



**Maingi v Juma & 2 others (Environment & Land Case 081 of 2022)  
[2023] KEELC 19946 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19946 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 081 OF 2022  
CA OCHIENG, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**THOMAS WAMBUA MAINGI ..... PLAINTIFF**

**AND**

**NAZIR JUMA ..... 1<sup>ST</sup> DEFENDANT**

**IRENE KALONDU T/A SMERP ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS MACHAKOS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before court for determination is the plaintiff's notice of motion application dated the November 10, 2022 where he seeks the following orders:
  1. Spent.
  2. That this honourable court be pleased to order the 3<sup>rd</sup> defendant/respondent herein to immediately remove the Caution lodged by the defendant/respondent over the property known as Donyo Sabuk/Komarock Block 104505.
  3. That this court be pleased to issue an interim injunction restraining the defendant/respondents whether by themselves, their servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing any activities on, interfering with the plaintiff/applicant's agents and or representatives and the process of subdivision, demolishing any structures on, selling, alienating, occupying and/or in any other way interfering with the suit property, Donyo Sabuk/Komarock Block 104505 pending the hearing and determination of the Application.
  4. That this court be pleased to issue an interim injunction restraining the defendant/respondents whether by themselves, their servants, representatives, agents and/or assigns



howsoever from dealing with, entering in, obstructing any activities on, interfering with the plaintiff/applicant's agents and or representatives and the process of subdivision, demolishing any structures on, selling, alienating, occupying and/or in any other way interfering with the suit property, Donyo Sabuk/Komarock Block 104505 pending the hearing and determination of this suit.

5. That this honourable court be pleased to order the Officer Commanding Station, KBC Police Station or any Police Officer to enforce Order 3 and 4.
6. That the cost of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the supporting affidavit of Thomas Wambua Maingi where he deposes that he is the registered owner of land parcel number Donyo Sabuk/Komarock Block 104505 which was excised from Donyo Sabuk/Komarock Block 1/334, hereinafter referred to as the 'suit land', as a result of Succession proceedings in Kangundo SPM Succession Cause No. 99 of 2016. He explains that Donyo Sabuk/Komarock Block 1/334 was a 50-acre block of land initially owned by the late Kitumbi Nzavyo. Further, on or about 2003, he bought and paid for 32 acres portion of the said land but the whole 50 acres land was transferred to him in an agreement that he would progressively pay for the remaining 18 acres as he received income from the subdivision as well as sale of the said 32 acres. He confirms demarcating the 32 acres in 50 by 100 metres plots, sourcing for purchasers of the said plots as well as apportioning the 1<sup>st</sup> defendant, five (5) acres of land. He claims the vendor died before he concluded the payment and he was involved in a tussle with the beneficiaries. Further, the beneficiaries contorted criminal charges being CR E 1738 of 2021 against him but later withdrew it. He states that the 3<sup>rd</sup> Defendant including the vendor's beneficiaries expunged his name from the register of the 50 acres of land being Donyo Sabuk/Komarock Block 1/334. He avers that the beneficiaries listed Donyo Sabuk/Komarock Block 1/334 as part of the Estate of the deceased in the aforementioned Succession Cause but the said Magistrate's Court did not have jurisdiction to handle it. He further states that the Succession Cause only granted him 28 acres but issued the 2<sup>nd</sup> defendant, three (3) acres while she is neither a beneficiary nor a purchaser. He avers that at the point of subdivision, he realized the 1<sup>st</sup> defendant had placed a caution on the suit land claiming purchaser's interest over the whole land yet his interest is of 5 out of 144 plots. He contends that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have colluded to create a new subdivision map for the area and have been fraudulently collecting money from his customers through bank accounts of an entity known as SMERP, promising to issue them with titles. Further, he reported the matter to DCI and sought for the removal of the caution but this was not done. He further claims that the 1<sup>st</sup> and 2<sup>nd</sup> defendants lodged the caution on the suit land to frustrate him.
3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants claimed to have filed replying affidavits late but the same are not in the court file. Further, the said replying affidavits were later expunged from Court Record on the March 20, 2023. The 3<sup>rd</sup> defendant had indicated he would oppose the Application on a point of law.
4. The plaintiff and 3<sup>rd</sup> defendant filed their respective submissions to canvass the instant Application.

### **Analysis and Determination**

5. I have considered the instant Notice of Motion Application including the rivaling submissions and the following are the issues for determination: Whether the plaintiff is entitled to orders of interlocutory injunction pending the outcome of this suit. Whether the Caution placed on the suit land should be removed.



