



REPUBLIC OF KENYA



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**Hilda Mukwanyaga Mathio M'Iberi t/a Meru Junior Primary School v Kathendu & another
(Environment & Land Case E011 of 2023) [2023] KEELC 18904 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E011 OF 2023**

**CK NZILI, J
JULY 19, 2023**

BETWEEN

**HILDA MUKWANYAGA MATHIO M'IBERI T/A MERU JUNIOR PRIMARY
SCHOOL PLAINTIFF**

AND

FESTUS KATHENDU 1ST DEFENDANT

THE LAND REGISTRAR – MERU CENTRAL 2ND DEFENDANT

RULING

1. The application before the court is dated May 24, 2023. In the 1st prayer, the court is asked to issue a temporary injunction against the 1st defendant, his agents, servants or employees from interfering with the plaintiff's quiet occupation, possession and utilization of the resultant extension of Plot No 1/52 Ref as 01 on Part Development Plan No 167/98/17 and currently known as LR No Meru Municipality Block 1/95 pending hearing and determination of this application. The 2nd prayer is for the court to issue an inhibition order restricting the 2nd defendant from registering any dealing on the certificate of title to the suit land pending the hearing and determination of this suit. The grounds are contained on the face of the application and the supporting affidavit sworn by Hilda M. Mathio M'Iberi on May 24, 2023. The plaintiff deposes that she has built and runs Meru Junior School on LR No Meru Block 1/52, which she owns as per the certificate of lease issued on May 28, 1990.
2. It is averred that by a letter dated 6.8.1998, the plaintiff requested for an extension of the land adjacent to her due to the increase of pupils and teachers to the school from the relevant government agencies who gave their approval by letters dated 12th, 13th, 14th and August 31, 1998. The plaintiff avers that following the permissions, she embarked on structural developments on both her plot and the extension while awaiting the processing of the certificate of lease for the extension. The plaintiff further avers that she has been in occupation of the extension for over 25 years with the full knowledge of the 1st defendant, who has now issued to her verbal threats and notices to vacate the premises based on a



- purported certificate of the lease for the plot registered on September 14, 2022 and issued on December 21, 2022. The plaintiff has attached the certificate of a lease, a letter of the school's plan dated March 5, 1991, a bundle of photos, a plan for the school and approvals from various departments, all marked as HMMM 1-6, respectively.
3. The 1st defendant opposes the application by a replying and supplementary affidavit sworn by Festus Kathendu on May 30, 2023 and June 6, 2023. It is averred that the 1st defendant was allocated an unsurveyed Plot No T – 565, later on registered as Meru Municipality Block 1/195, on May 8, 1992, through a letter of allotment, took possession of the same and fenced it. The 1st defendant avers that he met all the requisite conditions spelt out in the letter of allotment, processed the lease and eventually obtained a certificate of the lease on December 21, 2022.
 4. The 1st defendant also avers that by an agreement dated December 16, 2022, the plaintiff requested him to exchange his plot with the late plaintiff's husband, parcel number L.R No Meru Municipality Block 1/278. Due to this, the 1st defendant avers that he had only allowed the plaintiff to use his land as a playground on both temporary and consensual terms. He termed the letters of approval by the plaintiff as coming almost six years after he was allocated the land. Further, the 1st defendant avers that given that the plaintiff was not issued with any allotment letter, certificate of lease or made any payments for either the allocation or the land rates and rents, she had no proprietary interest on the land. He denied approving any alleged erection of structures on his land, which he termed illegal or based on unapproved building plans.
 5. Further, the 1st defendant avers that the plaintiff has not satisfied the requirements for a grant of any temporary injunction. The 1st defendant attached a copy of the allotment letter dated May 8, 1992, map, deed of exchange dated December 16, 2022 and certificates of lease as annexures marked "FK 1-FK 3". The 1st respondent also relies on written submissions dated June 8, 2023. In a supplementary affidavit sworn on 31.6.2023, the applicant disputes the alleged allocation of the suit land to the 1st defendant. She termed the title documents as fraudulently obtained and as forgeries. Further, she termed the deed of exchange as procured through pressure, duress, coercion, intimidation and was unconscionable. Additionally, the applicant avers that the 1st respondent lacked the capacity to enter into any agreement regarding the suit land. By written submissions dated 31.6.2023, the applicant submitted that she has satisfied the ingredients for the grant of a temporary injunction as set out in *Giella v Cassman Brown Co. Ltd* 1978) EA 358. Reliance is placed on *Mrao v First American Bank of Kenya Ltd* [2003] 1, *Nguruman v Jane Bond Nielsen & 2 others* [2014] eKLR.
 6. On the other hand, the 1st defendant, by written submissions dated June 8, 2023, submitted that in the absence of a letter by the applicant to show that she ever made such an application for an extension to her L.R No Meru Municipality Block 1/52 from the Commissioner of Lands, letters from the District Physical Planning Office and the District Surveyor cannot confer any proprietary interest over the suit land protectable by way of an injunction.
 7. Additionally, the 1st defendant submitted that the documents attached to his replying affidavit together with the deed of exchange are clear manifestations that he is the registered owner of the suit land. Reliance was placed on *George Gitau Wainaina v Kenya Commercial Bank Limited & 2 others* [2015] eKLR, *Gulf African Bank Limited v Mohamed Sheikh Hussein* [2018] eKLR, *Board of Governors Afraba High School & Anor v Kenya Commercial Bank Limited* [2004] eKLR and *Japhet Kaimenyi Ndatbo v M'Ndatbo M' Mbwiria* [2012] eKLR.
 8. A party seeking a temporary injunction must demonstrate a prima facie case with a probability of success, demonstrate irreparable loss and damage which may not be compensated by way of damages, and lastly, establish that the balance of convenience tilts in favour of granting the orders sought.



