



REPUBLIC OF KENYA



KENYA LAW
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**Wanje v County Land Registrar Kilifi County & 10 others (Petition
E8 of 2020) [2022] KEELC 4851 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION E8 OF 2020
MAO ODENY, J
SEPTEMBER 23, 2022**

BETWEEN

TSUMA TEZI WANJE PETITIONER

AND

COUNTY LAND REGISTRAR KILIFI COUNTY 1ST RESPONDENT

CHAIRMAN LAND CONTROL BOARD KILIFI 2ND RESPONDENT

CHIEF LAND REGISTRAR KENYA 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

NATIONAL POLICE SERVICE 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

KIMANI MUTUA 7TH RESPONDENT

KIGURU SURVEYORS 8TH RESPONDENT

SAIDA IBRAHIM YUSUF 9TH RESPONDENT

ZULEKHA IBRAHIM YUSUF 10TH RESPONDENT

REHMATBAI IBRAHIM YUSUF 11TH RESPONDENT

RULING

1. This ruling is in respect of an notice of motion dated September 8, 2020 by the petitioner seeking the following orders: -

a) Spent.

b) Spent.



- c) Spent.
 - d) Spent.
 - e) Spent.
 - f) That pending hearing and determination of this suit, the court be pleased to issue an order restraining the 9th, 10th and 11th respondents by themselves, agents, servants and/or employees and any other person acting on their instruction from encroaching and/or trespassing, alienating, entering, subdividing, selling, transferring, disposing, developing and/or carrying on any construction thereon and/or dealing with the plaintiff's parcel of land comprising of Title Number Kilifi/Mtwapa/663 in whatsoever manner.
 - g) That pending hearing and determination of this suit the court be pleased to issue an order restraining the 5th respondents from threatening and/or charging the applicant in respect to the ownership of the plaintiff's parcel of land comprising of Title Number Kilifi/Mtwapa/663.
 - h) That pending hearing and determination of this suit, the court be pleased to issue an order restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th by themselves, agents, servants, employees and/or any other person acting on their behalf and instruction or authority from alienating, subdividing, transferring, selling and disposing the plaintiff's parcel of land comprising of Title Number Kilifi/Mtwapa/663 either in whole or subdivision of it.
 - i) That pending hearing and determination of this suit, the court be pleased to issue and {sic}order restraining therespondents from dealing with plaintiffs parcel of land comprisingof Title Number Kilifi/Mtwapa/663 in any detrimental to his proprietary rights and interests and his quiet possession and enforcement of the said parcel of land.
 - j) That pending hearing and determination of this suit, the court be pleased to issue an order compelling the 5th respondent to act on the petitioner {sic}complain of forgery of signature and filing the report in court with {sic} 30 days of the date of the order.
 - k) That the pending hearing and determination of this suit, the court be pleased to issue an order compelling the 9th, 10th and 11th respondents to sign a bond of peace as they have vowed to kill the petitioner and 5th respondent to act on the said complaint.
2. Counsel agreed to canvas the application vide written submissions of which only counsel for thepetitioner complied.

Applicant's Case

- 3. The application is supported by the grounds on the face of the application together with the annexed affidavit of Tsuma Tezi Wanje thepetitioner herein who deponed that sometime in March 1991 he was approached by the 7th respondent who introduced to him one Yusuf Dada to purchase a part of his Land Title Number Kilifi/Mtwapa/663 being original Plot No 362 Mtwapa settlement scheme.
- 4. Thepetitioner deponed that he is the legal and registered owner of parcel of land comprising of Title Number Kilifi/Mtwapa/ 663 and that sometimes in 2006, he was arrested by police officers from Kijipwa police station and during the arrest the police ransacked his house and carried away all documents which were in his possession including the title deed to Plot No Kilifi/Mtwapa 663.
- 5. It was the applicant's evidence that upon doing a search at Kilifi land registry, he learnt that his parcel had been subdivided and transferred in to the 9th, 10th, and 11th respondents' names without



his knowledge, consent and authority. The applicant further stated that since the said subdivision and transfer of his land to the 9th, 10th and 11th respondent, he has been facing intimidation threats from the police and has on several occasions been arraigned in court on trumped up charges which cases have always been abandoned midway.

6. The applicant stated that he owed the 7th respondent some money which necessitated depositing his title at Advocate Ochuka's office as security and later in 2009, while following up on his title, he was informed of the said advocate's demise and loss of the title. Upon further enquiry, he learnt that his signature had been forged and the suit property subdivided into two parcels being title numbers Kilifi/Mtwapa/2027 and 2028.
7. It was the applicant's averment that he has been prejudiced by the subdivision as he neither sold his land to the 9th, 10th and 11th respondent nor received any purchase price and therefore prays that this honourable court issues an injunction to restrain the defendants from evicting him, interfering with his quiet possession and enjoyment of his property and/or alienating, transferring and or dealing with it in any manner whatsoever.

Petitioners's Submissions

8. Counsel identified three issues for determination as to whether the petitioner transferred any piece of land to the respondent; whether the petitioner is entitled to the orders sought and costs of the suit.
9. Quoting sections 7 and 85 of the Land Act, 2012, counsel submitted that there were no transfer documents in the land records yet a title was issued to the 9th -11th respondents and stated that this amounts to fraud envisaged under section 26 of the Land Registration Act, 2012.
10. Counsel further submitted that the applicant has met the conditions for grant of an injunction as set out in the case of *Giella v Cassman Brown [1973] EACA* pg 358-360 and in *Robert Mugo wa Karanja v Ecobank Kenya Limited & another* [2019] eKLR.
11. According to counsel. The applicant has established a prima facie case by showing that he is the rightful owner of the suit property with an interest to be protected and cited the cases of *Moses C Mubia Njoroge & 2 others v Jane W Lesaloi & 5 others* [2014] eKLR; and *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR.
12. On the issue whether the applicant will suffer irreparable damage which would not be adequately compensated by an award of damages, counsel relied on the case of *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR and submitted that the respondents have threatened to evict and have previously arrested the applicant on false charges.
13. Ms Meme submitted that the balance of convenience lies in favour of granting the orders sought for the injunction and cited the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR.

