



**Kalinge v Directorate of Criminal Investigation Taveta (Through
Kenya Police Service) & another (Environment & Land Case
14 of 2023) [2023] KEELC 20215 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 14 OF 2023
LL NAIKUNI, J
SEPTEMBER 25, 2023**

BETWEEN

CHRISTOPHER MELIKI KALINGE PLAINTIFF

AND

**THE DIRECTORATE OF CRIMINAL INVESTIGATION TAVETA (THROUGH
KENYA POLICE SERVICE) 1ST DEFENDANT**

THE REGISTRAR OF TITLES - TAVETA 2ND DEFENDANT

RULING

I. Introduction

1. The Plaintiff/ Applicant herein, Mr. Christopher Meliki Kalinge moved this Honorable Court for the hearing and determination of a Notice of Motion application dated 17th February, 2023. It was brought against the 1st and 2nd Defendants/ Respondents herein under a Certificate of urgency and the dint of the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 and Order 40 of the Civil Procedure Rules, 2010.
2. Upon service on the 3rd March, 2023, the 1st Defendants/ Respondents herein did file a Memorandum of Appearance and a response to the application through a Replying Affidavit dated 20th March, 2023 opposing the said application accordingly.

II. The Plaintiff/ Applicant's case

3. The Plaintiff/ Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.



- c. That this Honorable court do issue a mandatory injunction compelling the 1st Defendant to return to the Plaintiff the illegally taken title deed for all that parcel of land known as Taita Taveta/Kimala Matal 1400 pending the hearing and determination of this suit.
 - d. That this Honorable court do issue a mandatory injunction restraining the land registrar and/o his authorize agent servants, surveyors from cancelling or altering the title deed for all that parcel of land known as Taita Taveta/Kimala Matal 1400 pending the hearing and determination of this suit.
 - e. That the Honorable court be pleased to issue a temporary injunction restraining the defendants by themselves, their authorized agents, servant and/ or any other person acting on their behalf from trespassing into, survey, transfer, dispose of, revoke the title, demolishing houses or structures therein, sub-divide and/or dealing in any other manner adverse to all that parcel of land known as Taita Taveta/Kimala Kata/1400 pending the hearing and determination of this of this suit.
 - f. That cost of the application be provided for.
4. The application herein was premised on the grounds, testimonial facts and averments made out under the 16 Paragraphed Supporting Affidavit of Christopher Meliki Kalinge sworn and dated 17th February, 2023 together with three (3) annexures marked as “CMK – 1 to 3” annexed thereto. The Plaintiff/Applicant averred that:
- a. The Plaintiff is the owner of all that parcel of land known as Taita Taveta/Kimala Meta/1400 measuring approximately 90.59 Ha placed at a market value of a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500, 000,00/=).
 - b. On or about the 15th November 2022, the Plaintiff/Applicant’s house erected on the above stated parcel of land was broken into and the Plaintiff lodged a complaint and report at the Taveta police station under current occurrence book bearing numbers - OB NO 20/15/11/2022.
 - c. On reporting the above incident the police demanded that he furnish them with the original Certificate of title deed of the parcel of land on where the house is erected.
 - d. He obliged. The police officer who was dealing with the incident took the Title Deed and issued the Plaintiff/Applicant with an inventory showing that the Title deed had been recovered from him and retained the said Certificate of title deed together with the original minutes dated 13th August 1984.
 - e. The officer never divulged any reason for retaining the said Certificate of title deed or disclose who could be the complainants claiming ownership of his land.
 - f. The said office never investigated or caused any arrest of the criminals who broke into the claimant house and stole his valuables.
 - g. Despite several visits to the police station and his plea the police officer had refused to return the said land Title deed to the Plaintiff/Applicant.



