



Shitanda (Suing as the Legal Representative of the Estate of Peter Soita Shitanda - Deceased) v Malumasi & 2 others (Environment & Land Case E004 of 2022) [2023] KEELC 17074 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17074 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E004 OF 2022**

**EC CHERONO, J
APRIL 27, 2023**

BETWEEN

BETTY GLORIOUS SHITANDA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER SOITA SHITANDA - DECEASED) PLAINTIFF

AND

**GEORGE MALUMASI 1ST DEFENDANT
AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT
KABRAS FARM LIMITED 3RD DEFENDANT**

RULING

Introduction

1. Before me are two Notice of Motion applications brought under Certificate of Urgency dated 30th January 2023 and 7th February 2023 respectively. The first application is brought by the 3rd Defendant herein seeking for *inter-alia* an equitable relief of an injunction restraining the plaintiff/respondent, her agents, servants, employees or any one claiming through her whatsoever from trespassing in any way, ploughing, leasing, subleasing, building, or dealing adversely or in whichever manner with the 3rd defendant's /applicant's Land Parcel Number Bungoma/Wabuyefwe/271 Measuring one Hundred (100) Acres. The second application is bought by the plaintiff seeking an order to discharge, vary or setting aside the orders of injunction issued *Ex-parte* by this Honourable Court on 3rd February 2023. When the first application came up for direction before this Honourable Court sitting as the Duty Court Duty Court on 2nd February 2023, the application was certified Urgent to be heard *Ex-parte* in the first instance without service of Summons upon the plaintiff/respondent. This Honourable Court also granted a temporary injunction orders barring the plaintiff/respondent by herself, her agents, servants, employees or any one claiming through her whatsoever from trespassing in any



way, ploughing, leasing, sub-leasing building or dealing adversely or in whatever manner with the 3rd defendant's/applicant's land parcel No. Bungoma/Kafuyefwe/271 Measuring one hundred(100) Acres. In the second application dted 7th February 2023, the plaintiff seeks to discharge, vary and/or set aside the said interim terms issued o 30th January 2023. When the two application came up for directions on 13/03/2023, the parties through their Advocates agreed by consent to determine the two applications simultaneously

2. In their Notice of Motion application dated 30th January 2023, the 3rd defendant is seeking orders for inter-alia an interlocutory injunction barring the Plaintiff/Respondent, her agents, Servants employees or any anyone claiming through her whatsoever from trespassing in any way, ploughing, leasing, subleasing, building or dealing adversely or in whichever manner with the 3rd Defendant's/Applicant's Land parcel No. Bungoma/Kabuyefwe/271 Measuring one Hundred (100) Acres.
3. The application is supported by grounds apparent on the face of the said application, the supporting affidavit of its Director namely George Malumasi sworn on even date as well as annexures thereto.
4. The second Notice of Motion application dated 7th February 2023 is also supported by Grounds apparent on the face of the said application, the supporting affidavit of the plaintiff/applicant sworn on 7th February 2023 and annexures thereto.

3rd Defendant's Summary of Facts In Respect of The Notice of Motion Dated 30/01/2023.

5. In its affidavit sworn by the 1st defendant on 330/01/2023 in supporting of the Notice of Motion dated the same date, the 1st defendant deposed that the 3rd Defendant had only two Directors namely the late ON. Peter Soita Shitanda and himself and that they each hold equal shareholding of 500 shares in the 3rd Defendant Company.
6. He stated that the 3rd Defendant Company purchased at a public Auction conducted by the 2nd defendant (A.F.C) the suit property which was registered in the name of Nirosim Farm Limited. He further stated that by the time the said Hon. Peter Soits Shitanda passed on in 2016, the 2nd defendant had not effected transfer of the suit property into the name of the 3rd defendant. He stated that in 2020, the plaintiff moved the Court Nairobi Cause No. 1520 of 2016 claiming ownership rights and seeking eviction Orders against him as one of the directors of the 3rd defendant company from the suit property. He deposed thatat paragraph 10 of her Ruling delivered on 4th February 2022, the trial Judge Lady Justice mugure Thande made it clear and unambiguous that the suit property belongs to KABRAS and not to any of the Company's individual Shareholders.
7. The 3rd defendant also stated that the learned Judge in her Ruling flatly rejected the plaintiff's suggestion that the deceased bought the suit property through Kabras Farm Limited and dismissed it as a misapprehension of the concept that a company is a separate legal entity distinct from its members.
8. He stated that the plaintiff then moved to Bungoma ELC and filed a similar suit simultaneously with an application and in a Ruling delivered on 7th July 2022, this Honourable Court struck out the plaintiff's suit with Costs for being *Res judicata* and Statute barred. He stated that at page 19,20, 21 & 22 of the said Ruling, this Honourable Court affirmed that the issue of ownership of the suit property was determined by Mugure Thande J vide her Ruling dated 4th February 2022 in Nairobi Succession Cause No. 1520 of 2016 between the parties to which no appeal has been preferred.
9. He stated that despite the two decisions by Hon Mugure Thande J and Hon. Mr Boaz Olao J which She has not challenged through any known legal means, the plaintiff has continued to hold herself as the owner of the suit property in flagrant breach of the two valid Court orders.



