



REPUBLIC OF KENYA



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**Pownall v Faraj (Environment & Land Case E053 of 2022)  
[2023] KEELC 20781 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20781 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E053 OF 2022**

**AE DENA, J**

**OCTOBER 17, 2023**

**BETWEEN**

**MARLIN CORAM POWNALL ..... PLAINTIFF**

**AND**

**FATUMA ATHMAN ABUD FARAJ ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion Application dated 18/11/2022.

The application seeks the following orders:

1. Spent
2. Spent
3. That this honourable court be pleased to issue temporary injunction restraining the defendant either by herself, servants, agent, assigns and/or employees from entering, interfering with the plaintiff's quiet possession and/or evicting the plaintiff and/or dealing with the plaintiff's suit plot numbers Kwale/Diani/SS/2539 and Kwale/Diani SS/2274 in any manner whatsoever pending hearing and determination of this suit
4. That this honourable court be pleased to issue an order staying all the proceedings in the Chief Magistrates Criminal Case No 403 of 2017-Mombasa pending hearing and determination of the application/suit.
5. That costs of this application be provided for.

2. The application is based on the grounds on its face and supported by the affidavit sworn by Marline Coram Pownal. It is the applicant's case that she is the rightful and registered owner of plot numbers Kwale/Diani/SS/2539 and Kwale/Diani SS/2274 (hereinafter referred to as the suit properties). That



the same are jointly owned with one Salim Juma Khakim Kitendo who is now deceased. That upon his demise the suit properties were registered in the Applicant's names as the surviving owner as required by law under Section 91 of the [Land Registration Act](#). That the Defendant has however since the year 2016 continuously interfered with the applicant's quiet possession of the suit properties and has further instituted a criminal suit being Kwale Criminal Suit No 755 of 2016 against the applicant which caused her to be arrested and charged with obtaining the title deeds by false pretence. The same was however withdrawn when the court learnt of a succession cause with regards to the estate of the deceased. The applicant states that there is however Kwale Criminal Case 403 of 2017 which is still pending before court.

3. The Applicant states that the High Court in Mombasa Succession Case No 200 of 2015 made a finding that the suit properties were excluded from the estate of the deceased on account of joint ownership and directed that issues of ownership be dealt with by this honourable court. That the defendant has placed a caveat over the suit properties without the applicants consent and/or notification. The Applicant seeks that the criminal case 403 of 2017 which is coming up before court on 23/11/2023 be stayed and the application be allowed as prayed.

### **Response**

4. In response to the application the Defendant filed a replying affidavit before court on 3/5/2023. It is averred that the Defendant's late husband Salim Hakim Kitendo died on 23/2/2015 in Tanzania and she acquired a death certificate upon his death. That pursuant to the judgement by J Onyiego in Succession Suit No. 200 of 2015 she was declared a widow and beneficiary of the estate of the deceased. The death certificate annexed to the application herein is termed as a forgery.
5. The deponent states that she is aware the suit properties were held by the Plaintiff and the deceased as proprietors in common and not joint proprietors, consequently the deceased's share of the suit properties should vest in the estate of the deceased. That the green cards and title deeds of the suit properties do not indicate that the suit properties were held jointly between the plaintiff and the deceased as alleged by the plaintiff. For that reason, Section 90 of the [Land Registration Act](#) does not apply to the Plaintiff as regards the suit properties. That the deceased and the plaintiff were never married and it would not be logical for them to register property jointly. The respondent states that Criminal Case Nos 785 of 2016 and 403 of 2016 are pending before courts of competent jurisdiction and as such the court cannot make a determination as the same would amount to subjudice. That the applicant is attempting to use the court to block her prosecution in the criminal matters.

### **Response To The Replying Affidavit**

6. The Applicant filed a supplementary affidavit in response to the Defendant's replying affidavit dated 2/5/2023. It is averred that the Defendant's response is full of admission of facts raised in the plaint and application dated 18/11/2023 and ought to be dismissed.
7. The Applicant admits that she obtained a late death certificate registration 6 months after the death and burial of the deceased when the immediate family had already obtained the same on 30/4/2015. That it is suspect as to what prompted the defendant to obtain a 2<sup>nd</sup> death certificate. That the deceased's death was suspect and his death does not change the fact that he was the registered owner of the suit property jointly with the Applicant.
8. That *vide* Succession Petition No 200 of 2015 the court made a finding that the suit property was jointly owned between the deceased and the Applicant and the same was excluded from the list of assets for distribution. The applicant seeks that in the circumstances the application be allowed.



