



Musyoki (Suing as the Administratrix of the Estate of the Late Laban Maingi Kitele) & another v Dave & 5 others (Environment & Land Case E038 of 2023) [2023] KEELC 20150 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E038 OF 2023
AA OMOLLO, J
SEPTEMBER 28, 2023**

BETWEEN

**DAPHINE MUENI MUSYOKI (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE LABAN MAINGI KITELE) 1ST PLAINTIFF
JOHNBOSCO KYULE KITELE 2ND PLAINTIFF**

AND

**SAPNA DAVE 1ST DEFENDANT
PETER GIKURA MBURU 2ND DEFENDANT
IRUNGU KIMENYA 3RD DEFENDANT
ADAN DENGE 4TH DEFENDANT
ABDILLAHI HUSSEIN 5TH DEFENDANT
JAMAL ABDINOOR 6TH DEFENDANT**

RULING

1. For determination is a notice of motion dated 8th June 2023 by the Plaintiffs herein seeking for injunctive reliefs against the Defendants with regard to property LR Number 36/VII/600 (Original Number 193/2) pending the hearing and determination of this suit, and that the officer commanding Eastleigh Police Division do ensure compliance with the said order if granted, and cost of the application be provided for.
 - i. Spent
 - ii. Spent



- iii. That the honourable court be pleased to grant a temporary injunction restraining the Defendants/Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiffs' property being LR Number 36/VII/600 (Original Number 193/2) pending the hearing and determination of this suit herein.
 - iv. That the Officer Commanding Eastleigh Police Division do enforce compliance of the orders 2 and 3 above.
 - v. That the honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
 - vi. That the costs of this application be provided for.
2. The motion was supported by the affidavit of Daphine Mueni Musyoki who deposed inter alia that Laban Maingi Kitele - deceased is the legally registered proprietor of LR Number 36/VII/600 (Original Number 193/2), herein after referred to as "the suit property" having purchased and transferred to him on 23rd December 1974. That the suit property and LR No.36/VII/601 (Original no.193/3) which was sold to Samson Macharia Ndegwa arose from subdivision of Original Property LR 36/VII/193 done on 25th August 1972.
 3. She avers that the Plaintiffs have been trying to develop the suit property by constructing and developing residential-commercial buildings thereon but the Defendants have on numerous occasions trespassed on it in the company of rowdy goons and with the aid of rogue police officers like the 4th Defendant and demolished the structures and excavated the land. She further deposed that the Defendants claim that the suit property belong to the estate of Khair Din Chaudri yet the deceased had in his letter sold the same to Laban Maingi Kitele – deceased.
 4. The Defendants opposed the application by the Replying Affidavit sworn on 11th July 2023 by Sapna Dave on behalf the Defendants. She deposed that the suit property belongs to Khair Din Chaudhri and vide irrevocable Specific Power of Attorney dated 24th July 1990, she has the authority from his estate to deal with the same.
 5. She further stated that the Plaintiffs misled the court in Succession Cause No.298 of 2017 in order to steal a match when they listed the suit property which is non-existent and that there is no current search regarding the alleged sub division therefore the provided search cannot be relied upon as it is dated year 2017 when the Land Registry was still on the manual phase and full of malpractices. Further that the documents provided do not reflect they are from the Government Lands Registry.
 6. The Defendant deposed that the Deed Plan provided has no substantive applications or approvals which created it and the same has not been certified by the relevant authorities nor have they provided to the court a Deed of Surrender to indicate that the previous plans were surrendered. That the only existing Deed Plan No.45930 depicts that the said land was never subdivided to its conclusion.
 7. The Defendants stated that only official Land Registry records can cure the situation and that the Plaintiffs are simply coiled in their own imagination thinking that the Honourable Court of Law can rely on a mere receipt without a corresponding entry which can only be envisaged in a Certified copy of the records from the Ministry of Lands Registry.
 8. They further averred that the Plaintiffs are not in possession of the suit property, nor have the necessary approvals to develop it and neither the Administrators nor beneficiaries of the estate of the Laban Maingi Kitele has executed the Agreement for sale annexed as "DMM7 (i) and DMM7 (ii). That



the Plaintiffs have not provided the CR12 to indicate who are the Directors/Shareholders of Sabda Limited and its signatories

