



Wachuka (Suing in his capacity as the appointed attorney of Joyce Wachuka Kigwe and in his personal capacity) v Wachuka & 6 others (Environment & Land Case E064 of 2021) [2022] KEELC 2971 (KLR) (17 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E064 OF 2021**

**JG KEMEL, J
MAY 17, 2022**

BETWEEN

**CHARLES KIGWE WACHUKA PLAINTIFF
SUING IN HIS CAPACITY AS THE APPOINTED ATTORNEY OF JOYCE
WACHUKA KIGWE AND IN HIS PERSONAL CAPACITY**

AND

**ELIZABETH WAMBUA WACHUKA 1ST DEFENDANT
JAMES MWANGI ABIUD 2ND DEFENDANT
DAVID KIOGORA MAINGI 3RD DEFENDANT
ROSE NGIMA MAINGI 4TH DEFENDANT
PETERSON NJARAMBA MACHARIA 5TH DEFENDANT
PERPETUA ANNETTE AKINYI AYATTA 6TH DEFENDANT
CHIRA GAD GITHAIGA 7TH DEFENDANT**

RULING

1. The Plaintiff/Applicant filed the instant Notice of Motion Application expressed under Section 13(7),14 & 19 [Environment and Land Court Act](#) and Order 40 [Civil Procedure Rules](#) dated 2nd July 2021 for orders that;
 - a. Spent.
 - b. Spent.



- c. The Honorable Court be pleased to issue orders restraining the 1st Defendant, her agents or servants from dealing, selling or disposing off the land parcel Numbers Juja/Kalimoni/Block 8/574, 575, 576, 578, 580, 581,586, and 587 pending the hearing and determination of the main suit.
 - d. Spent.
 - e. The Honorable Court be pleased to issue orders restraining the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants, their agents or servants from dealing, selling or disposing off land parcel Numbers Juja/Kalimoni/Block 8/574, 575, 586 and 587 pending the hearing and determination of the main suit.
 - f. The Honorable Court be pleased to issue inhibitions directed to the Land Registrar Thika to forbid any dealings on Titles on Land parcel Numbers Juja/Kalimoni/Block 8/579 and 590.
 - g. The Honorable Court be pleased to issue inhibitions directed to the Land Registrar Thika to forbid any dealings on Titles on Land Reference Number 25468/311 (original Number 25468/23/2 situate S.W of Thika Municipality in Kiambu County.
 - h. The Honorable Court be pleased to order Dr Pius Kigamwa to prepare and file a report on Joyce Wachuka Kagwe for purposes of this suit.
 - i. Costs be provided for.
2. The Application is based on the grounds thereto and Supporting Affidavit of even date of Charles Kigwe Wachuka, the Applicant. He averred that he is the only son and appointed Attorney of Joyce Wachuka Kagwe (Joyce) vide a General Power of Attorney dated 10/7/2013. That Joyce was at all material times the registered owner of Land parcels Numbers Juja/Kalimoni/Block 8/574, 575, 576, 578, 580, 581,586, and 587 per the certified copy of Green Card CW-2 a-j and Land Ref No 25468/311 per copy of official search, CKW-3. That the Applicant has realized that his only sibling Elizabeth Wambui Wachuka, the 1st Respondent illegally transferred to herself Land parcels Numbers Juja/Kalimoni/Block 8/574, 575, 576, 578, 580, 581,586, and 587 in the year 2016 and later disposed some of those properties to the 2nd, 3rd, 4th, 5th,6th and 7th Respondents.
 3. The Applicant deponed that the 1st Respondent took advantage of their mother's mental illness to effect the impugned transfer hence the Application.
 4. The Application is strenuously opposed.
 5. The 1st Respondent filed her Replying Affidavit sworn on 23/9/2021 and denied the Applicant's Power of Attorney as a nullity in law; that this Court's jurisdiction is limited to land matters only and not mental health issues; that the prayer to order Dr Pius Kigamwa to avail Joyce's medical report is not tenable as the Doctor is not party to the instant proceedings; that the Applicant has not demonstrated whether he has sought the Land registrar's to restrict dealings on the impugned parcels of and before seeking this Court's Orders to that effect; the she did not take advantage of their mother and that the parcels of land she sold were rightly registered in her name. The 1st Respondent maintained that both her and the Applicant were shown their respective parcels of land by Joyce and that the Applicant is now trying to obtain her share.
 6. The Plaintiff filed a notice of withdrawal of suit against the 2nd Defendant dated 29/9/2021, thus there is no opposition by the 2nd Defendant.



