Mungai & another v Muli & another (Environment & Land Case E012 of 2024) [2025] KEELC 3441 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3441 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E012 OF 2024

NA MATHEKA, J

APRIL 29, 2025

BETWEEN

MBUGUA WA MUNGAI ..... 1ST APPLICANT

FLORENCE ELIZABETH WANJIRU NG'ANG'A ..... 2ND APPLICANT

AND

FLORENCE KHALUA MULI ..... 1ST RESPONDENT

THE LANDS DISTRICT REGISTRAR MACHAKOS ..... 2ND RESPONDENT

RULING

1. The application is dated 15th February 2924 and is brought under Article 40 of *the Constitution*, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections IA, 1B, 3A and 63 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Section 7 of the *Arbitration Act* seeking the following orders;

    1. That this Application be certified as urgent and service of this Application be dispensed with in the first instance.

    2. That the court be pleased to grant a temporary injunction prohibiting the 1st Respondent to Charge, mortgage, transfer, sale, alienate, procure construction, interfering and/or or any dealings with the property known as LR. No. Ndalani/Ndalani block 1/2479 pending the hearing and determination of this Application.

    3. That the court be pleased to grant a temporary injunction prohibiting the 1st Respondent to Charge, mortgage, transfer, sale, alienate, procure construction, interfering and/or or any dealings with the property known as LR. NO. Ndalani/Ndalani block 1/2479 pending the hearing and determination of the arbitration proceedings.

    4. That 2nd Respondent, his servants and/or agents be prohibited from processing or approving any document or transactions or from submitting any such documents for applications for

survey, physical planning or issuing of Title Deed and/or any dealings incidental thereto for all that property known as LR. No. Ndalani/Ndalani block 1/2479 the disputed property herein pending the hearing and final determination of the arbitration proceedings.

5. That the OCS Kithimani Police Station to effect the said orders.

6. That the 1st Respondent do pay the costs of this Application.

2. It is based on the annexed Affidavit of Mbugua Wa Mungai And Florence Elizabeth Wanjiru Ng'ang'a and on grounds that on the 4th day of January, 2017 the Applicants entered into an Agreement for Sale of a two acres parcel of land; a portion of all that piece of land known as Ndalani/Ndalani block 1/241 with the 1st Respondent. That in the aforesaid agreement under Clause 1.2, the Respondent, the vendor in the said agreement was obligated to subdivide the property known as Ndalani/block 1/241 into portions marked and identified as Portion A (2 acres) and B in the schedule attached to the aforesaid agreement. That via a Mutation Form dated the 20th day of March, 2017 the 1st Respondent went on to subdivide all that parcel of land known L.R. No. Ndalani/Ndalani block 1/241 into two portions, that is, portion A (L.R. No. Ndalani/Ndalani block 1/2224) and portion B (L.R. No. Ndalani/Ndalani block 1/2225). That the 1st Respondent however went ahead and subdivided the land in a manner that was not agreed upon by the parties and apportioned the Applicants a V-shaped parcel of land (i.e. portion A (L.R. No. Ndalani/Ndalani block 1/2224) contrary to what was agreed upon.

3. That the 1st Respondent later subdivided all that parcel of land known L.R. No. Ndalani/Ndalani block 1/2225 into two portions, that is, L.R. No. Ndalani/Ndalani block 1/2479 and L.R. No. Ndalani/Ndalani block 1/2480. That the disputed parcel of land sits on all that parcel of land known as LR. No. Ndalani/Ndalani block 1/2479 which is in the possession of the 1st Respondent and she resides and has her home therein. That what was agreed upon by the parties in the aforesaid agreement was that the 1st Respondent has sold to the Applicants a portion of all that parcel of land known L.R. No. Ndalani/Ndalani block 1/241, Rectangular in shape as was indicated and/or illustrated in the schedule attached to the sale agreement dated 4th January, 2017 and measuring two acres. That the 1st Respondent has her signature appended to the schedule attached to the aforesaid agreement dated the 4th day of January, 2017. That the Applicants upon learning of the mischievous deeds of the 1st Respondent altering the terms of the contract without prior notification to them, they communicated their dissatisfaction with her actions and made it clear to her that her actions were contrary to the aforesaid agreement. That despite various demands by the Applicants that the 1st Respondent rectifies her actions the 1st Respondent has refused and/or ignored the Applicants' demands. That the Applicants further caused a meeting to be convened by all the parties herein at the home of the Respondent (situate on all that parcel of land known as LR. No. Ndalani/Ndalani block 1/2479) on the 5th day of November, 2023, wherein the Applicants reiterated the said demands and she blatantly ignored their demands and she indicated she does not have time to comply with the Applicants' demands. That on the 7th day of February, 2023 via a phone call, the Applicants further demanded that the 1st Respondent rectifies the subdivision to be in tandem with the provisions of the aforesaid agreement but she ignored the Applicants' demands. That Clause 18 of the aforesaid agreement dated 4th January, 2017, provides that should there be a dispute emanating from the said agreement parties shall in the first instance attempt to resolve such dispute via amicable negotiations and should negotiations fail to achieve a resolution either party may declare a dispute and such dispute shall be referred to arbitration. That the Applicants have been patient with the 1st Respondent and they have always been willing to negotiate with her however, the negotiations have failed and it appears that the 1st Respondent is iron-willed on contravening the aforesaid agreement and she has totally ignored

