



Mutunkei & another v Noonkanas & another (Environment & Land Case E142 of 2024) [2025] KEELC 4220 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E142 OF 2024**

**MD MWANGI, J
MAY 29, 2025**

BETWEEN

NANTI ENE MUTUNKEI 1ST PLAINTIFF

KETUKEI KISERIAN MUSIKANYI 2ND PLAINTIFF

AND

SAIMON NTASIKOI NOONKANAS 1ST DEFENDANT

SAMUEL SHAPARA OLE SAIRE 2ND DEFENDANT

RULING

(In respect of the preliminary objection by the 2nd defendant dated 18th March 2025 and the plaintiffs’ notice of motion dated 6th December 2024 seeking an order of interlocutory injunction).

Background

1. The plaintiffs jointly initiated this case by way of the plaint dated 6th December 2024. The 1st plaintiff is the wife of the 2nd plaintiff.
2. The 1st plaintiff asserts that in the process of adjudication and titling of the Mailua Group Ranch and as part of the dissolution of Mailua Group Ranch, L.R. No. Kjd/Mailua/1146 measuring approximately 150 acres was adjudicated as the family property of the Ketukei Kaserian family. The said family accepted and agreed that the parcel of land be registered in the name of the 2nd plaintiff as the head of the family.
3. The 1st plaintiff asserts that she came to discover that the land was subsequently subdivided into two parcels L.R Kjd/Mailua/2059 and L.R Kjd/Mailua/2058. The latter parcel was transferred to the 1st defendant and eventually to the 2nd defendant. This was in breach of the trust bestowed upon the 2nd plaintiff to hold the land in trust for the family. The entire process and enterprise from the subdivision



of the original parcel to the purported transfer to the 1st then the 2nd defendant was fraudulent, illegal and unlawful. The consent of the beneficiaries was not sought; neither was that of the 1st plaintiff as a spouse of the 2nd plaintiff. She avers that the land is matrimonial property. The mandatory consent of the relevant Land Control Board too was not obtained to legitimize the processes.

4. It is the plaintiffs' case that the title acquired by the 1st defendant and subsequently transferred to the 2nd defendant was an illegal title which is and was null and void ab initio.
5. On his part, the 2nd plaintiff states that he never sold 50 acres to the 1st defendant. It is his case that the 1st defendant had approached him in the year 2010 seeking to lease rather than buy 50 acres out of his land for purposes of creating a recreation camp site for tourism purposes. As far as he was concerned, he merely leased the 50 acres to the 1st defendant for the intended purpose of setting up a recreation camp. The subdivision of his land by the 1st defendant and the purported transfer of one of the portions was without his consent, fraudulent and illegal.
6. The 2nd plaintiff claims that he never signed any valid sale agreement with the 1st defendant neither did he obtain the mandatory Land Control Board Consent to subdivide and sell a portion of his land. He further denies receiving any consideration for the purported sale.
7. The 2nd plaintiff states that he was surprised to see the 2nd defendant coming into his land allegedly to set up a camp therein in the year 2024. That was when he realized and discovered the fraud committed by the 1st defendant in cahoots with the 2nd defendant to defraud him a portion of his land.
8. The plaintiffs amongst others reliefs seek the cancellation of the title in the name of the 2nd defendant.
9. Alongside the main suit, the plaintiffs filed the application under consideration seeking an order of interlocutory injunction order to bar the 2nd defendant from selling, transferring or leasing the parcel of land L.R. No. Kjd/Mailua/2058 or dealing with it in any manner as to change its current status of ownership pending the hearing and determination of this case.

Response by the 2nd Defendant

10. In response to the plaintiff's application, the 2nd defendant filed a replying affidavit sworn on 18th March 2025 and the preliminary objection against the entire suit, of even date, asserting that the plaintiffs' suit is time barred by virtue of the provisions of Section 7 of the *Limitation of Actions Act* and this court therefore lacks the jurisdiction to entertain the suit herein on account of time bar.
11. In the replying affidavit, the 2nd defendant deposes that he bought the subject parcel of land vide an agreement dated 15th November 2010 from the 1st defendant. He has attached the alleged sale agreement as an annexure. He was issued with a title deed on 19th April 2011. He terms himself as a purchaser for value without notice of any defects in title. It is his case that the plaintiffs' application has not met the threshold for the grant of an order of interlocutory injunction.
12. The 1st defendant did not file a response to the plaintiff's application. From the record, the 1st defendant appointed an advocate on 23rd April 2025.

