



REPUBLIC OF KENYA



**Mwangi & 107 others v Karanja & another (Environment & Land
Case 386 of 2011) [2022] KEELC 2286 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 386 OF 2011**

**JA MOGENI, J
JUNE 30, 2022**

BETWEEN

**PETER KAMAU MWANGI 1ST PLAINTIFF
JOSPHAT NYAKWARA 2ND PLAINTIFF
MAUREEN ONDIEKI 3RD PLAINTIFF
MICHEAL OKEYO CURTIS & 104 OTHERS & 104 OTHERS 4TH PLAINTIFF**

AND

**ESTHER MUMBI KARANJA 1ST RESPONDENT
MARGARET WAIRIMU WANGUYU T/A RUAI PROPERTY
DEVELOPERS 2ND RESPONDENT**

RULING

1. This application relates to the 1st plaintiff's/applicant's Notice of Motion dated 17/11/2021. It is brought under Order 9, Order 40 Rule 1, 2, and 3, Order 50 Rule 1 of the *Civil Procedure Rules* and Section 3 and 3A of the *Civil Procedure Act*, the Kenyan *Constitution* and all other enabling provisions of the law. In it the Applicant seeks the following orders;
 - i. Spent.
 - ii. That a mandatory order do issue compelling the defendants to execute transfer forms, effect transfer process and issue individual Title Deeds.
 - iii. That a mandatory order do issue compelling the defendants to execute transfer forms, effect registration process and issue title deeds in respect of plots owned by the following plaintiffs and carved out of LR No. 7340/104 namely; Naomi Wangare Ndua ID No. xxxxxx Plot No. 92/324, Agnes Wanjiku Kimani ID No. xxxxxx Plot No. 92/377, Patrick Muchai Mugwanja



ID No. xxxxxxx Plot No. 92/323 and Plot No. 92/322, John Rua Nyambura ID No. xxxxxxx Plot No. 92/283, Peter Kamau Mwangi ID No. xxxxxxx Plot No. 92/366 and Plot No. 92/367, Wambui Kihunyu ID No. xxxxxxx Plot No. 92/294, Stephen Gathiaka ID No. xxxxxxx Plot No. 92/329, Kamurio Kinuthia ID No. xxxxxxx Plot No. 92/326, Rose Wanjiru ID No. xxxxxxx Plot No. 92/284, and Teresia Wamaitha ID No. xxxxxxx Plot No. 92/363. And which defendants have already paid transfer, registration and issuance of Title Deed fees to the defendants. Any other order.

iv. Costs

2. The 1st plaintiff stated that he had authority from his co-plaintiffs to swear the affidavit. He claims that he and his co-plaintiffs entered into a sale agreement with the Defendant on diverse dates where each plaintiff was to pay Kshs. 33,000 and the defendants were to execute transfer forms and effect registration and issuance of individual title deeds for all plots carved out of LR No. 7340/104.
3. That the parties through their advocate and with the advocate of the defendants the parties entered into a consent and wrote a consent letter which they adopted before DR Hon Barasa pm 5/12/2012. In the consent letter the defendants after receiving Kshs. 33,000 from the plaintiffs he was to execute transfer forms, effect transfer process and issue individual Title Deeds. To date the plaintiffs named in this application have cumulatively paid the defendants Kshs. 463,000 the individual amounts reflective of the plots they were each purchasing.
4. The plaintiff avers that the Director of Survey has completed the sub-division of the original plot LR 7340/104 into 104 divisions and what is still pending is the execution of the transfer form by both the plaintiffs and the defendant and subsequent issuance of individual title deeds for each plot.
5. The Plaintiff avers that he and his co-plaintiffs were awaiting registration of the transfer the Defendants executed another consent letter dated 31/08/2021 with another team for the same parcels of land without the knowledge and consent of the plaintiffs. The defendants have failed to execute transfer forms, effect registration and issue individual title deeds to the plaintiffs.
6. The application is supported by an affidavit sworn by the 1st Plaintiff on 19/4/2013 wherein he deponed that on the 17/11/2021. Further the plaintiff avers breach of the consent entered into dated 5/12/2012 and recorded before Hon Barasa Deputy Registrar of the Court.
7. The Plaintiff stated that it was his expectation that upon payment of agreed amounts and finalization of the sub-division of the LR 7340/104 the Defendants would execute transfer forms effect registration and issue individual title deed to the plaintiffs. However, he avers that the Defendants have failed to perform their part of the agreement, and have to-date refused to execute the transfer forms and issue individual titles after receiving the consideration. The Plaintiff annexed various documents in support of his claim and application.
8. This application was opposed by the 1st Defendant (now deceased) who filed a Replying Affidavit dated 02/12/2021 on behalf of the 2nd defendant. The 1st Defendant opposed the application on grounds that the 1st plaintiff did not seek leave of the court to represent himself in the matter.
9. In the Replying Affidavit the Defendant admits that the consent dated 5/12/2012 was executed by the plaintiffs who paid Kshs. 33,000 although she stated that this amount did not include the surveyor's fees. The 1st Defendant avers that there is another group that also purchased other plots and that it is the actions of the 1st plaintiff that have delayed the process of execution of transfer forms, effecting of registration and eventual issuance of individual title deeds.
10. The 1st Defendant also avers that there is a second consent entered into on 31/08/2021.



