



**Stanley & another v Mwongera & 5 others; Rutere & another (Interested Parties)
(Environment & Land Case 151 of 2017) [2023] KEELC 17181 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 151 OF 2017**

**CK NZILI, J
APRIL 17, 2023**

BETWEEN

JANE KANARIO STANLEY 1ST PLAINTIFF

JOCELYN KINANU MWIRICHIA 2ND PLAINTIFF

AND

CLIFFORD MWONGERA 1ST DEFENDANT

JOHN K. MWIRICHIA 2ND DEFENDANT

KIMATHI S MWIRICHIA 3RD DEFENDANT

RUTH NDURU STANELY 4TH DEFENDANT

DAVID MUGO ALIAS WILLIAM MITHIKA MUGO 5TH DEFENDANT

MUTHURI RUFUS M'RINGERA 6TH DEFENDANT

AND

CHARLES NKURU RUTERE INTERESTED PARTY

JULIA KANANU NKURU INTERESTED PARTY

RULING

1. This court has gone through the application dated 12.4.2023. At issue is whether the applicants have made a case to be entitled to interim orders of injunction to stop the intended burial of the 2nd plaintiff on the suit land.
2. A prima facie case has been defined as established if based on the material before court, a right has been established which is likely to be infringed, threatened with breached or has been breached calling for the opposite party to respond to it. See *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003)



eKLR. Further, irreparable loss or damage according to *Nguruman Limited vs Jane Bonde Nielsen & 2 others* (2014) eKLR is that loss or damage which may not be quantified or cannot be compensated by way of damages. In this case, the interested parties' case is based on a plaint dated 1.11.2018. They claim purchasers rights based on a sale agreement dated 28.12.2016.

3. The prayers are inter alia specific performance, damages for the breach of the sale agreement and refund of Kshs. 5,250,180/= being the purchase price. On the other hand, the plaintiff in this suit among them the 2nd plaintiff now deceased claims the suit land out of customary trust against the 1st, 2nd and 3rd defendant, and seeks for the nullification or cancellation of any resultant subdivision and title deeds in favour of the 4th defendant. A scene visit report dated 26.10.2017 confirmed that the plaintiff were in occupation of Parcel No. 980. The consent ruling dated 18.7.2018 allowed the 2nd plaintiff to occupy the said parcel of land as well as the 1st defendant.
4. The interested parties sought to join the suit vide chamber summons dated 9.5.2019 since they had also sued the 1st defendant in Meru CMCC NO. 194 of 2018 for specific performance and an alleged collusion between the 1st defendant and the rest of the family members. The plaintiffs' contention is that the alleged sale was done without the consent or approval of all family members.
5. In the sale agreement attached to the application, the applicants were to take vacant possession after clearing the full purchase price. They have admitted before this court that they only paid Kshs.5,250,180/= out of Kshs.7.5 million. Therefore, their rights if any are yet to crystallize.
6. In this suit, the land as per a certificate of official search dated 19.2.2017 belongs to the 1st defendant and not the plaintiff or the interested parties.
7. This suit is part heard before ELC Court No. 1 which is on annual leave till 28.4.2023. The rights of the parties over the suit property are yet to be conclusively determined.
8. Exhumation of a body of a human being is ordinarily an option though a sad affair, if the applicants were to be found deserving the land after the hearing.
9. In my considered view, the applicants have in their pleadings quantified their loss or damages as regards their entitlement to the land. I see no need to unnecessarily disturb the process of burial. See *Eliud Kingwara Achawo vs Philip Achieng John & another* (2015) eKLR.
10. In the case of *Joseph Siro Masioma vs Housing Finance Corporation of Kenya* (2008) eKLR, the court held that a party cannot be condemned to take damages in lieu of his crystallized right which cannot be protected by an order of injunction.
11. As regards the balance of convenience in *Chebii Kipkoech vs Barnabas Tuitoek Bargoria & another* (2019) eKLR, the court held that the meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff the inconvenience caused to them would be greater than that caused to the defendant if the injunction is granted and the suit ultimately dismissed.
12. Further, in *Paul Gitonga Wanjau vs Gathuthi Tea Factory Co. Ltd & 2 others* (2016) eKLR, the court held that where any doubt exists as to the applicants' rights 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 the nature of the injury which the respondent on the other hand would suffer if the injunction is granted and should ultimately turn out to be right and that the court will seek to maintain the status quo in determining where the balance of convenience lies.



13. In this suit, the applicants have been aware that the plaintiffs have been in occupation of the suit land. This was confirmed by the scene visit report. Similarly, the 1st defendant who holds the title deed has not sought to have his sisters vacate the suit premises so as to hand over vacant possession to the applicants herein. The ownership title deed in favour of the 1st defendant who sold the land to the applicants is under attack from the plaintiff on account of customary trust and for lack of consent to sell or transfer to the applicants.
14. Consequently, and in view of the foregoing, I find the applicants have failed to surmount to three conditions under the *Giella vs Cassman Brown* (1973) eKLR. It is also not in the interest of justice to issue the orders sought since there are no particulars of where the body of the 2nd plaintiff is lying, when the burial is likely to take place and on what exact portion.
15. Additionally, as applicants' claim is direct at the 1st defendant and not the plaintiff in which the said 1st defendant has been prohibited from disposing until the suit is heard and determined as per the ruling delivered on 18.7.2018 by this court, which is yet to be reviewed.
16. The upshot is I find the application dated 12.4.2023 lacking merits. The same is dismissed with no orders as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 17TH DAY OF APRIL, 2023

In presence of:

C/A: John Paul

Miss Kaume for the plaintiffs/respondents

Mr. Ndubi for applicants

Miss Kimotho for the 1st defendant

HON. C.K. NZILI

ELC JUDGE

