



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO EOO2 OF 2020**

**ABDULMALIK THOMAS MATEE NZOMO**

*(Suing as the administrator of the estate*

*of Daniel NZOMO MATEE(Deceased).....PLAINTIFF/APPLICANT*

**VERSUS**

**TABITHA KATILE KAWIZI**

*Alias Esther Katile Kawinzi .....1<sup>ST</sup> DEFENDANT/RESPONDENT*

**DANIEL MUTUKU KAWINZI ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SAMUEL MUNGUTI NDAMBUKI ... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of motion dated 6<sup>th</sup> of October 2020 brought under Order 40 rule 1 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 and all other enabling laws, the Applicant is seeking for the following orders: -

**a) Spent.**

**b) That this Honourable court be pleased to issue an order of injunction restraining the Defendants/Respondents by themselves, agents, servants or any other person claiming under their authority and/or instructions from entering, trespassing, interfering, constructing, demolishing, fencing, leasing out, selling and or carrying on any activity thereon or committing any act whatsoever on all that property belonging to Daniel Nzomo Wambua (deceased) the Plaintiff/Applicant's father measuring 2.024 Hectares situated within Wote Makueni county pending the hearing and determination of this application.**

**c) That this Honourable court be pleased to issue an order of injunction restraining the Defendant/Respondents by themselves, agents, servants or any other person claiming under their authority and/or instructions from entering, trespassing, interfering, constructing, demolishing, fencing, leasing out, selling and or carrying any activity thereon or committing any act whatsoever on all that property known as Makueni/Unoa/143 belonging to Daniel Nzomo Wambua (deceased) the plaintiff/applicant's father measuring 2.024 Hectares situated in Wote town within Makueni county pending the hearing and determination of this suit.**

**d) That the Administrators of the Estate of Ndambuki Kingutu Maitha(Deceased) be compelled to transfer the said portion of land measuring 2.024 hectares contained in title number Makueni/Unoa/143 in the name of Ndambuki Kingutu Maitha measuring 15.6 hectares situated in Wote within Makueni county to the Plaintiff/Applicant.**

**e) That the cost of the application be provide for.**

**APPLICANT'S CASE**

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on the 6<sup>th</sup> of October 2020.

3. A summary of the grounds and the supporting affidavit of the Applicant is that on 9<sup>th</sup> of August 1973, Daniel Nzomo Matee the

Applicant's late father purchased the suit land from the late Ndambuki Kingutu. He averred that the suit land had previously been sold to Kawinizi Ndambuki (deceased) who on being unable to complete the payment asked for a refund of his money from the vendor and that this necessitated a resale of the suit land to Daniel Nzomo Matee (Applicant's late father) who upon payment of the purchase price on 10<sup>th</sup> of October 1973 acquired the rights to the suit land. He averred that the land purchased by his late father measuring 2.024 hectares was part of land parcel Makueni/Unoa/149.

4. He argued that as the Administrator of the Estate of his late father, he approached the family of Ndambuki Kingutu who agreed to sub divide and transfer the land to him but the Defendants continued to frustrate his efforts to acquire the same.

5. He further averred that after the Defendants removed the fence and demolished the house that was constructed by his late father on the suit property, he reported the matter to the Chief who then summoned the Respondents. He averred that after the Defendants declined to respond to the summons by the Chief, he reported the matter to the police and consequently, the Defendants were arrested and charged in MCCR No 58 of 2017.

6. He argued that the Estate of his late father was the bona fide owner of the suit land and that it had been in possession of the property since 1973. He argued that the Defendants actions had exposed him to irreparable loss and damage as he was unable to administer the Estate of his late father.

### **RESPONDENTS CASE**

7. The application was opposed by the Defendants/Respondents vide the replying affidavit sworn by Samuel Ndambuki Munguti the 3<sup>rd</sup> Defendant/Respondent on his own behalf and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents. The Respondent stated that the suit land formed part of the Estate of his late father Ndambuki Kingutu Maitha who died intestate on 22/07/1985. He averred that they filed a succession cause and that a grant of letters of administration was issued to him jointly with Philes Mwikali and Esther Ndulu Kioko and later confirmed on 24/09/2017.

8. He further averred that before the grant was confirmed, the Plaintiff/Applicant had illegally and fraudulently caused a part of the suit land to be allocated a new title number Makueni/Unoa/3334 which was later cancelled. He argued that the Applicant had been trying for a long time to grab a portion of the land from the Estate of his late father that was occupied by the 1<sup>st</sup> Respondent and that in order to have the 1<sup>st</sup> Respondent vacate the portion of land, the Applicant maliciously instituted a criminal case (Makueni P.M CR NO 58 of 2017) against the 1<sup>st</sup> Respondent and her grandson Josphat Wambua who were later acquitted for lack of evidence.

9. He contends that his late father never sold the land to the Applicant's father and that the Applicant had never been in possession of the suit land.

10. He further averred that the Applicant's claim was determined by the succession court which declined his claim as a creditor. He argued that the estate had been distributed hence the Applicant's claim was far-fetched.

### **SUBMISSIONS**

11. The application was canvassed by way of written submissions.

12. The Applicant through his written submission filed on 18<sup>th</sup> of October 2021, submitted that he had established a prima facie case as his late father had purchased the suit land from the late Kingutu Ndambuki as evidenced by the sale agreement and Applicant's affidavit sworn on 6<sup>th</sup> of October 2020.

