



Lunani & another (Suing as the executors of the will of the Late Shaphan Lunani Walela) v Carlsberg International Limited & 4 others (Environment & Land Case E25 of 2022) [2022] KEELC 14831 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E25 OF 2022
FO NYAGAKA, J
NOVEMBER 16, 2022**

BETWEEN

**ELICANA WALELA LUNANI 1ST PLAINTIFF
MILLY KHAYANGA LUNANI 2ND PLAINTIFF
SUING AS THE EXECUTORS OF THE WILL OF THE LATE SHAPHAN
LUNANI WALELA**

AND

**CARLSBERG INTERNATIONAL LIMITED 1ST DEFENDANT
DKO INVESTMENTS LIMITED 2ND DEFENDANT
DAWN INNOVATIONS LIMITED 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT
CHIEF LAND REGISTRAR 5TH DEFENDANT**

RULING

1. By a Notice of Motion dated September 28, 2022 and filed on October 6, 2022, the Applicants moved this Court under Order 40 Rule Rules 1, 2, 3, 4 and 10, Order 51 Rules 1, 3, 4, 7 and 10 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and all other enabling provisions of the law. From the outset, I remind the Applicants, as I always do to any other party who is bent on relying on “all other provisions of the law” that such a phrase is meaningless in so far as a clarification or specification thereof is not given. Parties would do well to avoid the use of such ‘scarecrow’ phrases.
2. The Applicants sought the following reliefs:



1. ...spent
 2. ...spent.
 3. Pending hearing and determination of this suit, there be a temporary order of injunction restraining the 1st, 2nd and 3rd Defendants jointly and severally, either by themselves, employees, servants, agents of any other person purporting to act on their instruction or at their instance from encroaching onto, trespassing on, taking possession of, offering for sale, selling, or in any other manner whatsoever dealing with or interfering with all that parcel of land known and registered as L.R No. 3803/3 situate in Kitale within Trans Nzoia County.
 4. The costs of this Application be borne by the Defendants/Respondents.
3. The Application was supported by the Affidavit of one Elicana Lunani Walela, and a number of grounds. Beginning with giving a summary of the grounds herein, the Applicants stated in the Application that from way back on March 27, 1971, the late Shaphan Lunani Walela who died on August 20, 2013 was registered as owner of all that parcel of land known and registered as L.R. No. 3803/3. The parcel was situate in Kitale within Trans Nzoia County and measured approximately 816 acres. As at the time of filing the Application the land was still registered in the Estate of the deceased, and was a subject of a succession matter in the High Court at Kitale, namely, Probate & Administration Cause No. 8 of 2018. A further ground was that the 1st, 2nd and 3rd Defendants issued a demand notice to the Plaintiffs dated April 20, 2022 informing them that they were the owners of the parcel of land. The said Defendants warned the Estate of the late Shaphan Lunani Walela against cultivating the land the coming season.
 4. They stated further that strangers had since been visiting the property to view it for purposes of purchasing it hence the Plaintiff had fear the said Defendants would illegally and unlawfully dispose of the land and evict them. They stated that the Defendants' actions were illegal and premised on a fraudulent Certificate of Title and Lease described as Certificate of Title No. 239057 obtained several years after the death of the late Shaphan Lunani Walela. They stated further that the actions amounted to interference with the property of a deceased person contrary to the provisions of the [Law of Succession Act](#). They then sought the prayers in the Application.
 5. As stated above, one Elicana Walela Lunani swore an Affidavit on 28/09/2022 in support of the Application. In it he deponed on facts similar in content to the grounds in support of the Application save that he added as follows: That he was one of the Executors of the Estate of the Late Shaphan Lunani Walela was authorised by his Co-Executor, one Milly Khayanga Lunani, to make and swear the Affidavit on her behalf as well. To the Affidavit, he annexed and marked as ELW 1 a copy of the Title to land parcel L. R No. 3803/3 situate in Kitale within Trans Nzoia County to show that his late father owned it from 27/03/1971. The late father, one Shaphan Lunani Walela passed away on 20/08/2013. He annexed and marked as ELW 2 a copy of the Certificate of Death, and ELW 3 a copy of an official search conducted on the parcel of land.
 6. He deponed further that the late father executed a Will and on 07/02/2019 he and his co-executor embarked on obtaining a Grant with the Will annexed in Kitale High Court Probate & Administration Cause No. 8 of 2018 - In the Matter of The Estate of Shaphan Lunani Walela, which Cause was still ongoing. He annexed and marked as ELW 4 a copy of the Application for Confirmation. He then annexed and marked as ELW-5 a copy of a letter dated 20/04/2022 from the Defendant's lawyers and ELW-6 (a) and 6(b) a copy of Title and Lease respectively, sent to them through the said demand letter. The two documents bore the registration details as Certificate of Title No. 239057 and Lease Serial No. CF 303856, which were supposedly issued on the 18/12/2021 over the same property.



