



REPUBLIC OF KENYA



**Ngure v Ndungu & another (Environment & Land Case E032 of 2022)
[2022] KEELC 15427 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E032 OF 2022
FM NJOROGE, J
NOVEMBER 22, 2022**

BETWEEN

PETER NDUNGU NGURE PLAINTIFF

AND

PALSUNTER CAPITAL LIMITED 1ST DEFENDANT

FIDELIS MUTHONI NDUNGU 2ND DEFENDANT

RULING

1. This is a ruling in respect of two applications: Plaintiff's Notice of Motion dated June 6, 2022 and the defendants' Notice of Motion dated October 4, 2022.
2. The notice of motion dated June 6, 2022 seeks the following orders:
 - a. ...Spent
 - b. ...Spent
 - c. That pending the hearing and determination of this suit, the Honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, servants or agents from trespassing, interfering, alienating, disposing, selling, advertising for sale, charging, constructing and or dealing in any other way whatsoever with parcel of land known as Naivasha/Mwichiringiri Block 3/20172.
 - d. That costs of this application be borne by the defendant.
3. The application is supported by the affidavit sworn by Peter Ndung'u Ngure the Plaintiff herein where he deposed that he is the legal owner of all that parcel of land known as Naivasha/Mwichiringiri Block 3/2072 having been bequeathed the same by his biological mother Dorcas Muthoni Ngure; that his mother was the owner of Naivasha/Mwichiringiri Block 3/113 which she subdivided and



bequeathed portions thereof to her children, including the plaintiff, the suit land that he mandated the 1st Defendant to be entrusted with the duty of conveying the original title deed and transfer documents to the Plaintiff; that the 1st defendant illegally and fraudulently caused the suit land to be transferred to herself with the sole intention of disinheriting him of his legal entitlement; that the 1st Defendant proceeded to sell the suit land to the 2nd Defendant knowing that she did not have the capacity to pass any proprietary rights over the suit property to the 2nd Defendant; that the 2nd Defendant has commenced subdivision and marketing of the suit land with the sole aim of disposing to third parties; that the Plaintiff had tried to urge the 2nd Defendant to cease from the said actions in vain; that unless the prayers sought are granted, then the Plaintiff stands to suffer irreparable loss.

4. The notice of motion dated May 30, 2022 seeks the following orders:
 - a. ...Spent
 - b. ...Spent
 - c. ...Spent
 - d. That pending the hearing and determination of the Plaintiff's suit dated May 24, 2022, this Honourable Court be pleased to discharge and set aside the injunction issued on the June 10, 2022.
 - e. That the cost of this application be provided for.
5. The application is supported by the affidavit sworn by Samuel Macharia Kimani, a director at the 2nd Defendant's company sworn on the same day. The grounds on the face of the application and the supporting affidavit are that the 2nd Defendant is the owner and holder of certificate of title to Naivasha/Mwihiringiri Block 3/2072 the suit property; that it obtained the title from the 1st Defendant upon her default from a loan agreement where the suit land had been put as a collateral and security in the year 2018; that the 2nd Defendant held the title to the suit land since June 24, 2020 to date, that the 1st Defendant had, prior to that, been holding title to the suit property from October 16, 2015 and that the Plaintiff's claim is unfounded and unlikely to succeed for lack of evidence. It urged the court to discharge and set aside the ex parte orders issued on June 10, 2022; that the 2nd Defendant's business and practice in general as a non-deposit taking micro finance is being curtailed by the said injunction; that it cannot recover its risks and sums including the principal and interest as advanced privately to the 1st defendant.

Response

6. The 2nd Defendant in response to the application dated June 6, 2022 filed its replying affidavit dated October 4, 2022 where it reiterated the contents of its supporting affidavit. He added that a search had been conducted on the suit property which showed that Fidelis Muthoni Ndungu was the registered owner.
7. He averred that valuation was done on the suit property and the 2nd Defendant advanced a credit facility to the 1st Defendant with the suit land as collateral; that the 1st Defendant failed to honour her obligations under the loan agreement prompting it to take further action to safeguard their interest under the facility. It further averred that due to inaction on the part of the 1st Defendant on their demand and her default, the 2nd Defendant repossessed the suit land vide a notice issued to the 1st defendant on June 24, 2020.