7. The 3rd and 4th Respondents filed a joint Replying Affidavit dated 2/9/2021 and admitted being the registered owners of Juja/Kalimoni/Block 8/586 having legally purchased it from the 1st Respondent in 2018. That duly conducted due diligence before the said purchase and took possession, developed the land which they are currently occupying as shown by photos marked DKM & RNM-1. That their occupation is open and within the knowledge of the Applicant and his mother.
8. Similarly the 5th Respondent filed his RA dated 24/9/2021. He swore that he is the *bona fide* proprietor of land parcel No Juja/Kalimoni/Block 8/575 having legally bought it from the 1st Respondent according to copy of the Certificate of Lease and Sale Agreement annexed as PNM.
9. The 6th & 7th Respondent filed a detailed RA dated 11/11/2021. He deponed that the Applicant lacks locus standi in his capacity as claimed since he is not the registered owner of the suit parcels of land; that the Applicant has proven he is the son of Joyce; no evidence has been adduced to show Joyce's mental illness; the Applicant does not have an Order appointing him as Guardian ad litem; the Applicant has made vague and general allegations of fraud against the 1st Respondent and that the Applicant has not satisfied the conditions for interim injunction as set out in the case of *Giella v Cassman Brown* [1973] E.A 358. That the 6th and 7th Respondents are the registered owners of Juja/Kalimoni/Block 8/574 having bought it from the 1st Respondent in the year 2020 and obtained a Certificate of Title issued on 6/10/2020, CGG-1 capable of protection under Section 26, 30 & 35 of LRA. He urged the Court to dismiss
10. The Plaintiff filed a Supplementary Affidavit in reply to the 1st Respondent's Replying Affidavit dated 22/10/2021. He averred that he hold a valid Succession Cause No 950 of 2010 – In the matter of the Estate of Gladys Wambui Kigwe. That the Court has power to summon any individual to Court without due regard to technicalities.
11. The Application was canvassed by way of written submissions.
12. The firm of Nganga Ngigi & Co. Advocates filed submissions dated 1/12/2021 on behalf of the Applicant. The Applicant reiterated the contents of the Application and relied on Order 40 rules 1 & 2 Civil Procedure Rules and principles for injunction as held in the case of *Giella* supra in support of their prayers. That the Applicant has met the said principles for the Court to allow the Application as drawn.
13. On the other hand the 1st Defendant filed submissions dated 7/2/2022 through the firm of J. Harrison Kinyanjui & Co. Advocates. She impugned the Applicant's capacity to institute the instant suit as filed particularly that no High Court Order has been made appointing him as the manager of Joyce and therefore his suit is untenable. Reliance was placed on the case of *RNO (suing as the guardian ad litem and next friend to DOM) v Moses Choge Chesire* [2015] eKLR. That such an appointment is exclusively a preserve of the High Court and not the Environment and Land Court jurisdiction.
14. On the issue of mandatory injunction orders, the 1st Respondent cited the Court of Appeal case of *NMG & 2 others v John Harun Mwau* [2014] eKLR that an Applicant must establish existence of special circumstances before such injunction is granted. That the Applicant herein has not established any special circumstances and no irreparable injury would result if the Orders are denied. The 1st Respondent also assailed the Applicants prayers as contained in his Complaint and in the instant Application for want of uniformity thus a breach of Order 2 Rule 6(1) Civil Procedure Rules. Accordingly, that the Motion is defective and was ripe for dismissal.



15. Lastly the 1st Respondent submitted that this Court cannot usurp the Land Registrar's powers as spelt out in the [Land Registration Act](#); further that the Registrar is not a party herein; the balance of convenience does not favor the Applicant.
16. The 3rd, 4th, 6th and 7th Respondents filed their submissions dated 20/1/2022 through the firm of Elsy Njagi & Co. Advocates. Citing the pre-conditions in *Giella supra* as well, the Respondents maintained that the Applicant has not demonstrated a *prima facie* case in his favour because he has not presented any evidence how the 1st Respondent took advantage of her mother to effect the impugned transfers of land and that they are all bona fide purchasers for value.
17. The Respondents added that the Applicant has not demonstrated that if such injunction is not granted an award for damages shall not be adequate compensation. That the balance of convenience clearly lies in their favour and in any case, the Applicant as not come to Court with clean hands.
18. The 5th Respondent's submissions dated 8/2/2022 were filed by Gathoni Kariuki & Co. Advocates. In similar fashion as above he echoed that the Applicant has not established a *prima facie* case to justify the orders sought. This is because the 5th Respondent legally bought the suit land and the Applicant has not shown how his right were infringed. That the Applicant will not suffer any harm that cannot be compensated by way of damages and therefore the balance of convenience tilts in favor of the 5th Respondent.
19. The main issues for determination are; whether the Applicant has established a case to grant interim injunction; whether the Court can issue inhibitions directed to the Land Registrar; whether the Court can order Dr Pius Kigamwa to file a medical report for Joyce and who bears costs.
20. On the first issue, the relevant legal provision is contained under Order 40 rule 1 of the [Civil Procedure Rules](#) that;
 - “ 1. Cases in which temporary injunction may be granted [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 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.”
21. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a *prima facie* case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience. See the celebrated cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and [Nguruman Ltd v Jan Bonde Nielsen & 2 others](#) [2014] eKLR.