9. The Defendants contended that they are the ones who have been in occupation of the suit property evidenced by the Security Contract procured by the company of 4th Defendant who is the legal representatives of the 1st Defendant together with payment receipts thereto. Further, the 1st Defendant instructed the firm of Messrs. Chaudhri and Associates, advocates to grant the 2nd and 3rd Defendants a letter of authority to administer the property of Mr. Khair Din Chaudhri – deceased.
10. The Defendants argue that granting the orders as prayed by the Plaintiffs in paragraphs 2 and 3 of the application, will be a violation of their constitutional right under article 40. Instead they pray for an order of injunction to issue against the Plaintiffs and their agents regarding activities on the suit property.
11. The Plaintiffs filed a further affidavit both sworn by Daphine Mueni Musyoki on 18th July 2023. She deposed that the 6th Respondent trading as Abdinoor Jamal & Co. Advocates instructed the security firm, BABS Security Services Ltd to guard the suit property and that also on different occasions he met with Plaintiffs' Advocates and the developer a Mr. Sahane Kilas who proposed to them be paid off so as to stop interfering with the property, a proposal that was declined hence this suit.
12. Further, they explained that in the application dated the 8th of February 2023, they noted a typo error before any of the Respondents filed their response, and proceeded to amend the same. However, this court struck out both applications on the basis that no leave had been sought to amend the application. Owing to the threats posed by the Defendants to the suit property, they filed the current Motion now under consideration. Also, that an application struck out is not an application dismissed as the former can be re-filed and heard on merits whereas a dismissal bar re-filing.
13. The Plaintiff deposed that though the 1st Respondent alleged an interest in the property through the estate of Khair din Chaudhri as a niece, she has not produced any grant to show that she is the administrator of that estate nor has she produced a confirmed grant to show that indeed the suit property form part of that estate. That the letter of authority purportedly held by the 2nd and 3rd Respondent is granted by a non- existent administrator and is null and void.
14. The Plaintiff stated that it is inconceivable that the Khair Din-deceased would have issued the 1st Defendant with a special power of attorney in 1990 more than 20 years after he sub-divided the property and transferred. That in any case the alleged special power of attorney is void for want of a subject matter therefore, the 1st Respondent cannot purport to grant authority to the 2nd and 3rd Respondents through the letter of authority produced by her and marked SD5 whereas she had no authority whatsoever.
15. That the question as to whether the subdivision was done on the 25th August 1972 and subsequent transfer to the late Laban Maingi Kitele was done, as the search done in 2017 clearly shows the entire history of the property for more than forty years which is sufficient to allow court determine this matter. Further, they stated that the video evidence that they produced marked DMM 11 and DMM13 clearly tally with sketch map on their deed plan on page 4 of annexure DMM4 which shows how the area adjacent to the road on two sides and covered with a blue mabati in the video, is a construction site as is exactly drawn on the deed plan No. 90502 produced by them.
16. The Plaintiffs also stated that they have been in occupation of the suit property therefore the 1st Defendant is not only interfering with the actual quiet possession but is also in the process of messing with the file at the Lands Registry to try to illegally confer herself legal title.



