



Konde ((Suing as the Administrator of the Estate of Konde Muunga Mulai alias Konde Nzingila)) v Maithya (Environment & Land Case E025 of 2021) [2022] KEELC 2673 (KLR) (15 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E025 OF 2021**

TW MURIGI, J

JUNE 15, 2022

BETWEEN

**FRANCIS KINGOO KONDE PLAINTIFF
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF KONDE MUUNGA
MULAI ALIAS KONDE NZINGILA)**

AND

MUEKE MAITHYA DEFENDANT

RULING

1. By a Notice of Motion application dated 1st September 2021 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 1(a), 2 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicant is seeking for the following orders: -
 - 1) That this Honourable Court be pleased to issue interim orders that the Defendant/ Respondent by himself, his agents and or servants be restrained from entering into and/ or trespassing on, remaining on and or erecting/constructing houses or buildings, grazing, cultivating and/or any one claiming through him and/or in any other manner whatsoever interfering with the disputed portion measuring 2 acres comprising in land parcel number Nzai/Muumbuni/307 pending the hearing and determination of this application.
 - 2) That this Honourable Court be pleased to issue interim orders that the Defendant/ Respondent by himself, his agents and or servants be restrained from entering into and/or trespassing on, remaining on, or erecting/constructing houses or buildings, grazing, cultivating and/or anyone claiming through him and/or in any other manner whatsoever interfering with the disputed portion measuring 2 acres comprising in land parcel number Nzai/Muumbuni/307 pending the hearing and determination of the main suit.



- 3) That the cost of this application be borne by the Defendant/Respondent.

Applicant's Case

2. The application is premised on the grounds on the face of the application namely: -
 1. That the Estate of Konde Muunga Malai alias Konde Nzingila is the registered owner of land parcel number Nzai/Muumbuni/307.
 2. That the Defendant/Respondent has been constructing houses, grazing and committing other acts of waste on the suit land without the consent or permission of the Applicant.
 3. That the deceased Estate has been denied the use and enjoyment of the suit land.
 4. That unless restrained by an order of this Court, the Defendant will continue grazing, constructing houses and trespassing on the suit land.
3. The application is supported by the affidavit of the Applicant sworn on the even date. The Applicant averred that he is the Administrator of the Estate of Konde Muunga Malai alias Konde Nzingila which is the registered owner of land parcel number Nzai/Muumbuni/307. The Applicant further averred that after the demise of his father, his mother Kasiva Konde, sold to the Respondent on 13th of October 2000 5 acres comprised in the suit property for a consideration of Kshs. 75,000/.
4. The Applicant stated that the purchase price was Kshs 15,000/- per acre. That out of the agreed purchase price, the Respondent paid Kshs. 60,000/- which was the costs of 4 acres and refused to pay the balance of Kshs. 15,000/- being the purchase price for the remaining fifth acre which amount was to be used to facilitate the transfer process.
5. He further averred that the Defendant had hived off one acre from the Estate of Konde Muunga Malai alias Konde Nzingila and that he was developing the same. That despite demand and efforts to resolve the matter amicably, the Respondent has persisted in his acts of trespass on the suit land.

Respondent's Case

6. Opposing the application, the Respondent vide his replying affidavit sworn on 23rd of September 2021 averred that the purchase price for the suit property was Kshs 15,000 per acre and not 75,000/- as alleged by the Applicant. He stated that he paid Kshs 60,000/- as the purchase price for 5 and not for 4 acres and admitted that the amount of Kshs15,000/- was retained to facilitate the transfer process which he later paid and was recorded in the presence of Joshua Malua.
7. The Respondent contends that the agreement was for the sale of 5 acres of land and denied that she had hired or accepted to purchase one acre from the suit land. She further averred that she paid the remaining balance of the purchase price in the presence of the are Chief and denied trespassing on the Applicant's land.
8. In her further affidavit sworn on 13th of October 2021, the Respondent averred that after she purchased the 5 acres of land, a dispute as to whether she had purchased 4 or 5 acres was referred to the area Chief who in turn referred the matter to the Land Registrar to appoint a surveyor to verify the exact portion that was purchased by the Respondent. The Respondent contends that the Applicant has refused to implement the recommendations contained in the Land Surveyor's report.
9. The application was canvassed by way of written submissions.