10. He further stated that on 21st February 2022 soon after obtaining an *Ex-parte* injunction, the plaintiff invaded the suit property, arrogated to herself ownership rights and wasted the property to the detriment of the 3rd defendant who by then had ploughed 50 acres using tractors for planting maize but on the strength of the said ex-parte order issued on 21/02/2022 which has injuncted the 3rd defendant from from trespassing on, wasting, alienating or otherwise interfering or dealing with the suit property, the plaintiff invaded the suit property and leased out in fragmented portions of 2 acres each to conniving lessees. That the said lessees were identified strategically by the plaintiff to frustrate the 3rd defendant's ownership rights on the land and they actually with impunity proceeded to plant and harvested maize on land that they did not prepare.
11. That the 3rd defendant unfairly missed out to plant maize last year and beseeches this Court to issue appropriate injunctive orders against the plaintiff so that it does not miss again this year.
12. That the plaintiff acted in bad faith by misusing a Court order that did not bestow on her authority to lease out the land and deal with it in the manner she did and continue to do so to date.
13. That the plaintiff and her associates are holding regular illegal meetings planning how they will continue to frustrate the 3rd defendant on the suit land purportedly on the strength of an *Ex-parte* order issued on 21/02/2022 that has since been vacated/discharged through this Court's ruling of 7th July, 2022.
14. That the plaintiff's suit was dismissed with costs through the said Court Ruling and now what remains on record as a valid pleading for determination is the 3rd defendant's Counter-claim dated 14th March 2022 and filed on 17th March, 2022
15. That the plaintiff has no bona fide defence to the counter-claim as her only argument that the suit property belongs to the estate of the deceased is in contravention of two valid Court Rulings/Orders that have not been appealed or set aside to date.
16. That the urgency of the application lies in the fact that the planting season is right around the corner and preparations for the same need to be underway yet the plaintiff has prevented the 3rd defendant/applicant from accessing its property
17. That the plaintiff is abusing the Court process by claiming possession of the suit property based on a vacated/discharged injunction.
18. That the plaintiff is using the police officers at mbakalo police station in an abusive manner to threaten the 3rd defendant and its directors and agents from accessing the suit property.
19. That there is urgent need for an ex-parte injunction to prevent the plaintiff/respondent from accessing the suit property or dealing with it in any manner and that this is an appropriate matter to be determined in a summary manner since the issue of ownership of the suit property is no longer in contention.
20. That the 2nd defendant(AFC) has never participated in these proceedings despite proper service of pleadings as noted by Court in the ruling of 7th July, 2022 at paragraph 16 and therefore it is safe to conclude that it is not objecting to the orders sought against it for transfer of the suit property to the name of the 3rd defendant/Applicant.
21. In conclusion, the 3rd defendant stated that this Honourable Court is under a civil duty and obligation to restore law, order, civility and prevent wanton abuse of Court process by the plaintiff/respondent by granting the orders sought.



22. By way of a replying affidavit to the plaintiff's application and supporting affidavit of Betty Glorious Shitanda dated and sworn on 7th February 2023, the plaintiff stated as follows;
23. That the application by the plaintiff is misconceived, frivolous, vexatious, bad in law, incurably defective, an abuse of the Court process and should be dismissed with costs.
24. That the application seeks to vary the orders of this Court yet no basis has been raised at all as the issue of ownership of the suit property has been determined to finality by two Courts of competent jurisdiction and that the plaintiff and the said Terrance are illegally on the suit land
25. That this Honourable Court and Honourable Lady Justice Mugure Thande already determined that the suit property does not belong to the Estate of the late Peter Soita Shitanda and that the grant referred thereto is only applicable within the province of section 67 of the *Law of Succession Act* and not this matter where the court has returned a finding that the suit property does not belong to the late Honourable Peter Soita Shitanda.
26. That the allegations that the late Peter Soita Shitanda purchased the suit property through Kabras Farm Limited constitutes a misapprehension of the law as was rightly pointed out by Lady Justice Mugure Thande in her Ruling of 4th February 2022 in Nairobi High Court Succession Cause No. 1520 of 2016
27. That paragraph 6 of the replying affidavit is an admission of trespass in the suit land and that the plaintiff has always acted with impunity and that statement constitutes part of that impunity.
28. That the son of the plaintiff who work on the suit land are strangers as they are not part of the directors of the 3rd defendants/Respondents.