7. He swore further that the Plaintiffs and their late father had never sold the property to the 1st, 2nd and 3rd Defendants or any other party and it was not available for sale. He deponed that the documents of title held by the Defendants were obtained fraudulently and illegally and were supposedly issued in the year 2021, during the pendency of the Kitale High Court Succession Cause over it. They then lodged a complaint with the Police Station at Kitale vide Occurrence Book Number OB: 69/30/8/22. They asked the Court to intervene in the unfolding events, as prayed.

Supplementary Affidavit

8. The 1st to 3rd Defendants filed a Reply Affidavit to the Application. In a rejoinder to this, on 19/10/2022, the Applicants Supplementary Affidavit. It was sworn on 17/10/2019 by the deponent of the Supporting Affidavit. His further deposition was that the Defendants' Replying Affidavit showed that they are aware of the fact that the Estate of Shaphan Lunani Walela was in possession of LR. No. 3803/3 and that the late Shaphan Lunani Walela and his Estate had been in possession of the Property for 51 years and no disputes had arisen over the property all those years. He then swore that the Defendants had not shown to the Court any Application for Allotment or Letter of Allotment.
9. He disputed the deposition by the Respondents that the parcel of land ceased to have title after subdivision. He countered the argument on the non-existence of the title the Bank had extended a loan facility to the late Shaphan Lunani Walela. He deponed that the title to the land was not surrendered in the year 1960. He went on to depose that the title clearly shows that the only entries thereon was the subdivision of 3803 to create 3803/1, 3803/2 and 3803/3.
10. He annexed to the Supplementary Affidavit and marked as EWL 8 copies of the Application for Consent to Transfer, and the correspondence with regard thereto by Lands Limited which show how his late father purchased the property from Lands Limited. He also annexed as EWL 9 copies of the Application for Consent, forwarding Letter by Lands Limited and Consent to Transfer to his late father Shaphan Lunani Walela.
11. He refuted the claim that he had sought and obtained permission from the local administration to till about 500 acres on the land since he needed none because the property belongs to the Estate which had been in possession and use of the same, first before the demise of Shaphan Lunani Walela, and thereafter after his demise. He also discounted the deposition that the Public Trustee was involved in or handling any part of the estate of the late father. He deponed that at one time the National Land Commission wrote to the estate of the late father confirming that it was not aware anyone claiming the land. He annexed and marked EWL11 a letter to that effect.

Replying Affidavit

12. The 1st to 3rd Respondents which are limited liability companies appear to have a common interest, evidence and witnesses in this matter. They jointly gave written authority to one Daniel Akama Okello who swore a Replying Affidavit on 14/10/2022 in their behalf, in response to the instant Application. The Affidavit was filed on 17/10/2022. In it he deponed that he was a director of the 1st defendant company and was duly authorized to swear the affidavit by the directors of the said party and of 2nd and 3rd defendants. He swore further that the 1st, 2nd, and 3rd defendants were the true and bona fide registered owners of the land parcel LR 3803/3 which measuring approximately 816 acres vide the process of application for allotment which finally yielded a Certificate of a Title thereto, whose copy he annexed to the Affidavit and marked it as CDD-1. He then annexed a copy of the certificate of official search of the property and a copy of which he marked as CDD-2.



