



Mwangi (Suing in her capacity as the administrator of the Estate of David Kamau Mwangi) v Kariuki & 2 others (Environment & Land Case E027 of 2023) [2023] KEELC 21045 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E027 OF 2023
FM NJOROGE, J
OCTOBER 26, 2023**

BETWEEN

**MARY WANJIRU MWANGI PLAINTIFF
SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF
DAVID KAMAU MWANGI**

AND

**CHARLES WAHOME KARIUKI 1ST DEFENDANT
DISTRICT LAND REGISTRAR, NAKURU 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT**

RULING

1. This ruling is in respect of the Notice of Motion application dated 12/04/2023 which is expressed to be brought under Section 1A, 1B, 3A and 63(c) and (e) of the [Civil Procedure Act](#), Order 50 Rule 1 of the [Civil Procedure Rules](#), Section 68 of the [Land Registration Act](#) and Article 159 (2), (a), (d) and (e) of the [Constitution](#) of Kenya which seeks the following orders:
 - a. Spent
 - b. That this honorable court be pleased to place an inhibition order on the land parcel No. Njoro/ Njoro Block 5/69 (Ngondu) and the subsequent subdivisions known as Njoro/ Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngondu) pending the hearing and determination of this application and pending the hearing and determination of this suit.
 - c. That pending the hearing and determination of this suit, the defendants/respondents by themselves, their agents and/or servants from trespassing, charging, selling, disposing,



developing, constructing and/or interfering in any way with the parcel of land known as Njoro/Njoro Block 5/69(Ngondu) and the subsequent subdivisions known as Njoro/Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngondu).

- d. That the costs of the application be provided for in any event.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of the plaintiff. The grounds on the face of the application and the supporting affidavit are that the plaintiff is the administratrix of the estate of David Kamau Mwangi (deceased); that she was appointed administratrix in Nakuru High Court Succession Cause No. 104 of 1988; that the suit property was known as Plot No. 60 now known as Njoro/Njoro Block 5/69 (Ngondu) and forms part of the estate of the deceased; that she is the legitimate owner of land parcel No. Njoro/Njoro Block 5/69 (Ngondu) which has now been closed for subdivision into land parcel No's Njoro/Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngondu); that her late husband David Kamau Mwangi vide the agreement dated 26/06/1981 bought the suit property measuring approximately 2 acres from Benard Kariuki who had been allocated the same pursuant to the shares he had bought from Ngondu Farmers Co-operative Society Limited; that by virtue of Benard Kariuki's membership of Ngondu Co-operative Society Ltd, like every other member, he was allocated two parcels of land measuring 15 acres and two acres in Ngondu Farm along Njoro-Elburgon Road and Njoro-Mau Narok Road respectively and initially assigned the same ballot No. 60; that before acquiring the suit property, her late husband had acquired Plot No. 59 now land parcel No. Njoro/Njoro Block 5/66 (Ngondu) measuring two acres which is developed; that they fenced off both parcels of land and planted cypress trees along the boundaries thereby making both parcels one single block; that she has been in occupation of the suit property undertaking animal and crop farming and a posho mill business since her husband acquired it; that on 30/11/2022, the 1st defendant unlawfully invaded the suit property accompanied by fifteen police officers and hired goons; that they cut down fifteen mature cypress trees and destroyed the perimeter fence comprising of posts and barbed wires; that the plaintiff reported the matter to the OCS Njoro Police Station where the police officers who had accompanied the 1st defendant were stationed; the said OCS denied having knowledge of the same and informed her that the suit property was registered in the name of the 1st defendant; that she visited the Nakuru Lands Office where she discovered that the 1st defendant had fraudulently obtained title to the suit property on 17/09/1998; that the suit property was closed on subdivision into land parcels No's Njoro/Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngondu); that on 18/01/2023 she wrote to the Nakuru County Co-Ordinator, National Land Commission who wrote the letter dated 23/01/2023 recommending investigations into the matter; that the 1st defendant has subdivided the suit property and is in the process of selling the same so that he can defeat her ownership; that the 1st defendant is attempting to construct a perimeter wall on the suit property with the help of hired goons early in the morning or late at night; she reiterated that she has been in peaceful occupation of the suit property since 1981 and the 1st defendant had never gone to question her ownership; that in 1990 she applied for power supply to her posho mill on the suit property which was approved and would not have been possible without grant of wayleave by the 1st defendant; that her late husband applied for a water permit and authorization to extract water from Njoro river for use on the suit property which was not opposed by the 1st defendant; that she had leased the property between the years 2007 to 2010 and later between 2020-2022; that she has a caretaker on the suit property who has been in occupation since 1992; that vide the letter dated 14/09/1989 she was invited by Ng'ondu Farmers Co-operative Society Ltd to collect title deeds for parcel No. 59 and 60 (now Njoro/Njoro Block 5/66 and 69) from Ms. Cresswell Mann and Dodd but owing to her ill health she was not able to do so; that it would seem that the 1st defendant took advantage of her ill health and