6. The plaintiff in his submissions reiterated the averments in his supporting affidavit and insisted that the caution placed on the suit land is illegal and fraudulent. Further, that the court should grant an order for its removal. He contends that he has proven a prima facie case because he is the current owner of the suit land and has provided a history of ownership which is not contested. Further, that he will suffer irreparable injury which cannot be compensated by way of damages, if the orders sought are not granted. To support his arguments, he relied on section 73 of the *Land Registration Act* as well as the following decisions: *Mwangi Rukwaro & another v Land Registrar Nyeri* (2019) eKLR and *Giella v Cassman Brown* (1973) EA 358.
7. The 3<sup>rd</sup> defendant in its submissions insists that granting prayer No. 2 of the instant Application would amount to final orders being granted, circumventing the set procedure of removal of cautions as set out in section 73(1) and (2) of the *Land Registration Act*. He argues that the Plaintiff has not demonstrated if he initiated the removal of the caution. Further, that seeking for removal of caution in an injunctive application is improper, yet the plaintiff has not sought the same in the Plaint. To support his averments, he relied on the following decisions: *Mwangi Rukwaro & another v land Registrar Nyeri* (2019) eKLR; *Joseph Kibowen Chemjor v William C. Kasera* (2013) eKLR; *Rapha Hospital & Clinic Eldoret Company v Abdul Aziz Kana & another* (2019) eKLR and *Giella vs Cassman Brown* (1973) EA 358.
8. As to whether the plaintiff is entitled to orders of interlocutory injunction pending the outcome of this suit. In line with the principles established in the case of *Giella v Cassman Brown* (1973) EA 358, I will proceed to determine whether the Plaintiff has established a *prima facie* case to warrant the orders as sought. The Plaintiff is the registered proprietor of the suit land and has annexed a Certificate of Title for Donyo Sabuk/ Koma Rock Block 1/334 issued in his name on February 11, 2011. Further, he has also annexed a Certificate of Title for Donyo Sabuk/ Komarock Block 1/104505 issue on June 15, 2022 in his name. The Plaintiff claims the beneficiaries of the deceased vendor listed Donyo Sabuk/ Komarock Block 1/334 as part of the Estate of the deceased in the aforementioned Succession Cause. Further, that he was only allocated 28 acres yet he had already paid for 32 acres before the vendor's demise and they had agreed that he pays for the remaining 18 acres gradually The plaintiff explained that the defendants had registered a caution on the land and he was unable to transfer plots to various buyers.
9. Looking at the documents presented, I note from the Certificate of Confirmation of Grant in respect to the Estate of Kitumbi Nzavyu issued on August 2, 2018, land parcel number Donyo Sabuk/ Komarock Block 1/334 was distributed and yet the said title was already registered in the plaintiff's name. Further, none of the Respondents provided an explanation on how the title for Donyo Sabuk/ Komarock Block 1/334 was revoked and reverted to the deceased Estate. To my mind, the process of distributing a parcel of land which was not in the deceased name was improper and fraught with illegalities contrary to the provisions of the *Law of Succession Act*. The defendants have further not denied interfering with the suit land. Further, the 2<sup>nd</sup> defendant has also not denied receiving monies from prospective purchasers in respect to the suit land. In the circumstances, while noting that the Plaintiff's averments remain uncontroverted, I find that the Plaintiff has indeed established a prima facie case and is hence entitled to orders of interlocutory injunction pending the outcome of this suit.  
As to whether the Caution placed on the suit land should be removed.
10. The Plaintiff has sought for removal of caution on the suit land contending that the 1<sup>st</sup> defendant had placed one thereon claiming purchaser's interest over the whole land yet his interest is on 5 out of 144 plots. Further, that the 3<sup>rd</sup> defendant has declined to remove the said caution. The 3<sup>rd</sup> defendant opposed the removal of the caution insisting that it would amount to final orders being granted,



circumventing the set procedure of removal of cautions as set out in section 73(1) and (2) of the *Land Registration Act*. On removal of caution section 73 of the *Land Registration Act* stipulates thus:

- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation."

11. In applying the legal provisions I have cited above to the circumstances at hand, I note that the issue of removal of caution is a substantive one. Further, that the 1<sup>st</sup> Defendant is claiming purchaser's interest and the Plaintiff has not provided a guarantee on how he intends to safeguard his interests. In the interest of justice as well as safeguarding the substratum of the suit, I find that it would be pertinent for the Defendants to file their respective defenses first, then the matter proceeds to full hearing before the Caution can be removed. I will hence decline to make any order to that effect.
12. In the foregoing, I find the instant Application partially successful and will proceed to make the following orders:
  - i. That an order of interim injunction be and is hereby issued restraining the Defendant/ Respondents whether by themselves, their servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing any activities on, interfering with the Plaintiff /Applicant's agents and or representatives and the process of subdivision, demolishing any structures on, selling, alienating, occupying and/or in any other way interfering with the suit property, Donyo Sabuk/Komarock Block 104505 pending the hearing and determination of this suit.
  - ii. That the Officer Commanding Station, KBC Police Station or any police officer to enforce Order (i) above.
  - iii. That the cost of this Application be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023**



**CHRISTINE OCHIENG**  
**JUDGE**

