



**Noorbhai v Nzai & 4 others (Environment & Land Case  
56 of 2022) [2023] KEELC 17215 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17215 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 56 OF 2022  
EK MAKORI, J  
APRIL 26, 2023**

**BETWEEN**

**SHEHNAZ ABDEHUSSEIN EBRAHIMJEE NOORBHAI ..... PLAINTIFF**

**AND**

**ELKANA SAMUEL NZAI ..... 1<sup>ST</sup> DEFENDANT**

**KALUME SAMUEL ..... 2<sup>ND</sup> DEFENDANT**

**PHILIP SULUBU NZAI ..... 3<sup>RD</sup> DEFENDANT**

**SAMUEL KITSAO ..... 4<sup>TH</sup> DEFENDANT**

**SAMSON CHARO ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of an application by the plaintiff dated September 21, 2022 seeking the following orders;
  - 1) Spent.
  - 2) Spent
  - 3) That a temporary injunction be issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants/ respondents by themselves agents, employees, servants, and/or other persons acting on their behalf from developing, alienating, subdividing, selling and/or dealing with the parcel of land known as plot No 377 delineated on plan No 5764 and deposited at Mombasa by an indenture registered in volume LT. XIV folio 64/5 file No 3555 LT 198 and in any manner whatsoever transferring interests herein pending the hearing and determination of this suit.



- 4) That costs of this application be provided for.
2. The application was supported by the affidavit of Shehnaz Abdehussein Ebrahimjee Noorbhai sworn on the same day. She deponed that he was the registered owner of the suit land known as plot No 377 delineated on plan No 5764 and deposited at Mombasa by an indenture registered in volume LT XIV Folio 64/5 File No 3555 LT 198 measuring approximately 31.7 Acres which property first belonged to her father-in-law Ebrahimjee Noorbhai. That she built a 2 bedroomed house on the suit land and placed a caretaker but never lived there herself. She also deponed that after the demise of her father-in-law, the 3 sons of the deceased including her husband Gullamali Ebrahimjee, Amiralali Ebrahimjee Nurbhai, and Abdulhussein Ebrahimjee inherited the suit land, and the same was registered under their names for common tenancy in 1984.
3. She contended that after the demise of the 3 brothers, the applicant who was the wife and sister-in-law proceeded to inherit the property of the deceased through letters of administration which were issued *vide* succession cause 91 of 2001, succession cause 269 of 2001 and succession cause 268 of 2001 Mombasa.
4. Further, she became the registered owner of the suit property sometime in 2019 through the process of transmission, and sometime in 2004, the caretaker Mr Nzai started selling off a portion of land to strangers, and thereafter, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents proceeded to sell part of the property to innocent buyers without authorization from the applicant. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents have neglected, ignored, and refused to give vacant possession of the property to her as the rightful owner.

### Response

5. In response to the application, a replying affidavit sworn by Elkana Samuel Nzai was filed on the October 19, 2022. He alleged that he and the other defendants were all born on the suit property and that his family has carried out extensive developments on the suit property including 9 permanent houses on the suit property which developments were carried out in a span of more than 12 years.
6. He deposed that apart from his family and that of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants, the entire suit property is in fact occupied by over 99 families who have also carried out extensive developments on the suit property without any interruption from the plaintiff. He asserted that the plaintiff and her predecessors in title have all along known of their occupation and possession of the suit property and for the entire period of their occupation, the plaintiff has not interfered with their occupation and possession of the suit property. He also asserted that they have a counterclaim against the plaintiff and it is their case that the plaintiff's rights and/or interest in the suit property has since been extinguished by operation of law and that they have acquired adverse possession of the suit property and are entitled to be registered as owners of the land.

### Submissions.

7. The application was canvassed by way of written submissions with the applicant/ plaintiff filing submissions on the December 2, 2022 through the firm of Angeline Omollo & Associates. Counsel submitted that this court ought to be guided by the case of *Giella v Cassman Brown Co Ltd* 1973 E A 358 which laid down the principles applicable in determining whether or not to issue injunctive orders as follows; a *prima facie* case with a probability of success, whether the applicant runs the risk of suffering an irreparable injury which could not adequately be compensated by an award of damages and a balance of convenience when the court is in doubt.