13. On the issue whether the Applicant would suffer irreparable harm that cannot be compensated by an award of damages, the Applicant submitted that the Respondents had sub divided the suit land and were selling it to 3<sup>rd</sup> parties. He stated that unless the Respondents were restrained from disposing the suit property, the Applicant would suffer since the Respondents did not have any other property that could be used to compensate the Applicant. Reliance was placed in the case of **R.J.R. Macdonald v Canada Attorney General and order 40 rule 1 of the civil procedure rules.**

14. The Applicant submitted that the balance of convenience was in his favour as he had been in possession of the suit land from 1973 up to 2016 when the 1<sup>st</sup> Respondent entered the suit property and threatened the Applicant and his family.

15. The Respondents through the written submissions filed on 5<sup>th</sup> of October 2021, argued that the Applicant had failed to establish a prima facie case as the sale agreement attached to the Applicant's affidavit was between the Applicant's father and a 3<sup>rd</sup> party and not with his late father. He argued that the Respondents being the beneficiaries of the Estate of Ndambuki Kingutu, were entitled to occupy the suit land. He contends that the Applicant had sued one administrator instead of all the administrators and that if orders sought were granted, they cannot not be enforced against the rest of the Administrators who are not parties to this suit.

16. On the issue of whether the Applicant would suffer irreparable harm that is incapable of being compensated by an award of damages, the Respondents submitted that the Applicant had not adduced evidence to prove acts of wanton damage or on the allegation of sale of the suit property, which according to the Respondents false.

17. On the issue of balance of convenience, he submitted that it tilted in favour of the Respondents and their families who were in occupation of the suit land unlike the Applicant who had never been in occupation.

## ANALYSIS AND DETERMINATION

Having considered the application, affidavits and the rival submissions, I find that the issue for determination is whether the Applicant has met the threshold for the grant of an order of injunction.

1. The application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

### **Order 40, Rule 1**

**Where in any suit it is proved by affidavit or otherwise—**

**a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or**

**b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**

The principles applicable in an application for an injunction were laid down in the celebrated case of Giella Vs Cassman Brown & Co Ltd 1973 EA 358 where the court held that in order to qualify for an injunction.

ü *First the applicant must show a prima facie case with a probability of success.*

ü *Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.*

ü *Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.*

18. The first issue for determination is whether the Plaintiff has established that he has a *prima facie* case with a probability of success.

19. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR 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 or rebuttal from the latter.”***

20. On the issue whether the Applicant has established a prima facie case with a probability of success, the Applicant averred that the Estate of his deceased father was the bona fide owner of the suit property. The Applicant’s proprietary claim is based on a sale agreement executed by his deceased father and Ndambuki Kinguti deceased. The Applicant relied on a sale agreement annexure ATMZ1 in his supporting affidavit to prove ownership of the same. On the other hand, the Respondents argued that their late father never sold the portion of the suit land to the Applicant’s late father. The Respondents argued that the sale agreement was between the Applicant’s late father and a third party. It is not in dispute that the suit land formed part of the Estate of the late Ndambuki Kinguti Maitha. Upon confirmation of the grant issued jointly to the 1<sup>st</sup> Respondent, Philes Mwikali and Esther Kioko on 24<sup>th</sup> of September 2017, the Estate was distributed amongst the beneficiaries.

21. In the case of Mbuthia Vs Jimba credit Corporation Ltd 988 KLR 1, the court held that;

***“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”***

22. Similarly, in the case of Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd the court held that;

***“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”***

23. In the present case, it is evident that the Applicant’s proprietary claim over the suit property is anchored on the sale agreement which is contested by the Respondents. The issue as to whether the Applicant’s deceased father purchased 5.2 acres comprised in the suit land from the Respondents deceased father can only be determined in a full trial by calling evidence and interrogating it through cross examination. At this stage the court cannot determine those contested issues. In the circumstances, I find that the Applicant has not established that he has a *prima facie* case with a probability of success.

24. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

25. The Court of Appeal in Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR held that: -

***“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”***

26. On the issue as to whether the Applicant will suffer irreparable harm which cannot be adequately be compensated by an award of damages, it is not in dispute that the suit land forms part of the Estate of Ndambuki Kinguti Maitha. Although the Applicant averred that the Respondents have sub-divided and sold the suit land to third parties, no evidence was place before me to corroborate the averments. The Applicant further submitted that he was in occupation of the suit land from 1973 up to 2016 when the 1<sup>st</sup> Respondent entered the suit property and threatened him. From the Applicant’s pleadings and annexures, it is evident that the Applicant is in not in occupation of the suit land. Having failed to demonstrated that the Respondents are selling the suit land or that he is in occupation of the same, I find that the Applicant has failed to establish that he is likely to suffer irreparable harm which cannot be adequately compensated by way of damages.

27. On the issue of balance of convenience, I find that it tilts in favour of the Respondents as they are occupation of the suit land.

28. The upshot of the foregoing is that the application dated 6<sup>th</sup> October 2020 is dismissed with costs to the respondents. Parties to comply with order 11 within the next 30 days.

**RULING SIGNED DATED AND DELIVERED VIRTUALLY THIS DAY 16TH DAY OF FEBRUARY 2022.**

.....

**HON. T. MURIGI**

**JUDGE**

**IN THE PRECENCE OF: -**

Babu for the Plaintiff

Mr. Nyaata for the Defendant

Mr. Kwemboi – Court assistant