fraudulently acquired the suit property; that the records at Ngongu Farmers Co-operative Society do not have the name of the 1st defendant; that he therefore acquired the suit property fraudulently; that she had established a prima facie case and sought that her application be allowed as prayed.

3. In response, the 1st defendant filed a replying affidavit sworn on 25/04/2023 on 26/04/2023. He deposed that he was registered as the owner of land parcel No. Njoro/Njoro Block 5/69 (Ngongu) on 9/06/1998 that was closed upon subdivision; that on 2/11/2022 he applied for the land control board consent; that on 3/11/2022 he applied to the Land Control Board which allowed him to subdivide the suit property; that he subdivided the suit property which resulted in Njoro/Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngongu); that he has been in occupation of the suit property since the year 1998 and was surprised to learn that the plaintiff was claiming it; that he was a stranger to the plaintiff's allegations that her late husband purchased unsurveyed plots No. 59 and 21 from persons who had been allocated the said plots by Ng'ongu Farmers Co-operative Society Limited; that the suit property has never been plot No. 60; that he bought the Registry Index Map for the area and that Plot No. 60 is on the map and is very distinct from the suit property; that he had looked at the list from Ngongu Farmers Co-operative society and had not seen the name of Barnard Kariuki; that there are no cypress trees planted on the suit property; that the plaintiff has never been in occupation of the suit property and the posho mill is on the plaintiff's property; that the suit property does not have any buildings on it; that the plaintiff's barbed wire is intact as he only touched the trees on his land; that the suit property is not listed in the letters of administration issued to the plaintiff and she should therefore look elsewhere for her land; that he only shares a common boundary with the plaintiff which is separated by a permanent fence that was erected by the plaintiff; that the plaintiff cannot suffer loss for a property that does not belong to her; that he bought the suit property from Samuel Nduati Mwangi the chairperson of Ngongu Farmers and a title issued in his favour after he paid the purchase price and survey fee; that the order of injunction issued to him was unfair since he has been tilling the land and now he cannot access it in order to weed the crops; that the plaintiff filed a suit before the lower court which she withdrew and his counterclaim is still pending in the said court; that he is a stranger to any letters written to the National Land Commission; that the way leave documents were in respect to land parcel No. Njoro/Njoro Block 5/66 and not the suit property; that in 1990 the suit property was under the government even though it had been allocated to Ngongu Farmers Co-operative Limited; that it was not true that the plaintiff has been unwell since 1989; that the plaintiff is full of contradictions as she could not have a caretaker on the suit property since the year 1992 and at the same time lease it out; that he was not an original member of Ngongu Farmers Cooperative Society and that he has an equal right to his parcel of land; that as the registered owner he stands to suffer prejudice more than the plaintiff if an order of injunction is issued and he sought that the plaintiff's application be dismissed with costs.
4. The plaintiff filed a supplementary affidavit sworn on 10/05/2023 on the same date. She deposed that there exists sufficient proof that the respondent acquired the suit property fraudulently; that Article 40 of the *Constitution* protects genuine land owners and any fraudulently acquired title is impeachable under Section 26 of the *Land Registration Act*; she reiterated that she has been in occupation of the suit property since 1981 and that it was not true that the 1st defendant has been in occupation since 1998; that the 1st defendant involved police officers to intimidate and forcefully evict her; that at the time the grant in Nakuru HC Succession Cause No. 104 of 1988 was being confirmed, only the ground survey had been done; that at that time the suit property was known as Plot No. 60 which number appears in the certificate of confirmation of grant; that there is no fence between the suit property and land parcel No. Njoro/Njoro Block 5/66 (Ngongu); that she stands to suffer prejudice if the orders sought are not granted; that the 1st defendant has not provided any proof to show that he acquired the suit property from Samuel Nduati Mwangi; that she withdrew a case that she had earlier on filed which