9. *A prima facie* case in *Mrao Ltd* (supra) was said to be established if, on the material placed before court, a right or interest belonging to the applicant has been shown to call for a rebuttal from the opposite party. In exercising the discretion on whether or not to grant an injunction in *CKB & another v UDHL & others* [2000] eKLR, the court observed that a court should look at the whole case, have regard to not only the strength of the claim but also the strength of the defence and then decide what the best way forward. The court said that the remedy by interlocutory injunction was so useful that it should be kept flexible, and discretionary and should not be made the subject of strict rules.
10. In *Hutchings Biemer Ltd v Barclays Bank of Kenya & others* [2006] eKLR, the court observed that injunctive orders were meant to preserve the property and maintain the status quo during the period the matter was pending hearing and final disposal.
11. In *Tritex Industries Ltd and 3 others v National Housing Corporation* [2014] eKLR, the court cited with approval *Kenya Hotels Ltd v Kenya Commercial Bank Ltd & another* [2004] & *Kenya Commercial Finance Co. Ltd v Afraba Education* [2001] EA 86 that the *Giella* (supra) principles were sequential so that the 2nd condition would only be addressed if the first one was satisfied, and when the court was in doubt, then the 3rd condition would be addressed.
12. In *Mbuthia v Jimba Credit Finance Corporation & another* [1988] KLR, the court observed that in an application for interlocutory injunctions, the court is not called upon to make definite findings on contested facts and the law but only weighs the relative strength of the parties case. As to the adequacy of damages, the court in *Tritex Industries supra* observed that the adequacy of damages was a common denominator. In the *prima facie* case in *Giella v Cassman Brown supra* and the balance of convenience test of *American Cyanamid Co. v Ethicon Ltd* [1975] ALL ER 504 because under both tests, an injunction would not be granted if the injury or loss complained of may adequately be compensated or remedied by an award of damage.
13. The court cited with approval *Mbuthia v Jimba supra* that in matters of land, it was usual to grant an injunction to protect the parties' profound interest in land ownership whether as a residential property or as a capital asset of production.
14. Applying the preceding binding principles and case law, the plaintiff's case is based on the plaint dated May 24, 2023. She claims that the suit land, which has housed the school's developments or permanent structures for over 25 years, was allegedly fraudulently and illegally allocated to the 1st defendant.
15. Other than the objection letters issued in 1998, the plaintiff has not attached any formal application in which she sought to formalize the ownership of the suit land. No single letter is attached to show that the applicant was formally allowed by the allocating authority to continue using and occupying the same and on what terms. Additionally, there is nothing to show that even after the plaintiff sought for and obtained the approvals to use and occupy the land, the allocating authority authorized or approved any permanent or temporary structures to be erected on the suit land.
16. Moreover, no evidence shows that Part of Development Plan No 167/98/17 refers to Plot No T-565 now registered as Meru Municipality Block 1/195, whose certificate of lease is held by the 1st defendant. The applicant has not attached any authority to show that her rights in the Part Development Plan crystallized into any registrable interest under the Government *Land Act* (repealed) or any follow-up with the requisite processes of the allocation of the extension.
17. On the deed of exchange dated December 16, 2022, Clause C. thereof indicates that the plaintiff's late husband was aware of the allocation in favour of the 1st defendant between 1992 and 1993, culminating in a panel of elders meeting. From the deed, it is evident that the 1st defendant approved the



occupation by the plaintiff of the suit land. The 1st defendant also showed his willingness to amicably settle the matter by way of the exchange of plots. The 1st defendant is yet to file a defence to the plaint. He, however, acknowledges in the supporting affidavit that the plaintiff has undertaken various developments on the suit land to the extent of having accrued interest or rights to the land from 1993 to the present. A legitimate expectation on the part of the plaintiff was therefore created that she would be given due consideration, and perhaps this is why a deed of exchange was executed by the parties on December 16, 2022. The 1st defendant has not disowned the legality of the agreement. How the deed has been implemented remains unclear from the two parties.

18. Going by the case law quoted above, I think a prima facie case has been established by the plaintiff for this court to preserve the suit property pending the hearing and determination of this suit. Further, I think there will be irreparable loss and damage if the plaintiff is blocked from accessing the developments on the suit land, which form part of the school. The balance of convenience in granting the injunction tilts in favour of the plaintiff.
19. Given the condition that the land belongs to the 1st defendant and has duly been registered as such, coupled with the fact that the plaintiff has not brought any case against the allocating authority, I take the view that the injunction should be conditional that the plaintiff deposits Kshs.1 Million with the court as security for accrued monthly rents. The same is to be deposited within 14 days from the date hereof; otherwise, the temporary injunction shall stand vacated. An order of inhibition shall also issue against the certificate of lease held by the 1st defendant to last for one year only.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 19TH DAY OF JULY 2023**

In presence of

C.A John Paul

Mwirigi Kaburu for 1st defendant

Mwaura for plaintiff

HON. CK NZILI

ELC JUDGE