8. On the first principle, she submitted that the applicant has established a prima facie case with a probability of success as outlined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR stating that ownership of the suit land has been explained through letters of administration issued in succession cause 91 of 2001, 269 of 2001 and 269 of 2001 Mombasa. She also submitted that the applicant became the registered owner of the suit property in 2019 through the process of transmission.
9. On whether the applicant runs the risk of suffering an irreparable injury that could not adequately be compensated by an award of damages, counsel submitted that the suit property is the applicant's inheritance which she holds very dear, and as the beneficial owner she should be allowed to enjoy her proprietorship rights and that any loss that would be suffered by the plaintiff cannot be compensated by an award of damages. On this principle, she relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others*. Finally, on the 3<sup>rd</sup> principle of the balance of convenience, she submitted that the balance of convenience tilts in favour of the plaintiff/ applicant since she has satisfied the evidential burden on how she came to own the suit property.
10. The defendants/ respondents on the other hand filed their submissions on the December 7, 2022. Counsel submitted that on whether a *prima facie* case has been established, the applicant must demonstrate clear and unmistakable rights, which are directly threatened by the defendants. In the present case, the applicant has failed to demonstrate the existence of any rights over the suit property described in the plaint. It was his submission that the suit property described by the plaintiff in her pleadings as title No LT. XIV folio 64/5 file 3555 LT.19 in respect of which an injunction is sought in the application is different from the one registered in the plaintiff's name and because of this, the plaintiff has not established by material evidence any prima facie rights over the parcel of land described in the plaint and in the application.
11. On whether the applicant will suffer irreparable loss, he submitted that the applicant in her application has not demonstrated by evidence any activities made by the defendants on the suit property that may occasion irreparable loss to her.

### **Analysis and Determination**

12. This court has carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions by both counsels. In my considered opinion, the sole issue that arises for determination is whether the applicant has met the threshold for the grant of a temporary injunction pending hearing and determination of the suit herein.
13. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* [1973 EA 358]. This position has been reiterated in numerous decisions from our Superior Courts and more particularly in the case of *Nguruman Limited v 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) if 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.”

14. The applicant contends that she is the registered owner of the suit land known as plot No 377 delineated on plan No 5764 and deposited at Mombasa by an indenture registered in volume LT XIV Folio 64/5 File No 3555 LT 198 measuring approximately 31.7 acres which property first belonged to her father-in-law Ebrahimjee Noorbhai. She also contends that she became the registered owner of the suit property sometime in 2019 through the process of transmission and that sometime in 2004, the caretaker Mr Nzai started selling off a portion of the land to strangers and that thereafter, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents proceeded to sell part of the property to innocent buyers without authorization.
15. The respondents, on the other hand, assert that they were all born on the suit property and that their families have carried out extensive developments on the suit property including 9 permanent houses on the suit property spanning more than 12 years. Equally, the plaintiff and her predecessors in title have all along known of their occupation and possession of the suit property and for the entire period of their occupation, the plaintiff has not interfered with their occupation and possession of the suit property.
16. The plaintiff has informed this court that she became the registered owner of the suit property sometime in 2019 through the process of transmission and that the suit property was registered in her name. A search has since been produced showing that the suit property has since been registered in the applicant's name. The respondents on the other hand have taken the issue that they are entitled to the suit by virtue of the doctrine of adverse possession, which at this point should not prevent the applicant from enjoying injunctive orders on her inherited piece of land.
17. I am alive to the fact that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases. The principle was considered and Lord Diplock made the following observation in *American Cyanamid Co v Ethicon Limited* [1975] 1 ALL ER 504; [1975] AC 396 HL at 510.

“It is no part of the court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

18. I have two warring scenarios in this matter – what Kenyans say kwa ground vitu ni tofauti (on the ground things are different) - that of the applicant who is the registered owner of the property in contestation and the claim by the respondents that they have been living on the piece of land uninterrupted for a period of over 12 years. They have counterclaimed and intend to challenge the title held by the applicant. Photographs attached to the pleadings and responses by the respondents show that they are settled on the suit property and have carried out extensive development. What the court cannot determine at this stage is whether they have occupied the entire portion or part of it. The court can also not determine the duration they have been on the suit property. The applicant too admits that a caretaker for this land Mr Nzai embarked on sale expeditions without colour of right. The predecessors of title to this land acquiesced on their rights when all this was happening. The successor in the title – the applicant inherited the land and admits that the applicants have been on the ground. An alternative mode of dispute settlement has been tried out headed by the area administration. The applicant intended to carve a portion of the land in favour of the respondents who will hear none of it.



