



**Mose v Kirwa (Environment & Land Case 91 of 2016)
[2023] KEELC 18001 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 91 OF 2016**

JM ONYANGO, J

JUNE 15, 2023

BETWEEN

MARY KWAMBOKA MOSE PLAINTIFF

AND

ASHA CHEBET KIRWA DEFENDANT

RULING

1. By a Notice of Motion dated February 25, 2023 the Applicant filed an application seeking the following orders:
 - (a) Spent
 - (b) Spent
 - (c) That the Respondents, her servants, agents, any other person claiming under her or any other person whatsoever be restrained by way of temporary injunction from selling or disposing of, alienating or in any manner dealing with the plaintiff's land which is 4 acres of land parcel number Uasin Gishu /Tapsagoi/267 pending the hearing and determination of this suit.
 - (d) Costs of this suit (sic)
2. The application is premised on the grounds set out in the Notice of Motion and the Applicant's Supporting Affidavit sworn on the February 24, 2023.
3. The Applicant averred that she purchased a parcel of land measuring 4 acres out of land parcel number Uasin Gishu /Tapsagoi/267 whose total acreage is 9.4 hectares from one Salim Kiprono Kirwa (now deceased) and Asha Chebet Kirwa, the Defendant herein on June 27, 2006. That she was given vacant possession of the said parcel of land and she has been in occupation thereof since 2006.



4. She further averred that following the demise of Salim Kiprono Kirwa, the Defendant obtained a Grant of Letters of Administration vide Eldoret HC Succession Cause No 192 of 2015. She then wrote a letter to the Applicant, through her advocate demanding that she accepts a refund of the purchase price of Kshs 640,000 which she paid for the said parcel and vacates the same.
5. The Applicant thereafter applied for revocation of the Respondent's Grant on the ground that the Respondent had failed to disclose her interest as a purchaser, but her application was dismissed. She subsequently appealed to the Court of Appeal and her appeal was equally dismissed on May 27, 2022. In the meantime, she had instituted this suit which had been stayed pending the outcome of the succession case. It is her averment that following the dismissal of her appeal, the Respondent has threatened to sell the Applicant's parcel of land and the Applicant fears that if the suit land is sold, she will be deprived of her rightful share therein.
6. The Respondent filed a Replying Affidavit sworn on March 15, 2023 in opposition to the application. In the said affidavit she avers that the application has been overtaken by events as she is in possession of the suit property and has ploughed 4 acres thereof. She admits that the Applicant bought a portion of land measuring 4 acres from the deceased but the Land Control Board refused to give consent to transfer the 4 acres to the Applicant.
7. She avers that the Applicant applied for revocation of the Respondent's Grant in HC Succession Cause No 192 of 2015 but her application was dismissed. The Applicant's appeal was also dismissed. The Respondent therefore avers that this matter is res judicata.
8. In response to the Replying Affidavit, the Applicant filed a Further Affidavit denying that the matter was res judicata as the issue of ownership of the suit property has not been determined and in its Ruling the High Court stated that the issue of ownership should be determined by the Environment and Land Court.
9. The Applicant avers that the Respondent's entry into the suit property is an act of trespass as she was under the mistaken belief that the Court of Appeal had determined that the land belonged to her.
10. The application was disposed of by way of written submissions and both parties filed their submissions.

Issues for Determination

11. Having considered the Notice of Motion and rival submissions, the singular issue for determination is whether the Applicant has met the conditions for the grant of a temporary injunction.

Analysis and Determination

12. The principles that guide the court in considering whether or not to grant an application for injunction were set out in the case of *Giella v Cassman Brown & Company Ltd* 1973 EA 358 which are as follows:

“First, the applicant must show that he has 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 injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”



13. In the case of [Mrao v First American Bank of Kenya Limited](#) [2003] eKLR Bosire JA (as he then was) stated as follows:

“A *prima facie* case is one 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”

14. The Applicant’s case is predicated on the fact that she purchased a portion of land measuring 4 acres out of land parcel no Uasin Gishu /Tapsagoi/267 which she has been occupying since 2006. The deceased had the intention of transferring the land to her but the Land Control Board failed to grant him consent to transfer. It is her contention that she is entitled to the 4 acres and the Respondent should be restrained from repossessing the same. In her Paint she has sought an order of specific performance.

15. The first question I have to determine is whether the Plaintiff has a *prima facie* case with a probability of success. As was stated in the case of [Nguruman Ltd v Jan Bonde Nielsen & 2 Others](#) 2014 eKLR

The applicant need not establish title, it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.

16. On the material placed before the Court, I am persuaded that the Applicant established a *prima facie* case with a probability of success as she has demonstrated that she has a beneficial interest in the suit property.

17. I will now move on to consider if the Applicant is likely to suffer irreparable loss. In her Supporting Affidavit, the Applicant avers that she paid the purchase price in full and she has utilized the 4 acres since 2006 with the knowledge of the Respondent. The Respondent has not denied this fact. Her only contention is that the deceased did not transfer the land to the Applicant as he failed to get the consent of the Land Control Board. If the Applicant’s allegation that she has used the land for a period of 17 years is true, then she is likely to suffer irreparable loss if the Respondent effects her threat of selling it.

18. With regard to the balance of convenience, the court in the case of [Nawaz Manji & 4 Others v Vandeeep Sagoo & 8 Others](#) [2017]eKLR stated as follows:

“The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. 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 plaintiffs, the inconvenience caused to the plaintiffs would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that that that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”.

19. The circumstances of this case suggest that the Applicant is claiming and beneficial interest in the suit property. It is not in dispute that she has been utilizing the land for the last 17 years. The Respondent



does not deny that the Applicant purchased the land but she now wants to rescind the contract on the ground that the deceased did not obtain the consent of the Land Control Board. The rights of the Applicant to the suit property can only be determined at a full hearing. It is clear that if the injunction is not issued, the substratum of the suit will be destroyed as the Respondent would probably dispose of the suit property. The interests of justice would therefore be served if the subject matter of the suit is preserved pending the hearing and determination of the main suit.

20. Consequently, I find merit in the application and I grant prayer 3 of the Notice of Motion dated February 25, 2023 and direct has follows:

(a) A temporary injunction is hereby issued restraining the Respondent, her servants, agents, any other person claiming under her or any other person whatsoever from selling or disposing of, alienating or in any manner dealing with the plaintiff's land measuring 4 acres out of land parcel number Uasin Gishu /Tapsagoi/267 pending the hearing and determination of this suit.

(b) The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF JUNE 2023.

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J.M ONYANGO

JUDGE

In the Presence of;

1. Mr. Oduor for the Plaintiff/Applicant

2. Mrs. Lagat for the Defendant/Respondent

Court Assistant: A. Oniala

