



**Abdalla v Abdallah & 3 others (Environment & Land Case
25 of 2021) [2022] KEELC 3932 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3932 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 25 OF 2021**

MAO ODENY, J

MAY 11, 2022

BETWEEN

BASHIR ALI ABDALLA PLAINTIFF

AND

SAID MOHAMMED ABDALLAH 1ST DEFENDANT

HABIB SAID 2ND DEFENDANT

ISLAM AHMED 3RD DEFENDANT

AHMED MOHAMMED HAMI. 4TH DEFENDANT

RULING

1. This ruling is in respect of two applications brought by way of Notice of Motion dated 9th April, 2021 and 7th May, 2021 respectively seeking the following orders:
 1. Spent
 2. That a Temporary Injunction do issue restraining the 1st, 2nd and 3rd Respondents either by themselves in person, their servants, agents, children and/or employees from infringing upon the Plaintiff's right of possession of the property namely property on Wakf Land Plot No. 682/2 situate next to Sheikh Nasser Mosque Malindi within Kilifi County pending the hearing and determination of this Application interparties.
 3. That a temporary Injunction do issue restraining the 1st, 2nd and 3rd Respondents either by themselves in person, their servants, agents, children and/or employees from infringing upon the Plaintiff's right of possession of the property namely property on Wakf Land Plot No. 682/2 situate next to Sheikh Nasser Mosque Malindi within Kilifi County pending the hearing and determination of the substantive suit.



4. That the costs of this Application be borne by the 1st, 2nd and 3rd Respondents.

Counsel agreed to canvas the applications vide written submissions which were duly filed.

Applicant's Case

2. The application was supported by the affidavit of Bashir Ali Abdallasworn on 9th April, 2021 where he deponed that vide a Sale Agreement dated 16th November, 2020 he purchased the said property from the 1st Defendant for a consideration of Kshs. 1.7 million and it was a term of the agreement that he would pay a partial deposit of Kshs. 500,000/- with a mutual consent that the balance was to be remitted on or before 8th December, 2020.
3. He further stated that on 18th November, 2020, the 2nd and 3rd Defendants proceeded to break the door of the said premises and that to date the Plaintiff has not been in a position to reside on the said property following threats from the 2nd and 3rd defendants. Further that during the pendency of this suit the 1st defendant vide a demand letter dated 1st April, 2021 demanded the balance of the purchase price which was in breach of the terms of the agreement.

Respondent's Case

4. The 1st Defendant/ Respondent filed a Replying Affidavit sworn on 26th April, 2021 and deponed that it is true that the land in question belonged to him and he sold it to the Applicant who took possession of the land and that the fact that the applicant is in possession of the land, he needs to pay the remaining balance.
5. The respondent further deponed that the applicant cannot continue enjoying his property if he has not paid the balance of the purchase price and that the Applicant has breached the agreement dated on 16th November, 2020.

Application dated 7th May, 2021.

6. The application seeks similar orders that were sought in the application dated 9th April 2021 which in effect is an abuse of court process. The application adds an alternative prayer that the 2nd defendant be summoned to appear before court to explain the alleged acts of vandalism
7. The applicant deponed that when the matter came up for inter parties hearing on the 29th April, 2021, counsel for the 2nd, 3rd and 4th Respondents indicated to the court that they had no such intent of infringing upon the applicant's right of possession and as a result, the court did not see any point of granting the orders sought under Prayer 2 of the application.
8. It was the applicant's averment that the 2nd Respondent visited the Plaintiff's premises threatened and proceeded to demolish the door of the premises, which matter was reported to the police. Further that the applicant has intentions of clearing the balance but there is a contention over the ownership of the parcel of land which has to be resolved by this Honourable Court.
9. The 4th Defendant Ahmed Mohamed Hani filed a Replying Affidavit sworn on 20th September, 2021 in response to the applicant's application dated 7th May, 2021 and deponed that the 2nd and 3rd Defendants are his step son and brother-in-law respectively.
10. He stated that he is the owner of all that parcel of land known as Plot No. 686 located near Sheikh Nassor Mosque which was part of his inheritance in Succession Case No. 87 of 2008 before the Kadhi's Court. That subsequent to the above suit, the subject property was involved in various other suits



in Malindi; High Court Civil Appeal No. 15 of 2011 Ferruz Omar & 3others vs Ahmed Mohamed Honey, H.C Judicial Review No. 3 of 2016 Republic & 5others vs Kadhi (Malindi) & Another, J.R No. 7 of 2017 and Court of Appeal Civil Appeal No. 58 of 2015 Ferruz Omar & 4others vs Ahmed Mohamed Honey.

