



REPUBLIC OF KENYA



Mwagi & another v Mchonji & 4 others (Environment & Land Case 48 of 2022) [2023] KEELC 18996 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18996 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 48 OF 2022**

NA MATHEKA, J

JULY 26, 2023

BETWEEN

KENNEDY OYUGI MWAGI 1ST PLAINTIFF

ZAKARIA MUIRURA OWGI 2ND PLAINTIFF

AND

MARIANA WAWASI MCHONJI 1ST DEFENDANT

MICHAEL MUYA MUSILA 2ND DEFENDANT

TIMOTHY MBUGUA THAGICHU 3RD DEFENDANT

THE CHIEF LAND REGISTRATION OFFICER, MOMBASA .. 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The application is dated September 7, 2022 and is brought under sections IA, 1B, 3.4 and 63 of the [Civil Procedure Act](#) and Order 40 Rules 1 and 2 of the [Civil Procedure Rules](#) seeking the following orders:
 1. This Application be certified as urgent and to dispense with service of this Application in the first instance;
 2. Pending the hearing and determination of this application this honourable court be pleased to issue a temporary injunction restraining the 1st to 3rd defendants, whether by themselves, their employees, servants and/or agents or assignees and/or any person acting under their instructions or on their behalf, from entering, occupying, erecting upon or in any way transferring, charging, leasing or otherwise alienating or dealing with or disposing of the whole or any part of Plot Number Mombasa/Mwembelegeza/1535.



3. Pending the hearing and determination of the main suit this honourable court be pleased to issue a temporary injunction restraining the 1st to 3rd defendants, whether by themselves, their employees, servants and/or agents or assignees and/or any person acting under their instructions or on their behalf, from entering, occupying, erecting upon or in any way transferring, charging, leasing or otherwise alienating or dealing with or disposing of the whole or any part of Plot Number Mombasa/Mwembelegeza/1535 (hereinafter referred to as "the suit property"); and
 4. Pending the hearing and determination of this application this honourable court be pleased to issue a temporary injunction restraining the 4th defendant from recording, registering or otherwise recognizing any sale, transfer or other dealings whatsoever in or over the suit property, by the 1st to 3rd defendant or any person acting under their instructions or on their behalf.
 5. Pending the hearing and determination of the main suit this honourable court be pleased to issue a temporary injunction restraining the 4th defendant from registering or otherwise recognizing any sale, transfer, charge, lease, licence or other dealing whatsoever in or over the suit property, by the 1st defendant to 3rd or any person acting under their instructions or on their behalf.
 6. Give directions for the service of this application and to fix a date for the inter-partes hearing thereof; and
 7. The costs of this application be provided for.
2. It is based upon the grounds that the plaintiffs/applicants are the bona fide joint allottees of all that parcel of land known as Msa/Mwembelegeza/1535 situated in Bamburi area, Mombasa County measuring 0.04 Hectares and in possession of a valid letter of allotment issued on December 1, 1998 and that the beneficiaries of her Estate are entitled to possession and occupation thereof. The Plaintiffs/Applicants duly paid the ten (10%) percent deposit for the Suit Property and were issued with a receipt thereof and on April 10, 2018 the Plaintiffs were issued with a Discharge of Charge in their favour and in addition the Suit Property was transferred to them from the Settlement Fund Trustees on the same date. By virtue of being the lawful owners of the Suit Property, the plaintiffs/applicants were at all material times entitled to its proprietary rights as conferred by law including but not limited to the right to occupy the same as they have not entered into any transaction for the sale or transfer of the Suit Property or any part or portion thereof to any person.
 3. On June 8, 2021, pursuant to the plaintiffs/applicants' application for a land search, the plaintiffs/applicants discovered that the property had been registered under the name of the 3rd defendant. Upon further investigation the plaintiffs/applicants discovered that without their knowledge or consent, the 1st defendant had fraudulently registered a power of attorney in their names which power of attorney purportedly authorized her to act on their behalf in respect to the Suit Property inter alia dispose of the property and she used the power of attorney to collect the Discharge of Charge at the Land Adjudication and Settlement Office. From a quick look at the power of attorney, the passport photographs attached therein do not belong to the plaintiffs/applicants who further aver that the passport photographs attached to the said power of attorney are unknown to the plaintiffs herein. Further to the foregoing, the plaintiffs/applicants aver that the signatures on the said power of attorney also do not belong to them and consequently, the power of attorney is fraudulent. the 1st defendant herein used the aforesaid fraudulent instrument to sell and transfer the Suit Property to the 2nd defendant herein vide a transfer registered on May 14, 2020, who in turn sold it to the 3rd defendant



