



REPUBLIC OF KENYA



**Ngala v Kilumo & 5 others (Environment & Land Case E008 of 2023)
[2023] KEELC 22527 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E008 OF 2023
EK MAKORI, J
DECEMBER 13, 2023**

BETWEEN

TEDDY DAVIS NGALA PLAINTIFF

AND

CHARO SHIDA KILUMO 1ST DEFENDANT

SALIM STEPHEN NGALA 2ND DEFENDANT

ALI STEPHEN NGALA 3RD DEFENDANT

JUMA STEPHEN NGALA 4TH DEFENDANT

MISHI STEPHEN NGALA 5TH DEFENDANT

SAID STEPHEN NGALA 6TH DEFENDANT

RULING

1. The Notice of Motion dated 18th May 2023 seeks:
 - i. Order that the agreement dated 9th May 2009 which was signed on 10th April 2009 be set aside.
 - ii. Order that the Kilifi County Survey or to Survey and curve 5 acres from Plot No. 9 Block Group XIV Tezo measuring 16.94 acres and 8 acres from Plot No. 10 Block Group XIV Tezo measuring 13.84 acres.
 - iii. That the Mombasa Land Registrar register the 5 acres from Plot No. e Block Group XIV Tezo and 8 acres Plot No. 10 Block Group XIV Tezo in the name of the Plaintiff/Applicant.
 - iv. An order that 2nd, 3rd, 4th, 5th and 6th Respondents to subdivide or transfer 5 acres from Plot No. 9 Block Group XIV Tezo measuring 16.94 acres from Plot NO. 10 Block XIV Tezo measuring 13.80 acres to the Plaintiff/Applicant after succession.



- v. An injunction to issue restraining the Respondents from selling or transferring the suit property till this suit is heard and determined.
 - vi. Any other orders.
 - vii. Costs be provided.
2. The application is supported by the annexed affidavit of the applicant deposed on 18th May 2023. The application is opposed there is a replying affidavit deposed on 23rd June 2023,
 3. The court directed parties to do written submissions. They did comply.
 4. The applicant provided a long history of how he is entitled to the suit properties. It emanates from a perceived inheritance from his forefathers. His averment mirrors what he seeks in the main suit.
 5. The respondents were of the view that prayers 1 to 4 are final - in nature. Prayer 5 seeks an interlocutory injunction. It is averred that a prima facie case with a probability of success has not been achieved to warrant the orders sought since the applicant does not occupy the suit property but the respondents are the ones in occupation. And that this suit is said to be time-barred.
 6. The respondents have quoted the following cases in support of their averments – *Vivo Energy Kenya Ltd v Maloba Petrol Station and 3 Others* [2015] eKLR, elucidating that final orders cannot be issued before a proper hearing where witnesses are cross-examined. *Stephen Kipkebut T/A Riverside cottage and Rooms, v Naftali Ogola* [2009]eKLR and *Oliver Mwihaki Mugenda and Others v Okiya Omtata Okoiti & 4 Others* [2016] eKLR, enunciating that a major relief sought in the main suit cannot be granted at an interlocutory stage.
 7. The issues for determination of this Court are whether the orders sought in the application can be granted. Whether a temporary injunction can be issued under the circumstances obtained in this case.
 8. Prayers 1 to 4 of the applicant’s motion sought the following reliefs - order that the agreement dated 9th May 2009 which was signed on 10th April 2009 be set aside, order that the Kilifi County Survey or to survey and curve 5 acres from Plot No. 9 Block Group XIV Tezo measuring 16.94 and 8 acres from Plot No. 10 Block Group XIV Tezo measuring 13.84 acres, that the Mombasa Land Registrar register the 5 acres from Plot No. 9 Block Group XIV Tezo and 8 acres Plot No. 10 Block Group XIV Tezo in the name of the plaintiff/applicant and order that 2nd, 3rd, 4th, 5th, and 6th respondents to subdivide or transfer 5 acres from Plot No. 9 Block Group XIV Tezo measuring 16.94 acres from Plot NO. 10 Block XIV Tezo measuring 13.80 acres to the plaintiff/applicant after succession.
 9. From the materials placed before me, I agree with the advocate for the 1st respondent that those are definitively final orders that must await a hearing of the main suit and cannot be issued at an interlocutory stage. I am persuaded by the holding in the case of *Oliver Mwihaki Mugenda and Others v Okiya Omtata Okoiti & 4 Others* [2016] eKLR:

“ We have analyzed the ruling of the trial court delivered on 18th December 2015 and evaluated the same against the criteria in the persuasive dicta in the Indian decisions. Nowhere in the ruling does the trial judge give reasons for granting final orders at the interlocutory stage; no special circumstances have been explained to warrant the grant of final orders and the balance of convenience and question of irreparable injury have not been addressed. In our view, then, the ruling of 18th December 2015 does not pass the persuasive Indian threshold and criteria for grant of final orders at the interlocutory stage.



Applying the decisions of this Court in *Vivo Energy Kenya Limited -v- Maloba Petrol Station Limited & 3 Others* (2015) eKLR and *Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola* (2009) eKLR it has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have compared and contrasted the ruling and orders delivered on 18th December 2015 with the prayers in the Petition dated 21st October 2015. The Ruling of 18th December 2015 effectively granted final prayers in paragraphs 62 (c), (d) (f) (g) (h), and (j) of the Petition.

Guided by the dicta of this Court in the decisions of Vivo Energy Case (supra), we are convinced and satisfied that the learned judge erred in law in granting final orders at the interlocutory stage when the main Petition had not been heard.”

10. On interlocutory injunction, as enunciated in the leading decision in this realm - *Giella v Cassman Brown & Company Limited* [1973] E.A. 360, the threshold to achieve before the grant of an injunction at that stage is as follows:

“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 been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

12. The principles stated in the Giella 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”.

7. The applicant’s claim in this suit is premised on an agreement dated 9th May 2009 and the applicant stated his claim rests on succession and rights which accrued to his father. He does not have and is not in possession of the suit property. It is the respondents who are in occupation. They cannot be evicted yet. This issue has to also go to a full hearing to determine those rights. The applicant has not established a prima facie case with a probability of success at this stage. I cannot move to the next conditions set in the Giella Case after the first condition has failed. Application dated 8th May 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13TH DAY OF DECEMBER 2023.

E. K. MAKORI

JUDGE



In the Presence of:

Mr. Kinaro for Respondent.

Court Clerk: Happy

In the Absence of:

The Applicant