11. That the above matters came to a close on 9th December, 2019 in Judicial Review No. 6 of 2017 when the Ruling of the Kadhi's court was held to be binding. He also deponed that at no time did he transfer the subject property to the 1st Defendant as alleged and that any agreement in that respect was fraudulently executed.
12. The respondent further stated that on 18th November, 2020 he was informed that someone has placed a door without his consent and after visiting the suit property in the company of his son, the 2nd Defendant, he found the Plaintiff who informed them that the parcel of land had been sold to him by the 1st Defendant.
13. He further stated that he has seen the agreement purported to have been executed by himself by appending his left thumb print and wish to confirm that the same was obtained fraudulently by the 1st Defendant/ Respondent since he has never sold the property to anyone. That at no point did he appear before Kupalia Advocates to affix his left thumb print to the said Agreement and the actions of both the Plaintiff and the 1st Defendant are aimed at depriving him of his legally owned property whilst taking advantage of his old age and illiteracy.
14. The respondent also stated that despite the agreement to maintain status quo, it was the plaintiff's decision to proceed with construction over the suit property which was tantamount to contempt. Further that the Plaintiff has since embarked on intimidating the 2nd, 3rd and 4th Defendants by use of police officers and filing numerous police complaints to ensure that they give up on the pursuit of their right over the subject property.
15. He therefore urged the court to dismiss the applications dated 9th March, 2021 and 7th May, 2021 respectively as they have not met the criteria for grant of orders of an injunction.

Plaintiff's/ Applicant's Submissions

16. Counsel submitted that the Respondents notified the court that they had no such intent of either evicting or interfering with the Plaintiff's right to the premises and therefore the court did not see the point of granting the reliefs sought in the interim.
17. Counsel further submitted that on the contrary, the 2nd Respondent on the following day proceeded to the disputed property and engaged in acts of vandalism which necessitated the subsequent application dated 7th May, 2021 seeking similar orders.
18. Counsel stated that the applicant has met the threshold for grant of temporary injunctions as per the case of Giella vs Cassman Brown (1973) EA 358 and that the applicant has proved that he has a prima facie case with a probability of success and if the injunction is not granted he will suffer irreparable harm which cannot be compensated by damages.
19. Counsel further submitted that following the nuisance instigated by the 2nd and 3rd Respondent the applicant has not been in a position to reside within the suit premise and that the applicant has high chances of success as the case is based on a professional undertaking at Clause 7 of the agreement that the property was sold free from any 3rd party claim.



2nd, 3rd and 4th Defendants/ Respondents' Submissions

20. Counsel gave a brief background to the suit and stated that the 4th Defendant/Respondent is the owner of the subject parcel which was part of his inheritance share in Succession case Number 87 of 2008 before the Kadhi's Court. That subsequent to the above suit, the subject suit was involved in various other suits in Malindi as follows;
 - a. Court of Appeal Civil Appeal Number 58 of 2015 Ferruz Omar & 4 others Versus Ahmed Mohamed Honey.
 - b. Court of Appeal Civil Appeal Number 32 of 2014 Ferruz Omar & 4 others Versus Ahmed Mohamed Honey.
 - c. Court of Appeal Civil Application Number 26 of 2013 Ferruz Omar & 4 others Versus Ahmed Mohamed Honey.
 - d. High Court Civil Appeal Number 15 of 2011 Ferruz Omar & 3 others Versus Ahmed Mohamed Honey.
21. Counsel submitted that the above matters came to a close on 9th December, 2019 in Judicial Review No. 6 of 2017 when the Ruling of the Kadhi's Court was held to be binding.
22. Counsel submitted that the Plaintiff/Applicant has not met the threshold for grant of temporary injunction as was set in the case of *Giella vs Cassman Brown* (1973) EA 358. That the plaintiff has not established a prima facie case with probability of success since the suit in its entirety based on facts not proven and is only aimed at dispossessing the Defendants of their property.
23. Counsel cited the case of *Nguruman Limited vs Jan Bonde Nielsen & 2others* (2004) eKLR where the court set out the consideration of what amounts to a prima facie case. That the plaintiff has not made full payment for the alleged purchase of the parcel and as such cannot assert ownership of the subject parcel.
24. It was counsel's further submission that the Applicant is not entitled to the orders sought in both applications and that the actions of both the Plaintiff/ Applicant and the 1st Defendant are aimed at depriving the 4th Defendant/ Respondent of his legally owned property whilst taking advantage of his old age and illiteracy.