13. He deponed further that prior to the allocation, land parcel number LR 3803/3 belonged to the government after it was surrendered to it around the year 1960 and was never allocated to either the plaintiffs or their relatives. He denied in the Affidavit that the property was a subject of succession cause number HC No. 8 of 2019 as it did not belong to the late Shaphan Lunani Walela. He annexed a survey plan of the original LR 3803 whose copy he marked as CDD-3 to show that parcel No. LR 3803/3 which did not have a title after the surrender had been sub-divided into parcels 3803/1, 3803/2 and 3803/3.
14. His further deposition was that evidence showed that one Elicana Lunani had sought permission from the local administration to only cultivate about 500 acres. He stated that the plaintiffs did not produce both a title to LR 3803/3 and deed plan thereto but had instead produced the copy of title number I.R 172 together with a deed plan which belonged to the original LR 3803. He then swore that he had instructed the three Defendants' advocates to notify the 1st Plaintiff not to cultivate the land any further after the current crop and that was when the said party sourced for the canceled title number IR 172 and doctored it to suit his narrative. He deponed that the instant suit filed against the defendants, based on non-existent and forged documents which the Plaintiffs. He stated that the suit disclosed no reasonable cause of action.
15. The deponent sought to explain out the alleged forgeries by stating that the title relied on by the Plaintiffs as IR.172 was doctored and belonged to Land Registration Number LR 3803 which had been subdivided decades ago. He noted that Entry Number. 21 on the Plaintiff's annexure EWL-1 when compared to the official search in EWL-3 was done by different entities altogether. He discredited Deed Plan Number 11703 which showed that the parcel of land claimed by the Plaintiffs measured approximately 1008.6 acres while LR 3803/3 owned by the three Defendants measure 816 acres. He castigated as being contrary to the provisions of the *Land Act* the Search Certificate showing ownership of LR 3803/3.
16. The Respondents through the said deponent swore that records of the Office of the Public Trustee showed that one R. C. Chepkwony was the administrator of the Estate of Shaphan Lunani Walela of P.O. Box 2063, Kitale who died intestate on the 20/08/2013. He annexed and marked as CDD-5 a copy of the Kenya Gazette excerpt to that effect.
17. The deponent stated that plaintiffs had not provided proof of ownership of LR 3803/3. His further deposition was that property known as LR 3803 if in existence was different and distinct from the Property number LR 3803/3. He stated on oath that they had not encroached, trespassed, or carried out any activities whatsoever on the plaintiffs' property. He deponed that the status quo was that the three defendants were in possession hence if the orders sought they would put the plaintiffs in possession of the land. He contended that the plaintiffs had not produced any evidence of any irreparable loss they would suffer what could not be compensated by an award of damages. His argument was that parcel number LR 3803/3 was owned by the government and leased by the said authority to them. He stated that the principles in *Geilla Vs Cassman Brown & Co Limited* (sic) had not been established.

Submissions

18. The Plaintiffs filed their submissions dated 17/10/2022 on 19/10/2022. In them they first summarized the facts of the Application. I need not repeat them herein. Suit seeking the various reliefs set out in the Plaint. They then summarized the grounds for grant of an injunction as sated in the seminal *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. They related the facts of the instant Application to the principles for the grant of an injunction as given in that case. Their view was that they had



established a prima facie case, since they showed that their father had title to the land and they were even obtained a loan thereon from Standard Chartered Bank in 1971 which was then discharged in 2005. They also argued that being in possession, as evidenced from the demand letter by the Defendants, they had a strong prima facie case. They argued that damages would not be an appropriate remedy in the circumstances and that the balance of convenience tilted in their favour. They relied on the Giella Case (supra) and Juja Coffee Exporters Limited & another v N.I.C. Bank Limited & another [2020] eKLR.

19. The Defendants also filed their submissions dated 14/10/2022 on 17/10/2022. They too summarized the parties' respective cases as above. They submitted on the principles for grant of an injunction as stated in the Giella case (supra). They also referred to the Mrao Ltd v. First American Bank of Kenya Limited and 3 others (2003) KLR 125 as cited in Moses C. Muhia Njoroge & 2 others v Jane W. Lesaloi and 5 others, (2014) eKLR. They also cited the Gichinga Kibutha v Caroline Nduku (2018) eKLR case.

Issues, Analysis and Determination

20. I have considered the application before me, the supporting affidavit and supplementary Affidavit together with the annexures thereto. I have also deeply analysed the Replying Affidavit, the annexures thereto, both statute and case law on the issue and the submissions by the parties. I am of the view that two issues commend themselves to me for determination. These are:
- a. Whether the Applicants have met the criteria for the grant of temporary injunction.
 - b. Disposition and who to bear the costs of the Application.
21. I straight away proceed to consider the two issues: -

(a) Whether the Applicants have met the criteria for the grant of temporary injunction.

