



REPUBLIC OF KENYA



KENYA LAW
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Mwamadzeno & another v Mwalimu & 10 others (Environment & Land Case E010 of 2022) [2022] KEELC 14586 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 14586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E010 OF 2022
AE DENA, J
SEPTEMBER 27, 2022**

BETWEEN

RAMA HAMISI MWAMADZENGO 1ST PLAINTIFF

NIMALI MOHAMED MWAVYOMBO 2ND PLAINTIFF

AND

HAMISI MWALIMU & 10 OTHERS DEFENDANT

RULING

The Application

1. Vide a notice of motion dated February 23, 2022 filed before court on February 7, 2022 under certificate of urgency, the plaintiffs/applicants seek for the following orders;
 - a. Spent
 - b. Spent
 - c. That the honourable court be pleased to order a temporary injunction do issue restraining the defendants by himself, servants, employees and or other person acting under their instructions from constructing, developing, trespassing and/or interfering in any way with the plaintiffs quite possession, use, development and proprietorship of the suit property being all that piece of land known as plot No Kwale/Ukunda/5368 pending hearing of this suit
 - d. That an order do issue directing the Officer Commanding Station [OCS] Diani Police Station to ensure compliance with orders issued by the honourable court
 - e. That costs of this application be provided for.
2. It is the applicants case that they are the registered owners plot No Kwale/Ukunda/5368 (suit property). That the defendants without the applicants consent trespassed on the suit property and



commenced construction of permanent and semi-permanent structures thereon thus interfering with the applicants use and occupation of the suit property.

3. The application is supported by the affidavit of Rama Hamisi Mwamadzeno one of the applicants wherein it is further averred that the defendants have no title to the suit property and their continued occupation of the suit property is illegal and unlawful. The plaintiff/applicants are apprehensive that in the event that the orders sought are not granted the defendants will continue misusing the land to the plaintiffs detriment.

Response

4. In opposing the application, the respondents filed a replying affidavit sworn by Mbarak Mwasamali. He depones that the title deed held by the applicants must have been acquired fraudulently. That the suit parcel was owned by the respondents grandfather and a title over the same was acquired on December 10, 2014. That the estate was pending distribution before the Kadhi's court in Mombasa. The respondents contend that the parcel No Kwale/Ukunda/5306 does not exist and therefore the applicants had not demonstrated how they will suffer substantial loss and the present application if allowed will cause massive prejudice to the respondents. The court was urged to dismiss the application with costs.
5. The plaintiff/applicants filed a supplementary affidavit sworn by Nimali Mohamed Mwavvombo in response to the averments raised in the respondents replying affidavit. It was stated that Mbarak Mwasamali had not exhibited any evidence that his grandfather was the purported owner of the suit property. That the parcel no Kwale/Ukunda/135 was subdivided to Kwale/Ukunda/5056 and which was further sub divided to plot No Kwale/Ukunda/5368 pursuant to orders in Kadhi Succession Case No 162 of 2014.
6. It is further stated that it is the respondents title that is fake having been revoked by an order of the court in Kadhi Succession Case No 162 of 2014 and the suit property vested in the applicants. That the respondent had deliberately failed to produce a copy of the search for plot No Kwale/Ukunda/5056 aware it no longer existed. The court is urged to issue the orders as sought.

Submissions

Plaintiffs submissions

7. The plaintiffs submissions were filed on July 4, 2022. It was submitted that the applicants had met the standards set in *Giella v Cassman Brown* case, by not only annexing a copy of the title deed but also a green card to confirm that they were the registered owners of the suit property. That the question of ownership was settled. The respondents replying affidavit was impugned for want of authority to swear the same on behalf of the rest of the respondents.
8. Counsel for the applicants submits that by an order of the Kadhi's Court in Kwale Succession Cause No 162 of 2014 plot no Kwale/Ukunda/135 was subdivided to form the suit property herein. That the court further ordered for the suit property to be registered in favour of the plaintiffs. That further the defendants were laying claim on an entirely different parcel from the one that was subject of the application before court. The applicants submit that they have proved a *prima facie* case and relied on [*Mrao Limited v First American Bank Kenya Limited*](#), [*American Cynamid v Ethicon Limited*](#) and [*Mbuthia v Jimba Credit Finance Corporation*](#).
9. On the issue of irreparable harm, it was emphasised that photos of the ongoing construction works on the suit property had been presented and which the defendants had not denied they were undertaking.



