife Agnes Wanjiru who has taken advantage of his medical condition and pressured him to file the present proceedings. She further deposed that the plaintiff has access to medical care and the best treatment since he was diagnosed in the year 2017. She deposed that it was true that the defendant had gifted her the suit properties and that it was the plaintiff's estranged wife who intends to disinherit the defendants off the suit properties that had been gifted to them. She further deposed that the plaintiff had commenced divorce proceedings against Agnes Wanjiru and had filed for divorce in Murang'a Divorce Case No. E015 of 2021 Kamau David Ndungu vs Agnes Wanjiru Gichuhi which was withdrawn in the year 2022 upon the insistence of Agnes Wanjiru. She also deposed that the plaintiff and his wife are persons of means who own vast properties in Nakuru, Murang'a and Nairobi. That the plaintiff was aware when she transferred the suit properties to the 2nd defendant who is her brother. That no pending bills have been placed before the court and so she puts the plaintiff to strict proof. In conclusion she deposed that the present proceedings do not meet the legal tenets of a proper legal suit as it does not raise any cause of action.
 6. The 2nd Defendant filed a replying affidavit sworn on 21st March, 2023. He deposed that the present proceedings do not raise any cause of action. He also deposed that their father who is the plaintiff was diagnosed with cancer eight years ago. He reiterated that the real plaintiff in this matter is Agnes their step mother who he alleged secretly relocated the plaintiff from where they were taking care of him to a secret location. That upon the said relocation, the 2nd defendant alleged that the divorce cause that had been filed was withdrawn. That the present matter is full of falsehoods. That he has been supporting



his father by sending him money and ensuring that he got medical care. That he has the legitimate expectation that since he is a property owner his property rights are protected.

7. The plaintiff filed a supplementary affidavit sworn on 6th April 2023. He reiterated that after he was diagnosed with cancer in the year 2017, he transferred the suit properties to the 1st defendant as he did not expect to live long. That he has been in and out of hospitals for the past five years and has depleted his savings and that the law allows him to seek that the suit properties be returned to him. He deposed that the defendants chose to deviate from the real issues in this matter and focused on his marital issues that are not the subject of the present proceedings. That he has had to postpone some of his chemotherapy sessions for lack of funds and seeks that the court issues orders to preserve the suit properties and to expediate the hearing of the Originating summons so that he can gain access to the suit properties.

Submissions

8. The plaintiff filed his submissions on 6th April 2023 while the defendants did not file any submissions.
9. The plaintiff identified the following issues for determination;
 - a. Whether the Plaintiff/Applicant's suit discloses reasonable cause of action;
 - b. Whether the preliminary objection dated 21st March, 2023 by the Defendants/Respondents meets the fundamental threshold of a preliminary Objection;
 - c. Whether the Plaintiff/Applicants Notice of Motion application dated 2nd March, 2023 has merit.
9. On the first issue the plaintiff reiterated the contents of the grounds in support of the present application and relied on Section 31 of the *law of Succession Act* and the case of *Re Estate of the late Gedion Manthi Nzioka (Deceased)* [2015]eKLR. The plaintiff submits that the he has depleted his resources in seeking treatment and he wants the defendants to be compelled to transfer the suit properties to his name so he can sell them and get money for treatment. The plaintiff further submits that the instant suit has a reasonable cause of action and raises viable issues for determination and relies on Order 37 Rule 11 of the *civil procedure rules* in support of his arguments.
10. On the second issue, the plaintiff submits that the defendant's preliminary objection is not grounded on any law and does not therefore raise any pure point of law. The plaintiff relied on the cases of *Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd* [1969] EA 696 and *Attorney General & Another versus Andrew Mwaura Gitinji & Another* [2016] eKLR in support of his arguments.
11. On the third issue, the plaintiff relied on *Giella versus Cassman Brown* [1973] EA 358 and submitted that he has a *prima facie* case and is likely to suffer irreparable harm if the orders sought are not granted as the defendants can transfer the properties to other people and go beyond the reach of this court. The plaintiff submits that the balance of convenience tilts in its favour and so the application should be allowed as prayed.

Analysis and Determination

12. The plaintiff is seeking that the court issues an injunction for the defendants to deposit in court the original title deeds for land parcel No's Nakuru/Moi Ndambi/4262 and 4263 pending the hearing and determination of the Originating Summons.