Directions by the Court.

13. The directions by the court, with the concurrence of the parties, was that the preliminary objection and the plaintiff's application be handled concurrently and be canvassed by way of written submissions.
14. The plaintiffs and the 2nd defendant complied and filed their respective submissions which the court has had occasion to read and consider in writing this ruling.



Issues for determination.

15. The issues that commend themselves for determination are;
 - a. Whether the preliminary objection by the 2nd defendant is merited; and
 - b. Whether the plaintiffs' application meets the threshold for the grant of an interlocutory injunction.

Analysis for determination.

16. On the first issue, a reading of the plaint by the plaintiffs discloses that their cause of action is fraud; they allege fraudulent transfer of a portion of the 2nd plaintiffs' land to the 1st defendant and subsequently to the 2nd defendant. The plaintiffs have particularized the allegations of fraud in their plaint at paragraphs 14, 15 and 16 thereof. Whether the particulars of fraud as tabulated are plausible or not is a matter to be determined after the hearing of the case.
17. The provisions of Section 26 of the *Limitation of Actions Act* are therefore applicable in this case. The period of limitation starts to run after the discovery of the fraud. The plaintiffs have expressly pleaded in their plaint that they only discovered the fraud in the year 2024.
18. My finding therefore is that the plaintiffs' case is not time barred. It must proceed to full hearing. The 2nd defendant's preliminary objection is unmerited. This court is duly seized of the matter and shall proceed to consider the second issue.
19. The guiding principles for the grant of an order of temporary injunction were set out in the case of *Giella –vs- Cassman Brown Co. Limited* (1973) E.A. 358. The Court of Appeal in the case of *Nguruman Ltd – vs Jan Bonde Nielsen & 2 others* (2014) eKLR, while affirming the principles in *Giella –vs- Cassman Brown* held that,

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be



compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

20. It is not disputed that the suit property in the name of the 2nd defendant was excised from the 2nd plaintiff's original parcel of land. The plaintiffs alleges fraud as tabulated in the plaint. The 2nd plaintiff asserts that he never sold 50 acres out of his land to the 1st defendant neither did he sign any valid sale agreement with the 1st defendant nor did he obtain the mandatory Land Control Board Consent to subdivide and sell a portion of his land. He further denies receiving any consideration for the purported sale. No contrary evidence has been presented as of now in response to those allegations. The plaintiff in the court's opinion has demonstrated that he has a fair and bona fide question to raise as to the existence of the right which he alleges.
21. Considering the circumstances of this case against the above expositions, the court finds that the plaintiffs have not only established a prima facie case but have demonstrated that they are likely to suffer irreparable harm unless the order of interlocutory injunction is issued pending the hearing and determination of this suit. In arriving at this decision, I am further persuaded by the holding of Warsame J, (as he then was) in the case of Joseph Siro Mosiama –vs- HFCK & 3 others (2008) eKLR, where he stated that;

“Damages is not and cannot be a substitute for the loss, which (may) be occasioned by a clear breach of the law in any case, the financial strength of a party is not always a factor to refuse an injunction. More so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an injunction”.
22. Ours is a country governed by the rule of law; not by rule of power. Every person is equal before the law and has the right to equal protection and equal benefit of the law; the full and equal enjoyment of all rights and fundamental freedoms.
23. From whatever aspect one looks at it, the balance of convenience tilts in favour of the plaintiffs. The court must always opt for the lower rather than the higher risk of injustices as held in the case of Amir Suleiman –vs- Amboseli Resort Limited (2004) eKLR.
24. That said, the conclusion is that the preliminary objection by the 2nd defendant is dismissed. The plaintiffs' application on the other hand is allowed as prayed. The costs of the preliminary objection and the application shall be on the cause.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 29TH DAY OF MAY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Amemba h/b for Mr. Namada for the plaintiff/applicant

N/A for the defendants

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

