



Baslum & 2 others v Abdikadir & 3 others (Miscellaneous Application E006 of 2022) [2023] KEELC 20886 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
MISCELLANEOUS APPLICATION E006 OF 2022
PM NJOROGE, J
OCTOBER 23, 2023**

BETWEEN

**OMAR SALIM BASLUM 1ST RESPONDENT
ALI SHARRIF ABDINOOR 2ND RESPONDENT
NASSIR SHARRIF ABDINOOR 3RD RESPONDENT**

AND

**ADAN BORU ABDIKADIR 1ST APPLICANT
ABDINUR ABDIKADIR 2ND APPLICANT
NURI ABDIKADIR 3RD APPLICANT
FATUMA ABDIKADIR 4TH APPLICANT**

RULING

1. This application is dated 2nd August, 2022 and seeks the following orders;
 - a. That the application be certified as urgent and be heard *ex-parte* and service be dispensed with in the first instance.
 - b. That Plaintiffs/Respondents, their agents, employees, servants or anyone claiming through them be and are hereby restrained by a temporary injunction from, alienating, entering with the intention of preparing or erecting or construction of structures or trespassing, or howsoever interfering in any way with that parcel of Land Reference Number 11969/101 Marsabit (Hereinafter referred to as “the suit property”) pending the hearing and determination of this application and transfer of the matter from Marsabit Law Courts.
 - c. That Plaintiffs/Respondents, their agents, employees, servants or anyone claiming through them be and are hereby restrained by a temporary injunction from alienating, entering with the



intention of preparing or erecting or construction of structures or trespassing, or howsoever interfering in any way with that parcel of land known Reference Number 11969/101 Marsabit (Hereinafter referred to as “the suit property”) pending the hearing and determination of this suit.

- d. That the status quo be maintained pending the hearing and determination of the main suit.
 - e. That the costs of this application be provided for.
2. The application is supported by the affidavit of Adan Boru Abdikadir and has the following grounds;
- i. That the Defendant are beneficiaries of the estate of Sheikh Adan Golicha who is their grandfather who acquired the Land Reference No. 11969/101 Marsabit as a lease from the government of Kenya.
 - ii. That the Plaintiffs have without any color or right moved into the piece of land, have cleared and brought strangers in the land with the intention of preparing to erect structures in the parcel land.
 - iii. That the Plaintiff/Applicants have an arguable case with a high probability of success.
 - iv. That no prejudice will be occasioned to the Defendants/Respondents if the orders being sought herein are granted.
 - v. That it is wider interest of justice that the orders sought herein be granted as no prejudice shall be occasioned to the respondents herein.
3. In response to the application, the respondents filed grounds of opposition. The grounds are in the following format;
1. That the application dated 2nd August, 2022 seeks orders of temporary injunction pending hearing of the application and suit.
 2. In terms of Order 40 Rule 1 (a) of the Civil Procedure Rules 2010 under which the application has been made, a order of temporary injunction or other interlocutory order, can only be made in a suit concerned with property and since there is no suit as such, such orders would have no suit to be pegged on.
 3. That the foregoing notwithstanding, the applicants have no *prima facie* claim with probability of success for the following reasons:-
 - a. The Grant exhibited to the Applicants Supporting Affidavit clearly shows that the property L.R No. 11969/101 Marsabit Town registered in the name Madrassatul Fathi Al-Islamia, a society registered under the Societies Act wherein the Respondent are the current officials, and in terms of Sections 25 and 26 of the Land Registration Act, 2012, the registration confers indefeasible rights and interests over the land.
 - b. The Applicants’ allegation that the Respondent fraudulently transferred the property to themselves is untenable in law and fact since entry Number 3 in the said Grant clearly shows that way back in 2003, Sharrif Awo Mohamed, the proprietor then, is the one who transferred the property to the Respondents’ Society for valuable consideration
 - c. Any allegations of fraud, or any other claims, would have been directed against the said Sharrif Awo Mohamed or his Estate in case he is not alive.