8. He deposed that the [Constitution of Kenya](#) guarantees the 2nd Defendant right to own property which extends to the right to dispose of such property as intended. In conclusion, the 2nd Defendant urged the court to dismiss the Plaintiff's application.
9. The Plaintiff on the other hand in response to the application dated October 4, 2022 filed his Supplementary Affidavit dated October 14, 2022 where he averred that the suit land had been subdivided in to various parcels and beacons erected. He deposed that the initial transfer of the suit premises to the 1st Defendant was fraudulent in that it was intended to vest in the name of the Plaintiff.
10. The Plaintiff averred that the title deed and/or certificate of lease is not conclusive evidence of ownership as true evidence of ownership is manifested in the certified copy of the green card. He further averred that the 2nd Defendant has not demonstrated any evidence of how the suit property initially owned by Dorcas Muthoni Ngure ultimately vested to herself. He urged the court to dismiss the 2nd Defendant's application for being an abuse of the court process.
11. The Plaintiff also filed a replying affidavit dated October 26, 2022 in response to the 2nd defendant's application, where he reiterated the contents of his supporting affidavit. He averred that as advised by his advocates whose advise he believes to be true that the orders as earlier issued by the court on June 19, 2022 are merited and only seek to preserve the substratum of the suit and not to favour any party.
12. He averred that if a window is opened for the 2nd Defendant to have access to the property, it may commence the process of disposing of the suit property to the Plaintiff's detriment. He further averred that the Defendants have not demonstrated any prejudice which would be suffered if the orders for maintenance of *status quo* subsists pending the determination of the suit.
13. The 2nd Defendant also filed a supplementary affidavit October 19, 2022 to its application where he reiterated the contents of its replying affidavit. He added that the Plaintiff not only lacks title to the suit property but he has not availed any application for lost title save for the alleged entries of the green card.
14. He averred that the green card as presented was not certified and therefore lacked credibility as evidence. He further averred that the burden lies with the Plaintiff to adequately prove that the 1st defendant never held title to the suit property.
15. The 2nd defendant averred that there is no lack of proof of title or previous ownership or how the title had been acquired by the Plaintiff's proxy, Dorcas Muthoni, or evidence of lost title if at all. In conclusion, he urged the court to dismiss the Plaintiff's application for being unfounded.

Analysis and Determination

16. This court has considered the applications and replying and supplementary affidavits and the main issue for determination is whether the parties are entitled to the orders as sought in their applications.
17. The temporary injunction orders issued on June 10, 2022 were limited to the inter-partes hearing of the said application. They were limited to preserving the suit property pending the hearing inter-partes. That means that when the application was heard inter-partes, the orders issued on June 10, 2022 expired. After that date, there was nothing to be discharged or set aside. The 2nd Defendant's application urging this court to discharge and set aside the injunction issued on the June 10, 2022 has therefore since been overtaken by events. In [David Njunu Koinange v Edward Kibe Wanjohi & 5 others](#) [2021] eKLR, the applicant sought interim prayers pending the hearing of the application and nothing else. It appears to have been a mistake but the court, not wishing to wade into the arena and correct his papers for him, dismissed the application. It is regrettable that the same fate must meet the 2nd defendant's application dated May 30, 2022; It must be dismissed.