Analysis and Determination.

25. As earlier stated, it is evident that both application seek similar orders except an alternative prayer that the 2nd defendant be summoned to appear before court to explain the alleged acts of vandalism. This is an abuse of court process. If an order is not complied with, you do not file a similar application but an application for contempt. I have noticed that there is a habit of applicants filing numerous application which clog the court system and are not interested in dealing with the main issue in contention. Parties should avoid side shows in unnecessary applications and be ready to fix matters for hearing without delay.
26. This matter had four pending applications filed in quick succession. An application dated 22nd November 2021 was withdrawn with no orders as to costs to pave way for the hearing of these two current applications.



27. The issue for determination is whether the plaintiff/applicant has met the threshold for grant of a temporary injunction as per the principles enunciated in the case of *Giella v. Cassman Brown* (supra) of injunctions.
28. Order 40 Rule 2 of the Civil Procedure Rules 2010 provides as follows:
2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]
- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
29. Does the applicant have a prima facie case with a probability of success? This is a convoluted case where the applicant claims to have bought the suit property from the 1st defendant whereby he paid a deposit of Kshs. 500,000/ of which the 4th defendant claims to be the owner and disputes the legality of the transaction and states that it is fraudulent
30. The plaintiff/applicant annexed an agreement between him and the 1st defendant dated 16th November 2020 where he made the partial deposit of Kshs. 500,000/- with a mutual agreement that the balance was to be remitted on or before the 8th of December, 2020. This balance has not yet been paid even though the completion date has lapsed.
31. The averments of the contents of the Replying Affidavit sworn by the 4th Defendant cannot be ignored, as he stated he is the owner of all that parcel of land known as Plot No. 686 located Near Sheikh Nassor Mosque which is part of his inheritance share in succession case Number 87 of 2008 before the Kadhi's Court and at no time did he transfer the subject property to the 1st Defendant as alleged and any agreement to that extent was fraudulently executed. The 1st Defendant has however not produced any document to show that he is the owner of the disputed parcel of land or how the same was allocated to him.
32. In the case of *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR the Court of Appeal stated that:
- "With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus,
- "If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."
33. Similarly in the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the court further expounded and stated that:
- "In *Habib Bank AG Zurich v. Eugene Marion Yakub*, CA No. 43 OF 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:



“Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

34. In the case of *Siskena* 1977 3 All E.R Lord Diplock at page 824 held that:

“A right to obtain an interlocutory injunction is not a cause of action, it cannot stand on its own. It is dependent on their being a preexisting cause of action against the defendant arising out of an invasion, actual, or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him which may or may not include a final injunction.”

35. From the pleadings it is evident that there is a dispute between the 1st defendant and the 4th defendant in respect of the suit land. The dispute must be adjudicated upon to ascertain the ownership and the rights of the parties.

36. The court has the power to order the maintenance of status quo as was held in the Court of Appeal case of *Mugab -v- Kunga* [1988] KLR 748 Practice directions vide Gazette Notice No. 5178/2014 more particularly practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case. The court can issue an order of status quo suo moto and not only when prompted vide an application if it is in the interest of justice to make such an order to preserve the subject matter of the case as was held in the case of *Texaco Ltd -v- Mulberry Ltd* [1972]1 WLR 814.

37. The court had already granted an order of status quo to be maintained pending the hearing of this application inter partes. I find that this is the appropriate order to grant so as to preserve the substratum of the case pending the hearing and determination of this suit.

38. Parties to fasttrack the hearing of this case and fix the same for pretrial within the next 30 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the [Civil Procedure Rules](#).