was Nakuru CM ELC No. E196 of 2022; that she withdrew the case because the said court did not have the pecuniary jurisdiction to determine the matter; that after the court issued temporary orders on 12/04/2023, the 1st defendant attempted to fence off one of the subdivisions during the night of 28/04/2023 and she then reiterated the contents of her supporting affidavit.

5. The 1st defendant filed a supplementary affidavit sworn on 15/05/2023 on 18/05/2023. He deposed that in his replying affidavit he forgot to attach the register of Ngongu Farmers Co-operative Society and the sketch plan that showed that the suit property has never been plot No. 60 as alleged.
6. The plaintiff filed an 'additional supplementary affidavit' sworn on 13/06/2023 on the same date. She deposed that the list of members annexed to paragraph 2 of the 1st defendant's supplementary affidavit may constitute the names of the original members of Ngongu Farmers Co-operative Society and it does not show the specific plots each member was allocated; that Benard Kariuki is in the list of members of Ngongu Farmers Co-operative Society with member registration No.56 Serial No. 64; that her late husband acquired the suit property through an exchange agreement dated 26/06/1981 where he took Benard Kariuki's Plot No. 60 and the latter took plot No. 21 which her husband had bought from one Karanja Mbugua who also appears on the list of members as registration No. 60 serial No. 30; that all the agreements were drawn by the firm of Cresswell Mann & Dodd who had been retained by Ngongu Farmers Co-operative Society; that if indeed the said list is genuine then it vindicates her claim and that the sketch plan annexed to the 1st defendant's supplementary affidavit was not used to allocate unsurveyed plots but was a survey plan that was drawn after the survey and subdivision of LR No. 523/3-Njoro and assigned the plots the current title numbers.

Submissions

7. The plaintiff filed her submissions dated 16/05/2023 on 17/05/2023 while the 1st defendant filed his submissions dated 24/05/2023 on 05/06/2023. The plaintiff then filed supplementary submissions dated 12/06/2023 on 13/06/2023. The 2nd and 3rd defendants did not file any response to the application and neither did they file any submissions.
8. The plaintiff in her submissions set out the prayers she sought in her application, the contents of the 1st defendant's replying and supplementary affidavits and identified the following issues for determination:
 - a. Whether the plaintiff/applicant has met criteria for the grant of interlocutory temporary injunction pending the hearing and determination of the suit.
 - b. Whether the court should issue an order of inhibition.
 - c. Who shall bear the costs of the application.
9. On the first issue, the plaintiff relied on Order 40 Rule 1 of the *Civil Procedure Rules*, the cases of *Joyce Mutindi Ndili v Mulu Ndili* [2022] eKLR, *Giella v Cassman Brown* [1973] EA 358, *Nguruman Limited v Jan Bonde & 2 Others* CA No. 77 of 2012 [2014] eKLR and reiterated that the suit property was initially known as plot No. 60 and belonged to Benard Kariuki who sold it to her deceased husband. She also submitted that she has been in occupation since 1981 and even though the 1st defendant claims to have acquired the suit property through purchase, he had not exhibited any agreement or payment receipts to prove his claim. It was the plaintiff's submissions that the 1st defendant acquired the suit property fraudulently and that she has demonstrated that she has been in occupation of the suit property and so she has a prima facie case. The plaintiff then reiterated the contents of her supporting and supplementary affidavits.



