



REPUBLIC OF KENYA



**Njoroge v Charo (Environment & Land Case 8 of 2023)
[2023] KEELC 22192 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 8 OF 2023
EK MAKORI, J
NOVEMBER 30, 2023**

BETWEEN

ISAAC NJUGUNA NJOROGE PLAINTIFF

AND

MARGARET SOMMER CHARO DEFENDANT

RULING

1. The plaintiff and the defendant seem to be embroiled in a plethora of lawsuits. This is one of them. The common denominator seems to be over properties either they had acquired or been holding in common(sic) or one of the parties seeks to get an advantage over the other if the materials placed before me are anything to go by.
2. In this suit the plaintiff/applicant has sued the defendant/respondent claiming that he was unlawfully evicted from Land Parcel situated - North Creek in Kilifi County measuring 0.0568 hectares being Subdivision No. 20781 (ORG. No. 539/534) Section III Mainland North Survey Plan No.357995, Certificate of title No.LR 80050 Deed Plan No. 357995.
3. The eviction is alleged to have been under the judgment and decree in Mombasa ELC No. 230 of 2010 (Omollo J.)
4. The applicant now seeks from the Court orders in the form of an interlocutory injunction to restrain the respondent from wasting, alienating, altering, or transferring to 3rd parties – the suit property. An interlocutory mandatory injunction to remove the respondent from the suit property any further issue orders of restitution of the applicant unto the suit premises pending the hearing and determination of this suit.
5. In his averment, the applicant contended that the suit property herein is not the same as what was decided in Mombasa ELC No. 230 of 2010.



6. He further asserted that the premises where he was evicted from was his place of work and business and he would suffer immensely if the orders sought were not granted. He emphasized he purchased the suit property and had made massive improvements to it.
7. On the other hand, in rejoinder, the respondent claimed that the suit property/premise christened as Magisa Guest House is the same subject matter that was subject to the Mombasa lawsuit and the subject of warrants of eviction, discussed by the judge from page 15 to 33 of the judgment and therefore it will be laughable to have him back. Further, an appeal was preferred, which returned the same verdict.
8. On allegations of purchase of the said property, the respondent contended that all the documents shown were a forgery, which was also underscored in the Mombasa suit.
9. From the materials I have, what falls for the determination of this Court is whether the applicant has met the conditions for the grant of both interlocutory injunction(prohibitory) and interlocutory mandatory injunction. Who should bear the costs of the application?
10. The threshold to be surmounted before the grant of an interlocutory injunction is as held in the *Giella v Cassman Brown Co. Ltd* [1973] EA 358:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”

11. The first issue to determine then is whether the applicant has proved a prima facie case with the probability of success as held in *Mrao v First American Bank Of Kenya & 2 others* [2003] KLR 125 as follows:

“A prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

12. The material available suggests that the suit property in this matter was subject to a judicial decision in Mombasa ELC No. 230 of 2010 (Omollo J.) the Court held:

“On the land hosting Magisa guest house, the same has not been registered in the name of either of the parties. The plaintiff on her part produced a sale agreement showing how she acquired the land. She told the Court that the purchase price is Kshs 600,000 out of which Kshs 400,000 has been paid and the balance of Kshs 200,000= is to be paid after the title deed is issued. At the time of buying the land, there was already a Swahili house with 8 rooms. The defendant does not dispute these facts. His contention is again on renovations carried out and at whose cost. The defendant also alleged that the person who sold the property called Mama Moza is a distant relative of the owner. Neither the alleged owner or Mama Moza has sued the plaintiff. At least no documents were presented to the Court to support such averement. The plaintiff has clearly stated that she has no interest in the bar which is comprised of temporary structures (as seen during the site visit). The defendant although claims he incurred the expenses for renovations which is denied but he has not contributed any payment towards the purchase price. I therefore reach the same conclusion as that of the plot No 21814 & 21815 that the plot belongs solely to the plaintiff her co-owner and she is



therefore entitled to vacant possession. The defendant can only continue using the premises with her consent which has been withdrawn by virtue of the claim before this Court.”

13. On appeal in Mombasa Civil Appeal No.91 of 2017, the Court of Appeal reiterated the findings of the ELC and determined in favour of the respondent herein.
14. The respondent also avowed that if the applicant holds any title to that property, it was obtained by forgery and is an issue for a full trial. The applicant has not shown that the current suit property is different from what was determined in Mombasa ELC No. 230 of 2010.
15. In my view after reviewing the materials from both sides the end, the issues at hand will have to be resolved at the main hearing. A prima facie case has not been disclosed by the applicant to merit an award of interlocutory injunction – whether prohibitory or mandatory.
16. The principles stated in Giella’s Case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraba Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”.
17. An interlocutory mandatory injunction cannot be reckoned at this stage for the same to accrue there must be the clearest of all cases and such a remedy is sparingly considered as it tends to have an effect akin to eviction, which issues calls for a full hearing of parties on merit because it is final - See *Malier Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR, where the Court held as follows:

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella v Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Limited v Washington Okeyo [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.
18. As evidenced by the discussion in this case, the applicant has not demonstrated a clear proprietary interest in the suit property. The title he has attached to his application is in doubt because it is alleged to have been obtained fraudulently. There is also the issue that if the applicant is allowed to return, it will be reversing the pendulum, the issues herein have been litigated and execution completed by way of eviction. The case was heard up to the Court of Appeal, where the Magisa Guest House was discussed and a decision was reached. To order his restitution would be a violation of the findings of the initial ELC that handled the case, as well as the Court of Appeal, and would be a recipe for chaos.
19. The upshot is that the application dated 6th December 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 30TH DAY OF NOVEMBER 2023.



E. K. MAKORI

JUDGE

In the Presence of: -

M/s Kiarie Kariuki for the Defendant

Court Clerk: Happy

In the Absence of

Mr. Konde for the Plaintiff

