



Kiarie (Suing on behalf of the Estate of the Late Gladwell Mumbi Muthemba alias Gladwell Mumbi Muthamba) v Njuguna & another (Environment & Land Case E071 of 2023) [2023] KEELC 20427 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20427 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E071 OF 2023
JA MOGENI, J
SEPTEMBER 28, 2023

BETWEEN

JANE MUMBI KIARIE (SUING ON BEHALF OF THE ESTATE OF THE LATE GLADWELL MUMBI MUTHEMBA ALIAS GLADWELL MUMBI MUTHAMBA) PLAINTIFF

AND

BEATRICE WANJIRU NJUGUNA 1ST DEFENDANT
EMBAKASSI RANCHING CO LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's application dated 27/03/2023 brought by way of Notice of Motion under Certificate of Urgency seeking for orders:
 1. Spent.
 2. That an interim injunction restraining the Defendants, their agents and/or servants or any other person under their instructions, consent, authority and control from causing registration of conveyance of Plot No. T 15BB and T 18B now renamed LR No. LR No 136/15856 and 136/15857 or taking occupation of whichever nature pending the inter parte hearing of this Application
 3. That an order of injunction restraining the Defendants, their agents and/or servants or any other person under their instructions, consent, authority and control from causing registration of conveyance of Plot No. T 15BB and T 18B now renamed LR No. LR No 136/15856 and 136/15857 or taking occupation of whichever nature pending the inter parte hearing of the suit.



4. That the cost of this application be provided for.
2. This application was dispensed with by this court by orders issued on 14/06/2023. The grounds upon which the application dated 27/03/2023 is premised are detailed in the Plaintiff's affidavit sworn on 27/03/2023.
3. This matter was placed before me on 14/06/2023 and the parties proposed that they should canvass by way of written submissions which the court directed that parties file and serve as appropriate. As already stated, the application is premised on 8 grounds and the supporting affidavit of Jane Mumbi Kiarie on 27/03/2023.
4. The Application is opposed by the replying affidavit dated 15/05/2023 sworn by the 1st defendant Beatrice Wanjiru Njuguna. She avers that she is rightful owners of the suit property having purchased it from one Samuel Karanja Githuku.
5. That the said Samuel Karanja Githuku, owned certificates to plot numbers 025161 and 025162 which certificates were produced and marked as BWN-1. She averred that she confirmed and proved that the said suit properties belonged to Samuel Karanja Githuku and they then entered into a sale agreement and she paid the full purchase price she also produced the sale agreement which as marked as BWN-2. A closer scrutiny however revealed that it was Embakasi Ranching Certificate and not a sale agreement.
6. The 1st defendant averred that she was the rightful owner of the suit properties having followed all the processes and that the 2nd defendant is aware of how she obtained the suit property. She further stated that that she never interacted with the deceased Gladwell Mumbi Muthemba alias Galdwell Mumbi Muthamba and therefore it is not true as alleged that the name of the plaintiff was struck out of the register at the offices of the 2nd defendant and replaced by the name of the 1st defendant.
7. Further that the plaintiff had not placed any evidence before the court to prove that there was any construction going on at the suit properties which she has alleged in her supporting affidavit.
8. She concludes by stating that the application does not meet the threshold of granting of an interim injunction and should be dismissed.

Background Of The Case.

9. By a plaint dated 21/02/2023 and filed in court, the plaintiff herein sued the defendants for an order of a permanent injunction restraining the defendants their servants and or agents from claiming title under them from transferring, alienating, transferring, damaging, disposing or in any way interfering with the suit property.
10. The plaintiff also sought a declaratory order that the plaintiff as the administrator of the estate of the late Gladwell Mumbi Muthemba together with her siblings are entitled to the suit properties. Further that the Land Registrar was directed to cancel the registration for the 1st defendant as the proprietor of the suit.
11. The plaintiff later filed an application under certificate of urgency seeking for an interim injunction against the defendant from interfering with the suit properties.
12. The plaintiff averred in her supporting affidavit that she is the administrator of the estate of her late grandmother Gladwell Mumbi Muthemba alias Gladwell Mumbi Muthamba who died intestate on 28/11/2015. She annexed a copy of the death certificate and letters of Administration ad litem. She further averred that the 1st defendant has been allotted by the 2nd defendant the suit properties which belonged to her late grandmother despite the fact that the said properties had been allotted to her



grandmother and were therefore not available for any subsequent allocation to the 1st defendant or to any other person.