22. On the first issue, I first discuss the law on it. The beginning point is the understanding of the cardinal position in law that he who asserts proves. Section 107(1) of the Evidence Act, Chapter 80 of the Laws of Kenya then provides if one alleges the existence or non-existence of a fact he must prove it. In this case, it is the onus of the Applicants to satisfy this Court that they have met the criteria for the grant of a temporary injunction, and thereby demonstrated that the application is merited.
23. The law on grant temporary injunctions is clear and now settled. I will not comment much on the relevance or otherwise of the provisions of the law that were relied on by the Applicant. Suffice it to say that where there are clear provisions of law on an issue, it is important that, as much as Article 159(2)(2) of the Constitution 2010 provides for power of the Courts not to rely on technicalities as they determine matters before them, the parties ought to cite the proper provisions at all times whenever they bring applications to Court. Otherwise, it would make the law a joke to have laws in place but they are not followed. It would portend a state of anarchy and disrespect of the Rule of Law. Be that as it may, at the onset I reminded the parties herein that the phrase "all enabling provisions of the law" is nothing but a hollow part of the sentence that does not avail much and should be avoided. Parties need to specify the provisions under which they approach the Court. Again, it is worth of note that some of the provisions learned counsel cited are, in my humble view, not relevant. For instance, Sections 1A, 1B and 3A of the Civil Procedure Act have a special place in the practice of law. Their application herein is rather superfluous in so far as the specific prayer of injunctions for which provisions exist requires. But let me go to the substance of the Application.
24. The remedy of an order of injunction is an equitable one and is discretionary. What the Court ought to bear in mind at all times is that the discretion should be exercised judiciously. This was stated in Kahoho



v Secretary General, EACJ Application No. 5 of 2012. Additionally, in *Daniel Kipkemoi Siele v Kapsasian Primary School & 2 Others* [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/118862> the Court rendered itself in like manner as follows, "... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously." By being judicious it means taking into account all the facts and the circumstances of each case and make a decision that is not plainly wrong.

25. With that in mind, I now consider the law on which I must apply the facts and circumstances of this case. There is an avalanche of authorities by the Courts in Kenya, ranging from the Supreme Court to the Superior Courts, on the law of injunctions. I will not spend time reproducing them here. But in brief, for a party to be granted a temporary injunction he must pass the test in the case of *Giella -vs- Cassman Brown* [1973] EA 358. It is a three-pronged one whose limbs are:
 - (a) Whether the applicant has established a prima facie case;
 - (b) Whether the he or she would suffer irreparable loss that may not be compensated by damages; and
 - (c) That if the court is in doubt, it may rule on a balance of convenience.
26. On whether the applicants have established a prima facie case, the Court notes that both the Plaintiffs and the Defendants lay claim to the parcel of land in question by relying on separate and distinctive title documents thereto. The Plaintiffs claim that their late father, one Shaphan Lunani Walela was the owner of the parcel of land by being registered thereto as such on title document registration number L.R. No. 3803/3 from 27/03/1971. Their claim is that the said deceased parent bought the land from Lands Limited, a subsidiary of Agricultural Finance Corporation.
27. Their late father Shaphan Lunani Walela died on 20/08/2013. After his death the Applicants commenced succession proceedings on his property including the same, in the High Court at Kitale in Probate & Administration Cause No. 8 of 2018. They stated that the estate of the deceased and them were in possession and use of the land since that time of acquisition and to prove that the title existed and was genuine, on the one hand, they annexed to the Supporting Affidavit copies of the title, certificate of official search, certificate of death, Application for Confirmation in Kitale High Court Probate & Administration Cause No. 8 of 2018 - In the Matter of the Estate of Shaphan Lunani Walela, and to the Supplementary Affidavit the Application for Consent, forwarding Letter by Lands Limited and Consent to Transfer to his late father Shaphan Lunani Walela. They also annexed copies of the demand notice they received from the 1st - 3rd Defendant's Advocates to the effect that the estate of the late Shaphan Lunani Walela stop any farming activities on the land the following planting season.
28. The Respondents, on the other hand, claimed that the 1st, 2nd, and 3rd defendants were the true and bona fide registered owners of the parcel of land which measured approximately 816 acres. Theirs was the contention that they became owners through the process of application for allotment and the issuance of a Certificate of a Title. They annexed a copy of the Lease and Certificate of Title and marked it as CDD-1, a copy of the Certificate of Official Search as CDD-2, a copy of the Survey Plan as CDD-3, and CDD-4 a copy of the Gazette Notice to show that the Plaintiff's father died intestate. It was filed by the Public Trustee, Eldoret, notifying the public of intent to apply for Probate in the High Court in Eldoret. The Certificate of Title was for a period of 99 Years running from 01/09/2013 and was witnessed on 18/12/2021 and the Lease was from the same date for the same length of time as the Certificate and it was signed on 09/12/2019. The deponent stated further that prior to the allocation, parcel of belonged to the government upon its surrender around the year 1960.



