



**Walekhwa v Mechi & another (Environment & Land Case E001 of 2023)  
[2023] KEELC 21974 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21974 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E001 OF 2023  
EC CHERONO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**ALVARES WABWILE WALEKHWA ..... PETITIONER**

**AND**

**EDWARD MUSOMBI MECHE ..... 1<sup>ST</sup> RESPONDENT**

**MATILI TECHNICAL INSTITUTE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion application filed under Certificate of Urgency filed simultaneously with the Petition herein dated 6<sup>th</sup> July 2023, the Petitioner/applicant seeks the following orders;
  - a. (Spent)
  - b. That this Honourable court be pleased to grant a temporary stay of proceedings of trial court in Kimilili SPM Succession cause NO. 67 of 2018 pending interparty hearing of the application inter-parties.
  - c. That the court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/ Respondents whether by themselves, agents and/or servants from dealing, interfering, alienating, intermeddling, planting, selling and/or otherwise disposing of the part of the suit property being land parcel No. Kimilili/Kimilili/630 Measuring 21.0 acres or thereabouts situated in Matili, Kimilili sub-location, Bungoma County within the Republic of Kenya pending hearing and determination of this application interparties.
  - d. That the court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents whether by themselves, agents and/or servants from dealing, interfering, alienating, planting, selling and/or otherwise disposing of the suit property being land parcel NO. Kimilili/Kimilili/630 Measuring 21.0 acres or thereabouts situated in Matili,



Kimilili sub-location, Bungoma County within the Republic of Kenya pending hearing and determination of the main suit.

- e. THat O.C.S Kimilili Police Station be directed to oversee compliance of this order.
  - f. Costs of this application be provided for.
2. The application is supported by the affidavit of the applicant/Petitioner sworn on even date. The said application is further supported by a supplementary affidavit also sworn by Alvares Wabwile Walekhwa on 4<sup>th</sup> October, 2023. By way of a response, the 1<sup>st</sup> Respondent Edward Musombi Mechi filed a replying affidavit on 19<sup>th</sup> July, 2023 in opposition to the said application.

### **Applicants Summary Of Facts**

3. The applicant in his affidavit in support of the application sworn on 6<sup>th</sup> July 2023 deposed that he is the administrator of the estate of Jackton Walekhwa(deceased) having obtained letters of administration to administer the estate. He further stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents fraudulently hived off a portion measuring 4 acres out of land parcel No.Kimilili/Kimilili/630 fraudulently and have taken control of the land by rerouting the official access road and erecting boundaries and beacons on the suit parcel of land measuring 21.0acres which he is the legal administrator.
4. The applicant also deposed that he has made a report to the relevant authorities in regard to the fraudulent action taken by the respondents but have not borne fruits hence filing this suit and application to stop the illegal actions by the respondents. He deposed that in addition, the respondents have jointly and severally issued threats of physical harm through their agents, relatives and servants should he try to push them out of the suit property and/or interfere with their unlawful action.
5. He also stated that the Succession cause before Kimilili Principal Magistrate Court No.67 of 2018 is still pending hearing and determination for confirmation and that it will only be prudent that the said portion measuring 4 acres hived from land parcel No.Kimilili/Kimilili/630 fraudulently that forms part of the estate of Jackton Walekhwa Marani(deceased) is recovered fully to enable him as the administrator to proceed with application for confirmation.
6. The applicant deposed that unless the suit land is protected and preserved by way of restraining orders, he stands to suffer irreparable loss and harm for which damages will not be adequate remedy
7. In his supplementary affidavit, the applicant deposed that on 9<sup>th</sup> January 2023, he wrote a letter through the firm of J.B Otsiula & Associates to the land Registrar Bungoma informing him that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents colluded and carried out illegal subdivision on land parcel No. Kimilili/Kimilili/635 without letters of administration that affected the estate of Jackton Walekhwa Marani and lawful owner of land parcel No. Kimilili/Kimilili/630. However, the land Registrar verbally advised him to file a case in the High Court for cancellation of the Title deed issued illegally in respect of the two parcels namely L.R No. Kimilili/Kimilili/635 and 866. He further stated that on 21<sup>st</sup> February 2023, he also made a report at Kimilili Police Station vide O.B No. 17/21/02/2023 at 0943 hrs

### **Respondents' Summary Of Facts**

8. The 1<sup>st</sup> Respondent in his replying affidavit deposed that he has never participated in any process of hiving off four (4) acres or any other portion of land from land parcel No. Kimilili/Kimilili/630 nor has he participated in any illegal process of erecting beacons nor putting up any illegal boundary as alleged by the applicant in respect of land parcel No. Kimilili/Kimilili/630. He further stated that the existing boundary as well as the access road separating land parcel No. Kimilili/Kimilili/630 and Kimilili/Kimilili/635 has been there since time immemorial as he found it there when was born.