Plaintiff's Counsel's Submissions

13. Plaintiff's Counsel filed his submissions dated 15/08/2023 whereby they submitted that the plaintiff is in possession of all requisite documents which included the share certificate numbers 453 and 7084, documents for bonus plots T15B and T18B. The relied on the *Pattni vs Ali & 2 Others* Court of Appeal No. 354 OF 2004, *Nguruman Ltd vs Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Lucy Wangui Gachara vs Mirudi Okamba Lore* [2015]EkLR and *Giella vs Cassman Brown* (1973) E.A. The Applicant filed the current application in order to protect and preserve the estate of the deceased grandmother and which was at threat of being alienated and allocated to the 1st defendant until this suit is heard and determined.

1st Defendant's Submissions

14. The 1st defendant filed her submission dated 24/08/2023 and submitted that the plaintiff/applicant has failed to prove that she had any proprietary interest in the suit property. Further that being a granddaughter of the alleged owner of the suit property it is not clear how she would have acquired an interest that has made her stake a claim to the said suit property
15. She relied on the cases of *Propwa Company Ltd vs Justus Nyano Gatondo & Another* (2020) EkLR, *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) EkLR and *Nation Media Group & 2 Others vs John Harun Mwanu* (2014) EkLR.
16. The Counsel for the 1st defendant termed the application as a sham and urged the court to dismiss it for failing to establish conditions that would compel the court to grant an injunction. He submitted that there is no right violated by the 1st defendant that would warrant granting of an injunction since the 1st defendant has a right to the property as provided under Article 40 of the *Constitution*.

Analysis

17. I have considered the submissions by both Counsels for the plaintiff/applicant and for the 1st defendant/Respondent and the supporting documentation herein. I have also considered all the judicial authorities and other legal materials presented before me and I have come to the conclusion that the issues for determination are as follows:-
 - i. Has the Plaintiff made out a prima facie case with a probability of success?
 - ii. Is the Plaintiff likely to suffer irreparable injury which would not be adequately compensated by an award of damages?
 - iii. In whose favour does the balance of convenience tilt if the court is in doubt?.
18. In granting interim injunctions, the court must exercise this discretion judiciously as was stated in the case of *Hasmukh Khetsbi Shah Vs Tinga Traders Ltd*. Civil Appeal No. 326 of 2002 KLR 462.
19. The first question is as to whether the Plaintiff has established a prima facie case with a probability of success. The 1st defendant annexed copies of certificates of ownership of the suit properties showing the owners as Samuel Karanja Githuku, sale agreement and copies of non-member certificate awarded to the 1st defendant upon the transfer from Samuel Karanja Githuku.



20. The plaintiff has attached a death certificate to her documents showing that the deceased died on 28/11/2015. I have also examined the Non-Member Certificates attached by the 1st defendant which allegedly were issued by the 2nd defendant.
21. The 1st defendant alleges that she bought the contested suit property from one Samuel Karanja Githuku and she has produced receipts showing that he owned Plots numbers 025161 and number 025162.
22. I find that the issues raised by both the plaintiff and the 1st defendant relate to ownership in the suit properties and this need to be litigated in court. The plaintiff was issued with a limited grant ad litem dated 19/01/2023 and so the plaintiff has authority to bring the suit before this court.
23. In *American Cyanamid Co (No 1) vs Ethicon Ltd* [1975] UKHL 1 Lord Diplock in respect to the role of the court regarding issuance of temporary held that:-
- “It is not part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”
24. The Court of Appeal expressed a similar view in *Mbuthia vs Jimba Credit Finance Corporation & another* [1988] KLR 1 held that:-
- “The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”
25. In the instant case, it is apparent that the plaintiff has sought this court to make a determination on the ownership of the suit properties as per the plaint filed and therefore at this point the court is being called upon to consider whether the said suit property can be preserved until the suit is heard and determined through the issuance of a temporary injunction vide the application herein.
26. This instant application is seeking interim injunction, and therefore there is only one issue for determination, which is as to whether this Court ought to grant the said interim order for temporary injunction.
27. The Court of Appeal in *Charter House Investments Ltd vs. Simon K. Sang and others*, Civil Appeal No. 315 of 2004 in this regard held that:
- “Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”