Submissions

10. The Applicants written submissions were filed on 3rd of February 2022.
11. Counsel for the Applicant submitted that the Applicant has met the threshold for the grant of an injunction as set out in the case of *Giella vs Cassman Brown* [1973] EA 358 which were later reiterated in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR.
12. On the first limb, Counsel submitted that the Applicant had established a prima facie case with a probability of success and relied on the case of *Mrao Ltd Vs First American Bank of Kenya & 2 Others* (2003) eKLR in support of his submissions.
13. On the second limb, Counsel submitted that the Applicant had demonstrated in his pleadings that he would suffer irreparable loss which cannot be adequately be compensated by way of damages should an injunction not issue, as the land stood to be diminished before the case is heard and determined. To support his submissions on this point, Counsel placed reliance on the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR.
14. On the third principle, Counsel submitted that the balance of convenience was in favour of preserving the suit property. Reliance was placed on the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai*(supra).
15. The Respondent's written submissions were filed on 11th of February 2022.
16. Counsel for the Respondent raised the following issues for the Court's determination;
 - i) Whether the Applicant has met the threshold for the grant of an injunction.
 - ii) Who should pay the costs of the application.
17. Counsel submitted that the Applicant has not met the threshold to warrant the Court to grant the orders sought. Reliance was placed on the case of *Giella Vs Cassman Brown & Co Ltd 1973 EA 358*.
18. On the first limb, Counsel submitted that it was not in dispute that the parties had entered into an agreement for the sale of five acres of land. Counsel submitted that the only dispute between the parties was the size of the land occupied by the Respondent vis a vis what was sold to her. Counsel went on to submit that the issue was settled by the surveyor who established that the Respondent was in occupation of six acres whereas she had purchased five acres. Counsel argued that the Applicant had not established a prima facie case as the Respondent had purchased five acres which she was occupying.
19. On the second limb, Counsel submitted that the Applicant had not demonstrated that damages would not be an adequate remedy. Counsel went on to submit that the Applicant could be fully compensated by an award of damages for the extra 0.97 acres of land if he succeeds in the suit.
20. On the third limb Counsel submitted that the balance of convenience was in favour of the Respondent as she had demonstrated that she had a stronger case.

Analysis and Determination

21. Having considered the application, affidavits and the rival submissions, I find that the only issue for determination is whether the Applicant has met the threshold for the grant of an order of injunction.
22. The law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides as follows: -



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.

23. Both parties made reference to the case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 which lays down the principles applicable in an application for injunction as follows: -First the applicant must show a prima facie case with a probability of success. 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. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
24. The first issue for determination is whether the Applicant has made out a prima facie case with a probability of success to warrant the grant of an order of an injunction.
25. 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.”
26. On the first condition as to whether the Applicant has established a prima facie case with a probability of success, the Applicant’s claim over the suit property is anchored on the certificate of official search and on the letters of administration ad litem. The following issues are not in dispute: -
 - a) That the suit land is registered in the name of the Estate of Konde Muuga Mulai alias Konde Nzingila.
 - b) That the Applicant is the Administrator of the Estate of Konde Muuga Mulai alis Konde Nzingila.
 - c) That on 13th of October 2000, the Respondent entered into a sale agreement with the Kasiva Konde for the sale of five acres.
27. The issue in dispute is with regards to 2 acres comprised in the suit land. The dispute at hand is whether the Respondent has paid the balance of Kshs 15,000/- being the purchase price for the remaining 5th acre that was to be utilised to facilitate the transfer process and whether the Respondent has hived off an additional one acre from the suit property.



28. The Applicant contends that they received from the Respondent Kshs. 60,000/- being the purchase price for the four acres of the suit land. On the other hand, the Respondents stated that she had paid the purchase price in full. Both parties confirmed that the purchase price for one acre was Kshs. 15,000/-.
29. I have carefully read the sale agreement dated 13th of October, 2000 between the Respondent and Kasiva Konde. Paragraph two of the agreement states as follows: -
- “Today Moses Maithya has paid the total cost of four acres amounting to Kshs 60,000/- sixty thousand only. The balance of the Kshs 15,000/- for the 5th acre shall remain for transfer transactions.”
30. In *Mbuthia vs Jimba credit Corporation Ltd* [1988] 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.”
31. Similarly, in the case of *Edwin Kamau Munuu Vs Barclays Bank of Kenya Ltd* NBI HCCC NO 1118 of 2002, the court held that;
- “In an interlocutory application, the court is not required 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.”
32. At this stage the Court is not required to determine the issues which will be canvassed at the trial.
33. The Court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy.
34. The issues that are in dispute are whether the Respondent paid the balance of Kshs 15,000/- being the purchase price for the fifth acre that was meant to facilitate the transfer process and whether the Respondent has hived off one acre from the Estate of the deceased. These issues can only be determined in a full trial where the parties will have the opportunity call evidence and have the same challenged by way of cross examination.
35. In so finding, I am guided by the decision in the case of *Virginia Edith Wambui Vs Joash Ochieng Ougo* Civil Appeal No. 3 of 1987 eKLR, where the Court of Appeal held that: -
- “The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”
36. In the present case, it is evident from the sale agreement that the Respondent has paid Kshs 60,000/- being the purchase price for the four acres comprised in the suit land. What is in dispute is whether the Respondent has paid the 15,000/- for the remaining acre of land and whether the Respondent has hived off one acre from the Estate of the deceased.
37. The Respondent in her replying affidavit stated that she had paid the remaining balance in the presence of witnesses and that the same was recorded in an exercise book. I have looked at the Respondent’s replying affidavit and I find that the said record is not attached to the replying affidavit. Furthermore, in paragraph five of her replying affidavit, the Respondent states that the Chief confirmed that there was an outstanding balance of Kshs 5,000/- that was yet to be paid. It is clear from the pleadings and



annexures that the Applicant has a legitimate claim for Kshs 15,000/- being the purchase price for the fifth acre of land which was meant to facilitate the transfer process.

38. The Applicant stated that the Respondent had hived off an additional one acre from the Estate of Konde Muunga Mulai alias Konde Nzingila which she purported to have purchased though she had not paid for it and was developing the same. The Respondent on the other hand denied the allegations and stated he had purchased 5 acres. He averred that the dispute was referred to the Land Registrar who tasked the surveyor to survey the disputed parcel of land.
39. I have read the report by Peter M Ndonge, the Chief Surveyor Lands, Mining, Physical Planning and Development dated 25th of November 2019 which is annexed to the Respondent's replying affidavit. In his findings, the Chief Surveyor stated as follows: -
- “The area of six acres was more than what the seller sold to the buyer. The seller had sold 5.03 acres to the buyer. The seller and the buyer were requested to agree on what is their suggestion on the extra 0.97 acres.”
40. It is evident from the Surveyor's report and the Respondent's submissions that, the Respondent is occupying six acres whereas he purchased five acres. Looking at the documents annexed to the respective affidavits, it is evident that the Plaintiff's claim is not baseless. On the basis of the material that is on record, I find that the Plaintiff/Applicant has established a prima facie case with a probability of success.
41. On the second condition, the Applicant must establish that he will suffer irreparable injury which cannot be adequately compensated by an award of damages.
42. 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.”
43. It is not in dispute that the purchase price for one acre was Kshs15,000/. It is also not in dispute that the Respondent paid Kshs 60,000/- being the purchase price for four acres comprised in the suit land. The balance of Kshs 15,000/ being the purchase price for the remaining fifth acre was to cater for the transfer process. The Applicant submitted that he would suffer irreparable loss as the land stood to be diminished if an injunction is not granted.
44. It is evident from the Surveyor's report that the Respondent is occupying more than what he purchased. I therefore find that the Applicant will suffer irreparable loss if the orders sought are not granted.



45. On the balance of convenience, it is not in doubt that an order of injunction is meant to preserve the suit property. In the case of Exclusive Estates Ltd Vs Kenya Posts & Telecommunications and Another the court held that: -

“ A Temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination a suit pending the disposal of the suit to preserve the subject matter.”

46. I find that the balance of convenience tilts in favour of preserving the suit property.

47. In the end, I find that the Application dated 1st of September 2021 is merited and I proceed to allow it in the following terms: -

a) That a temporary injunction be and is hereby issued restraining the Defendant/Respondent by himself, his agents or servants from entering into and/or trespassing on, remaining on and or erecting/constructing houses or buildings, grazing, cultivating and /or anyone claiming through him and/or in any other manner whatsoever interfering with the disputed portion measuring 2 acres comprised in land parcel number Nzai/Muumbuni/307 to be identified by the Makueni County Land surveyor pending the hearing and determination of this suit.

b) The costs of the application to be borne by the Respondent.

48. The parties herein are directed to comply with Order 11 of the *Civil Procedure Rules* within the next 30 days.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15th DAY OF JUNE, 2022.

IN THE PRECENCE OF: --

Court assistant – Mr. Kwemboi

Munyasya for the Applicant

Kioko for the Respondent

