



Mutuse & 15 others v Stanley & Sons Limited & another; County Government of Makueni & 2 others (Interested Parties) (Environment & Land Case 8 of 2020) [2023] KEELC 17746 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 8 OF 2020**

**TW MURIGI, J
MAY 31, 2023**

BETWEEN

MARY WAENI MUTUSE & 15 OTHERS PLAINTIFF

AND

STANLEY & SONS LIMITED 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

AND

THE COUNTY GOVERNMENT OF MAKUENI INTERESTED PARTY

THE NATIONAL LAND COMMISSION INTERESTED PARTY

CHIEF LAND REGISTRAR INTERESTED PARTY

RULING

1. Before me for determination is the Notice of Motion dated 20th February, 2020 brought under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules, 2010 in which the Plaintiffs/Applicants seek the following orders: -
 1. Spent.
 2. That an interim temporary injunction does issue in the first instance preventing and/or stopping and/or prohibiting the 1st Respondent/Defendant herein, Stanley & Sons Limited, together with its servants, agents and/or assigns from in any way subdividing, transferring or registering into any other persons' name and/or interfering with the current status of the suit properties herein known as Land Reference Number LR 1748 Kiima Kiu/Kalanzoni and Mukaa ward pending the inter partes hearing and determination of the instant application.



3. That an interim temporary injunction does issue in the first instance preventing and/or stopping and/or prohibiting the 1st Respondent/Defendant herein, Stanley & Sons Limited, together with its agents and/or assigns from in any way subdividing, transferring or registering into any other persons' the suit properties herein known as Land Reference Number LR 1748 Kiima Kiu/Kalanzoni and Mukaa ward pending the hearing and determination of the instant suit.
 4. That in the alternative to prayer 3 above, status quo on the suit property be maintained wherein the 1st Respondent/Defendant herein, Stanley & Sons Limited remain in possession of the suit property but be restrained from in any way interfering with the existence and status of the suit property pending the hearing and determination of the instant suit.
 5. That an order do issue for the joint survey or granting the surveyor of the Interested Party herein, the County Government of Makueni, access to the suit property to survey and ascertain the acreage pending the hearing and determination of the instant suit.
 6. That an order do issue for the consolidation of this present suit with Makueni ELC Petition No. 5 of 2018 which is pending before this Honourable Court.
 7. Any other reliefs that the Court may deem fit to grant.
 8. The costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Mary Waeni Mutuse sworn on even date.

The Applicants' Case

3. The Applicant averred that she is the Secretary of Kiamuka Society, which is duly registered and represents the interests of the inhabitants of Kiima Kiu – Kalanzoni and Mukaa Ward in Makueni County. She added that the 1st Defendant is the registered owner of all that land known as LR. No. 1748/Kiima Kiu/Kalanzoni and Mukaa Ward measuring approximately 5048 acres.
4. The thrust of the application is that the suit property was originally ancestral land occupied by the Plaintiffs' parents and relatives. That during colonization, the suit property was arbitrarily taken away from the Plaintiffs' parents and granted to Robin Woodcraft Stanley for a period of 999 years from 1st October, 1947.
5. That the term of 999 years has since been reviewed to 99 years by dint of Article 65 (2) of the *Constitution*. That the Plaintiffs' ancestors lost their land by reason of the atrocities suffered in the hands of the colonial Government. The Applicants averred that they continue to suffer great damage because there has been no appropriate method for redress of the historical land injustice.
6. The Plaintiffs further averred that they filed a complaint over historical land injustice with the 2nd Interested Party being Claim No. NLC/HLI/541/2018 while the 1st Defendant equally filed a Memorandum of Complaint dated 26/10/2018 before the 2nd Interested Party.
7. That while the two complaints were pending before the 2nd Interested Party, the 1st Defendant moved this Court vide Petition No. 5 of 2018 *Stanley & Sons Limited v The Hon. Attorney General & 4 others*.
8. The Applicants contended that Petition No. 5 of 2018 and the instant suit are substantially between the same parties over the same subject matter and should therefore be consolidated.