17. The Plaintiffs filed their submissions dated 18th July 2023, the 1st -3rd Defendants filed submissions dated 24th July 2023, and the 4th-6th Defendants filed submissions dated 24th July 2023.
18. The Plaintiffs submitted that the title document to prove ownership is in the form of a conveyance from one Khair din Chaudri to the registered proprietor for a valuable consideration of Kenya Shillings One Hundred and Thirty Thousand (130,000) made on the 23rd of December 1974. That, a reading page 2 line 3 of the said conveyance shows the transferor Mr. Khair Din acknowledged receipt of the full consideration for the transfer of the suit property to the registered proprietor.
19. It is submitted for the Plaintiff that they had fulfilled all the three requirements for grant of temporary injunction as enunciated in the case of *Giella Versus Cassman Brown* (1973) EA 358 and reiterated in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR by the Court of Appeal. In support of the argument that their application is not an abuse of the court process, the Plaintiffs cited the case of *Enock Kirao Mubhanji v Hamid Abdalla Mbarak* [2013] eKLR where O. A. Angote J. distinguished between the terms “dismissal” and “striking out” as well as their implication stating that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.
20. The 1st-3rd Defendants submitted that in determination of who is the proprietor of the suit property, it should be considered that sub division of land is a process and not an event and that the Plaintiffs have failed to provide any documentation before this court evidencing the alleged subdivision process. Further, that the Plaintiffs have not produced any expert witness before this Court in form of a duly Licensed Surveyor or Physical Planner to buttress their allegations that the suit property was indeed subdivided.
21. The Defendants also submitted that the Plaintiffs’ application dated 8th June 2023 is an abuse of Court’s process as a similar application was filed and determined. In support they cited the case of *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* (2014] eKLR) where the Court of Appeal stated that it is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding.
22. The Defendants submit further that Khair Din Chaudhri - deceased is the registered proprietor of LR Number 36/VII/193 as evidenced in the annexed Deed of Conveyance of the subject property to their replying affidavit and therefore the balance of convenience tilts in their favour. It is also submitted that the Plaintiffs have failed to demonstrate how they acquired the title they hold thus contravenes the principles envisaged to establish a prima facie case as laid out in the case of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) EKLR.
23. The Defendants added that the Plaintiffs have not committed to pay damages to them if it turns out that the injunctive orders were not merited and cited the case of *Gati v Barclays Bank (K) Ltd* (2001) where the court stated that undertaking to pay damages is one of the criteria considered for granting an injunction. That the Plaintiffs have nothing to lose that cannot be compensated by way of monetary terms if the orders sought are not granted.
24. The 4th -6th Defendants stated that the Plaintiffs are not entitled to injunctive orders because that they are abusing the court process. They explained that there is no evidence to show that they participated in any trespass at all and that 6th Defendant is an advocate and should not be sued in executing his work in a purported continuing tort. They further submitted that the Plaintiffs were not in possession of the suit property and proposed that a status quo order should be issued as the same would not prejudice the Plaintiffs, citing the importance of possession as explained in the case of *Kinuthia v Munguti & 2 others* (Environment & Land Case E18 of 2022) [2022] KEELC 15001 (KLR). On the issue of irreparable



harm, they submit that it is the 1st Defendant in possession and would be the one to suffer irreparable harm.

25. In submitting that the Plaintiffs are abusing the process of the court, the 4th -6th Defendants cited the case of *Penina Atieno and another v Standard Chartered Bank Limited and another*, Kisumu High Court civil case number 1333 of 2002 (Gachenje,J on 23, May 2003)which held that the most reasonable thing for an advocate to do is to withdraw one application before filing another application seeking similar orders as to have both applications on record is an abuse of the process and would otherwise offend section 6 of the *Civil Procedure Act*.

Analysis

26. The following issues are framed for determination:
- a. Whether the plaintiffs’ motion is an abuse of court?
 - b. Whether the Plaintiffs should be granted the injunctive relief sought?
 - c. Costs

a) Whether the Plaintiffs’ motion is an abuse of court?

27. The Defendants contended that the Plaintiffs’ motion dated 8th June 2023 amounted to an abuse of court process as the issues it raises had been raised in the application dated 8th February 2023 and subsequently amended on 21st February 2023 and which was struck out. It is not contested by the Defendants that the former applications were struck out before they responded to the same and that the earlier application was not heard on merit. Consequently, the Plaintiffs’ submission that a pleading struck out is different with one that is dismissed is correct as a dismissal equates to conclusive determination of the issues raised on merits thus barring re-filing but striking out allows for re-filing. The cases cited by the defendants are distinguishable as the said cases were heard on merits before the order of dismissal was made.

c) Whether the Plaintiffs should be granted the orders of injunction sought?