## Submissions

9. The application was dispensed by way written submissions. The respondent's submissions were filed before court on 16/6/2023 and which I have considered. On 21/6/23 this court granted the applicants leave to file their submissions by close of business on 23/6/23. As at the time of preparing this ruling the applicant's submissions were not on record.

## Analysis And Detrmination

10. Order 40 (1) (a) and (b) of the Civil Procedure Rules 2010 governs the grant of interlocutory injunctions, the same provides that: -

“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.”

11. The guiding principles in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction 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 applicant 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.

12. From the provisions of Order 40 rule 1 of the Civil Procedure Rules, the courts paramount consideration before granting injunctive orders is proof that the subject property is in the danger of being wasted or damaged. In the instant suit it is noted that the suit properties have title deeds issued on 26/8/2015 in the name of the applicant herein. The question which therefore arises is whether the applicant has established a *prima facie* case.

13. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as: -

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.



14. The Applicant contends that she is the lawfully registered proprietor of the suit properties and the defendant has no lawful claim of ownership over the said properties. She further states that the Defendant/Respondent has placed cautions over the suit properties denying her the chance to have any dealings on the same despite her being the lawfully registered proprietor to the properties. The court is yet to establish whether the suit properties form part of the estate of Salim Juma Khakim Kitendo or the same are the Applicant's property. The court will further determine the validity of the titles held by the parties herein at a later stage, but before then it is important to preserve the substratum of the suit and which is the suit properties herein. I am therefore satisfied that the Applicant has established a prima facie case so as to warrant the granting of the orders of injunction.
15. Having found that the Applicant has established a prima facie case, the court will proceed to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in *Nguruman Limited V. Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -
- “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
- (a) establish his case only at a prima facie level,
  - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
  - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.
16. 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. Ltd v. Afraba 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.”
17. The Applicant has deponed that the Respondent is keen on dispossessing her of the suit properties. The Applicant states that the defendant has placed a caveat over the suit property and has been interfering with her use and occupation of the same. This means that no dealings can therefore be made on the suit property by the applicant despite holding titles to the same. The second limb has therefore been proved.



18. It is evident that the balance of convenience tilts in favour of the Plaintiff/Applicant. I am guided by the decision in *Amir Suleiman vs 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.”

19. In view of the foregoing I am persuaded that there is a lower risk in granting the orders sought than not granting them. As to legal ownership of the suit parcel the court will render itself after interrogating the evidence of the parties and weighing it on the scales of justice. It behoves the court to preserve the suit properties as the court has not had opportunity to interrogate all the documents and evidence that might be relevant in providing a history of events leading to the registration of titles in the name of the Plaintiff and whether the properties were initially under joint tenancy or tenancy in common.

20. The court notes that the Applicant has further made prayers for the criminal proceedings in Kwale Criminal Case 403 of 2017 to be stayed pending the hearing and determination of this suit. In my opinion the cause of action in the criminal case is an entirely distinct from the one in the instant suit. This court has been tasked with making a determination on the ownership of the suit properties while the lower court suit in the criminal matter is on the validity and registration of the titles to the suit property. If anything, this court has no jurisdiction in criminal matters and can therefore not deal with a matter in which it is devoid of jurisdiction, see Section 13 of the *Environment and Land Court Act*.

21. I am convinced that the Plaintiff/ Applicant has met the criteria for grant of orders of injunction, the application partly succeeds in the following terms;

1. That this honourable court be and is hereby pleased to issue temporary injunction restraining the defendant either by herself, servants, agent, assigns and/or employees from entering, interfering with the plaintiff's quiet possession and/or evicting the plaintiff and/or dealing with the plaintiff's suit plot numbers Kwale/Diani/SS/2539 and Kwale/Diani SS/2274 in any manner whatsoever pending hearing and determination of this suit
2. Costs will abide the outcome of the suit.

It is so ordered

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

**AE DENA**

**JUDGE**