11. The 1st Defendant avers that if the parties sat down and talked they would have solved the problem and titles to each plaintiff would have been issued by now.
12. There is evidence that the 1st defendant is now deceased and therefore the 2nd defendant swore a filed a Supplementary Affidavit dated 20/05/2022. She sought the leave of Court through the Affidavit to rely on the Affidavit of the 1st defendant (now deceased) of 2/12/2021.
13. The 1st Plaintiff swore a Further Affidavit on 23/02/2022 in response to the 1st Defendant's Replying Affidavit, wherein he stated that he was duly elected by Ufungua Airways Self Help Group and that is why he was organizing them as their chairman. Further that the plaintiffs had paid Kshs. 100,000 to the Surveyor and Kshs. 208,000 to the 1st Defendant towards the registration and issuance of title.
14. The plaintiff denies putting any restriction on the suit property precipitating the delay in processing individual titles to all the plaintiff. He contends that he did not know about the new group which signed a consent dated 31/08/2021 and had the cost of the parcels reduced.
15. Owing to the fact the 1st defendant passed on, the 2nd defendant filed a Supplementary Affidavit in which she denies that the 1st plaintiff didn't pay the 1st defendant's Kshs. 208,000 nor the Surveyor Kshs. 100,000. She avers that the minutes that the meeting referred to by the 1st defendant in paragraph 9 of the Further Affidavit show that the 1st plaintiff was not in attendance in the said meeting and therefore he was an imposter and does not represent the plaintiffs as he states.
16. She avers and reiterates that the 1st plaintiff does not have the consent of the other plaintiffs to swear an affidavit on their behalf. She further avers that the 1st plaintiff has set out to be disruptive in the entire sale of land process which is uncalled for. That if the 1st plaintiff would have complied with the consent order of 5/12/2012 the transfer and issuance of title to individual buyers would have been completed by now.
17. The 2nd defendant contended that she is still willing to sit and reconcile accounts with the applicants and therefore the Plaintiff's application should be dismissed with costs since the plaintiff has even no authority to file the application as he has alleged.

Analysis and Determination

18. The application was canvassed by way of written submissions. Counsel for the 1st Plaintiff filed submissions dated 6/06/2022 where they itemized four issues as being those requiring address. He argued that the 2nd defendant under the principle of jus accrescendi being a joint owner with the 1st defendant (now deceased) had become the automatic owner of the suit property and is capable to answer any questions relating to the suit property. This position is not contested therefore.
19. It was 1st plaintiff's counsel's submission that the consent dated 5/12/2012 is valid. Further that the court order of 25/06/2015 the injunction that had been issued against the property dated 4/08/2011 was removed as a result the subdivision of the suit property was done. Further that the 1st plaintiff was a bon fide representative of the Ufungua Airways Self Help group.
20. Counsel also submitted that the 2nd Consent dated 31/08/2021 cannot replace the consent dated 5/12/2012 he argued that the 1st Plaintiff entered into a valid sale agreement and paid the purchase price, thus the 1st Plaintiff is entitled to be issued with title and the 2nd defendant should be compelled to execute transfer and issuance of individual titles.
21. On his part, Counsel for the 2nd Defendant Mr Benjamin Mwikya Musyoki filed submissions dated 10/06/2022 wherein he identified three issues and argued that the 1st Plaintiff lacked locus since he



was acting in person and had not sought the Court's leave to do so as provided under Order 9 Rule 8. Further in the situation where the 1st plaintiff has stated that he has authority to act on behalf of the other co-plaintiff it is the 2nd defendant's contention that Order 1 Rule 13 require him to file the authority from the others showing the authorization.