9. It was further averred that in addition to the 5048 acres comprised in the suit property, the 1st Defendant has illegally fenced off community land unto the registered title making an excess of 6000 acres. The Applicant averred that the 1st Defendant intends to subdivide, transfer or register the suit property in other persons' names.

The 1st Defendant's Case

10. Opposing the application, the 1st Defendant filed a Replying affidavit sworn on its behalf by Robin Alan Stanley its Managing Director on 20th April, 2020. He averred that the deponent of the supporting affidavit to the instant application is not the Secretary to Kiamuka Society. It was averred that Geoffrey Maweu Matheka is the true Secretary of Kiamuka Society and as such Mary Waeni Mutuse lacks authority to institute these proceedings on behalf of the Plaintiffs. On that ground, the 1st Defendant argued that the suit should be struck out ex debito justitiae.
11. The 1st Defendant averred that, Robin Woodcraft Stanley acquired an indefeasible title in the suit property in consideration of a premium of Kshs. 37,860/= pursuant to the Crown Lands Ordinance 1902. He further averred that since July 2018, the Plaintiffs have orchestrated actions aimed at depriving the 1st Defendant of the suit property.
12. That on or around July 2018, the Plaintiffs caused the area MCA Hon. Joseph Muthini Muema to lodge a motion with the County Assembly of Makueni proposing that a complaint be filed with the 2nd Interested Party that the suit property be reallocated to the Plaintiffs. That the County Assembly of Makueni did not file a complaint with the 2nd Interested Party as the motion was based on false and unsubstantiated allegations.
13. It was further averred that the Plaintiffs changed tact and on 8th August, 2018 they filed proceedings against the 1st Defendant in Makueni ELC Case No. 82 of 2018 *William Nduse Matheka & 2 Others (Suing on their own behalf and as officials of Kiamuka Society) v Stanley & Sons Limited*.
14. That the 1st Defendant filed ELC Petition No. 5 of 2018 *Stanley & Sons Limited v The Attorney General, the National Land Commission, the County Assembly of Makueni and William Nduse Matheka* subsequent to which the 1st Defendant obtained orders restraining the Plaintiffs, the 1st and 2nd Interested Parties from surveying and interfering with the suit property pending the hearing and determination of the suit.
15. The 1st Defendant contended that the instant proceedings offend the provisions of Section 6 of the *Civil Procedure Act* and are intended to sidestep the orders issued in ELC Petition No. 5. of 2018. He argued that the orders of consolidations of these proceedings with ELC Petition No. 5 of 2018 would be inappropriate given that different considerations apply to Constitutional matters and to civil matters. He argued that the continuation of these proceedings when there are parallel proceedings before the 2nd Interested Party constitutes a further abuse of court process.
16. Lastly, it was averred that the Plaintiffs have failed to demonstrate that they have a prima facie case with a probability of success. That the Plaintiffs had failed to demonstrate what harm would be suffered if the orders sought are not granted. That the balance of convenience tilts in favour of the 1st Defendant and therefore, the application and the suit ought to be dismissed with costs to the 1st Defendant.
17. A further replying affidavit was sworn on behalf of the 1st Defendant's by Michael Eustace Aronson on 21st April, 2020. He averred that he served as a Registrar of Titles in the Nairobi Land Registry since the year 1951 after being admitted as an Advocate. He further averred that the suit property was



indeed Crown Land and that the Title deed thereof was properly issued pursuant to the provisions of the Crown Lands Ordinance.

18. That the suit property was surveyed and a Deed Plan No. 41836 dated 29/11/1947 issued. That pursuant to Section 75 of the now repealed *Constitution*, the Government of Kenya guaranteed legally registered owners of land absolute and indefeasible title to their land.
19. On 24th November, 2020, the Plaintiffs filed a further affidavit sworn on their behalf by William Nduse Matheka. He averred that he is the Chairman of Kiamuka Society. He further averred that at, all material times to this suit, Mary Waeni Mutuse was the Secretary to Kiamuka Society.
20. The deponent averred that Makueni ELC 82 of 2018 *William Nduse Matheka & 2 others v Stanley & Sons Limited* was never heard on its merits as envisaged in Section 7 of the *Civil Procedure Act* and thus denied that the current suit is res judicata.
21. It was further averred that the Plaintiffs have evidence to demonstrate that the 1st Defendant's title to the suit property was not lawfully acquired. The deponent urged this Court to allow the application.
22. The parties agreed to canvass the application by way of written submissions.