10. On whether she stands to suffer irreparable damages, the plaintiff relied on the case of *Niaz Mobamm Jammohammed v Commissioner of Lands & 4 Others* [1996] eKLR and submitted that she is on the verge of losing the suit property to the 1st defendant who is allegedly using goons and police officers to get her out of land that she has been in occupation of for over forty years. The plaintiff also submitted that she stands to suffer irreparable loss that cannot be compensated by way of damages. The plaintiff relied on the case of *Lois Chepkopos Lomur v Wiliam Lomur Maler* [2019] eKLR among other cases and submitted that the balance of convenience tilts towards maintaining status quo in order to preserve and protect the suit property.
11. On whether the court should grant an order of inhibition, the plaintiff relied on Section 68(1) of the *Land Registration Act*, the case of *Simon Muriungi v M'igweta M'mpria* [2021] eKLR and submitted that since her interests are not reflected in the register, it is important that an order of inhibition be issued.
12. The 1st defendant in his submissions reiterated the contents of his replying and supplementary affidavits and submitted that he is the registered owner of the suit property and so he has the right to use and occupy the suit property as he wishes. The 1st defendant identified the following issues for determination:
 - a. Whether the plaintiff/applicant has met the conditions requisite for the grant of the orders of interim injunction.
 - b. Whether the plaintiff/applicant is entitled to be granted the prayers sought herein.
13. The 1st defendant relied on Order 40 of the *Civil procedure Rules*, the cases of *Giella v Cassman Brown & Company Ltd* 1973 EA 358, *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR and submitted the plaintiff has to demonstrate a prima facie case. The 1st defendant relied on the case of *Mrao v First American Bank of Kenya Limited* [2003] eKLR and submitted that the court has to weigh the relative strength of each parties case before granting an interlocutory application. It was the 1st defendant's submission that the plaintiff has confirmed that she has been in possession of the suit properties through proxies and she has therefore not established a prima facie case. The 1st defendant submitted that he has the title deed to the suit property which he subdivided in 2022 and his title can only be challenged through fraud or misrepresentation. The 1st defendant also submitted that the plaintiff has challenged his title on the basis of fraud but she has not adduced any evidence to prove the same. It was the 1st defendant's submission that the plaintiff has therefore not established a prima facie case with a probability of success and neither has she demonstrated that she will suffer irreparable injury which would not be adequately compensated by way of damages. It was also the 1st defendant's submissions that since he is the registered owner of the suit property, the balance of convenience tilts in his favour.
14. In her supplementary submissions, the plaintiff reiterated the contents of her further affidavit and urged that land parcel No. 523/3 Njoro was the original title which upon survey gave rise to the suit properties among other parcels of land. It was the plaintiff's submission that at the time of application for electricity supply, the Kenya Power and Lighting Company could not use numbers of unsurveyed plots and therefore all documents referred to the original title number before subdivision. It was also her submission that even though they used the original title number, allottees were in occupation of their unsurveyed plots which had been clearly marked. She concluded her submissions by stating that she has been in occupation of the suit property and even though the 1st defendant tried to take possession by using goons, he was not able to.



Analysis and Determination

15. After considering the application, the responses thereto and the submissions, the following issues arise for determination:
1. Whether a temporary order of injunction should be issued restraining the defendants from trespassing, charging and/or interfering in any way with the suit property pending the hearing and determination of the suit.
 2. Whether an order of inhibition on the suit property should be issued pending the hearing and determination of this suit.
 3. Who should bear costs of this suit.
- Whether a temporary order of injunction should be issued restraining the defendants from trespassing, charging and/or interfering in any way with the suit property pending the hearing and determination of the suit.
16. The guiding principles for the grant of orders of temporary injunction are set out in the case of *Giella v Cassman Brown* (1973) EA 358 and reiterated by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where it was held as follows:
- “In an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
- These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
17. The Plaintiff/Applicant has to first demonstrate that he has a prima facie case. The court in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR stated as follows on what constitutes a prima facie case:
- “... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
18. The plaintiff is seeking for the court to issue an injunction restraining the defendants from trespassing and/or interfering in any way with the suit property pending the hearing and determination of the present suit on the ground that her late husband David Kamau Mwangi acquired plot No. 60 now known as Njoro/Njoro Block 5/69 (Ngondu) from Benard Kariuki and has been in occupation since 1981. It was also her case that sometime in November 2022, the 1st defendant allegedly trespassed onto the suit property in the company of police officers and goons, cut down cypress trees and destroyed her fence. It was further her case that when she visited the Nakuru lands registry, she discovered that the suit property had been registered in the name of the 1st defendant sometime in 1998 and that now, the 1st defendant is trying to construct a perimeter wall around the suit property.
19. The plaintiff annexed to her supporting affidavit a rectified certificate of confirmation of grant issued in Nakuru HC Succession cause No. 104 of 1988 in the matter of the estate of the late David Kamau