9. He stated that he has neither alone nor with any other person issued any threats of physical harm to the applicant or his relatives and that the applicant is making mere wild allegations and has not attached any evidence to support his allegation.
10. The Respondent confirmed that the applicant had indeed filed a succession cause vide Kimilili Pm-Succession Cause No. 67 of 2018 for the grant of letters of administration in respect of the Estate of the Late Jackton Walekhwa Marani and on 25<sup>th</sup> August 2022, and thereafter, an order was issued directing that the County Surveyor do visit land parcels No. Kimilili/Kimilili/630, 635 and 866 for purposes of establishing its actual acreage for purposes of advising the beneficiaries and thereafter file a report in court.
11. He stated that pursuant to the said court order, the County Surveyor vide a letter dated 6<sup>th</sup> December, 2022 notified all the concerned parties that he would visit the disputed land parcels on 14<sup>th</sup> December 2022 at 10.00 A.M. Following the said visit, the County Surveyor filed a report dated 18<sup>th</sup> January, 2023. He stated that following the report by the County Surveyor, the trial court in the said succession cause No. 67 of 2018 expunged all proceedings from the record and lifted the order touching on land parcel No. Kimilili/Kimilili/6710. He deposed that this court does not have jurisdiction to entertain and grant an order staying the order issued on 10<sup>th</sup> May 2023 by Kimilili Principal Magistrate's court in succession cause NO.67 of 2018.
12. The respondent further stated that this Court cannot grant the temporary stay of proceedings in Kimilili SPM Succession Cause No.67 of 2018 as it is neither an appellate Court in succession matters nor is it sitting on review of the said order.
13. In conclusion, the Respondent stated that despite generic allegations by the applicant that he has made reports to relevant authorities in regard to the alleged fraudulent acts of rerouting access road and boundary, the applicant has no attached any evidence to show the same and neither has he stated when and to whom these reports were made.

### **Legal Analysis And Decision**

14. I have considered the Notice of Motion application dated 6<sup>th</sup> July 2023, the supporting affidavit, the supplementary affidavit, the replying affidavit and the relevant law. In this application, the applicant is seeking two orders namely a temporary injunction order and stay of proceedings of the trial court in Kimilili SPM Succession Cause No.67 of 2018. Before granting an equitable relief of temporary injunction which is a discretionary power, the court must be satisfied that the applicant has established the three conditions as set out in the celebrated case of *Gella v Cassman Brown (1973) EA 358*, to wit; prima facie case, irreparable loss and a balance of convenience where the court is in doubt.
15. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others, C.A No.77 of 2012*, it was held;
 

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision. In discharging a prima facie case, the applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise



as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

16. The applicant in his supporting affidavit stated that he is the administrator of the estate of one Jackton Walekhwa Marani(deceased) who is the registered owner of Land parcel No. Kimilili/Kimilili/630 Measuring 21.0 acres out of which the respondents have fraudulently hived off 4 acres. The applicant further stated the respondents have also unlawfully erected beacons and put up illegal boundary over the suit land which acts are likely to cause the beneficiaries irreparable loss and damage. There is no sketch map, photographs, beacon certificate or any other empirical evidence attached to the application in support of those allegations. The applicant at paragraph 6 of his supporting affidavit also deposed that the respondents through their agents, relatives and servants have threatened him with physical harm and he even reported the matter to Kimilili Police Station who issued him with a police occurrence book No. 17/21/02/2023. There is no indication that the respondents were summoned by the police to record any statement or even charged with any criminal offence.
17. In the absence of any prove that the respondents have either fraudulently hived off 4 acres out of the suit land parcel No.Kimilili/Kimilili/630 or trespassed into the said land, this court finds no prima facie case has been established by the applicant. This court also finds that the applicant has not demonstrated that he will suffer any irreparable injury that would not be compensated by an award of damages if the temporary injunction orders are not granted. Deciding this matter on a balance of convenience, it is my view that the same tilts in disallowing the application.
18. The second order sought by the applicant is for stay of proceedings in Kimilili SPM Succession Cause No. 67 of 2018. The applicant has not given reasons why this Honorable court should issue an order staying proceedings in a court competent and authorised under the law. As deposed by the respondent in his Replying affidavit, the applicant is the one who petitioned the trial court for the Grant of letters of administration in the said Succession Cause. The Respondent in his replying affidavit at paragraph 10 stated that on 25<sup>th</sup> August 2022, the trial court in the said Succession Cause issued an order directing the County Surveyor to visit land parcels No. Kimilili/Kimilili/630, 635 and 866 for purposes of establishing the real acreage and thereafter file a report in court. He further deposed that pursuant to the said directions, the County Surveyor wrote a letter dated 6<sup>th</sup> December 2022 notifying all the concerned parties of his intention to visit the parcels of land named hereinabove on 14<sup>th</sup> December, 2022. Following the County Surveyor's visit to the disputed parcels of land on 14/12/2022 and filing of a report dated 18/12/2022, the trial court issued an order expunging proceedings and lifted the order touching on land parcel No. Kimilili/Kimilili/6710 issued on 10<sup>th</sup> May, 2023.
19. I agree with the respondent that this court cannot grant the order sought as it is neither an appellate court in Succession matters and neither does it sit on review of the said order. If the applicant is aggrieved by the orders issued by the trial court, he could have preferred an appeal to the appropriate court.
20. The upshot of my finding is that the Notice of Motion application dated 6<sup>th</sup> July 2023 is devoid of merit and the same is hereby dismissed with costs.

**READ DELIVERED, DATED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 30<sup>TH</sup> NOVEMBER, 2023**

**HON.E.C CHERONO**

**ELC JUDGE**



In the presence of;

Wayongo for 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent/advocate-absent

Applicant in person-

Okwaro C/A-