The 1st Defendant's Submissions

23. The 1st Defendant's submissions were filed on 16th April, 2021. On its behalf, Counsel submitted that the prayer for consolidation is overtaken by events since Makueni ELC Petition No. 5 of 2018 was compromised and withdrawn vide directions issued by the Court on 02/03/2021. It was also submitted that the Plaintiffs had failed to provide their written submissions.
24. Counsel for the 1st Defendant submitted that the test for the grant of an interlocutory injunction was established in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. Counsel submitted that the conditions must be considered sequentially.
25. On whether the Plaintiffs have established a prima facie case, Counsel further submitted that the 1st Defendant is the registered owner of the suit property which was issued by the Government under the now repealed Registration of Titles Act. That the 1st Defendant's title to the suit property is now deemed to have been issued in accordance with the *Land Registration Act*, 2012.
26. Counsel argued that the Plaintiffs do not have a legitimate interest in the suit property as their claims to the suit property are vague since they are not supported by evidence. Counsel submitted that the Plaintiffs had previously in Makueni ELC Case No. 82 of 2018 *William Nduse Matheka & 2 Others (suing on their behalf and as officials of Kiamuka Society v Stanley & Sons Limited)*. averred that they were trespassers to the suit property.
27. It was contended that in law, a trespasser has no color of right over property. That the Plaintiffs cannot be allowed to approbate and reprobate their position relating to their claim to the suit property.
28. Counsel submitted that under Section 26 (1) of the *Land Registration Act*, 2012, the title deed to the suit property is conclusive evidence that the registered owner has absolute and indefeasible title. Hence, it was argued that the Plaintiffs had failed to prove a prima facie case for the grant of an injunction.
29. Counsel submitted that having failed to prove a prima facie case, then the Plaintiffs could not prove irreparable harm which cannot be compensated in damages. Counsel argued that the Plaintiffs did not prove that they have been in recent possession of the suit property which has at all times been in the 1st Defendant's possession.



30. On the balance of convenience, Counsel submitted that it tilts in favour of the 1st Defendant who has an absolute and indefeasible title to the suit property. Counsel contended that the Plaintiffs have neither demonstrated any legal rights or equitable interests in the suit property.
31. Lastly, Counsel argued that the suit property is private land and there being no boundary dispute in respect of the suit property, then the Plaintiffs are not entitled to an order that the suit property be surveyed. Counsel urged this Court to dismiss the application with costs.
32. To buttress his submissions, Counsel relied on the bundle of authorities dated 12/04/2021.

The 1st Interested Party's Submissions

33. The 1st Interested Party's submissions were filed on 9th February, 2023. On its behalf, Counsel reiterated the principles set out in the case of *Giella v Cassman Brown (supra)* and submitted that the Applicants have demonstrated that they are entitled to an order for injunction. On whether the Applicants have established a prima facie case, Counsel argued that the Applicants claim is based on perceived historical injustice in that the 1st Defendant's title to the suit property was acquired through illegal dispossession of land.
34. On whether the Applicants will suffer irreparable harm, Counsel argued that the Applicants are homeless and destitute dating back to the colonial regime. It was contended that the purpose for the injunctive relief is to protect the substratum of the suit in order to avoid a scenario where there is need to enjoin a third party by virtue of registration of an interest in the suit property.
35. On the balance of convenience, Counsel argued that it tilts in favour of the Applicants. Counsel argued that the Court should balance the greater public interest on the question of the right to land held by a particular community or class of members.
36. Counsel further submitted that it is in the interest of justice that the suit property be surveyed so as to establish the exact limits of the parties interests in the suit property.
37. When this matter came up for directions on 31/10/2022, Counsel for the Applicants made representation that their submissions dated 28/09/2022 had been filed in Court. However, upon perusal, the same are not in the Court record.