29. The Respondents did not deny that their advocates issued a Notice to cease all activity on the land. It was given on 20/04/2022. By that Notice, they admitted that the Plaintiffs were on the parcel of land and working on it. Actually, they admitted at paragraph 10 of the Replying Affidavit to the Plaintiffs being on the land - about 500 acres or thereabout - by virtue of “permission from the local administration”. While this assertion of permission may be plausible to give, it is not clear how and when the local administration could have power to allow a private citizen to use public land, without proper authority from the National Land Commission or the previous office of the Commissioner of Lands. Without further evidence to support that allegation and even indicate the time from when the Plaintiffs or their late father was permitted by the said local administration to occupy the land, I refuse the assertion.
30. Having before me two instruments of ownership of the same parcel of land of which one purports to be in existence from 1971 and the other from 2019 and 2021 I am of the view that proof of the authenticity and validity of the same shall form the crux of the matter for hearing. I cannot determine these issues at the preliminary stage. What is left of me is to consider whether the Applicants have established a prima facie case to warrant issuance of the orders sought. The Applicants hold instruments of ownership which they have exhibited to the Court. They also have demonstrated beyond peradventure that as at the time of filing the suit and application they are the ones in possession and use of the property in question, to the exclusion of the Defendants or their agents. The totality of this is that they have satisfied this Court that they have a prima facie case.
31. As to whether they are likely to suffer irreparable loss which cannot be compensated by way of damages, they stated in both the supporting Affidavit and Supplementary one that the family of the late Shaphan Lunani Walela and his estate, after his demise, together with them have been in occupation and use of the land since he acquired it in 1971 - a period of over 50 (which they stated again as 51) years. He even obtained a loan facility on it, from the Standard Chartered Bank. On the other hand, the Respondents have demonstrated that they intend to sell the property, through the Notice of Cessation of All Activity thereon. That being the case, should applicants’ long-term use of the land fail to be ‘protected’ and also the subject property be sold to third parties it will occasion substantial loss to the Applicants. In any event, from the totality of the analysis of the facts before me, the balance of convenience tilts in favour of the Applicants.

(b) Disposition and who to bear the costs of the Application

32. Let us hear the conclusion of the whole matter: The Application dated September 28, 2022 is merited and it is hereby granted on the following terms: -
- a. Pending hearing and determination of this suit, there is hereby issued a temporary injunction against the 1st, 2nd and 3rd Defendants jointly and severally, restraining either they by themselves, their employees, servants, agents of any other person purporting to act on their instruction or at their instance from encroaching onto, setting foot on, trespassing on, taking possession of, offering for sale, selling, or in any other manner whatsoever dealing with or interfering with all that parcel of land known and registered as L.R N-. 3803/3 situate in Kitale within Trans Nzoia County.
 - b. The Plaintiffs are hereby given 30 days to file and serve the trial bundle which should comply with the requirements of the Civil Procedure Rules and the Practice Directions of this Court. The Defendants are required to file their respective pleadings within 14 days of this order and shall have 30 days from the date of service of the Plaintiffs’ bundle to file their bundle(s) and serve the Plaintiffs.



- c. The Plaintiffs to serve the 4th and 5th Defendants with this Ruling within seven (7) days of its delivery.
- d. Parties shall, at least fifteen (15) days before the mention date, indicate in writing to the Court and the other parties if they will object to production of documents or which makers of documents to be produced in evidence they will require their attendance at the time of trial.
- e. This matter shall be mentioned on 9/02/2023 to confirm compliance and fix a hearing date.
- f. The Applicants shall have the costs of this Application.

33. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 16TH DAY OF NOVEMBER, 2022

HON. DR. *JUR* FRED NYAGAKA

JUDGE, ELC KITALE

