



REPUBLIC OF KENYA



**Gakuya v Wairimu & 3 others (Environment & Land Case E023 of 2021)
[2023] KEELC 22547 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E023 OF 2021
A KANIARU, J
NOVEMBER 29, 2023**

BETWEEN

PETERSON MAINA GAKUYA PLAINTIFF

AND

MARY WAIRIMU 1ST DEFENDANT

DIRECTOR LAND ADJUDICATION 2ND DEFENDANT

DISTRICT LAND REGISTRAR MBEERE NORTH 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion application dated 15.12.2021 and filed on 17.12.2021. It is expressed to be brought under Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act*, Order 40 rule 2 and Order 51 of the Civil Procedure Rules, Section 50, 134 (7) of the *Land Act* 2012, Section 26(2) of the *Land Adjudication Act*, and all other enabling provisions of the law. The applicant – Peterson Maina Gakuya (Suing as a Personal Representative of The Estate Of Daniel Gakuya) is the plaintiff in the main suit while the 1st, 2nd, 3rd & 4th Respondents - Mary Wairimu, Director Of Adjudication, District Land Registrar Mbeere North And The Attorney General respectively– are the 1st, 2nd, 3rd & 4th Defendant’s respectively. It is essentially an application for Temporary injunction and the prayers sought are as follows:
 - i. Spent
 - ii. That pending the hearing and determination of this application and the main suit, a temporary injunctive order do issue restraining the 1st Respondent herein, her agents, servants and persons claiming under her from disposing off, dealing in letting out and in any manner committing



acts that may transfer or assign ownership rights of the suit property to third parties, whether temporarily or permanently.

- iii. Abandoned
 - iv. Abandoned
 - v. That the costs of this application be provided for.
2. The application is premised on the grounds that the deceased was, or allegedly should be, the legally registered proprietor of the suit property herein but that upon his demise, the 1st Respondent herein in collusion with the 2nd Respondent fraudulently altered the entries in the adjudication records in the year 2012 so as to falsely reflect that the 1st Respondent was the owner of the suit property. That is said to have been done without adherence to the legal probate and administration procedures and that action has resulted in the deceased's estate not being subjected to succession as the suit property was the only asset belonging to the estate of the deceased. Further, it is said that the alterations were in total violation of the set out procedures in the law of succession Act, the Land Act, and the Land Adjudication Act, and that the illegal alteration was by design. Further also that it was meant to disinherit the beneficiaries of the estate of the deceased. The Applicant is therefore apprehensive that if the orders sought are not granted in the first instance, then the substantive suit may be rendered academic. In a supporting affidavit that he swore dated 15.12.2021, the Applicant reiterated the averments in the application.
 3. The 1st Respondent filed a replying affidavit in response to the application. The affidavit is dated 15.06.2022. The 1st Respondent's case is that she married Daniel Gakuya in Hola Protestant Church on 4.02.1978. She says he had no other wife and was not capable of marrying another woman as their marriage was monogamous. That she was allocated land parcel P/No. 1214 Wachoro (herein referred to as the suit property) on 13.01.1981 in her own names. That after their wedding they settled on the said land parcel. She denies having seen the adjudication form in dispute herein and says that she does not know who included the name Daniel Gakuya Kamau on the records of the Land Adjudication Office as she is seeing the document for the first time. She doubts its authenticity. Further that she does not know why the Applicant assumed that the suit land belonged to their father when they sued her in PMC Wang'uru MISC SUCC NO. 33 OF 2018, which implies they had inside information of the adjudication section. That whatever mischief the person who included the name of the deceased in her document was trying to play it was defeated by operation of law as the document shows that he only became a tenant in common. According to her it is trite law that upon the demise of a tenant in common his share is automatically relinquished to the owner (really?). That the Applicant has not proved that she committed any fraud or that the suit land was not hers even as at 31.01.1981 and as at now she is the legal owner of the suit land according to records from the Adjudication Office. That further as a registered owner an injunction ought not to issue against her. She averred that the Applicant is misadvised as the land never belonged to her husband and that the Applicants themselves have never occupied the suit land as that is the land she resides on with her children and has extensively developed it. That also the applicants did not exhaust the procedure under the Land Adjudication Act that provides that if one is dissatisfied with the first registration during adjudication then the first remedy is an appeal to the Minister. Therefore the Applicant has skipped that procedure and rushed to court. She depones further that the Applicant has not demonstrated that the suit land is in danger of being wasted or alienated as she resides on the property and neither has he demonstrated what prejudice he stands to suffer if the application is not allowed. She prays that the application be dismissed.
 4. The Applicant in response to the 1st Respondent's Replying Affidavit filed a further affidavit dated 25.10.2022. He deponed that his deceased father had two wives, who are his mother and the 1st