Analysis and Determination

38. Having considered the application, the respective affidavits and rival submissions, the following issues arise for determination:-
 - i. Whether the Applicants have met the threshold for the grant of an injunction;
and
 - ii. Whether the Applicants have demonstrated that the suit property ought to be resurveyed.
39. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides that;

“Where in any suit it is proved by affidavit or otherwise-

 - (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”

40. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giellla v Cassman Brown & Co Ltd* [1973] EA 358 as follows:-First the applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
41. The Court will first determine whether the Applicants have established a prima facie case with a probability of success.
42. A prima facie case was defined by the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR as follows;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 as to call for an explanation or rebuttal from the latter.”
43. The Plaintiffs claim to the suit property is based on the grounds that the land was historically occupied by their parents, grandparents and relatives who were its native residents prior to the colonial regime.
44. That the suit property was utilized as ancestral land, communal grazing land and for purposes of traditional shrines.
45. The Applicant averred that the Plaintiffs’ ancestors were unlawfully dispossessed of their land by the 1st Defendant. The 1st Defendant on the other hand averred that he is the registered owner of the suit property. It is not in dispute that the 1st Defendant is the registered owner of the suit property. Both parties are claiming ownership over the suit property. According to the certificate of title, the suit property is registered in the name of the 1st Defendant. The Applicants claim to the suit property is based on historical injustice.
46. The issue of whether the Plaintiffs grandparents and parents were dispossessed of the suit property are issues which need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the court is not required to determine the issues which will be canvassed at the trial.



47. The court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy. This was the holding in the case of *Mbutia v Jimba Credit Finance Corporation Ltd & another* [1988] eKLR, the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
48. Similarly, in the case of *Edwin Kamau Muniu v Barclays Bank of Kenya Ltd* Nairobi HCCC No. 1118 of 2002 the court held that;
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
49. Section 26 of the *Land Registration Act* 2012, provides that a certificate of title is proof of ownership and provides for circumstances under which the title can be impeached. Until that is done the rights of a registered proprietor shall be taken by all courts as prima facie evidence that the person so named is the absolute and indefeasible owner. On that ground, I find that the Plaintiffs have not established a prima facie case with a probability of success.
50. On that ground, this court finds and holds that the Applicants have not established a prima facie case with a probability of success. The conditions set out in the *Giella v Cassman Brown Case (supra)* are to be considered sequentially.
51. Having found that the Applicants have failed to establish a prima facie case with a probability of success, this courts finds that it will be immaterial to delve into the other limbs that are to be considered on grant of a temporary injunction.
52. In so finding I am persuaded by the holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the Court of Appeal opined as follows: -
- “...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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... 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 are 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.”
53. The Applicants sought for an order to have the suit property re-surveyed so as to determine the interests of the parties herein. The Applicants produced the 1st Defendant’s title documents marked as Exhibit “MWM5”. Deed Plan No. 41836 dated 29th November, 1947 indicates that the suit property was surveyed.
54. The Plaintiffs have not pleaded or particularized the existence of a boundary dispute. Thus, the prayer for survey of the suit property must fail. The Applicants seeks an order for the consolidation of this suit with Makueni Petition No. 5 of 2018. The grounds are basically that the parties and the cause of



action is the same. The 1st Defendant on the other hand submitted that the application is overtaken by events as the suit was compromised.

55. I have carefully perused Makueni ELC Petition No. 5 of 2018 and I find that vide the directions issued on 2nd March 2021, the Petition was compromised in terms of prayers (a) and (b) of the Petition with no orders as to costs. The Petition was marked as withdrawn. This court finds and holds that the prayer for consolidation is therefore overtaken by events.
56. The upshot is that the application dated 20th February, 2020 is devoid of merit and the same is dismissed with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF MAY, 2023.

In the presence of: -

Court clerk - Mr. Kwemboi

Deya holding brief for Kuyo for the 1st Defendant.

Munywoki for the 1st Defendant.