19. At the end of the day, what the court needs to balance at this stage is the rights of the two wrangling parties as claimed to await a full and final determination of the matter. The preservation of the substratum of the subject matter or status quo orders as held by the Court of Appeal in the case of *Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others* (civil application E055 of 2021) [2022] KECA 402 (KLR) the Court of Appeal in granting temporary orders of stay of execution to preserve the substratum of a suit property stated as follows:

“We have considered the arguments and submissions canvassed by the applicants and 1<sup>st</sup> respondent. Mr Gikandi has raised the preliminary issue of this court’s jurisdiction to grant the orders sought. It is notable in this regard that the court’s powers and discretion under rule 5 (2)(b) is wide and this court can order a stay of execution, injunction, or stay of further proceedings on such terms as the court deems just. Status quo orders preserve the subject matter of litigation pending the hearing of a suit or appeal, and are therefore a species of stay orders and fall within the ambit of rule 5(2)(b). The power of this court to grant status quo orders has been recognised in various decisions, including in the cases of *Kolongei Farmers Co-operative Society Ltd v Tom Kevolwe Anzingale & 6 others* [2005] eKLR and *Rhoda Mukuma v John Abuoga* [1988] eKLR. The powers of this court in this respect include specifying the terms and extent of the status quo orders.

13. In this regard, the principles applicable in the exercise of the court’s unfettered discretion under rule 5(2) (b) to grant an order of stay are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
14. The applicants herein have referred the court to their memorandum of appeal and the grounds of its appeal therein to demonstrate that it has an arguable appeal. The applicants have in their grounds faulted the *ELC* on the application of the doctrine of *res judicata*, which we find arguable and ought to be canvassed fully. The applicants’ appeal is therefore not frivolous. The first limb of arguability has therefore been satisfied. On the nugatory aspect, it was stated by this court in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227, that “the term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.” See also *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [supra] wherein it was held, *inter alia*, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved.
15. It is notable that the 1<sup>st</sup> respondent does not dispute that the applicants are in occupation of the property which was the subject of the ruling in Malindi *ELC* Case No E063 of 2020, namely Kilifi/Madzimbani/Mitangoni/835 and 841. In the circumstances it is our view that the appeal will be rendered nugatory, if the current status quo with regard to possession and the status of the title to the suit property is disturbed before the determination of the applicants’ appeal.”
20. Pursuant to the Environment and Land Court Practice Directions 2014, this court has been granting status quo orders to preserve the subject matter pending full determination of the suit see for example



Onguto J. in *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR:

“In land matters the maintenance of status quo order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of *Mugah v Kunga* [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice directions *vide* gazette notice No 5178/2014 have followed suit. Practice direction No 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case. I however take note that the gazette notice was issued before this court’s July 16, 2014 decision.

The end result is that status quo orders will issue not just when the court is prompted by way of formal applications for injunction or conservatory or stay orders: see *Texaco Ltd v Mulbery Ltd* [1972] 1 WLR 814, but also when the court is of the view that as a case management strategy, it would be more proportionate and appropriate without prejudicing one party but both, to issue a “status quo” order.”

21. Whereas the applicant had sought injunctive orders at this stage which orders differ from those of status quo to my mind the situation I have commends for issuance of status quo orders and therefore the instant application succeeds to that extent and I hereby issue the following orders:
- a) That the notice of motion application dated September 21, 2022 partially succeeds only to the extent that there be status quo to be maintained on the suit land meaning there shall be no transaction whatsoever including but not limited to alienation, charging, mortgaging, leasing or transferring of proprietary interest of the suit property until this matter is heard and determined;
  - b) That there shall be no eviction of any party from the suit property;
  - c) That there shall be no further constructions or development by the defendant on the suit property and any constructions by the defendants that is ongoing on the suit property to forthwith cease.
  - d) That there shall be maintained peace and tranquility by all the parties and their agents at the suit land at all times during the pendency of this suit until it is heard and determined.
  - e) At this stage the court encourages the parties to consider alternative modes of dispute resolutions either by court annexed mediation or alternative justice system.
  - f) That costs to be in the cause.

**DATED, SIGNED, AND DELIVERED AT MALINDI THIS 26TH DAY OF APRIL, 2023**

**E.K. MAKORI**

**JUDGE**