- h. The Plaintiff/Applicant apprehended that the police and/or any other person in collusion therefore might use the title deed to transfer or dispose of the parcel of land without his knowledge and/or consent and hence the orders sought ought to be granted.
- i. The Plaintiff/Applicant had “a prima facie case’ with high chances of success.
- j. The Plaintiff/Applicant shall suffer irreparable loss and damages if the orders sought were not granted because the Defendants might proceed to dispose of the property to the detriment of the Plaintiff/Applicant herein.
- k. The balance of convenience tilted in favour of the Plaintiff/Applicant.
- l. It was in the interest of justice and equity that the orders sought are granted

III. The responses by the 1st Defendant/Respondent

5. On 24th March, 2023, while in opposition of the application, the 1st Defendant/Respondent filed a 25 Paragraphed Replying Affidavit sworn by PC Benson Nyange, an officer of the 1st Defendant/Respondent together with two (2) annexures marked as “BN - 1 to 2” annexed thereof. He stated as follows: -
 - a. The contents of Paragraphs 2 and 3 of the Applicant’s said Supporting Affidavit were vehemently opposed and the Respondent in addition claims that the Plaintiff/Applicant was a co - owner of the parcel of land known as Taita/Taveta/Kimala Amal/1400 together with others (group) and marked “BN 1” is a copy of a title deed.
 - b. He was a stranger to the allegations mentioned in paragraph 3 of the supporting Affidavit and further state that if there was any break-in then the same was not by act of the Respondents herein.
 - c. In response to the contents made out under Paragraphs 4 and 5 of the supporting Affidavit the Respondent averred that the office of the 1st Respondent received information from allege co-owners of Taita/Taveta/Kimala Amal/1400 that the Plaintiff had illegally retained the Certificate of title deed to the said parcel of land and was apprehensive in releasing the same and especially having that the said parcel is co-owned.
 - d. A party seeking equitable remedy like an injunction order must be honest and candid. In the present case the Plaintiff/applicant has failed to make a frank disclosure of all relevant facts to the just determination of the Application. The Applicant intentionally failed to disclose that the said parcel was acquired with others.
 - e. Further in response to the contents of Paragraph 5 above and without prejudice to the foregoing the Respondent states that the said title deed was retained purely for investigation purposes. Annexed and marked “BN - 2 (i),(ii),(iii),(iv)” were copies of letters dated 16th February, 2023 and 7th March, 2023 from the Land Registrar, Taita-Taveta and official searches confirming the results of the investigation.
 - f. The contents of made out under Paragraphs 9 and 10 of the supporting affidavit were denied and the 1st Respondent further stated that the Plaintiff/Applicant had not placed any iota of proof to reinforce his assertions that the 1st Defendant officers were colluding with an aim of acquiring the said parcel of land.



- g. It was trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction. The Plaintiff/Applicant had not demonstrated any existence of exceptional and special circumstances in the case herein.
- h. Further the Respondent stated that no real danger had been demonstrated or would be caused to the Plaintiff/Applicant if the said orders were not granted.
 - i. The Applicants should therefore separately and solely pursue the party that sold to them Sub - division Number 1528 Section III Mainland North and let the transaction between the 1st and 2nd Respondents continue in operation undisturbed.
- j. The 1st Respondent opined that the inconvenience caused to the other Co - owners to the suit property would be greater than that which would be caused to the Plaintiff/Applicant if the injunction was granted.
- k. The Plaintiff/Applicant had not demonstrated any sufficient reason to warrant grant of the orders sought and as such the application herein should be dismissed.
- l. In the premises it was clear that the Application consisted of inaccuracies of facts and full of misrepresentation and untruths. The Plaintiff/Applicant herein had come to court with unclean hands and the same should not be given the light of day.
- m. The 1st Defendant therefore urged the court to dismiss the application herein as no prejudice or substantial loss would be occasioned on the Applicant in dismissing the application.
- n. It was only fair and just that the application be dismissed with costs as it was wholly devoid of merit.