28. Consequently, a look at the application before this court and the applicant/plaintiff's assertions, the main issue based on the pleadings presented by the parties is who is the owner of Plot No. T 15B and T 18 B, under Share Certificate Number 453 and 7084. Each party has presented the documents they strongly believe point to their being the rightful owners of the suit property. Therefore, in keeping with the principles in *Giella vs Cassman Brown & Co Ltd* [1973] E.A 358, all the court is at this stage required to do is to satisfy itself if either party has shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. The court may also consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience will lie with the plaintiff or with the 1st defendant.
29. In this regard, the Court of appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [Supra], stated that:
- “If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”
30. The applicant herein has tendered documents with a view of establishing ownership of the suit property, thus driving towards establishing a prima facie case, however it is notable that a prima facie case is not sufficient on its own to warrant the grant of a temporary injunction. Be it as it may I note that this is land matter and two parties are claiming to be owners of the same piece of land. This makes me come to the conclusion that this is a dispute that needs to be determined. In the circumstances the applicant/plaintiff has indeed established a prima facie case. The subject matter before the court deserves to be preserved until this suit is heard and determined.
31. Furthermore, the applicant/plaintiff has stated in the supporting affidavit that they have been divested of their land by the 1st defendant, implying that the balance of convenience lies in favour of denying the orders sought, as the said property is currently in the hands of the 1st defendant. Their main claim in this matter is that the 2nd defendant has sanctioned the issuance of title document to the 1st defendant without any notice to the plaintiff while failing to inform the 1st defendant that the suit property has been allocated to the plaintiff who has been occupying and is in possession since 1994.
32. I do however note that the suit properties are lands which have not been administered through a Succession cause to determine which beneficiary gets what. The allocation documents for the suit property are still in the name of the deceased. From the above analysis I find that I can say conclusively that the applicant/Plaintiff has established a *prima facie* case with a probability of success.
33. On the second limb as to whether the applicant/plaintiff would suffer irreparable injury which cannot be adequately compensated by an award of damages, the plaintiff deponed that the 2nd defendant has transferred the suit properties to the 1st defendant and sanctioned issuance of title documents in the name of the 1st defendant. Despite the 2nd defendant's action of transferring the land, I still find that the plaintiff can be adequately compensated by way of damages if the need arises.



34. I am further guided by what was held in the case of *Wairimu Mureithi -vs- City Council of Nairobi* Civil Appeal No. 5 of 1979 KLR 332, 396.

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them”.

35. In answer to the question in whose favour the balance of convenience tilts in the event that the court is in doubt is very important in this case. The plaintiff has come to court for orders for injunction against the 1st defendant alleging that the 2nd defendant has sanctioned issuance of title documents to the 1st defendant knowing very well that the said suit property was not available for allocation since it was already allocated to the deceased. Armed with a limited grant ad litem, the plaintiff is seeking to preserve the suit property of the deceased which certainly will be given to succession processes. The court is aware that applications for injunctions must be filed in a suit as envisaged under order 40 of the *Civil procedure rules*. From the above analysis, I am inclined to find that the balance of convenience tilts in favour of the Plaintiff/Applicant.

36. As I make this finding I am inclined to note that the 1st defendant has denied that there is any construction going on at the suit properties meaning that they have not taken possession despite claiming to have the title to the land which was however not presented to court. In the circumstances I will make a finding as follows:

- a. That an interim injunction be and is hereby issued restraining the 1st and 2nd Defendants, their agents and/or servants or any other person under their instructions, consent, authority and control from causing registration of conveyance of Plot No. T 15BB and T 18B now renamed LR No. LR No 136/15856 and 136/15857 or taking occupation of whichever nature.
- b. That an order for injunction be and is hereby issued restraining the 1st and 2nd Defendants, their agents and/or servants or any other person under their instructions, consent, authority and control from causing registration of conveyance of Plot No. T 15BB and T 18B now renamed LR No. LR No 136/15856 and 136/15857 or taking occupation of whichever nature pending the inter parte hearing of the suit.
- c. The costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023.

MOGENI J

JUDGE

