



REPUBLIC OF KENYA



**KENYA LAW**  
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**Baya v Mwinyikai & 2 others (Environment & Land Case 43 of 2022)  
[2023] KEELC 20823 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20823 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 43 OF 2022  
MAO ODENY, J  
OCTOBER 17, 2023**

**BETWEEN**

**KADZO PETER BAYA ..... PLAINTIFF**

**AND**

**SULEIMAN KHAMIS MWINYIKAI ..... 1<sup>ST</sup> DEFENDANT**

**MARYAM KHAMIS MWINYIKAI ..... 2<sup>ND</sup> DEFENDANT**

**MASIKA KHAMIS MWINYIKAI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 19<sup>th</sup> July, 2022 by the Plaintiff/Applicant seeking the following orders;
  - a. Spent
  - b. That pending the hearing of this application inter partes, there be and is hereby issued an order of injunction to restrain the defendants/respondents by themselves, their servants and/or agents from evicting the plaintiff/applicant from or in any way selling, charging or any other way whatsoever interfering with the parcel of land known as plot MN/111/33 situated in Mtwapa.
  - c. That pending the hearing and determination of this suit inter partes there be and is hereby issued an order of injunction to restrain the defendants/respondents by themselves, their agents and/or agents from evicting the plaintiff/ applicant from or in any way selling, charging or any other way whatsoever interfering with the parcel of land known as plot MN/111/33 situated in Mtwapa.
  - d. Costs of the application be provided for.



2. The application was supported by the affidavit sworn by the Kadzo Peter Baya on the 19<sup>th</sup> July, 2022 where he deponed that he was the administrator of the estate of the late Jumwa Yeri Mbuwa being the daughter of the late Kache Ngala Mzungu who was the daughter of the late Yeri Jumwa Mbuwa.
3. He further deponed that the said Yeri Jumwa Mbuwa owned the piece of land known as Plot No. MN/111/33 Mtwapa together with the late Khamis bin Mohamed bin Juma but the said Khamis bin Mohamed Bin Juma wrongly registered the whole parcel of land in his name.
4. It was the Applicant's evidence that he lives on the land together with his children and nine grandchildren on the suit plot MN/111/33 Mtwapa which is part of the estate of the late Hamisi Ramadhan Mwinyikai that is due for distribution. The Applicant claims ownership of the suit property on behalf of the estate of the late Jumwa Yeri Mbuwa.
5. In Response, the Respondents filed a Replying affidavit sworn by Suleiman Khamisi Mwinyikai on the 7<sup>th</sup> September, 2022 where he deponed that his father Hamisi Mwinyikai Ramadhan was the sole and beneficial owner of the parcel of land registered as CR Number 4314/1 and upon his passing, the parcel was subdivided among his siblings and the beneficiaries further subdivided, sold and transferred the subdivided parcels of land to third parties.
6. He further deponed that the Plaintiff trespassed on the suit property sometime in 2015 and built temporary mud huts, which prompted him to demand letters to the Plaintiff to vacate the suit property. He also stated that he was a stranger to the suit property herein MN/111/33 as the same is not registered as such among the subdivisions on the parcel of land they inherited from their late father.

#### **Plaintiff's/applicant's Submissions.**

7. Counsel submitted that the estate of Jumwa Yeri Mbuwa is entitled to the land under the principle and right to property of Jumwa Yeri Mbuwa which right is inherent to an owner and also guaranteed and protected by the law and *the Constitution*.
8. Counsel further submitted that the Plaintiff has established a prima facie case that the property belongs or is due to the particular claimant stated and that the court must protect the right and give effect to it. Further that the estate of Jumwa Yeri Mbuwa is entitled to the property owned by the said Jumwa Yeri Mbuwa and that is all that is necessary for the grant of an injunction to protect the Applicant from eviction from the property and to protect from sale, disposal or interference.
9. Mr. Kimaiyo stated that damages would not be sufficient to compensate the Applicant and her children who would be entitled to the estate should they be evicted and/or the property sold. Counsel urged the court to allow the application as prayed.

#### **Respondents' Submissions.**

10. Counsel submitted that the criteria for granting injunction orders are spelt out in *Giella v Cassman Brown Co. Ltd* and that the Plaintiff does not have a prima facie case with a probability of success as the suit property registered as CR. Number. 4314/1 no longer exists. He stated that the suit property was rightfully subdivided among the Respondents who have registered titles and transfers in their names with others selling to innocent third parties.
11. He also submitted that the Plaintiff does not stand to suffer any irreparable losses if the orders sought are not granted, as the people who would suffer are the Respondents and third parties who are buyers for value and in good faith. Finally, that the balance of probability tilts in favour of the Respondents



as the Plaintiff has not produced any document to prove that the alleged Jumwa Yeri owned the suit property.

### **Analysis and Determination.**

12. The issues for determination in an application for injunction are well settled. The Applicant must meet the threshold for grant of interlocutory injunction and establish a prima facie case with a probability of success, that he or she will suffer irreparable harm if the order of injunction is not issued and lastly that if the court is in doubt then it should rule on a balance of convenience as was held in the case of *Giella v Cassman Brown Co. Ltd* 1973 E.A.

13. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR the Court of Appeal held that;

“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”.

14. The current application is premised under Order 40 Rule 1(a) of the *Civil Procedure Rules* which provides as follows: -

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) ..... 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.

14. It is therefore incumbent upon the Plaintiff ought to establish a prima facie case with a probability of success as per the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR in which the Court of Appeal defined the meaning of a prima facie case as:

“... 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.”

15. The Plaintiff/Applicant gave a long history of how the they are supposed to be beneficiaries of the suit land but there was no tangible explanation linking them to the suit land. There is also evidence that the suit land has since been subdivided with entries of subdivisions and transfers as per the list of documents by the defendant



16. Secondly, the Plaintiff has to demonstrate that she will suffer irreparable injury will if an order of temporary injunction is not granted. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR where irreparable injury was defined as follows;

“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.

17. The Applicant as to what injury will be occasioned to her if an order of injunction is not issued has not demonstrated to this court. The Applicant just gave a long history how their grandmother owned the land.

18. On the issue of balance of convenience, the Plaintiff having failed to establish the first two limbs for grant of temporary injunction. I find that the balance of convenience would safely lie in not granting the orders sought.

19. 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.”

20. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF OCTOBER 2023.**

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