22. The 2nd Defendant also contends that the 1st plaintiff had not met the threshold of setting aside the consent entered into on 31/08/2021. He relied on the court of Appeal decision of [Board of Trustees National Social Security Fund v Micheal Mwalo](#) [2015] eKLR which stated that a consent can only be set aside if it is illegal or obtained through fraud.
23. With regard to the execution of the transfer instruments the 2nd defendant maintained that they are ready and willing to execute the transfer for any plaintiff who pays the agreed amount to the advocate of the 2nd defendant to facilitate the transfer and issuance of individual titles.
24. Counsel also submitted that the prayer for mandatory injunction should not be granted at the interlocutory stage devoid of it being a simple and clear case, and of special circumstances.
25. I have carefully considered the pleadings and submissions by the 1st Plaintiff and the 2nd Defendant. The issues that I pick for determination are basically three; whether the 1st Plaintiff has met the requirements for the grant of a mandatory order that he seeks, whether the 1st plaintiff had the capacity to bring the instant suit on his behalf and on behalf of his co-plaintiffs and finally whether the 2nd defendant as a joint tenant can litigate without substituting the deceased 1st defendant. The prayers sought by the 1st Plaintiff are not in the nature of a temporary injunction but are mandatory injunctions, as they seek to have the 2nd Defendant execute transfer documents for land and have the individual titles issued to the individual plaintiffs.
26. I will first consider the issue of *locus* on the part of the 1st plaintiff since this is a matter that should have been brought by way of preliminary objection since it is a point of law. The capacity of a party to bring a matter before a court of law is not a matter of fact but of law and it needs to be determined first before I delve into other issues of the suit. Now, the 1st plaintiff alleges to have the authority of his co-plaintiffs to bring the suit. While perusing the file I have noted that there are several filed witness statements, the sale agreement among other documents that point to the identities of some of those parties. However, the 1st plaintiff has not complied with order 1 rule 8 of the [Civil Procedure Rules](#) 2010. Order 1 rule 8 of the [Civil Procedure Rules](#) 2010 provides as follows:
 8.
 - (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
 - (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
 - (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit".
27. In the instant case, the 1st plaintiff purports to institute the suit on behalf of the co-plaintiffs without their written authority. Does this warrant the striking out of pleadings? My answer to this is in the negative. My understanding of Order 1 rule 8 (1) (2) and (3) the [Civil Procedure Rules](#) is that in the



event a plaintiff does not have written authority from the co-plaintiffs, then she cannot purport to represent them. Lack of such an authority does not necessarily void the proceedings, but rather it incapacitates the plaintiff from purporting to represent the co-plaintiffs. The suit is treated as that of the one plaintiff. In the case of *Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others* [2016] eKLR the court in affirming this settled law reasoned as follows: -

“However, the court of appeal appears to have settled the foregoing issue when it held in the case of *Research International East Africa Ltd V Julius Arisi & 213 Others* [2007] eKLR, C.A at Nairobi Civil Appeal No. 321 Of 2003 that the superior judge had discretion and jurisdiction not to strike out a plaint where the verifying affidavit was sworn without the authority of other plaintiffs, but to allow the parties to remedy the situation by complying with the rules of procedure...Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules...”

28. Accordingly, the 1st plaintiff has locus to make this application in his own right as the 1st plaintiff.
29. I now go back to my first issue which is whether the 1st plaintiff met the criteria for grant of a mandatory order that he seeks. The circumstances under which the court would grant a mandatory injunction was stated by the Court of Appeal in the case of *Maber Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR, as follows:

“The test for granting a mandatory injunction is different from that enunciated in the *Giella vs Cassman Brown* case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the court of appeal in the case of *Kenya Breweries Ltd vs Washington Okeyo* (2002) EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was correctly stated in VOL 24 of Halsbury’s Laws of England 4th Edition paragraph 948 which states as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

In the English case of *Locabail International Finance Ltd v Agro Export & Another* (1986), ALL ER 901 which the Court of Appeal in Kenya has cited with approval in many decisions, the court held that: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”