It is urged that the continued illegal entry and developments on the suit property if not restrained will lead to loss. On what constitutes irreparable loss that cannot be compensated by an award of damages, the applicants placed reliance on *Nguruman Limited v Jan Bonde Nielson & 2 others*. On the balance of convenience, it was submitted that the same tilts in favour of the applicants as they stood to suffer loss of the suit property and which will be hard to reclaim in the long run.

10. The defendants did not file submissions in respect of the application. On July 19, 2022 I noted that though Ms Barayan was present in court when the date was taken, the respondents had not filed their submissions. However, in the interest of justice I granted a further 7 days to the respondents to comply with submissions and directed Ms Nyange to accordingly inform counsel of these orders. I gave a deadline of July 24, 2022 and there was no compliance.

Analysis and Determination

11. I have considered the application, the affidavits in support and opposition, annexures thereto and the submissions on record and the following issues are for determination in this application; -

- a. Whether the applicant has satisfied the principles for grant of a temporary injunction;
- b. Who is to bear the costs of the application and what orders to issue

12. It is now established that three tests are considered for the court to grant an interlocutory injunction. The party seeking the injunction must demonstrate they have a *prima facie* case with a probability of success and if they will suffer irreparable damage. In the event of any doubt the issue ought to be decided on a balance of convenience. See *Giella v Cassman Brown* [1973] EA 358. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*, the Court of Appeal stated:

“....So what is a *prima facie* case? I would say that in civil cases 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.”

13. An applicant must therefore convince the court they have an interest in the suit property and it is threatened. The applicants have exhibited a copy of a title dated May 18, 2017 which shows that they are the registered owners of the suit property and which in law shall be taken as *prima facie* evidence of ownership until it is proved that they obtained it fraudulently which must be left for the full hearing. The title is also confirmed by the green card and certificate of official search which were annexed. The defendants claim that the land originally belonged to their grandfather and they are the lawful owners of the same by virtue of the judgement in Kadhi Succession Cause No 162/2014. They displayed a title deed for Kwale/Ukunda/5056 issued on December 10, 2014 in the name of Hamisi Hamisi and Mwanakombo Hamisi and claim the title held by the plaintiffs does not exist. Whether this title refers to the suit property is a matter for determination at the full hearing. Consequently, it is my finding based on the definition of what constitutes a *prima facie* case that the applicants have established a *prima facie* case with a probability of success.

14. I'm aware that the existence of a *prima facie* case alone is not sufficient. Justice Munyao persuasively stated in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR that;-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is



not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

15. It is the applicant’s case that the respondents have invaded the suit property and were erecting structures thereon. A look at the annexures to the application shows photographs of permanent houses under construction. The applicants certainly stand to suffer irreparable loss if the respondents carry out further development or even dispose of the suit property. In any event the essence of order 40 of the *Civil Procedure Rules* is to prevent the wastage of the suit property which in my view is necessary in the circumstances pending the resolution of the dispute herein. In my considered view, the applicants have demonstrated they will suffer irreparable loss if the prayers sought are not granted.
16. Turning to the balance of convenience I will be guided by the case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR, where Ojwang J while enumerating on “balance of convenience” stated: -

“The court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice.”

Based on the above it is my view that the balance of convenience if I had doubt tilts in favour of the applicants. The respondents will have an opportunity to explain how the land formed part of their grandfather’s estate at the hearing hereof. The issuance of a temporary injunction will be a lower risk of injustice as compared to failure to grant the same.

17. The upshot is that I find the application dated February 23, 2022 has merit and the following orders hereby issue to dispose of the same; -
- i. That a temporary injunction do issue restraining the defendants by themselves, servants, employees and or other person acting under their instructions from constructing, developing, trespassing and/or interfering in any way with the plaintiffs quiet possession, use, development and proprietorship of all that piece of land known as plot No Kwale/Ukunda/5368 pending hearing and determination of this suit
 - ii. That an order do issue directing the Officer Commanding Station [OCS] Diani Police Station to ensure compliance with the above orders.
 - iii. Costs shall follow the event.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 27TH DAY OF SEPTEMBER, 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

N/A for the Plaintiffs/Applicants

N/A for the Respondents

Mr. Denis Mwakina- Court Assistant.

