



**Ochilo v Theuri & 2 others (Environment & Land Case
141 of 2012) [2023] KEELC 18814 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 141 OF 2012**

**E ASATI, J
JULY 13, 2023**

BETWEEN

JESSE OYUGI OCHILO PLAINTIFF

AND

JOSEPH MAINA THEURI 1ST DEFENDANT

DOROTHY AWENDE MASUI 2ND DEFENDANT

MACHIBONI ELLIASSY MORRIS MARANG'A 3RD DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's notice of motion application dated February 8, 2023 stated to be brought pursuant to the provisions of sections 1A, 1B, 3A, 63(e) and 63 (3) of the [Civil Procedure Act](#), order 40 rules 1 and 2 of the [Civil Procedure Rules](#) and section 2 of the [Judicature Act](#). The application seeks for:
 - a. an order of temporary injunction compelling the defendants/respondents either by themselves their agents, servants or any other person whosoever from trespassing onto, constructing on, ploughing, selling, alienating or otherwise interfering or in any way dealing with land parcels numbers Kisumu/konya/5544 and Kisumu/konya/3643 pending hearing and determination of the suit.
 - b. an order of temporary injunction stopping the 1st and 2nd defendants either by themselves their agents, servants or any other person from transferring Kisumu/konya/3643 to the 3rd defendant pending the hearing and determination of the suit
 - c. orders as the court deems necessary to safeguard the ends of justice.
 - d. costs of the application.



2. The application was based on the grounds that; *vide* its ruling dated September 30, 2022, the court set aside the judgement dated November 8, 2017. That there no order in place protecting the suit property from interference by the defendants/respondents. That unless the orders sought are granted the applicant is likely to suffer irreparable loss. That the respondents will not suffer prejudice if the application is allowed.
3. The application was supported by the supporting affidavit sworn by the plaintiff/applicant on November 28, 2022 and the further affidavit sworn by the same deponent on February 8, 2023. The applicant's case is that he bought the suit lands from the defendants who have become reluctant to transfer the suit lands to him and instead they are trying to unlawfully transfer the suit lands to the 3rd defendant.
4. The 1st defendant opposed the application *vide* the replying affidavit sworn by the 1st defendant on February 21, 2023. The defendants' case is that the application has already been decided on *vide* the ruling dated September 30, 2022 hence the application is non-existent. That the 2nd defendant died on June 25, 2014. That it is the applicant who failed to pay the balance of the purchase price so as to enable the 1st and 2nd defendants to complete the sell transaction. That at some point the plaintiff caused the suit lands to be fraudulently, illegally and un-procedurally transferred in his favour. That they sold and transferred the suit lands to the 3rd defendant after the plaintiff failed to perform his part of the sale agreements. That having sold the suit lands to the 3rd defendant, they have no proprietary interest in the same. That it was the plaintiff who unlawfully caused the 3rd defendant's title to be cancelled. That the plaintiff has not come to court with clean hands. That the plaintiff will not, in the circumstances, suffer any prejudice if the orders sought are declined.
5. The 3rd defendant opposed the application *vide* his replying affidavit sworn on April 3, 2023. His case is that the suit lands had already been transferred into his name and the present application is untenable as it seeks to prevent an event that has already occurred. That the only reason why the suit lands are not currently in his name is because the plaintiff caused the registration to be unlawfully cancelled. That since he took possession of the suit lands, he has developed them by putting up a residential house wherein he lives with his family and some rental units. That he bought the suit lands in the year 2009 and paid the purchase price in full and the lands transferred in his favour. That he had no knowledge of the plaintiff's claim. That he is a third party, a purchaser for value without any notice of any other claim and that the plaintiff's claim, if at all, lies elsewhere not in the suit property.
6. The application was canvassed by way of written submissions.
7. Written submissions dated May 25, 2023 were filed on behalf of the plaintiff by the firm of Mwamu & Co Advocates. It was submitted on behalf of the plaintiff that the important consideration before granting a temporary injunction under order 40 rule 1 *Civil Procedure Rules* is the proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongly sold in execution of a decree or that the defendant threatens or intends to remove or dispose the suit property. That the plaintiff has a legal right to the property under article 40 of the *Constitution* of Kenya 2010 as he has a beneficial interest in the suit property. That unless the injunction is granted the suit property will be at the risk of being sold, wasted damaged or alienated by the defendants. That the plaintiff will suffer irreparable injury and that the balance of convenience tilts in favour of granting the orders sought. That in respect of the 2nd defendant who is deceased, the process of substitution has been initiated *vide* citation cause No 69 of 2023 dated May 4, 2023. Counsel prayed that the application be allowed.



8. Written submissions dated May 24, 2023 were filed on behalf of the defendants by the firm of Elizabeth Wangari & Company Advocates. Counsel submitted that under order 24 rule 4 of the [Civil Procedure Rules 2010](#), the suit against the 2nd defendant who died on June 25, 2014 has abated and no orders can be issue in respect thereof. That the plaintiff has not demonstrated a *prima facie* case against the defendants and in particular against the 1st defendant as he did not prove that he paid the purchase price in full. That the suit lands had been lawfully transferred to the 3rd defendant. Further that the applicant had not demonstrated that he will suffer irreparable injury. That the plaintiff has never taken possession of the suit lands. That it is that 3rd defendant who has possession and physical occupation and use of the suit land. That to grant the plaintiff's prayers is to grant orders of eviction of the 3rd defendant. Counsel prayed that the application be dismissed with costs to the 3rd defendant.
9. I have carefully considered the application, the response thereto and the submissions made. The grounds for grant of interlocutory injunction were set out in the case of *Giella v Cassman Brown Co Ltd* (1973) 358 that the applicant must establish a *prima facie* case with a probability of success, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of probabilities. A *prima facie* case was defined by the Court of Appeal in [Mrao Ltd v First American Bank Kenya Ltd & 2 others](#) [2003] eKLR as follows:

“a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringe d by the opposite party as to call for an explanation or rebuttal from the latter.”
10. On whether or not the plaintiff has demonstrated a *prima facie* case with a probability of success, the plaintiff's case is anchored on a beneficial interest arising from land sale agreements for the purchase of the suit lands from the 1st and 2nd defendants who were the registered owners. That he made part payment of the purchase price but that there after the 1st and 2nd defendants failed to transfer the suit lands to him to enable him to pay the balance of the purchase price. It is not in dispute that the land sale agreements between the plaintiff and the 1st and 2nd defendants were never completed and that the plaintiff did not pay the purchase price in full. There is no dispute that the 2nd defendant died in the year 2014 and that no substitution has been done to date. That there is also no dispute that the plaintiff never took possession of the suit lands. That the 3rd defendant has deposed that it is him and his family reside on and use the suit lands.
11. I find that no *prima facie* case has been demonstrated.
12. I also find that it has not been sufficiently demonstrated that unless the orders sought are granted the applicant will suffer such injury as will not be compensated by an award of damages. As for the balance of convenience, in the circumstances of this case, the same tilts in favour of letting the person in possession to remain in possession pending determination of the suit.
13. However, for the purposes of preserving the suit lands pending hearing and determination of the suit, I order that the status quo prevailing as at the date of this ruling in respect the registers of the suit lands be maintained. For avoidance of doubt, there should be no transfers, change of ownership, sub-division or registration of any transaction in respect of the suit lands pending hearing and determination of the suit. Costs of the application to the 1st and 3rd respondents.

It is so ordered.



RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 13TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Mwamu for the Plaintiff/Applicant

Ouma for the 1stDefendant/Respondent

Omollo holding brief for Onyango for the 3rd Defendant/Respondent