22. The starting point is to establish whether the Applicant has demonstrated a *prima facie* case to grant the orders sought. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 123, defined a *prima facie* case as:-
- “A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. 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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
23. In Nguruman case supra the Court of Appeal went on to further state 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. 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.
24. It is against that background that I will analyze whether the Applicant has established a *prima facie* case herein. It is the Applicant’s case that he is the appointed Attorney for his mother, Joyce. That his sister, the 1st Respondent took advantage of their mother’s mental condition and transferred the suit parcels of land to herself in 2016 before further transferring them to the 3rd–7th Respondents. He also urges the Court to order his mother’s Doctor Pius Kigamwa to file a medical report detailing Joyce’s mental state.
25. The 1st Respondent maintained that their mother showed her and the Applicant their respective parcels of land and this suit and Application are the Applicant’s attempts to dispossess her, her share. The 5th – 7th Respondents are emphatic that they are bona fide purchasers for value and currently in occupation of the suit parcels of land. They annexed copies of their certificates of Title/Lease entitling them their respective ownership thereof.
26. It is not in doubt that according to the copies of green cards on record the parcels of lands (suit lands) belonged to Joyce Wachuka Kigwe having been registered as such on the 20/4/2016. On the 14/9/16 parcel Numbers 574, 575, 576, 578, 580, 581, 586 and 587 became registered in the name of the 1st Defendant on the 14/9/2016. Thereafter parcel Numbers 574, 575, 586 and 587 were registered in the names of the 6th, 5th 3rd and 2nd Defendants respectively. It is on record that the Plaintiff removed the 2nd Defendant from the suit. The remaining parcels Numbers 576, 578, 580 and 581 are in the name of the 1st Defendant.
27. It is the case of the Plaintiff that the transfer of the parcels from Joyce Wachuka to the 1st Defendant was vitiated by the incapacity of the said Joyce Wachuka arising from a mental illness or infirmity as a result of which the 1st Defendant did not receive a good title. That consequently having not received a good title, the said 1st Defendant did not convey any title to the Defendants to entitle them title by way of the doctrine of bonafide purchaser for value without notice.
28. It is the view of the Court that the Plaintiff has set out the link or the root of the titles in this case, the origin being from the said Joyce Wachuka. The issue of whether or not the said Joyce Wachuka suffered from any form of incapacity in transacting between herself and the 1st Defendant is for the trial Court to consider based on the evidence that shall be laid before it. The issue of whether the Defendants received good title is also reserved for the trial Court to determine. It suffices for now to state that the Plaintiff has raised an arguable case before the Court as to call for a rebuttal from the Defendant’s side.



Whether the case shall succeed or not is not for the Court to determine at this stage. In the end I find that the Plaintiff has established a *prima facie* case.

29. With respect to the second limb that is the Applicant must prove that an award of damages would be insufficient to alleviate any damage suffered. It is trite that land being a commodity is capable of valuation and therefore if any damage is suffered the same is capable of being remedied in damages.
30. Where does the balance of convenience lie? Having reviewed the evidence I find that the balance of convenience lies in the Court preserving the subject matter in terms of maintaining status quo pending the hearing and determination of the suit. I shall give the appropriate orders in the end.
31. With respect to the prayer seeking orders of inhibitions on the suit land, Section 68(1) of the [Land Registration Act](#) provides;

“ 68. Power of the Court to inhibit registered dealings

- (1) The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

32. It is trite that an order of inhibition issued is discretionary in nature and similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the Applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial. See the case of [Dorcas Muthoni & 2 others v Michael Ireri Ngari](#) [2016] eKLR.
33. In this case the parcels sought to be inhibited are 579, 580 and LR 25468/311. They are all registered in the name of Joyce Wachuka. The Applicant has not established sufficient ground to warrant such orders given that Wachuka is the registered owner. This prayer is declined.
34. Regarding the Applicant’s application to order Dr Pius Kigamwa to file a medical report, I find that this prayer can well be addressed at the hearing by calling witness(es) if desired. In any event it would appear that the Applicant abandoned this prayer in his submissions.
35. Final orders and disposal.
 - a. *Status quo* orders be and are hereby maintained in terms of prayer No c and e of the application.
 - b. Prayers f, g and h are hereby declined.
 - c. Costs shall be in the cause.
36. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Wainaina holding brief for Mr. Ngige



Harrison Kinyanjui for the 1st Defendant

2nd Defendant – withdrawn

Ms. Njagi for 3rd and 4th Defendants

Ms. Gathoni for 5th Defendant

Ms. Njagi for 6th and 7th Defendants

Court Assistant - Phyllis