the Applicants' demands. That the Applicants have referred the matter to arbitration via a letter dated 12th February, 2024 and addressed to the Chairman of the Chartered Institute of Arbitrators Kenya. That in the interim the Applicants are seeking an order of prohibition, prohibiting the Charge, mortgage, transfer, sale, alienation, construction, interfering and/or or any dealings with the property known as L.R. No. Ndalani/Ndalani block 1/2479 pending the hearing and determination of the arbitration proceedings given that the disputed parcel of land sits on all that parcel of land known as LR. No. Ndalani/Ndalani block 1/2479 which is in the possession of the Respondent and she resides and has her home therein. That the Applicants are apprehensive that the 1st Respondent intentions are ill-motivated being that the 1st Respondent had no colour of right to alter the terms of the aforementioned sale agreement without notifying the Applicants and her actions were malicious and unlawful. That if the orders sought herein are not granted there is danger of the suit premises being utilized by strangers and to the detriment of the Applicants which will in turn lead to the violation of the Applicant's proprietary rights. That without the intervention of this Honourable Court, the Applicants herein stands to suffer grave irreparable loss and damage and the risk of losing their legally acquired property.

4. The 1st Respondent opposed the application and confirms that on 4th January, 2017 the she entered into an Agreement for Sale of a two acres parcel of land; a portion of all that piece of land known as Ndalani/Ndalani block 1/241 with the Applicants. She stated that the Applicants took possession of the saleable portion immediately and after the subdivision process, the portion of land became L.R. No. Ndalani/Ndalani block 1/2224 and she remained with LR. No. Ndalani/Ndalani block 1/2225 she attached copies of the LCB forms, consent to sub division and mutation. That the Applicants never raised any issue since the year 2017 and they have been farming and carrying on with any manner of activity. And that this suit is an afterthought.

5. This court has considered the application and the submissions therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella vs Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR where the Court of Appeal held that;

> in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

6. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

   Consequently, the Plaintiff ought to, first, establish a prima facie case. The Plaintiff/Applicant submitted that they have established a prima facie case. In the case of Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that;

   ... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

7. In support of their application, the Plaintiffs have attached copies of documents of the sale agreement, mutation form and registry index map to the suit property.

8. Secondly, The Plaintiffs have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

9. Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

10. The Plaintiffs stated that after entering into the sale agreement, the 1st Respondent went ahead and subdivided the land in a manner that was not agreed upon by the parties and apportioned the Applicants a V-shaped parcel of land (i.e. portion A L.R. No. Ndalani/Ndalani block 1/2224) contrary to what was agreed upon as it was to be a rectangular shape.

11. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

> 'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

12. In the case of Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

> Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

13. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because if the orders sought herein are not granted there is danger of the suit premises being utilized by strangers and to the detriment of the Applicants which will in turn lead to the violation of the Applicant's proprietary rights. That without the intervention of this Court, the Applicants herein stands to suffer grave irreparable loss and damage and the risk of losing their legally acquired property.

14. The decision of 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."

15. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to thesubdivision. I have also not had the opportunity to interrogate the annextures to therein.

16. In Robert Mugo Wa Karanja vs Ecobank (Kenya) Limited & Another (2019) eKLR where the court in deciding on an injunction application stated;

> circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

17. In view of the foregoing, I find that the application is merited and order that the status quo be maintained pending the hearing and determination of this suit. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE