



**Ali (Suing as the personal representative of the Estate of Ali Mbiere Tundo (Deceased) v Wesonga & another (Environment & Land Case E0004 of 2023) [2023] KEELC 18853 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18853 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E0004 OF 2023**

**EC CHERONO, J**

**JULY 14, 2023**

**BETWEEN**

**JUDITH AUMA ALI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ALI MBIERE TUNDO (DECEASED)) ..... PLAINTIFF**

**AND**

**FREDRICK BARASA WESONGA ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPHAT WESONGA TUNDO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion application dated 17/4/2023, the plaintiff/applicant seeks the following orders;
  - a. (Spent)
  - b. That the respondents and any other persons or buyers claiming under him be barred from carrying out any developments and or any activities on the land parcel E.Bukusu/S.Kandunyi/15055 any subsequent subdivisions pending hearing and determination of this suit.
  - c. That all transactions at the lands title Number E.Bukusu/S.Kandunyi/15055 and subsequent subdivisions are prohibited pending hearing and determination of this suit. Costs of the application.
2. The application is supported by the affidavit of the applicant sworn on even date and grounds apparent on the face of the said application. The supporting affidavit is further supported by a supplementary affidavit and numerous annexures thereto.



3. The application is opposed with a replying affidavit sworn by Joseph Wesonga Tundo, the 2<sup>nd</sup> respondent herein. When the said application came up for directions on 16/05/2023, the parties agreed to dispose of the said same by way of written submissions.

#### **Applicant's Summary Of Facts.**

4. In her supporting affidavit, the applicant stated that she is the daughter and legal representative to the estate of Ali Mbiere Tundo (deceased) who was the sole proprietor of land parcel NO. E.Bukusu/S.Kandunyi/2898. She stated that before his demise, his father had plans to subdivide the suit land amongst his children and had even allocated them their respective portions and laid boundaries to that effect.
5. The applicant further stated that the respondents who are grandsons to the deceased sold all the parcel of land that was allocated to their father by the deceased and the deceased sympathized with the respondents and gave them a plot measuring 50x50 to build houses after their father sold the parcel that was allocated to them.
6. She said that the respondents went ahead and allocated themselves 0.025 acre of land from the deceased's parcel No. E.Bukusu/S.Kandunyi/2898 without the consent of the deceased. She stated that after processing the title deed NO. E.Bukusu/S.Kandunyi/15055 for the said parcel measuring 0.025, they went ahead to subdivide the said parcel into two titles being No. E.Bukusu/S.Kandunyi/18320 and No. E.Bukusu/S.Kandunyi/18319
7. She further stated that on learning of the said subdivision, the deceased cancelled the said two titles No. E.Bukusu/S.Kandunyi/18319 and 18320. After the said cancellation, the 1<sup>st</sup> Respondent whose title was registered in his name opted to have the title registered in the 2<sup>nd</sup> Respondent's name. The applicant stated that the two titles No. E.Bukusu/S.Kandunyi/18319 and 18320 were cancelled on the 30/01/2019 and the land was registered in the 1<sup>st</sup> Respondent's name the same date,
8. The applicant also contends that before the deceased had the title reverted in his name, the 1<sup>st</sup> Respondent transferred the land into the name of the 2<sup>nd</sup> Respondent. She averred that the actions of the 1<sup>st</sup> Respondent of transferring the title to the 2<sup>nd</sup> Respondent was fraudulent, illegal and meant to sabotage the deceased's intention of having the land reverted into his name and that the 2<sup>nd</sup> Respondent obtained a title for the land without the consent of the deceased on the same date the deceased cancelled the subdivision. The applicant deposed that the deceased never got any information about the said transfer from the 1<sup>st</sup> to the 2<sup>nd</sup> Respondent and passed on two months later before taking any action against the said illegal transfer.
9. The applicant further stated that according to the allocation and boundaries laid on the ground, the parcel of land that was illegally transferred by the Respondents belongs to her late brother Douglas Majid Mbiere and sister Rose Nekesa Belle who has never gotten married and is ailing at the moment and that respondents have fraudulently obtained a mutation form that does not reflect how the boundaries appear on the ground and have continued to tamper with the boundaries that were laid by the deceased.
10. In response to the replying affidavit by the respondents, the applicant filed a supplementary affidavit sworn on 9<sup>th</sup> June 2023 in which she deposed that the deceased never shared out his parcel of land amongst his children but only demarcated the land before he passed on. She stated that from the annexure in paragraph 4 of the 1<sup>st</sup> respondent's replying affidavit, it shows that apart from L.R No. E.Bukusu/S.Kandunyi/15055, the 2<sup>nd</sup> respondent has allocated himself another parcel plot No. E.Bukusu/S.Kandunyi/15058 which is also part of the estate of the deceased.



### 1<sup>st</sup> Respondent's Summary of Facts

11. The 1<sup>st</sup> respondent filed a replying affidavit sworn on May 26, 2023 opposing the application and stated that the deceased before his demise was the registered owner of land parcel No. E.Bukusu/S.Kandunyi/2898 which he subdivided into five parcels namely E.Bukusu/S.Kandunyi/15054, 15055, 15056, 15057 & 15058 respectively which the deceased transferred to various people, some of who have picked their titles while others are yet to do so.
12. He denies that land parcel No. E.Bukusu/S.Kandunyi/15055 forms part of the estate of the deceased, the same having been transferred by the deceased during his lifetime and that the deceased transferred to him before he passed on.
13. The 1<sup>st</sup> respondent further deposed that at no time did the deceased ever cancelled the transfer of land No. E.Bukusu/S.Kandunyi/15055 as alleged but the mutation form was only rectified. He deposed that the deceased shared all his properties before his demise and that there is nothing remaining for sharing at this stage and that land parcel No. E.Bukusu/S.Kandunyi/15055 is no longer registered in his name and that the orders sought are unavailable.

### 2<sup>nd</sup> Respondent's Summary of Facts

14. The 2<sup>nd</sup> respondent also oppose the said application and filed a replying affidavit sworn on May 26, 2023 and deposed that the land parcel No.E.Bukusu/S.Kandunyi/15055 is no longer registered in his name and that the deceased having subdivided and transferred his land during his life time, the orders sought in the application are not available. He further deposed that this application has not met the conditions for granting an order of injunction as set out in the celebrated case of *Giella v cassman Brown* case.

### Legal Analysis and Decision

15. I have considered the Notice of Motion application dated 7<sup>th</sup> April 2023 brought under certificate of urgency, the supporting as well as the supplementary affidavit sworn by the applicant on 17/4/2023 and 9<sup>th</sup> June 2023 respectively. I have also considered the replying affidavits, the submissions by the parties and the applicable law. The orders which the applicant seeks is an equitable remedy. The principles for deciding whether or not to grant an equitable relief has been discussed in numerous decisions by the superior Courts. In the case of *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, the Court of Appeal held as follows;

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie 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 an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable Tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...”



16. In this case, the applicant is seeking an equitable remedy to stop the respondents or anybody acting or claiming through them from carrying out any development and/or any activities on the suit land parcel No. E.Bukusu/S.Kandunyi/15055 and any subsequent subdivisions thereon. From the replying affidavits, the respondents deposed that the said land parcel No. E.Bukusu/S.Kandunyi/15055 has changed hands and is now registered in the name of one Edwin Arlington Otieno Oriar. The said Edwin Arlington Otieno Oriar is not a party to these proceedings. The applicant did not seek to join the said Edwin Arlington Otieno Oriar as a party in this suit. In my view, the applicant has not established a prima facie case as a condition for the grant of the equitable remedy sought. The second principle is that the applicant must show that she might otherwise suffer irreparable injury the injunction order is granted. Irreparable injury was discussed in the case of *Nguruman Limited V Jan Bonde Nielsen & 2 Others* (2014) eKLR where the court held as follows;

“We are ourselves satisfied that the 1<sup>st</sup> respondent did not show prima facie that he might himself otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Can a claim for shares in a company be attached to a particular company asset” Temporary injunction should never issue when an action for an award of damages would adequately compensate injuries threatened or caused.

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

17. From the affidavit evidence and the submissions by the parties, I find that the applicant has not shown any probability of irreparable injury unless the orders sought are granted. Consequently, the second condition also fails. Deciding this matter on the third principle, I find that the balance of convenience tilts in disallowing the application.

18. The upshot of my analysis is that the notice of motion application dated April 17, 2023 is without merit and the same is hereby dismissed with each party to bear their own costs.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 14<sup>TH</sup> JULY, 2023**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

M/S Masakhwe for the Applicant

Mr. Munyendo holding brief for Mr. Bw'onchiri for Respondent

M/S Joy Court Assistant