Respondent; that upon his death they both conducted his burial. That as per the adjudication record it is evident that the 1st Respondent did at one point file an objection with the Adjudication officer, which was dispensed with on 20th June 2012 and that is when the fraudulent alterations were carried out. That the said fraudulent alterations in the Adjudication Record are so prominent on the face of it that it still bears the impression signature of his late father, who evidently was the original allottee of the suit property; that therefore the 1st Respondent has never been a legitimate owner of the suit property and has been working in cahoots with the other Respondents in attempting to disinherit him and his other siblings. That there has been an infringement of proprietary rights perpetrated by the Respondents against the survivors of Daniel Gakuya (herein referred to as the deceased father) which if not remedied will cause irreparable harm to him and bring unjust enrichment to the 1st respondent. It would also disinherit him and his siblings and this is incapable of compensation by an award of damages. Consequently, he averred that he has demonstrated a prima facie case with a high probability of success, hence meriting the 1st Respondent to be enjoined from dealing with the suit property until determination of the suit. He depones further that he learnt of the fraudulent transactions around the year 2016, about 6 years after the objection was determined and as such, he did not have an opportunity to file an appeal pursuant to section 29 of the [Land Adjudication Act](#). It followed that he obtained a consent from the Land Adjudication Officer pursuant to section 30(1) as read with section 30(4) of the same Act allowing for institution of a law suit relating to adjudication sections as the time to institute an appeal had expired. That his deceased father acquired the suit property while he was in employment of Kenya Prisons Service at the Mwea G.K Prison; and that together with his siblings, they were allowed to set up houses on the suit property until the 1st Respondent incited her children to demolish their houses and chased them away from the premises around the year 1994. He prays that the court allows the application and order for the preservation of the suit property while the parties are allowed to ventilate their issues and litigate their respective cases on merit.

5. From my record, only the Applicant filed written submissions. The same is dated 2.12.2022 and filed on 5.12.2022. The applicant gave a synopsis of the application and identified two issues for determination. They are:
 - i. Whether the Applicant has made a prima facie case deserving interim orders pending the hearing of the suit.
 - ii. Whether the Applicant has complied with the doctrine of exhaustion set out in the [Land Adjudication Act](#).
6. According to the Applicant, this is demonstrably a prima facie case of fraud with a high probability of success and the balance of convenience dictates that the applicant be granted interlocutory restraining orders. That the Applicant has satisfied the second condition precedent in that the act by the respondents would amount to disinheriting the applicant together with his siblings and the attempt to deny them the beneficial rights to the estate of his father is potentially irreparable and incapable of being adequately compensated by way of damages. He submits further that he has exhausted all the requisite legal channels before filing this suit. The Applicant cited the cases of *Giella vs Cassman Brown* (1973) EA 358, *Kenya Breweries Ltd vs Okeyo* (2002) E.A 109, *Mrao Ltd vs First American Bank Ltd* (2003) KLR 125, the relevant provisions of the [Land Adjudication Act](#) and in particular sections 29, 30(1) and 30(4), to support his submissions.
7. I have considered the application, the response made, and submissions by the applicant. I find that there are two issues for determination by the court which are;
 - i. Whether the Applicant has complied with the doctrine of exhaustion set out in the [Land Adjudication Act](#).



- ii. Whether the Applicant has satisfied the conditions for grant of temporary injunction.
8. Section 29 of the *Land Adjudication Act* provides as follows;

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by— (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

Section 30(1) & (4) of the same Act provides

- (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.
 - (2)
 - (3)
 - (4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.
9. The Applicant submits that he came to learn of the alleged fraudulent transactions whose consequence was to alter proprietorship in favour of the 1st Respondent around the year 2018. The applicant would therefore not have been able to file an appeal pursuant to Section 29 of the *Land Adjudication Act* within the prescribed 60 days period. It followed that the applicant obtained a consent from the Land Adjudication Officer pursuant to section 30(1) of the Act which consent was presented before this court. I find therefore that the Applicant exhausted all mechanisms provided for in the Act before coming to this court and therefore the Applicant’s application is properly before me. I say this because the applicant could not possibly have filed an appeal to the minister if, as he says, the alleged legal wrongs were discovered when the time of filing an appeal had already expired.
10. The principles which guide the court when considering an application for a temporary injunction were set out in the case of *Giella v Cassman Brown* [1973] EA 360 where the court set out three conditions that ought to be met for grant of a temporary injunction. It was stated:

“First, 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.”



11. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, described 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 right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

12. In another case of *Jan Bonde Nielsen v Nguruman Limited & 2 others* [2016] eKLR the court of appeal stated as follows;

“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 be urgent necessity to prevent the irreparable damages 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 person 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”.

13. From the material before me, I am satisfied that the Applicant has established a prima facie case with probability of success. The Applicant’s case is that on or about February 2018, with the full consent and authority of his siblings as beneficiaries of the deceased’s estate, he moved to take out letters of administration of the estate of the deceased whose process of owning of the suit land herein was still ongoing and the certificate of title was yet to be processed. That he made several failed attempts to obtain the land adjudication records from the Land Adjudication Offices in Karaba, Siakago, and Kiritiri. That he was being referred from one office to the other until finally he got the records from the Ministry of Lands headquarters situated at Ardhi House, Nairobi. That upon inspection of the land adjudication records extracts, he discovered that an alteration had been made on the records by cancelling the name of the deceased and replacing it with the name of the 1st Respondent herein; which alteration had been caused by an alleged objection No. 1125 raised by the 1st Respondent in the year 2012 long after the demise of Daniel Gakuya. He made available the said adjudication record which shows that the name of the deceased was deleted and replaced with that of the 1st Respondent herein. There are two objections raised, that is objection No. 426 by a Muriithi Mugo which was dismissed and objection No. 1125 by Mary Wairimu Gakuya, which was allowed and the suit land transferred to Mary Wairimu Gakuya. The applicant says that he was not informed of the said objection and its hearing date and he contends that it is at this point the suit property must have been transferred to the 1st Respondent.

14. The Respondent on the other hand says she is a stranger to the adjudication record in dispute as well as any alterations made to it yet she is named as the objector in the same. On the face of it, it is unclear under what circumstances the alterations were made to transfer the suit property from the deceased to the 1st Respondent. From the material placed before me, the suit land was registered in the name of the deceased during adjudication and no explanation has been given as to how the land came about to belong to the 1st Respondent. The 1st Respondent claims that she was allocated the suit land on 13.01.1981 in her names but there is nothing in the record to show the same. The court



observes that there are allegations of fraud and this can only be determined during trial. Given the above information and circumstances, the court is satisfied that the plaintiff has established a prima facie case with probability of success.

15. However, in the case of *Nguruman Limited V. Jan Bonde Nielsen & 2 Others*, CA NO. 77 OF 2012 as quoted in *Stanley Anyamba Ageyo & another v Musa Matu Riunga & 5 others* [2022] eKLR 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.

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.” (Emphasis mine).

16. The applicant’s main contention is that he is apprehensive that if the orders sought are not granted then substantive suit may be rendered academic. I have perused the affidavits by the Applicant and note that there is nothing indicating any intended threat to waste or dispose of the suit property. The applicant did not also demonstrate any compelling reasons to warrant the need of the injunctive orders as was sought in the application. The Applicant’s averments remain mere apprehensions. I find therefore that the Applicant has not demonstrated any irreparable injury that will be occasioned to him should the court not grant an order of temporary injunction. Failure to prove irreparable harm by the applicant constitutes the Achilles heel in the application before me.
17. In the circumstances, I do find that the applicant has not proven a case for grant of a temporary injunction pending hearing and determination of the suit. I therefore dismiss this application with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 29TH DAY OF NOVEMBER, 2023.

In the presence of Kinyua for plaintiff/Applicant; Mutua for Kiongo for 2nd, 3rd & 4th respondents and in the absence of Kamuga for 1st defendant.

Court assistant: Leadys



Interpretation: English/Kiswahili

A.K. KANIARU

JUDGE

29.11.2023