18. This court is now left to determine the Plaintiff's application dated June 6, 2022.
19. The law governing the grant of temporary injunction is Order 40 rule (1) (a) and (b) of the [Civil Procedure Rules 2010](#). Further, there are principles set out for grant of a temporary injunction which were spelt out in the case of *Giella v Cassman Brown* (1973) EA 358. The principles were reiterated in the case of [Nguruman Limited versus Jan Bonde Nielsen & 2 others](#) CA No 77 of 2012 (2014) eKLR where the Court of Appeal held that in an interlocutory injunction application the applicant has to satisfy the triple requirements to establish his case only at a *prima facie* level, demonstrate irreparable injury if a temporary injunction is not granted and by showing that the balance of convenience is in his favour. The court stated that these are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent and that it is established that all the above three conditions are to be applied as separate distinct and logical hurdles which the Plaintiffs/Applicants are expected to surmount sequentially.
20. On the issue of a prima facie case, the case of [Mrao Ltd v first American Bank of Kenya Ltd & 2 others](#) [2003] KLR 125 is instructive. A *prima facie* case was defined as follows:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”
21. The Plaintiff contends that the 1st defendant illegally and fraudulently caused the suit land to be transferred to herself with the sole intention of disinheriting him. He further contends that the 1st defendant sold the land to the 2nd defendant who has since commenced subdivision and marketing of the suit land with the sole aim of disposing to third parties.
22. The 2nd defendant on the other hand contends that that it is the owner of the suit property after it obtained the title from the 1st defendant upon her default from a loan agreement where the suit land had been put as a collateral and security in the year 2018. It further contends that there is no proof of title ownership or previous ownership or how the title had been acquired by the Plaintiff's proxy Dorcas Muthoni or evidence of lost title if at all. The 1st defendant did not file a response to any of the applications.
23. From the pleadings and annexures, it would appear that the 1st defendant obtained a loan facility in the sum of Kshs 500,000 from the 2nd defendant which was secured by title to the suit property. It is also not in dispute that the 1st defendant is in arrears and has since defaulted on payment. Furthermore, the suit property is in the name of the 2nd defendant.
24. This court notes that the Plaintiff contends that the suit property had been bequeathed to him by his mother Dorcas Muthoni Ngure, however he has not shown any evidence of how the said property had been gifted to him. He annexed a copy of the green card that shows how the suit property changed ownership from Dorcas to the 1st defendant and later the 2nd defendant. Dorcas has also signed a written witness statement stating that she gave the suit land to the plaintiff and that the plaintiff has been constructing his house on the suit land since 2014. Photographs or other evidence of the house construction have not been exhibited and there is no basis upon which the court would be in a position to establish if there would be irreparable loss. The version given by Dorcas is that she gave the title document to the 1st defendant to deliver to the plaintiff which the 2nd defendant never delivered as



instructed. The plaintiff is acting out of the perception that the 1st defendant sold the land to the 2nd defendant which now appears not to be the case. However, the 1st defendant has failed to file appearance and defence the question still arises as to how she obtained the transfer into her name if it was not executed by Dorcas.

25. The above situation notwithstanding, I have considered that the donor is the plaintiff's parent who speaks of having given blessing to his son on the space that she had bequeathed him. It is fortunate that there is now in this dispute a live witness who speaks of having bequeathed the land to the plaintiff as in most occasions cases on bequests are conducted after the demise of the person making the bequest. In the present case the direct evidence of Dorcas would be in this court's view be quite useful in the determination of the dispute.
26. In view of the foregoing discourse, I am persuaded that the Plaintiff has established any *prima facie* case and that is sufficient to dispose of the application but not proved irreparable loss and I am of the view that the balance of probability tilts in favour of maintaining the *status quo* of the same land and expediting the hearing of the suit.
27. The upshot of the foregoing is that I am inclined to grant the application dated June 6, 2022 and order an expedited hearing of the main suit.
28. In the upshot, this court makes the following orders:
 - a. The Plaintiff's Application dated June 6, 2022 is hereby granted in terms of prayer no (c) thereof;
 - b. The 2nd defendant's application dated May 30, 2022 is hereby dismissed;
 - c. The plaintiff shall ensure an affidavit of service of summons upon all defendants is on the record within 7 days from today;
 - d. The plaintiff shall file a trial bundle duly paginated and indexed comprising of a list and copies of all the documents he intends to rely on at the hearing as well as witness statements and a list of witnesses within 30 days of this order and no plaintiff's documents shall be filed after this period without leave of court formally applied for with justification given.
 - e. The defendants shall file a trial bundle duly paginated and indexed comprising of copies of a list and copies of all the documents that they intend to rely on at the hearing as well as witness statements and a list of witnesses within 60 days of this order and no plaintiff's documents shall be filed after this period without leave of court formally applied for with justification given.
 - f. The time frames issued herein shall run concurrently;
 - g. The suit shall be mentioned on January 25, 2023 for the issuance of a hearing date.
 - h. Each party shall bear the costs of their respective application.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF NOVEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