herein vide a transfer dated October 21, 2020. The plaintiffs/applicants aver that any sale and transfer done by the 1st defendant was and is fraudulent and therefore invalid. The plaintiffs/applicants wish to reiterate that they have never advertised or offered the Suit Property for sale to any of the defendants or to any other person and they have never received any sum of money from the defendants or from any other person relating to the Suit Property and the 2nd and 3rd defendants acquired title to the Suit Property fraudulently, irregularly and illegally and the said title deeds are void ab initio. The plaintiffs/applicants states that the registration of the Transfer purporting to transfer ownership of the Suit Property to the 2nd defendant and subsequently the 3rd defendant is fraudulent and illegal and was done with the 4th defendant's connivance and/or collusion. The plaintiffs further aver that in the circumstances, the registration of the 2nd defendant and subsequently the 3rd defendant as alleged consecutive owners of the Suit Property in the light of the above, was irregular and marred by fraud, is null and void and they urge this honourable court to find as so and order for the revocation of the 2nd and 3rd defendants' illegal title deeds. The plaintiffs further aver that as a result of the fraud and irregularities set out herein, they risk losing their right to the Suit Property, have been unable to develop the same and have suffered loss and continue to suffer damages due to the defendants' unlawful actions and conduct which should not be condoned by this honourable court.

4. The 3rd defendant states that he has the ownership and possession of the suit property herein Mombasa/Mwembelegeza Squatter/1535 (Annexed and marked TMT I is a copy of the Title to the suit property). That before he purchased the property he did due diligence by obtaining ownership documents from the 2nd defendant/respondent and the office of the 5th defendant whose green card showed the 2nd defendant/respondent as the owner and he was satisfied that the suit property belonged to him. That he later instructed his advocates to proceed to prepare documents for purposes of transfer of the suit property to his name which he believes was carried out with professionalism to the end. (annexed are copies of the sale agreement and transfer documents marked as TMT 2).
5. The 1st defendant/respondent states that the suit property belonged to her late husband who is their elder brother and she is the administrator and heir to the late Joash Mwagi Oyugi is thus eligible to deal with the same. (Marked MWM -1 are grant letters of administration together with its confirmation). That the said parcels of land was put in the name of the said Applicants for safe keeping for their children and it is for that reason that the Applicant signed a power of attorney so that she could manage and or deal with the said parcel as she pleased for the benefit of the children, that this new claim is an afterthought only aimed at dispossessing her of her husband's land when even the parcels that they occupy to date was given to them by her late husband annexed herein as "MWM-2" is the said Power of Attorney signed by the Applicants herein.
6. That even before the said parcel was demarcated, her husband had bought the same from the original owners which includes the parcels her late husband gave to his brothers herein the Applicants. That claiming this other title is mischievous on the part of the plaintiff/applicants. (Attached and marked MWM- 3 is a bundle of letters and other documents). That the Plaintiffs' claim is an afterthought, unfounded, defective and an abuse of the court process. The Plaintiffs have thus come to court with dirty hands and is guilty of laches. That before the Plaintiff went to court she had already gotten a buyer and sold the parcel and for this reason she no longer own the suit property herein for this reason the Plaintiff is estopped to interfere with the suit property which they had indeed given her a power to so dispose.
7. This court has considered the application and submissions therein. An order of interlocutory injunction is an equitable relief that is granted at the discretion of the court as guided by the principles set down in *Giella v Cassman Brown Co Ltd* (1973) EA 358. The first issue to consider is whether the 1st Respondent had proved the existence of an arguable case which raise a serious question to be tried.



The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words;

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

8. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR held that;

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

9. The plaintiffs/applicants are the bona fide joint allottees of all that parcel of land known as Msa/Mwembelegeza/1535 situated in Bamburi area, Mombasa County measuring 0.04 Hectares and in possession of a valid letter of allotment issued on December 1, 1998 and that the beneficiaries of her Estate are entitled to possession and occupation thereof. The plaintiffs/applicants duly paid the ten (10%) percent deposit for the Suit Property and were issued with a receipt thereof and on April 10, 2018 the plaintiffs were issued with a Discharge of Charge in their favour and in addition the Suit Property was transferred to them from the Settlement Fund Trustees on the same date. They now claim that the same was fraudulently transferred to the 2nd defendant and onward to the 3rd defendant. A question of whether a title was acquired fraudulently is a serious question of law that qualifies as a prima facie case at an interlocutory stage.

10. On the second issue of irreparable damage, I am guided by the Court of Appeal in *Nguruman* (*supra*), where it was 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 face, 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.”

11. The 1st defendant/respondent states that the suit property belonged to her late husband who is their elder brother and she is the administrator and heir to the late Joash Mwagi Oyugi. That the said parcels of land was put in the name of the said Applicants for safe keeping for their children and it is for that reason that the Applicant signed a power of attorney so that she deal with the same and she decided



to sell the suit property to the 2nd Defendant. The 3rd Defendant states that he is a bona fide purchaser and did all the due diligence before acquiring the same. It is my finding that the Plaintiffs stand to suffer irreparable injury that cannot be adequately compensated by an award of damages since they are raising fraud and illegality of the title, it is only fair and just for this court of equity to exercise its discretion and tilt the balance of convenience in favour of the Plaintiffs. The suit property must be preserved, which will be done by maintaining the status quo until the case is heard and determined. I find that the application is merited and order that the status quo be maintained pending the hearing and determination of this suit.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH JULY 2023.

N.A. MATHEKA

JUDGE

