



Riverine Investment Limited v Sankok & 2 others (Environment & Land Case E006 of 2022) [2022] KEELC 14973 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14973 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E006 OF 2022
CG MBOGO, J
NOVEMBER 24, 2022**

BETWEEN

RIVERINE INVESTMENT LIMITED APPLICANT

AND

TIALAKAE OLE SANKOK 1ST RESPONDENT

**LAND REGISTRAR, NAROK NORTH & SOUTH DISTRICT ... 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. Before me for determination is a notice of motion application dated July 19, 2022. The application is brought under the provisions of Order 40 Rules 1,2, and 3, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A,1B, 3,3A, and 63(e) the Civil Procedure Act and Article 40 of the Constitution seeking the following orders;
 1. Spent.
 2. Spent.
 3. That this honorable Court be pleased to grant an order of injunction restraining the 1st defendant/ respondent by himself, his servants, agents, and or employees from interfering with peaceful possession, denying access, illegally subdividing, and generally attempting to occupy and forcefully use, lease, cultivate, construct dispose of or in any other manner deal with all that suit land known as parcel number Narok / Cis-Mara/Olopito 514 belonging to the plaintiff/ applicant until the hearing and determination of the suit.
 4. That the officer commanding Narok police station be served with the said order and does ensure compliance with orders 2 and 3 herein.



5. That the cost of this application be provided for.
 6. Any other relief(s) that the honorable court may deem fit and just to grant.
2. The application is premised on the following grounds *inter alia* that the applicant is the sole registered proprietor of land parcel number Narok/ Cis-Mara / Olopito/ 514 having legally purchased the same from the 1st respondent on the October 7, 1999. Further, that the directors of the applicant were shocked to discover that the respondents have fraudulently caused the transfer of ownership of the suit property and registered in favour of the 1st respondent who in turn has purported to subdivide into 3 portions the suit parcel of land with the intention of disposing of the same.
 3. The application is supported by the annexed supporting affidavit of Selina Kibogy Kandie-Director of the applicant sworn on even date. She reiterated the grounds set out on the face of the application and further deposed that she is the administrator of the estate of the late Philip Kimayio Kandie who was one of the founding directors of the applicant together with Paul Kosgei. She further deposed that on October 7, 1999, the applicant entered into an agreement for sale with the 1st respondent for purchase of the suit land measuring 15.34 hectares at the agreed purchase price of KShs 950,000/=. Following the execution of the agreement for sale, the applicant and the 1st respondent applied for the consent of the Land Control Board, which consent was granted on March 21, 2000. The applicant further deposed that on June 23, 2000, it was successfully registered as the proprietor of the suit property. Following the sale, the applicant took possession of the suit property and the same has always remained in possession albeit without developments. That on February 5, 2011, the applicant's agent visited the suit property and found strangers interfering with the same purporting to have leased some portions from the 1st respondent.
 4. The 1st applicant further deposed that when its agent stopped the 1st respondent from purporting to lease the said land to third parties, he rushed to Narok North Central Land Dispute Tribunal and filed a claim which was fully heard and the Tribunal on the June 21, 2011 ruled that the suit property belongs to the applicant. The said decision was filed in court being Narok CMCC Misc Application No 22 of 2011 and on August 30, 2011, the court entered judgment in the terms of the award. The applicant further deposed that despite the orders of the court, the 1st respondent continues to interfere with the peaceful and quiet possession of the applicant. That sometime in the month of June 2022, the 1st respondent was spotted on the suit parcel of land conducting subdivision activities on the suit property and upon conducting a search certificate on July 4, 2022, the applicant discovered that the 2nd respondent had caused the registration of transfer in favour of the 1st respondent. The applicant deposed that it has never transferred the suit property back to the 1st respondent and therefore, it is clear that the impugned registration of the transfer of the suit property in favour of the 1st respondent was effected fraudulently.
 5. The 1st respondent opposed the application vide replying affidavit sworn on September 6, 2022. The 1st respondent deposed that he was introduced to Philip Kimayio Kandie (deceased) by his agent Bernard Mariko. That the deceased was an advocate operating in the firm of Kandie Kimutai & Company Advocates which also doubled as a shylock's office. The 1st respondent further deposed that he was given a loan of Kenya Shillings 300,000/= and he gave his title as a security for the said loan. However, he was not issued with a copy of the loan agreement by the said Kandie.
 6. The 1st respondent further deposed that since he experienced difficulties in loan repayment, Kandie advised him to supply pyrethrum for a tender he had been awarded and which Kandie offered in KShs 100,000/= to use in purchasing the said pyrethrum and the proceeds will go towards his loan



repayment. It was later when he tried to follow up on whether his loan has been repaid but found that Kandie was now deceased from the notices on his office.