- d. The application claim of entitlement to the property as beneficiaries of the Estate of their deceased grandfather is equally untenable in law and fact when one finds the definition of “Estate” in Section 2 of the *Law of Succession Act* to mean “...the free property of a deceased person”, granted that the Applicants’ grandfather divested himself of ownership in 1991 when he transferred the property to Shariff Awo Mohamed.
 - e. Even assuming that the Applicants would eventually succeed in their strange claim, the property can only revert back to Sharrif Awo Mohamed or his Estate, but to them or the Estate, that would be impossibility.
 - f. There is no evidence that the Respondents intend to alienate the propriety. The respondents are also being accused of improving the property, which accusation cannot coexist with that of alienation. It would be illogical to expect the respondents to improve property which they intend to give away.
 - g. Any order sought by the applicants would have the undesirable effect of either evicting or dispossessing the respondents before hearing the main suit. The respondents have rents paying tenants on the property.
 - h. That the applicants applications merit being dismissed for being band in law, incompetent, an abuse of the court process, and for being frivolous and vexatious.
 - i. That the applicants be condemned to pay costs.
4. It is noted that the application is signed as follows;
- Kiget & Company
Advocates For The Plaintiff:
5. The declaration that it is signed for the plaintiff should be a mistake as in its body the application is clearly directed against the plaintiffs, ostensibly in an earlier suit which has not been explicitly referred to.
 6. The application was canvassed by way of written submissions. The applicants have submitted they have satisfied the principles for grant of temporary orders of injunction as enunciated in the case of *Giella v Cassman Brian & Company Limited* [1973] EA358 as follows: “Firstly, an applicant must show a *prima facie* case with a probability of success

Secondly, an interlocutory injunction will not normally be granted unless the applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”
 7. The applicants say that they will suffer irreparable damage that may otherwise not be compensated by way of an award of damages, as they intend to commence developments on the suit land which is occupied by the respondents. They also claim that they have an arguable case with high chances of success.
 8. The respondents have complained that although the court gave the applicants 7 days within which to file submissions, they did so on 3rd October, 2022 days after the time that had been stipulated by the court. They further complain that even after filing submissions, the applicants did not serve the submissions until 19th June, 2023 (a year later).



9. The applicants have submitted the application for temporary injunction is misconceived and unmerited in the absence of;
 - a. A suit or
 - b. Disputed property (in a suit).
10. The respondents have submitted that the photographs referred at page 2 of the applicants submissions reveal old/existing construction which have been in place over the years. They state that there is no evidence that they have commenced fresh improvement.
11. The respondents say that there were land documents as follows;
 1. Transfer dated 6/11/1991 – Sheikh Adan Golicha TO Sharrif and Mohammed.
 2. Transfer dated 29/4/2003 – Sharrif and Mohamed TO Madrassatul Fathi Al – Islamia.They offer these documents as proof that the respondents rightfully own the suit property. They further aver that if the applicants did pay any Land Rates or Rents after 1991 to the County Council of Marsabit or to the Government, then they did so in error.
12. The respondents submit that there is no where the applicants have sought to revoke/cancel the transfers. They opine that, if they were to do so, they would start with a challenge against Sharrif Awo Mohamed, the one to whom their grandfather transferred the land. They conclude by stating that the applicants have no factual or legal basis upon which a temporary injunction can be granted.
13. I have considered the pleadings filed in this matter including the submissions filed by the parties.
14. I will start with the agreement that this application is misconceived and unmerited in the absence of a suit or disputed property (in a suit).
I am unable to make any findings regarding this issue as the evidence of non-existence of a suit was not proffered.
15. In their pleadings, the applicants admit that the respondents are in possession and occupation of the suit property. Although the applicants may be disputing the propriety of the title held by the respondents, the title nevertheless exists and its legal standing can only be established and determined after the main suit has been heard.
16. Having considered all the facts and evidence tendered in this matter, I do find that it would be inappropriate to restrain the respondents from the land upon which they are already in occupation. I do also find that denial of the orders sought by the applicants would not occasion an injury not compensable with an award of damages should the applicants eventually win the main suit.
17. In the circumstances, I issue the following orders;
 - a. This application is dismissed.
 - b. Costs are awarded to the respondents.

DELIVERED IN OPEN COURT AT ISIOLO THIS 23RD DAY OF OCTOBER, 2023

In the presence of:

Mwirigi for the Respondents.

HON. JUSTICE P.M NJOROGE



JUDGE

