



**Mohamed v Tayabali & 5 others (Environment & Land Case
145 of 2022) [2023] KEELC 18129 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 145 OF 2022**

NA MATHEKA, J

JUNE 21, 2023

BETWEEN

ABDULKADIR SAID MOHAMED PLAINTIFF

AND

MURTAZA SHABBIR TAYABALI 1ST DEFENDANT

QUTBUDDIN SHABBIR TAYABALI 2ND DEFENDANT

ISLAM AWADH 3RD DEFENDANT

MBARAK MOHAMED 4TH DEFENDANT

ABDALLA MOHAMED ALI 5TH DEFENDANT

LAND REGISTRAR, MOMBASA 6TH DEFENDANT

RULING

1. The application is dated December 16, 2022 and is brought under Sections IA, 1B, 3 & 3A & 63(e) of the *Civil Procedure Act*, Order 40 Rule 1 & 2 and Order 51, *Civil Procedure Rules*, Section 13(7) (a) of the *Environment & Land Court Act* seeking the following orders;
 1. That this application be certified as urgent and service of the same be in the first instance dispensed with.
 2. That pending the hearing of this application interpartes, this Honourable Court be pleased to issue a temporary injunction restraining the 1st & 2nd Defendants from alienating, selling, subdividing, developing and/or in any manner whatsoever encumbering all that parcel of land known as Plot No 16/R/Group I Takaungu-LT-15 Folio 2788 File 3024, and restraining the 6th Defendant from allowing, entertaining and/or registering any dealing(s) with the said property.



3. That pending the hearing of this application interpartes, this Honourable Court be pleased to issue a temporary injunction restraining the 3rd, 4th & 5th Defendants by themselves, their agents, employees, servants, hirelings and/or any person claiming rights under them or through them from going into or in any way whatsoever entering and/or interfering with or any part of all that parcel of land known as Plot No 16/R/Group I-Takaungu-LT-15 Folio 2788 File 3024.
 4. That for purposes of prevention of any fraud and/or improper dealings, this Honorable Court be pleased to issue an Order prohibiting all dealings whatsoever with all that parcel of land known as Plot No 16/R/Group I-Takaungu-LT-15 Folio 2788 File 3024 pending the hearing and final determination of this suit.
 5. That pending the hearing and final determination of this suit, this Honorable court be pleased to issue an interlocutory injunction restraining the 3rd, 4th & 5th Defendants by themselves, their agents, employees, servants, hirelings and/or any person claiming rights under them or through them from going into or in any way whatsoever entering and/or interfering with or any part of all that parcel of land known as Plot No 16/R/Group I-Takaungu-LT-15 Folio 2788 File 3024
 6. That the costs of this application be provided for.
2. It is grounded on the facts that as averred in the plaint and deponed in the supporting affidavit herein, the subject parcel of land was registered in the names of the 1st and 2nd Defendant under questionable circumstance, which glaringly evidences illegality, error and/or fraud. There is genuine fear that with the existence of this suit against the said questionable registration, the 1st and 2nd Defendant may decide to get rid of this property by disposing it off by way sale to unsuspecting third parties, or encumber it by way of bank charges, and should any of these happen the outcome of this suit, however favourable, will be rendered nugatory. The 3rd, 4th 5th Defendants have, without any colour of right forcefully invaded the suit property, destroyed its vegetation cover, and have since embarked on subdivision of the same. That unless this suit property is persevered as it is, and the Defendants are given leeway to succeed with their aforesaid mischiefs the Plaintiff/Applicant will definitely suffer irreparable loss. The applicant's case has overwhelming chances of success.
 3. The 1st and 2nd Defendants state that they are the beneficiaries of the Estate of Shabbirhussein Noorbhai (deceased). Annexed is a copy of the Asset and marked F1. That the parcel of land known as portion No group I Takaungu was purchased by the family in 1951 from one Mariam Binti Ahmed Salim Bahyan. Annexed a copy of the Indenture and marked it F2. That the suit property was then registered in the name of the 1st and 2nd Defendants. Annexed is a copy of the Certificate of Postal Search dated December 18, 2014 and marked F3. That the 1st and 2nd Defendants have since sold the property and are no longer the registered owners thereof. Annexed is copy of the Certificate of Postal Search dated April 13, 2023 and marked F4. That the aforesaid search shows that the current registered owners are George Odull and Abubakar Maalim. The Plaintiff/Applicant states that on 29th February 2001 the suit land was owned by her mother Hadijah said Hamid and the said Miriam Bint Ahmed. On conducting another Search in 2014 the land was now in the names of the 1st and 2nd Defendants as beneficiaries. That she could not find the original indenture of the suit land issued on January 3, 1955.
 4. This court has considered the application and submissions therein. The power of the court in an application for interlocutory injunction is discretionary, the discretion is judicial and is exercised on the basis of law and evidence. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, set out the three requirements that has to be satisfied in an interlocutory injunction application. The applicant has



to establish his case only at a *prima facie* level, demonstrate irreparable injury if a temporary injunction is not granted, and where the court has any doubts, it will be decided on a balance of convenience.

5. The court of Appeal in [Mrao Ltd vs First American Bank of Kenya Ltd & 2 others](#) (2003) KLR 125 defined a *prima facie* case is. It held that;

So what is a *prima facie* case? I would say that 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” The court went further to hold that “A *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant case upon trial. That is clearly a standard which is higher than an arguable case.”

6. The Respondent submitted that the 1st and 2nd Defendants are the beneficiaries of the Estate of Shabbirhussein Noorbhai (deceased). That the parcel of land known as portion No group I Takaungu was purchased by the family in 1951 from one Mariam Binti Ahmed Salim Bahyan. That the suit property was then registered in the name of the 1st and 2nd Defendants. That the 1st and 2nd Defendants have since sold the property and are no longer the registered owners thereof.

7. The Court of Appeal in [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) (2014) eKLR held that;

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

8. The court in [Nguruman Limited](#) (*supra*), found that the three conditions and stages have to be applied as separate, distinct and logically. It was held that;

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 is 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. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

9. In the instant case, I find that the Plaintiff/Applicant has established a *prima facie* case but has not established what irreparable loss they would suffer as they are not in possession of the suit land. It is also not disputed that the ownership was changed way back in 2014 and this suit was filed in 2022. I find this application has no merit and is dismissed with costs. Parties are advised to comply with order 11 and set down this matter for hearing.



10 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE, 2023.

N.A. MATHEKA

JUDGE