13. The Plaintiff is also seeking that the court issues a restriction order restraining the defendants from transferring land parcel No's Nakuru/Moi Ndabi/4262 and 4263 pending the hearing and determination of the originating summons.
14. The plaintiff's case is that he had purchased land parcel No. Nakuru/ Moi Ndabi/1286 in the year 2014 and subdivided it into land parcel No's Nakuru/Moi Ndambi/4262 and 4263. He alleges that was diagnosed with prostate cancer and so in contemplation of his death he gifted the 1st defendant with the suit properties. He alleges that he has now exhausted his money and he therefore sought the 1st defendant to return the properties to him so that he can sell them and get money for further treatment. That instead the 1st defendant gifted the 2nd defendant with the suit properties.
15. The defendants case on the other hand is that it is the plaintiff's wife Agnes Wanjiru who has influenced the filing of the present matter and that they have always supported the plaintiff to get medical treatment. The defendants filed a preliminary objection alleging that the plaintiff's application does not raise a cause of action.
16. The case of *Mukbisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Limited*, 91969) EA 696, defined a preliminary objection as follows;

.....a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

17. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
18. The defendants preliminary objection is on the ground that the plaintiff's application does not raise a cause of action. For a preliminary objection to succeed, the facts should not be disputed.
19. The court in the case of *Zipporah Njoki Kangara v Rock and Pure Limited & 3 others* [2021] eKLR held as follows;

The Preliminary Objection invites court to find that the suit has no cause of action to be determined by court, and for this to be done court has to make reference to facts that are disputed by both parties. The court cannot from the face of the preliminary objection, conclude that the suit reveals no cause of action. There is need to consider factual evidence and court will exercise its judicial discretion. Once court steps out of the Preliminary objection, it ceases to be a point of law and cannot be sustained."

20. It is my view that in the present matter, and as was held in *Zipporah Njoki Kangara v Rock and Pure Limited & 3 others* (supra) the court cannot conclude that the suit reveals no cause of action from the



face of the preliminary objection. The preliminary objection's foundation is on factual information and it therefore lacks merit and should be dismissed.

21. On whether the court should issue an injunction to compel the defendants to deposit in court the original title deeds of the suit properties, the plaintiff must meet the requirements set out in the case of *Giella vs Cassman Brown & Co Ltd*, (1973) EA 358.
22. The court in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR set out the principles for granting an injunction 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.
23. 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”.
24. The plaintiff must establish a *prima facie* case. The court in the case of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) eKLR held 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.”
25. In support of his application the plaintiff annexed to his supporting affidavit an agreement for sale dated 7th February 2014 which shows that he bought land parcel No. Nakuru/ Moi Ndabi/1286 and a title deed issued on 27th February 2014. The plaintiff has also annexed a mutation form dated 9th June 2020 which showed that land parcel No. Nakuru/ Moi Ndabi/1286 was subdivided into land parcel No's Nakuru/ Moi Ndabi/4262 and 4263. The title deeds in the name of the plaintiff are also annexed together with the donation agreement dated 22nd July 2020 which shows that the plaintiff had donated to the 1st defendant the suit properties. The plaintiff further annexed the title deeds of the suit properties in the names of the 1st defendant and the donation agreement dated 12th July 2021 that shows that the properties were gifted to the 2nd defendant by the 1st defendant. The title deeds in the name of the 2nd defendant are also annexed. It is my view therefore that the plaintiff has demonstrated a *prima facie* case.
26. Secondly, the plaintiff must demonstrate that he will suffer irreparable injury if the order of temporary injunction is not granted. The court in the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* [2018] eKLR stated as follows;
27. 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.”
28. It is my view that the plaintiff in this matter has not demonstrated that if the orders sought are not granted, he will suffer irreparable loss which cannot be compensated with damages.



29. Thirdly, the plaintiff has to demonstrate that the balance of convenience tilts in his favour. The court in the case of *Paul Gitonga Wanjau Vs Gatbuthis Tea Factor Company Ltd & 2 others* (2016) eKLR held as follows;

Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

30. In this matter the balance of convenience tilts in favour of the plaintiff and in upshot, the court issues a restriction/prohibitory order restraining the defendants/respondents, their servants and/or agents from transferring, leasing or in any way alienating title number Nakuru/Moi Ndambi/4263 pending the hearing and determination of the originating summons filed herewith. I do decline to issue prayer number 1. Mention on 15th June 2023 for directions.

RULING DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 27TH DAY OF APRIL 2023

A.O. OMBWAYO

JUDGE