VI. The Further Supporting Affidavit by the Plaintiff/Applicant

- 6. With leave of Court, the Plaintiff/Applicant filed a 10 Paragraphed further Supporting Affidavit sworn by Christopher Meliki Kalinge sworn and dated 24th May, 2023 where he averred that:
 - a. The deponent of the Replying Affidavit had not disclosed why he has held on to his Certificate of Title Deed for all that period of time.
 - b. The issue of ownership of the suit parcel of land was clarified by the demarcation officer vide his later dated 3rd April 1995. Annexed and marked "CMK - 1".
 - c. Further to the averments made out under Paragraph 4 of the Replying Affidavit, it evidently clear that the co - owners of the suit property are owners of the bordering parcel of land.
 - d. In the year 2008 and 2009 there arose boundary disputes which Issues were separately addressed In Taveta Civil Case No.1 of 2008 and Taveta PMCC no 26 of 2009 in the favour of the Plaintiff/Applicant and costs of the suit was paid to him and no appeal was preferred to date. Annexed and marked as "CMK - 2 "a", "b" & "c" were the said rulings and defendant schedule on cost payment.
 - e. It was therefore as misinformation backed with no evidence that the suit property was co - owned.
 - f. It was therefore in the interest of Justice and equity that the application be allowed.



VI. Submissions

7. On 8th May, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 17th February, 2023 be disposed of by way of written submissions. Unfortunately, by the time the Court was retiring to write this ruling, it was only the Plaintiff/Applicant who complied within the stipulated time frame. A ruling date on merit was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant

8. On 31st May, 2023, the Learned Counsel for the Plaintiff/Applicant through the Law firm of Messrs. Otieno Otwere & Associates Advocates filed their submissions dated 24th May, 2023. Mr. Otwere Advocate commenced his submission in respect of the Plaintiff/Applicant's Application dated 17th February, 2023 by stating that the same sought for the following orders:-

- i. Spent.
- ii. Spent.
- iii. That this Honorable court do issue a mandatory injunction compelling the 1st Defendant to return to the plaintiff the illegally taken title deed for all that parcel of land known as Taita Taveta/Kimala Matal 1400 pending the hearing and determination of this suit.
- iv. That this Honorable court do issue a mandatory injunction restraining the land registrar and/o his authorized agent servants, surveyors from cancelling or altering the title deed for all that parcel of land known as Taita Taveta/Kimala Matal 1400 pending the hearing and determination of this suit.
- v. That the Honorable court be pleased to issue a temporary injunction restraining the defendants by themselves, their authorized agents, servant and/or any other person acting on their behalf from trespassing into, survey, transfer, dispose of, revoke the title, demolishing houses or structures therein, sub-divide and/or dealing in any other manner adverse to all that parcel of land known as Taita Taveta/Kimala Kata/1400 pending the hearing and determination of this of this suit.
- vi. That cost of the application be provided for.

9. The Learned Counsel observed that the grounds upon which the motions was premised were on the face of the application and supported by the affidavit of the Plaintiff/Applicant and the annexures thereto.

10. The Learned Counsel provided the Court with the brief facts of the case to wit that that the Plaintiff/Applicant was the registered and therefore the absolute owner of the suit property herein Taita Taveta/Kimala Amal/1400 on or about the 15th November 2022 unknown people broke into the suit property an incident which was dully reported at the police station. Subsequent to the incident being reported, the police officer mandated to handle the matter told the Plaintiff/Applicant to hand over the Certificate of title deed which he did but never returned it back. The Plaintiff/Applicant's several demands to be given back his title deed did not elicit any response. The Plaintiff could not therefore concentrate on his farming since the title deed was confiscated. The Plaintiff/Applicant apprehended that, the police officer was colluding with the third parties to take away his parcel of land. The position