30. The above decision was cited with approval by the Court of Appeal in the case of *Sbarriff Abdi Hassan v Nadhif Jama Adan* CA 121/2005 (2006) eKLR by further observing that: -
- “The courts have been reluctant to grant a mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property.”
31. The same Court of Appeal in the case of *Jaj Super Power Cash and Carry Ltd v Nairobi City Council & 20 others* CA 111/2002 stated:
- “This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”
32. At the same time it was held by the Court of Appeal in *Kenya Breweries Ltd and another v Washington Okeyo* (2002) 1 E.A. 109, that there must be special circumstances over and above the establishment of a prima facie case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.
33. In pleading his case before the court the 1st plaintiff has relied on the following cases *Isabel Chelangat v Samuel Tiro* (2012) eKLR; *Mwangi Gakuri v Bernard Kigotho Maina & Anor* [2016] eKLR; *Samson Munikah practicing as Munikah & Co. Advocates v Wedube Estates Limited* Nairobi Civil Appeal No. 126 of 2005; *Protus Hamisi Wambada & Anor v Eldoret Hospital* [2020] eKLR among others.
34. There is, no general rule of law that final orders cannot be granted in an interlocutory application. However, it is only in rare cases when such orders can be granted. In the instant suit both parties have acknowledged the existence of a consent order and the 2nd defendant has even stated that if the 1st plaintiff had stopped being a trouble-maker this matter would already have been concluded.
35. *Halsbury's Laws of England* volume 24 paragraphs 948 states as follows on special circumstances: -
- “A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”
36. The Defendants herein allegedly acted in bad faith by refusing to execute the transfer documents and issuance of individual title deeds and introduced a new consent without the approval of the 1st Plaintiff. The Defendants denied the allegations. That is therefore not a clear case. Again the case of *Locabail*



International Finance Ltd v Agro-export And Another [Supra] 1ALL ER 901 sets out the principles applicable in cases of mandatory injunction. It states as follows: -

“.....Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

37. Where a prima facie case is established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. However, I find in the instance that, justice would be served well if parties are given their day in court. The case of *Doherty v Allman* 3 App. Cas 79,710,720, may apply in its full vigour

“Where a mandatory order is sought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and if so, what kind of mandatory order, will produce a fair result. In this connection the court must, in my judgement, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which it is entitled merely because it would be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant.”

38. This was expounded in the case of *Shepherd Homes Ltd v Sandham* [1971] 1 ch. 34, where it stated in part

“..... it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the Plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint.

39. From the foregoing it is my considered view that the prayer sought by the 1st plaintiff for mandatory injunction should not be granted as the granting of such mandatory injunction should only be on the clearest of cases. The Applicants' case is not as clear and the explanations given cannot in any way be done through affidavit evidence but rather the same should be canvassed during the main hearing. Both parties have gone to great length to bring evidence on the issue of consent but there are other material facts that may need elaboration at the trial.

40. The last issue is whether the 2nd defendant being a joint owner can automatically take over the conduct of this matter. To start with ownership is not contested and it is acknowledged by both parties to the suit. The distinction between joint tenancy and tenancy in common was made in *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (supra), I will therefore not repeat myself but only state that the 2nd defendant became the sole owner of the suit property through the doctrine of survivorship which is



recognized under the provisions of the RLA and Land Registration Act, 2012. It is my finding therefore that the Plaintiff is the sole proprietor of the suit property.

41. As I make my disposal order I would like to state that granting orders sought by the 1st plaintiff would in effect dispose off this suit without giving the Defendants and the other plaintiffs (more than 104) their day in court which will be against the spirit of Article 50 of the Constitution. Further, I note that this matter would benefit from negotiation and mediation if the parties are willing to engage and the court is ready and willing to refer the parties to court annexed mediation but only if the parties are desirous to do so. The issue of consent order is not in contention and this can be a starting point in trying to resolve this matter amicably.

Disposal Orders

42. It is my humble opinion that it is judicious to order that the status quo be maintained in following terms, pending the hearing and determination of this suit.
- i. The Plaintiffs and Defendant(s) are restrained from dealing in any way with the suit property be it trespass, dumping or building material, alienating, constructing, fencing off and interfering in any manner whatsoever with the suit premises LR No. 7340/104 and situate in Ruai Nairobi by themselves and or through their agents and servants pending the hearing and determination of this suit.
 - ii. The Defendant(s) either by themselves or through their representatives, agents or servants not to interfere with the Plaintiffs occupation and possession of the suit premises until the main suit is determined.
 - iii. Parties to comply with Order 11 within 30 days from the date hereof. Mention of this matter shall be on 22nd September 2022.
 - iv. The costs of the 1st plaintiff's Notice of Motion dated 17/11/2021 shall be in the cause.

ORDERS ACCORDINGLY.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JUNE, 2022.

.....

MOGENI J

JUDGE

In the presence of

Mr. Lumumba for the 1st Plaintiff/Applicant

Ms Rotich for the Defendants/Respondents

Mr Vincent Owuor.....Court Assistant