The Plaintiff's Summary Of Facts In Respect To The Notice Of Motion Dated 7th February, 2023.

29. The plaintiff in her affidavit in support of the said application deposed as follows;
 1. That She has obtained Grants of Administration ad colligenda bona defunct thus capable of swearing this affidavit and bringing forth suit on behalf of the Estate of the late Peter Soita Shitanda
 2. That her late husband Peter Soita Shitanda was the sole contributor towards the purchase of land reference No. Bungoma/Kabuyefwe/271 measuring 100 acres through a public auction conducted by Agricultural Finance Corporation(AFC) in the year 2008
 3. That her late husband held 50% shares in the Kabras Farm Limited who is the Applicant herein.
 4. That she has not leased the suit property to anyone as the entire suit land is planted with sugarcane and pasture that are grown by her two sons Terrance, Sidney and her solely for purpose of offsetting the loan their late father obtained from the 2nd defendant towards the purchase of the land.
 5. That she has not received any notice from the 3rd defendant of its intention to evict them from the suit property.
 6. That the Estate of the late Hon. Peter Soita Shitanda has not been served with any resolution by the 3rd defendant over the takeover of the farm furthermore the 3rd defendant owes the estate the purchase price of the suit property as her late husband was the only contributor.



7. That the orders of the Court as granted deny her children and workers from accessing the land which is currently planted with sugarcane being at 4 months and Boma Rodhes pasture which require constant attendance to avoid losses.
8. That the 1st defendant has misinformed the court with an aim of obtaining ex-parte orders and therefore coerce them to hand over the suit land to him yet he did not contribute towards its purchase.
9. That the 1st defendant has been using the order to threaten their farm workers with arrests if they proceeded to tend the farm and this has exposed the farm crops to interference by other neighbours who have grazed their animals on the commercial pasture.
10. That her late husband had expressed his wishes for the suit property to be inherited by his children namely Terrence, Sidney and Shirley who have been in possession of the suit property since its purchase in 2008 to date.
11. That sometime in January 2020, the 1st defendant decided to take advantage of the demise of her husband without any resolution from the company and went ahead and broke the gate while her and her children were away out of the suit land.
12. That the 1st defendant then begun to plough the suit land with a tractor and threatened their workers with arrest if they dared stop him.
13. That it took the intervention of the police who stopped his harassment and illegal activities.
14. That she is informed by her Advocates on record that despite the court determining ownership of the Farm, the Estate of the late Peter Soita Shitanda holds voting rights in Kabras Farm Limited and therefore the 1st defendant cannot arbitrarily evict them from the suit property.

Analysis And Decision

30. I have considered the two Notice of Motion applications dated 30th January 2023 and 7th February 2023 and the affidavit evidence in support thereto. I have also considered the response to the two applications and the annexures thereto as well as the rival submissions and the applicable law.
31. From the affidavit evidence in the two applications, the following facts are not contested;
 1. The suit is owned by Kabras Farm Limited, the 3rd defendant herein;
 2. The said Kabras Farm Limited purchased the suit property through a public Auction; conducted by Agricultural Finance Corporation in exercise of their Statutory Power of Sale in the year 2008;
 3. George Malumasi, the 1st defendant herein and Hon. Peter Soita Shitanda (deceased) are the only directors of Kabras Farm Limited, the 3rd defendant herein;
 4. The 1st defendant is the only surviving director of the 3rd defendant Company;
 5. There are two decisions issued by this Honourable Court vide and the High Court vide a ruling delivered on 7th July, 2022 and Nairobi High Court Succession Cause NO. 1520 of 2016 delivered on 4th February 2022;
 6. The two decisions referred under paragraph 5 above are given by Courts of competent concurrent jurisdiction and have neither been discharged, reviewed, set aside or appealed against.