The Respondent's Case

14. In response, the 1st respondent filed a replying affidavit sworn on February 9, 2021 by Stella G Kinyua who deposed that with regards to the suit property, a green card was opened on April 10, 1993 and on June 21, 1996, a discharge of charge and transfer were registered and a title deed issued in favour of the petitioner.
15. That on July 30, 1997, a caution was registered in favour of one Ibrahim Yusuf Dada claiming purchaser's interest but the same was withdrawn on August 10, 2001 and on the same date the title was



closed on subdivision with the new numbers being 2027 registered to the 9th, 10th and 11th respondent and No 2028 registered to the petitioner who has never collected his title deed.

16. The 9th -11th respondents equally filed a replying affidavit sworn on March 8, 2021 by the 11th respondent, Rehmatbai Ibrahim Yusuf who deposed that the petitioner sold 6 acres out of the 12 acres of the suit property to her late father Ibrahim Yusuf Dada for a consideration of Kshs 180,000/-.
17. That the parties therein signed an agreement for sale dated March 19, 1991 to that effect and annexed payment receipts, as a result, the suit property was then subdivided causing her family to take possession and develop the same.
18. The 11th respondent added that the petitioner filed a similar case and application in Kilifi SRMCC No 469 of 2009, which application was dismissed vide the lower court's ruling dated August 3, 2010.
19. The 4th, 7th and 8th respondents have not yet entered appearance.

Analysis and Determination

20. The issues for determination is whether the applicant has met the threshold for grant of interlocutory injunctions and whether the court should issue an order restraining the 5th respondent from threatening or charging the applicant. In respect of the suit parcel of land.
21. The principles for grant of temporary injunctions is well settled as per the case of *Giella v Cassman Brown* (1973) EA 358 as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

22. In the case of *Kenya Commercial Finance Co Ltd v Afraba Education Society* (2001) 1 EA 86 the Court of Appeal held that the conditions are sequential in that the second condition can only be addressed if the first one has been met. The Court of Appeal in held as follows: -

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

23. On the issue whether the applicant has established a *prima facie* case, it is not in dispute that the suit property, prior to the alleged subdivision belonged to the petitioner. What the petitioner contests is that the subdivision and transfer was done without his knowledge and that his signature on the documents pertaining thereto was forged.
24. The rival claim by the 9th -11th respondents is that their late father, Yusuf Dada, purchased half of the suit property from the petitioner and that upon sub-division, the new No Kilifi/Mtwapa/2027 was registered in their favour; and Kilifi/Mtwapa/2028 in the petitioner's name. This shows that the petitioner's case is based on allegations of fraud.
25. The 1st respondent stated that a replacement of the title deed Kilifi/Mtwapa/663 was issued vide a gazette notice of July 10, 2001 and the suit property subdivided *vide* the mutation form No 148511 and dated August 10, 2001. Looking at the proprietorship section of the excerpt of the green card, sub-



division was equally done on August 10, 2001. What stands out is that there was no gazette notice of July 10, 2001. What is on record is a gazette notice of replacement of title deed dated August 21, 2009. If the suit property was sub-divided in 2001, how then would a replacement title for Kilifi/Mtwapa/663 be issued in 2009 when the same did not even exist at that point by virtue of the alleged subdivision? This alone shows that there is a need to preserve the suit land pending the hearing and determination of the suit.

26. I find that the applicant has established a *prima facie* case which entitles him to an order of injunction restraining the respondents from interfering or further dealing with the suit land pending the hearing and determination of the suit.
27. The applicant also risks losing his land hence may suffer irreparably if the order is not granted.
28. The 9th -11th respondents admitted that they are in possession of part of the suit property and in the circumstances it is only fair that the status quo as at the date of these orders be maintained pending determination of the suit.
29. On the issue of restraining the 5th respondent from charging or threatening the applicant in respect of the suit land, the applicant has also alleged threats to kill him. There are laid down reporting procedures to the relevant security agencies if one fears that his/her life is in danger, the applicant can utilize such procedures as he has a right to do so.
30. In the case of *f Asaa & 61 others v O. C. S, Malindi police station & 2 others; Said & another (Interested Party)* (Environment & Land Petition 21 of 2021) [2022] KEELC 3141 (KLR) this court held that: -

“I am in agreement with Eboso J on the issue of jurisdiction of the court as this court also handles matters which are of a quasi-criminal nature especially when the court is asked to determine fraud in land matters and contempt of court. However, issues have to be determined on a case by case basis and not a blanket check to deal with criminal matters.

Looking at the petition and the orders the petitioners are seeking for, it is evident that the petitioners want an open check to bar any current or future prosecution of any activities that they have or may engage in which are of a criminal nature. This court cannot grant such orders as they are not related to use and occupation of land.”
31. If the applicant was complaining about a current forcible detainer in respect of the suit land, then the court could have intervened to stay the case pending the determination of the issue of ownership. That is not the case in this matter.
32. I have considered the application, the submission on record and find that the applicant has established a *prima facie* case against the respondents. I find that the order that suits this case is an order for *status quo* to preserve the substratum of the case. Costs to abide the outcome of the case.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 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.