Mwangi that lists Plot No. 60 Ngondu Farm Njoro as part of his estate. The plaintiff has also annexed a certified copy of the green card for land parcel No. Njoro/Njoro Block 5/69 (Ngondu) which showed that the suit property was first registered on 17/9/1989 in the name of the government of Kenya and subsequently on 9/6/1998 it was registered in the name of Charles Wahome Kariuki, the 1st defendant. On 23/12/2022 the title was closed on subdivision. An agreement was also annexed dated 26/06/1981 between Benard Kariuki and David Kamau Mwangi where they agreed to exchange plots issued to them by Ng'ondu Farmers Co-operative Society Limited. Bernard Kariuki apparently exchanged Plot No. 60 with plot No. 21 that had been issued to David Kamau Mwangi. A copy of the title deed of the suit property was also annexed which showed that the suit property is registered in the name of the 1st defendant.

20. The plaintiff also annexed certificates of official search dated 13/03/2023 of land parcel No's Njoro/Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngondu) which indicates that they are all registered in the name of the 1st defendant. Pictures were annexed showing tree stamps, a 'plots for sale' sign post put up by Kasten Agencies, building materials on the land and a wooden structure which seems to be under construction. A copy of a letter dated 14/09/1989 was annexed addressed to the plaintiff requiring her to collect her title deeds for two plots from the firm of Cresswell Mann & Dodd Advocates between 15/09/1989 and 16/10/1989 upon payment of Kshs. 8,142/=.
21. The 1st defendant on the other hand argues that he has been in possession of the suit property since 1998 when he was registered as the owner and that he had bought it from Samuel Nduati Mwangi. The plaintiff claims that the suit property was formerly known as plot No. 60 before it was registered as land parcel No. Njoro/Njoro Block 5/69 (Ngondu) while on the other hand the 1st defendant argues that plot No.60 is not the same as the suit property. It is my view that the issue of whether or not plot No. 60 and Njoro/Njoro Block 5/69 (Ngondu) refer to one and the same property can only be determined during the hearing of the main suit.
22. It is not disputed that the suit property is registered in the name of the 1st defendant. It is also not disputed that land parcel No. Njoro/Njoro Block 5/69 (Ngondu) has now been subdivided into land parcel No's Njoro/Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngondu). It is further not disputed that the said plots are registered in the name of the 1st defendant and they are in the process of being sold. Given the said circumstances, it is my view that the plaintiff has established a prima facie case for the grant of a temporary injunction.
23. Secondly, the plaintiff has to demonstrate that she will suffer irreparable injury if an order of temporary injunction is not granted. The Court in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR held as follows on what is irreparable injury:

“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.”
24. The plaintiff alleged that she has been in occupation of the suit property since the year 1981 to date. The plaintiff has also demonstrated that the suit property has been subdivided and there is a likelihood that the said parcels of land could be sold. It is my view that this is not sufficient to demonstrate that she will suffer irreparable injury not capable of being compensated by way of damages.



25. Thirdly, the plaintiff has to demonstrate that the balance of convenience tilts in her favour. The court in Pius Kipchirchir Kogo (supra) stated as follows on what constitutes a balance of convenience:

“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”.

26. It is my view that in the present case, the balance of convenience tilts in favour of granting the order of injunction.

27. The plaintiff is also seeking that an order of inhibition be issued pending the hearing and determination of this suit. Section 68 of the [Land Registration Act](#) provides as follows:

“(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered. when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period.”

28. As indicated before the suit property has been subdivided into parcel No's Njoro/Njoro Block 5/1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096 and 1097 (Ngundu) which are in the process of being sold. It is in the interest of justice to preserve the subject matter of the case pending the hearing and determination of this suit and given the circumstances, an order of inhibition ought to be granted.

29. The plaintiff's application dated 12/4/2023 therefore succeeds and is hereby granted in terms of prayers (2) and (4) thereof. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