- taken up by the Plaintiff/Applicant was that he had a prima facie case with high chances of success and shall suffer irreparable loss and damages unless the orders sought were granted. The Plaintiff/Applicant also asserted that the balance of convenience tilted in his favour, as the owner of the suit land.
11. The Learned Counsel submitted that in response thereto, the 1st Defendant/ Respondent filed a Replying Affidavit sworn by P.C Benson Nyange, his position was that the Plaintiff/Applicant was a co-owner of the suit property and therefore not the absolute owners. He also averred that the title deed was retained as the said parcel of land is being investigated particularly on how it was obtained.
 12. The Learned Counsel further observed that the Plaintiff had proved that he was the registered and therefore he absolute owner of the suit parcel of land. The Defendants had not annexed any document to prove that the parcel of land is co-owned save for the official search which cannot be a substitute for the tittle deed. Further vide the documents annexed to the Plaintiff/Applicant's further supporting affidavit, the demarcation officer clearly observes that the Plaintiff/Applicant was the owner of the suit parcel of land and the people said to be others own the parcel of land bordering the Plaintiff/Applicant's suit parcel of land.
 13. In the said further Supporting Affidavit, the Plaintiff/Applicant had annexed the rulings. The said rulings were on cases filed by people owning bordering parcels of land. The cases were filed in the years 2008 and 2009. In the said suits they alleged trespass and boundary dispute. The same being SRMCC no 11 of 2008 Taveta and PMCC no 26 of 2009 respectively which were decided in favour of the Plaintiff herein his accusers were condemned to pay costs of the suit.
 14. It was now settled that for a court to grant an interlocutory injunction it had to be satisfied that the applicant had a prima facie case. This court is guided by the principles in case of:- "Giella v Cassman Brown (supra)" which included: whether the applicant has shown prima facie case with a probability of success; whether the applicant shall suffer irreparable Injury which cannot be compensated by damages; and if the court is in doubt then it can decide the application on a balance of convenience.
 15. The Learned Counsel submitted that the application herein was merited as the Plaintiff/Applicant had met all those requirements. The Plaintiff/Applicant being the owner of the suit property should not be denied the orders. He had a prima Facie case with high chances of success now that the Defendants/ Respondents had not produced any document to contradict the issue of ownership. The Defendant/ Respondent in his affidavit had not disclosed who the co-owners are either in the official searches attached or in the green card. It's therefore clear that the Plaintiff/Applicant was most likely to suffer irreparable loss and damages, because with the title deed being in the hands of third party, the said land could easily be sold and/or transferred to the anonymous co-owners to the detriment of the Plaintiff.
 16. The Learned Counsel observed that the Plaintiff/Applicant being the owner of the suit property should be granted the orders sought since the balance of convenience tilted in his favor. To support his argument he relied in the case of:- "Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma [2020] eKLR" the court of appeal reaffirmed its decision in "Kenya Breweries Limited & Another v Washington O. Okeyo [2002] eKLR" and stated that:-

"a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application."
 17. The Learned Counsel submitted that this Honourable Court has the discretion to grant mandatory injunction especially after being satisfied that there exists special circumstances. And in this case special circumstances are that the Plaintiff/Applicant had a right to have back his title deed. If indeed the



Defendants/Respondents were to investigate the title they ought to have moved to court and got orders first but not sending thugs to break into the Plaintiff's property and upon making a report as required by the law the investigation offices sends for a title to prove ownership and thereafter his title deed was illegally confiscated. It was his constitutional right. Without the Certificate of Title deed, the Plaintiff/Applicant usage of the property was limited as he was apprehensive that the same might be sold. The police could not hold the property's title deed indefinitely. Investigation should and must always come to a conclusion. They could retain certified copies of the title deed as they take their sweet time to conclude their investigations.

18. In conclusion, the Learned Counsel averred that the application before the Honourable Court is merited and should be allowed as prayed.

19. Analysis & Determination.

20. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant and the Defendants/Respondents herein, the written submissions by the Plaintiff/Applicant, the myriad of cases cited herein, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
21. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion dated 17th February, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - b. Whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage?
 - c. Who will bear the Costs of Notice of Motion application 17th February, 2023.

Issue a). Whether the Notice of Motion dated 17th February, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

22. Under this sub - heading the main substratum of this application is whether to grant or not the orders of injunction. Pursuant to that it follows that the issues on injunctions need to be deliberated on critically in this ruling. Ideally, to commence the deliberations, the Honorable Court holds that the application by the Plaintiffs herein is premised the under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.



23. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella v Cassman Brown & (Supra)”, where it was stated:-

“First an applicant must show a prima facie case 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

24. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- Nguruman Limited (Supra), thus:-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. 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. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

25. In dealing with the first condition of “prima facie case, the Honorable Court guided by the definition melted down in the case of “MRAO Limited v First American Bank of Kenya Ltd & 2 others [2003] KLR 125,. Its stated thus:-

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”. Page 8

That “...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.” Page In the instant case and the surrounding facts herein, it is not in dispute that the Plaintiff/Applicant is a the suit property parcel of land known as TAITA TAVETA/KIMALA META/1400 measuring approximately 90.59 Ha. The 1st Defendant/ Respondent attached a copy of a Certificate of title deed marked as “BN - 1” which clearly indicates that the Plaintiff is the legal proprietor of the suit property. The Plaintiff/ Applicant averred that on 15th November, 2022, the Plaintiff/Applicant’s house erected on the above stated parcel of land was broken into and the Plaintiff/Applicant made a report at TAVETA police station under OB NO 20/15/11/2022. On reporting the incident, the police demanded that he furnish them with the title deed of the parcel of land on where the house is erected. The police officer who was dealing with the incident look the Title Deed



and issued the plaintiff with an inventory showing that the Title deed had been recovered from him and retained the said land title deed together with the original minutes dated 13th August 1984. The Officer had never divulged any reason for retaining the said title deed or disclose who could be the complainants claiming ownership of his land. The said office never investigated or caused any arrest of the criminals who broke into the claimant house and stole his valuables.

26. Be that as it may, without notifying the Plaintiff/Applicant is seeking to have the Defendants/ Respondents restrained from trespassing into, survey, transfer, dispose of, revoke the title, demolishing houses or structures therein, sub-divide and/or dealing in any other manner adverse to all that parcel of land known as Taita Taveta/Kimala Kata/1400. The 1st Defendant/Respondent on the other hand averred that they took the said title deed belonging to Plaintiff as they had received claims from alleged co-owners of the Taita/Taveta/Kimala Amal/1400 that the Plaintiff/Applicant had illegally retained the title to the said parcel of land and was apprehensive in releasing the same and especially having that the said parcel is co-owned.
27. In the case of “Mbuthia v Jimba credit Corporation Ltd 988 KLR 1”, the court held that:-
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
28. Similarly, in the case of “Edwin Kamau Muniu v Barclays Bank of Kenya Ltd” the Court held that:-
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
29. Regarding this first condition though, I have fully noted the vehement arguments advanced by the 1st Defendant/Respondent to the effect that the property is co-owned and that the 3rd parties claim that the Plaintiff retained the title with total disregard to the 3rd Parties, I am fully satisfied and find that the Plaintiff/Applicant has established that he has a prima facie case with a probability of success. In saying so, I discern that the said arguments are premature to say the least. The Court has not had ample opportunity to critically and thoroughly interrogate and scrutinize all the documents annexed by the 1st Defendant challenging the validity of the suit instituted by the Plaintiff/Applicant. I believe that time will be availed during the full Trial. In the meantime, I reiterate there will be need to preserve the suit property.
30. With regards to the second limb of the Court of Appeal in case of “Nguruman Limited (supra)”, held that,
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by



which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

31. On the issue whether the Plaintiff/Applicant would suffer irreparable harm which cannot be adequately compensated by an award of damages. I hold that the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. In the instant case, it is not hidden that the Plaintiff/Applicant’s property is at high risk as he claim and it’s an issue not in dispute that the property belongs to the Plaintiff/Applicant and the Defendants/Respondents being the 1st Defendant has retained the suit title deed for purposes of investigation. The Plaintiff/Applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of “Pius Kipchirchir Kogo (Supra)” provides an explanation for what is meant by irreparable injury and it states:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

32. Quite clearly, the Plaintiff/Applicant would not be able to be compensated through damages as he has shown the court that his rights to the suit property. For these reasons, the Plaintiff/Applicant who is now exposed to a higher risk, has therefore satisfied the Court that they are entitled to the second condition as laid down in the case of:- Giella’s case.

33. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR” which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

34. In the case of “Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits



or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

35. The Plaintiff/Applicant contends that the balance of convenience tilted in his favour because is the legal proprietor of the suit property being that the 1st Defendant by himself has also provided evidence that the Plaintiff is the legal proprietor. The 1st Defendant never disclosed to them of any other intention that he would retain the title deed to the suit property. The decision of “Amir Suleiman v Amboseli Resort Limited [2004] eKLR” where the Learned Judge offered further elaboration on what is meant by “balance of convenience” and stated:-

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

36. Under this sub heading, the Honorable Court have expended such elaborate analysis above holds that the Plaintiff/Applicant is entitled to all the prayers sought from the filed application herein. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. As indicated above, this is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiff/Applicant. I have also not had the opportunity to interrogate the annexures attached to the Replying Affidavit by the 1st Defendant/Respondent herein to be in a position to decipher the issues raised by it. That will only be possible and convenient during a full trial. In the meantime, there will be great need to preserve the suit property pending the hearing and final determination of the suit.

37. In the case of “Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR where the court in deciding on an injunction application stated:-

“circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

38. Therefore, I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/Applicant has met the criteria for grant of orders of temporary injunction. Thus, I proceed to orders accordingly.

Issue No.b). Whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage?

39. I will consider the question of whether these orders can be issued at the interlocutory stage. The decisions of the Court of Appeal offer guidance on this point.



40. In “Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma (supra)” the court of appeal reaffirm its decision in “Kenya Breweries Limited & another – v Washington O. Okeyo [2002] eKLR” and stated that

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

41. The Court also reaffirmed its decision in “Shariff Abdi Hassan v Nadhif Jama Adan [2006] eKLR” where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

42. Based on these cases, for mandatory to be granted at least these conditions ought to be fulfilled:-

- a. There is special circumstances to be considered;
- b. The Defendant is not taking advantage to steal the match against the Plaintiff.
- c. That once the case is decided it brings to a conclusion of the matter.

43. From the facts of this instant case, I am not convinced that special circumstances exist in this matter that may warrant the grant of a mandatory injunction. It is not in dispute that there exists a land or boundary land dispute which has led to the Defendant to interfere and they require ample time to conduct an intense investigation of the suit property. Perhaps seeing and retaining the original Certificate of the title deed would be necessary in the given circumstances so long as they do not cause any interference with it in any way whatsoever. I am also not convinced that this case is so clear that it ought to be decided at once. There are competing claims by both parties and these require further interrogation. At this stage I cannot tell for sure that the 1st Defendant/Respondent claim is untrue.

44. For these reasons, therefore, I decline to grant orders of Mandatory injunction.

Issue No. b). Who will bear the Costs of Notice of Motion application 17th February, 2023.

45. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh v Tarchalan Singh” eKLR [2014] and Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited, eKLR [2014].

46. In this case, as Court finds that the Applicants have fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010, this application shall be deemed to have merit and is hereby partially allowed with costs to the Plaintiff/Applicant as against the 1st Defendant/Respondent herein in as far as granting of temporary injunction is concerned. .

47. Conclusion & Disposition



48. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Plaintiff/Applicant have a case against the 1st Defendant/Respondent herein.
49. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 17th February, 2023 is found to have merit and is hereby allowed strictly as far as Prayers numbers 1, 2, 5 & 6 hereof are concerned but decline to grant Prayers numbers 3 and 4 respectively.
 - b. That an order of Temporary injunction do issue restraining the Defendants either by themselves, officers, agents, employees, assigns or any person acting on their behalf from trespassing into, survey, transfer, dispose of, revoke the title, demolishing houses or structures therein, sub-divide and/or dealing in any other manner adverse to all that parcel of land known as Taita Taveta/Kimala Kata/1400 pending the hearing and determination of this of this suit.
 - c. That an order hereby do issue for the 1st Defendant to strictly hold and retain the Certificate of Title Deed acquired or taken from the Plaintiff for all that parcel of land known as Taita Taveta/kimala Matal 1400 pending the hearing and determination of this suit strictly for purposes of conducting investigation of the matters before this Court.
 - d. That this matter to be fixed for hearing on 10th April, 2024.
 - e. That the cost of this application is awarded to the Plaintiff/Applicant.

It is so Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2023.

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HON. JUSTICE L. L. NAIKUNI, (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.**
- b. No appearance for the Plaintiff/Applicant.**
- c. No appearance for the 1st Defendant/Respondent.**