7. The 1st respondent deposed that he has never entered into a consent for transfer. The same consent and application were fraudulently obtained. Further, he has never sold his land and has not signed a sale agreement or a transfer in favour of the applicant and that at all material times, he has been the registered proprietor of the suit property being a bona fide member of Olopito Group Ranch and allottee of the same. He has been in occupation and possession of the said property to date. He deposed that the Land Disputes Tribunal has no power to determine an issue of ownership of land or make any judgments thereto and that being aggrieved by the court in upholding the ultra vires decision of the Tribunal by the Court in miscellaneous number 22 of 2011, he instructed Wambuu Wainaina-Advocate to lodge an appeal in the High Court in Nakuru HCC No 83 of 2012. Unfortunately, the said Mr Wainaina died during the pendency of the appeal and his suit was dismissed for want of prosecution.
8. The 1st respondent denied the allegations that he fled to Tanzania and that the application is aimed at harassing him. Further, since he was registered in 1999, he has never sold it or transferred it to any other person. The resultant title deed in the applicant's name, if any, was obtained fraudulently. The 1st respondent prayed that the prayer for injunctive relief should be denied as the applicant is seeking an equitable remedy and has come to court with dirty hands by befuddling the court with half-truths and falsehoods all aimed at distorting the true position.
9. In response thereto, the applicant filed a further affidavit sworn by Paul Kipsang Kosgei on September 20, 2022. He deposed that Kandie was his partner in the Firm of Kandie Kimutai & Co Advocates at the time of the sale transaction between the applicant and the 1st respondent in the year 1999 and that the said law firm never engages itself in lending money or shylock services. It also does not engage in the pyrethrum business.
10. He further deposed that before the applicant purchased the suit property, he had already sold the same to other five people who had paid part of the purchase price to the 1st respondent namely James Njuguna Kshs 32,650/=, Waweru Thumbi Ole Nampaso Kshs 20850/=, Njenga Njoroge Kshs 85,650, James Mwaura Ksh 10,500/= and Samuel Njoroge. Mr Kosgei-Advocate further deposed that on learning that the 1st respondent had sold the suit property to the applicant, the five purchasers placed caution on the suit property and it was only after the applicant refunded the amount received by the 1st respondent that they withdrew the caution.
11. Mr Kosgei further deposed that the documents annexed by the 1st respondent relate to the initial transfer by Olopito Group Ranch to beneficiaries which are kept at the land's office upon opening of the green card and issuance of the title deed to beneficiaries. Further that the applicant has been in possession of the suit property from the year 2000 until the year 2022. He further deposed that the 1st respondent, with the assistance of the 2nd respondent's office, has proceeded to destroy all evidence of records relating to the suit property and reverting the records to the dissolution of Olopito Group Ranch in 1999.
12. He further deposed that it was the 1st respondent who filed the case at the Land Disputes Tribunal being Tribunal Case No 15 of 2011 almost 11 years after the completion of the sale transactions and successful transfer of the suit property from the 1st respondent to the applicant in his first attempt to regain his land. Upon failure to regain the suit property, the 1st respondent filed a suit at the High Court in Nakuru HCC ELC No 83 of 2012 on a second attempt to regain the suit property but failed to prosecute the case and it was subsequently dismissed for want of prosecution.



13. He further deposed that the records of the suit property at the 2nd respondent's office have been altered in favour of the 1st respondent, which could not have happened without the assistance of the 2nd respondent or officers under him.
14. He further deposed that on September 14, 2022, some unknown persons were seen surveying the suit property despite the orders which actions point to the refusal by the 2nd respondent to place restrictions on the suit property.
15. The 1st respondent filed a supplementary affidavit sworn on October 3, 2022. The 1st respondent reiterated his averments in his replying affidavit and added that it was Kandie who drafted the loan agreement and executed it in his presence and that he has never sold the suit property to the applicant or its representatives/directors as the case may be. Further, that he only gave out his title as collateral for the loan advanced to him. He followed the due process of law in procuring the title as a bona fide member of Olopito Group Ranch and was thus registered.
16. On July 28, 2022, this court directed parties to file written submissions. The 1st respondent filed written submissions dated November 17, 2022. The 1st respondent raised one issue for determination which is whether the applicant meets the threshold for granting of interim injunction. The 1st respondent submitted that before an award of interlocutory injunction is granted some conditions must be met as expounded in *Giella versus Cassman Brown Co Ltd* 1973 EA 358.
17. The 1st respondent further submitted that Section 7 of the [Land Act](#) provides for methods of acquisition of land and that the 1st defendant is the registered proprietor of the suit property having been allocated the same by virtue of being a member of the group ranch which is prima facie evidence that he is the absolute and indefeasible owner of the same. The 1st respondent further submitted that he has established how a loan agreement turned out to be a sale agreement and to mitigate on this horrendous act, the 1st respondent approached the court for reprieve but this could not be realized as counsel on record passed away before the determination of the suit thereby causing it to be dismissed for want of prosecution. As such the 1st respondent has suffered and continues to suffer irreparably if the occupation and enjoyment of his property will be curtailed.
18. On a balance of convenience, the 1st respondent submitted that it tilts in his favour as he has been in continuous occupation of the suit property and the applicant only wants to benefit from an illegality. Further, that the applicant un-procedurally and through corrupt scheme acquired the suit property and by granting the injunction, the court will occasion great injustice by helping the applicant perpetrate an illegality.
19. The applicant did not file written submissions. Be that as it may, I have carefully analysed and considered the application, the reply thereof and the written submissions filed by the 1st respondent and the main issue for determination is whether the applicant has made out a case for the granting of orders of temporary injunction.
20. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the [Civil Procedure Rules](#) which provides that: -

“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 [Rev 2012] Civil Procedure CAP 21 [Subsidiary] C17 – 165;



- (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.”

21. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an 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 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. The test for granting of interlocutory injunction was considered in the *American Cyanamid Co v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely: -

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

23. The important consideration before granting a temporary injunction under Order 40 Rule 1 of the *Civil Procedure Rules* is the proof 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 that the defendant threatens or intends to remove or dispose of the property, the court is in such a situation obligated to grant a temporary injunction to restrain such acts.

24. The applicant having sought injunctive orders is only entitled to either grant or denial of the same at this stage. It is not in doubt that there have been contradictory and contentious issues that have been raised by both parties that require proper interrogation during the main trial, by calling of evidence, testing the same through cross-examination, and arrival of determination of the said contentious issues. However, the suit is still at an interlocutory stage and the court cannot deal with the merit of the case at this stage. See the case of *Airland Tours and Travel Ltd Vs National Industrial Credit Bank*, Milimani HCCC No1234 of 2003, where the Court held that: -

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”

25. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1st respondent has not denied subdividing and alienating the said property.

26. The question that therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003)



KLR 125 which was cited with approval in Moses C Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, the Court of Appeal defined a *prima facie* case as: -

“ A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

27. Has the applicant herein established a prima facie case? It appears that the 1st respondent is in occupation of the suit property as he has not refuted this and confirmed that he has been in occupation since 1999. He contends that any transfer to the applicant was done fraudulently. The said contention cannot be settled at this juncture. As already stated above, these are contentious and contradictory statements of facts that cannot be determined at this stage. This court will have to determine the same at the main hearing.
28. The instant application relates to land parcel no Cis-Mara/Olopito/514. It is not in doubt that the suit property was allotted to the 1st respondent. The applicant alleges that it purchased the suit property from the 1st respondent and has a certificate of title. The applicant claims that the 1st respondent in collusion with the 2nd respondent have altered the documents to revert the suit land to the names of the 1st respondent.
29. Prima facie and being the holder of a title deed reissued in its name, the applicant has therefore established that it has an interest over the suit property. Given that the applicant has further alleged that the 1st respondent is in occupation and is subdividing and alienating the property without a lawful cause, it is therefore not in doubt that its rights over the suit property (being the right of being in quiet possession) have allegedly been infringed upon by the 1st respondent by occupying the same. Consequently, the court finds and holds that the applicant has established a prima facie case with a probability of success as its rights can only be curtailed by the law.
30. On whether the applicant will suffer irreparable loss which cannot be compensated by an award of damages; - ‘Irreparable loss’ was described in the case of Paul Gitonga Wanja versus Gathuthi Tea Factory Co Ltd & 2 Others, Nyeri HCC No 28 of 2015, as simply injury or harm that cannot be compensated by damages and would be continuous.
31. It is not in doubt that the applicant is in possession of the suit property. If for any reason the applicant is put out of possession and taking into account that it appears there are many attempts by the 1st respondent to waste, subdivide, sell or alienate the suit property and if after the main hearing the applicant becomes the successful litigant, this court finds and holds that the applicant will suffer irreparable harm that cannot be compensated by way of damages. It is trite that a crystallized right that is violated cannot be equated to compensation by damages. In the case of Niaz Mohammed Janmohammed versus Commissioner for Lands & 4 Others (1996) eKLR, the court held that: -

“ It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”
32. Equally, in this case, the court finds that if the applicant’s rights are infringed, no amount of money can compensate for such infringement. For the above reasons, this court finds that the applicant has established that it is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.



33. On the third limb wherein if the court is in doubt, then it ought to determine the matter on the balance of convenience, the court finds that the balance of convenience always tilts in favour of maintaining the *status quo*. It is not in doubt that this matter raises serious conflicts of facts. Further, it is not in doubt that a temporary injunction is meant to preserve and protect the suit property. I place reliance in the case of *Exclusive Estates Ltd versus Kenya Posts & Telecommunications Corporation & Another*, Civil Appeal No 62 of 2004 where 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 in a suit pending the disposal of the suit, to preserve the subject matter”

34. Further in the case of *Virginia Edith Wambui versus Joash Ochieng Ougo*, Civil Appeal No 3 of 1987 (1987) eKLR, 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.”

35. In this case, this court finds and holds that the *status quo* ought to be maintained and the *status quo* herein is that which existed before the wrongful act. The wrongful act herein is the interference of the suit property by the 1st respondent.

36. The applicant has made out a prima facie case against the respondents and the orders sought in the application ought to be granted in the interest of justice. Therefore, the court must intervene as prayed to preserve the suit property.

37. Arising from the above, I find and hold that the notice of motion application dated July 19, 2022, is merited and the same is allowed in terms of prayer 3 and 4. Costs shall abide the outcome of the substantive suit. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 24TH NOVEMBER, 2022.

MBOGO C.G.

JUDGE

24/11/2022.

In the presence of: -

CA: Chuma