28. The principles upon which an interlocutory injunction may be granted are well settled, i.e. establish a prima facie case with a probability of success that 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 and if in doubt, the court will decide the matter on a balance of convenience.
29. As was reiterated in *Bruce Mutie Mutuku t/a Diani Business Travel & Diani Business Center v Ashburton Grove Limited* [2020] eKLR, courts have also accepted that in dealing with an application for an interlocutory injunction the court is not necessarily bound by the three principles set out in the Giella Case as it may look at the circumstances of the case generally and the overriding objective of the law.
30. In the case of *Suleiman –v- Amboseli Resort Ltd* (2004) KLR 589 Ojwang Ag. J (as he then was) stated thus:

“.....counsel for the defendant urged that the shape of the law governing the grant of injunction relief was long ago in *Giella v Cassman Brown* in 1973 cast in stone and that no new element may be added to that position. I am not, with respect in agreement with counsel in that point for the law always kept growing to greater levels of refinement, as it



expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770 -781. A fundamental principle of... that the court should take whichever counsel appears to carry the lower risk of injustice if it should turn out to have been “wrong” ...

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella v Cassman Brown* the court has had to consider the following questions before granting relief:

- iv) is there a prima facie case....
- v) does the applicant stand to suffer irreparable harm.....
- vi) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory relief, should always opt for the lower rather than the higher risk of injustice...”

31. To demonstrate evidence of interest in the suit property, the Plaintiffs have produced a title in the form of a conveyance from one Khair din Chaudri while the 1st Defendant has produced a Deed of Conveyance of all that Parcel of Land known as LR Number 36/VII/193 before subdivision of the suit property. Both parties are alleging that they are in occupation of the suit property. The 1st Defendant deposed the registered owner of the original title is deceased but she did not present any documents relating to the administration of the deceased estate that confirms authority on her to deal with the suit property. It is trite that the authority of the P.O.A referred to ceases as soon as the donor dies.
32. At this interlocutory stage of the proceedings, the court will not accept the invitation to analyze the authenticity of the documents annexed to the affidavits in support of and against the application. On the face of documents relied upon by the Plaintiffs and the 1st Defendant show the owner of the original plot was Kahir Din Chaudri-deceased. The dispute now is whether the property was subdivided and part of it transferred to Laban Maingi Kitele-deceased or it still remains whole in the name of Kahir Din-deceased.
33. Whether the land was subdivided or not, can only be determined during the trial of the case therefore it is imperative that the suit property be preserved pending its determination on merits. The question this court is tasked to deal with is in whose favour should the orders of injunction be granted. The Plaintiffs pleaded that each time they have made attempts to develop the suit property, they are always disrupted by the Defendants and or their goons. From this statement, I draw a conclusion that the land in its current state is not developed. Because of the conflicting claims, the interests of justice would be to have it preserved in that state instead of having the court authorizing development to take place before hearing the suit.
34. Consequently, I will allow the application but vary the prayers sought so that the orders of injunction are given on the following terms;
 - i. That an order of injunction be and is hereby issued restraining the Defendants, whether by themselves, their agents and or servants from trespassing on, construction on, alienating or otherwise interfering or dealing with the suit property LR. Number 36/VII/600 (Original number 193/2) pending hearing and determination of this suit.



- ii. That the Plaintiffs/Applicants are restrained from undertaking any construction works or continuing with any ongoing constructions and or alienating the suit property pending the hearing and determination of this suit
- iii. That the Officer Commanding Eastleigh Police Division do ensure compliance with order (i) and (ii) above
- iv. The costs of the application to the Plaintiff in any event.

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

A. OMOLLO

JUDGE

In the presence of :

Mr. Bruno for 1st -3rd Defendants

Ms. Moku for Plaintiff

Mr. Jama for 5th -6th Defendants

Court assistant: Valentine