32. From the Ruling in Nairobi Succession Cause NO. 1520 of 2016 delivered by Hon. Lady Justice Mugure Thande on 4th February 2022, the learned Judge at page 3 paragraph 10 expressed herself as follows;

“ 10. It is not disputed that the deceased was a director and shareholder of Kabras, the exhibited documents confirm as much. It is also not disputed that Kabras had purchased the suit property but that the transfer to Kabras is yet to be effected. Even if the transfer had been completed and the title was in the name of Kabras, the Applicant would still encounter headwinds. This is because a company is a separate legal entity from its members. This principle is espoused in the famous case of *Salomon v Salomon & Co. Ltd.* [1897] AC 22,.. The suit property belongs to Kabras and not to any of the Company’s individual shareholders. The assertion by the Applicant that the deceased bought the suit property through Kabras is clearly a misapprehension of the concept that a company is a separate legal entity distinct from its members. Accordingly, I find and hold that this Court lacks Jurisdiction to grant the reliefs sought in relation to the suit property as the same does not form part of the estate of the deceased.”

33. I entirely agree with the understanding and interpretation of the law as regards properties bought by a company which belong to the Company and not any of the Company’s individual shareholders.

34. The plaintiff at paragraph 13 of her supporting affidavit to the Notice of Motion dated 7th February 2023 deposed as follows;

“ 13. THAT my late husband had expressed his wishes for the suit property to be inherited by his children namely Terrance , Sidney and Shirley who have been in possession of the suit property to date since its purchase in 2008.”

35. Just the same way the Hon. Lady Justice stated in her Ruling delivered on 4th February 2022, it is my view that the applicant’s assertion that her late husband’s wishes that the suit property be inherited by their three sons namely Terrance, Sidney and Shirley is clearly based on a misapprehension of the concept that a Company is a separate legal entity distinct from its members.

36. I have also looked at the ruling of this Honourable Court delivered on 7th July 2022 by my brother Hon. Mr. Justice Boaz N. Olao. At page 21 paragraph 32 held as follows;

“ 33.In view of the very clear findings by Mugure Thande J that “the suit property belongs to ABRAS and not to any of the Company’s individual shareholders, “ it is difficult to see what prima facie case the Applicant has established. Clearly, She has no right in the suit property which is threatened with violation. Any right she may have had in the suit property was extinguished by the ruling delivered on 4th February 2022 in Nairobi High Court Succession Cause No. 1520 of 2016 which was never appealed.

37. And since no prima facie case has been established, there would be no need to consider the other grounds.....The Applicant is clearly not deserving of the temporary injunction as sought..

“ 34. Ultimately however and having considered all the issues herein, I am persuaded that both the plaint dated 17th February 2022 and the Notice of Motion



grounded on it are res-judicata. They are accordingly struck out with costs to the 1st and 3rd Respondents.”

38. When the 3rd defendant’s application brought under certificate of Urgency was placed before the Hon. Mr. Justice Boaz N. Olao sitting as the Duty Judge on 2nd February 2023, He certified it Urgent and directed the application to be canvassed by way of written submissions. The learned Judge also exercised his discretion and granted temporary injunction orders based on the materials placed before him.
39. The main purpose of a temporary injunction is to protect the rights of a proprietor from irreparable injury and to preserve the power of the Court to preserve the subject matter and ultimately render a meaningful decision on the merits. In doing so, the Court must be careful not to determine any controverted right. That was the finding in the case of *Rosebella Ndumi Mbiti v Jonathan Mbiti Nthuka & 3 Others* [2012] KLR where it was held;
- “The main purpose of of a preliminary injunction is to protect the plaintiff from irreparable injury and to preserve the power of the Court to ultimately render a meaningful decision on the merits. The Court must be careful in considering applications for preliminary injunctions, not to determine any controverted right. The aim is to prevent a threatened wrong or the doing by one of the parties to a litigation, an act which might threaten or endanger the right of the plaintiff.”
40. From the application dated 7th February 2023 and the affidavit evidence as well as the rival submissions by Counsels, it is my finding that plaintiff has not established sufficient grounds for this Honourable Court to discharge the temporary injunction order issued on 2nd February 2023.

The upshot of my finding is as follows;

1. The Notice of Motion application by the plaintiff dated 7th February, 2023 is without merit and the same is hereby dismissed.
2. The 3rd defendant’s application dated 30th January 2023 is hereby allowed and the preliminary injunction order issued on 2nd February, 2023 is hereby confirmed pending hearing and determination of the 1st and the 3rd defendants counterclaim.
3. The costs of the two applications shall be borne by the plaintiff.

READ DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 27TH APRIL, 2023

Hon. E.C CHERONO

ELC JUDGE

In the presence of;

