



REPUBLIC OF KENYA



**Marino & another v Oduor & another (Environment & Land Case
4 of 2022) [2023] KEELC 18193 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 4 OF 2022**

**MAO ODENY, J
JUNE 20, 2023**

BETWEEN

SANTIN MARINO 1ST PLAINTIFF

SANDRA DICKSON 2ND PLAINTIFF

AND

JABESS MDHAI ODUOR 1ST DEFENDANT

REBECCA MUTOLA 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated January 26, 2022 by the Plaintiff/Applicant seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That upon inter-parte hearing, an injunction be issued restraining the Defendant by themselves, agents, servants, legal representatives. Workmen or anyone claiming interest through them from entering, remaining, constructing, selling, leasing and/or dealing with the suit property being land portion known as number 5519 (Original Number 1738/21) Malindi LT 38 Folio 270A/1 File Number 6724 measuring 112.82 acres pending the hearing and determination of this suit.
 - d. That costs to tis application be provided for.
2. The Application was supported by the grounds on the face of the application and the affidavit of Santin Marino sworn on December 14, 2021 where he deponed that the Plaintiffs were at all material times



the registered owners of all that land known as number 5519 (Original Number 1738/21) Malindi LT 38 Folio 270A/1 File Number 6724 measuring 112.82 acres.

3. He further stated that sometime in the year 2018, the 1st Defendant trespassed on the suit property and thereafter illegally sold a portion to the 2nd Defendant. That the Plaintiffs never entered into any agreement for sale with the Defendants and that the only person they permitted to enter the land as a caretaker was one Jane Vidzo Kazungu who also holds their power of attorney.
4. The Applicant stated that the Defendants kicked out the said Jane Kazungu from the suit property and commenced construction of a perimeter wall thereon.
5. The Defendants opposed the application vide Replying Affidavits filed on June 3, 2022, where the 1st Defendant deponed that the application was defective for want of written authority from the 2nd Plaintiff authorizing the 1st Plaintiff to swear the supporting affidavit.
6. The 1st Defendant deponed that he was the immediate former owner of the suit property having purchased the same from one Moses Ojala Sikuku on February 8, 2018 and that he transferred the suit property to the 2nd Defendant for a consideration of Kshs 1,000,000/- as per the sale agreement dated September 28, 2021 and that the indenture produced by the Plaintiffs referred to a different parcel of land not the suit property. The 1st Defendant added that there was no one in occupation when he took possession of the suit property.
7. The 2nd Defendant adopted the 1st Defendant's averments and stated that the suit property she purchased measured 1.029Ha and not 112.82 acres as alleged by the Plaintiffs. According to her the suit property was a different portion from hers.
8. Parties agreed to canvass the application by way of written submissions but at the time of writing this ruling only the Defendants had complied. The Plaintiff/Applicant never filed submissions.

1ST Defendant' S Submissions

9. Counsel for the 1st Defendant relied on the principles expounded in the case of *Giella v Cassman Brown and Bros Ltd [1973] EA 358* that a party must establish a prima facie case with probability of success and quoted the definition of a prima facie case stated in the case of *Mrao Limited v First American Bank of Kenya [2003] KLR 125*.
10. Counsel further submitted that the Plaintiffs failed to establish a prima facie case since the copy of indenture produced as proof of ownership referred to a different parcel of land from that which the Defendants own.
11. It was counsel's submission that the Plaintiffs failed to satisfy the second requirement of showing that they will suffer irreparable injury which would not be adequately compensated by an award of damages and relied on the case of [*Pius Kipchirchir Kogo -v- Frank Kimeli Tenai \[2018\] eKLR*](#).
12. Finally, counsel stated that the balance of convenience tilts in favour of the 1st Defendant and that since the latter was not in occupation of the suit property, injunctive orders could not be issued against the 1st Defendant.
13. The 2nd Defendant relied on the same case law cited above and submitted that the Plaintiffs did not provide any evidence of ownership of the suit property and that the alleged power of attorney was in relation to a different parcel of land and urged the court to dismiss the application with costs.



Analysis And Determination

14. In applications for temporary injunctions, a party must meet the threshold as was held the case of *Giella –v- Cassman Brown* [supra] as aptly submitted by the Defendants. This position has been reiterated in numerous decisions 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) Establish his case only at a prima facie level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests 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. See *Kenya Commercial Finance Co Ltd V Afraha Education Society* [2001] Vol 1 EA 86. 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.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.'

15. Therefore, the issue for determination is as to whether the Plaintiff has met the threshold for grant of an interlocutory injunction. The first question is whether the Plaintiffs have established a prima facie case against the Defendants.
16. The Plaintiffs in the application stated that they were at all material times the registered owners of all that land known as number 5519 (Original Number 1738/21) Malindi LT 38 Folio 270A/1 File Number 6724 measuring 112.82 acres. There is nowhere in the pleadings stating the measurement of a portion of 1.029Ha. The Plaintiffs were under a duty to distinguish between the measurement of 112 acres and 1.029 Ha and the location of the parcel or portion of land.
17. This leaves a doubt as to whether the land the Plaintiff is claiming is similar to the one the Defendants also claim. The Plaintiff had an opportunity to rebut the Defendant's assertion by filing submissions as ordered.



18. For starters to establish a prima facie case, it was incumbent upon the Plaintiff to prove that they have an interest in the suit land. He who claims must prove as defined in *Halsbury's Laws of England, 4th Edition, Volume 17*, at paras 13 and 14 thus:

' The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.'

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?'

19. I find that the Plaintiff has failed to establish a prima facie case with a probability of success against the Defendants.
20. The second question is whether the Plaintiffs would suffer irreparable injury if the injunction sought is not granted. The Plaintiffs averred that the Defendants have cleared indigenous trees and commenced construction of a perimeter wall thereon and attached photographs.
21. The photographs attached only show a halfway done perimeter wall but does not show the portion where the indigenous tree have been cut. There is no evidence that the photographs were taken on the suit land.
22. In the interest of justice, it would be prudent to grant an order of status quo to be maintained to preserve the substratum of the case as was held in the case of *Joel Mugambi Mukira & 2 others (for and on behalf of Kimathi tenants' welfare group) v County Government of Nyeri [2019]eKLR* that;
- ' 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. The court's practice directions vide Gazette Notice No 5178/2014 Practice direction No 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.'
23. The upshot is that an order of status quo is hereby granted pending the hearing and determination of the case. Each party to bear their own costs

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE



NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

