



**Lukui v Musili (Environment & Land Case E007 of 2022)
[2022] KEELC 15022 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E007 OF 2022
TW MURIGI, J
NOVEMBER 9, 2022**

BETWEEN

WILLY MAKOVE LUKUI APPLICANT

AND

BONIFACE MUTUA MUSILI RESPONDENT

RULING

1. By a Notice of Motion dated 23rd of March 2022 brought pursuant to the provisions of Order 40 Rules 1, 2, 3, 4 and 10, Order 50 Rule 1 of the [Civil Procedure Rules](#), Sections 3A & 3B of the [Civil Procedure Act](#) and all the enabling provisions of the law the Applicant seeks for the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to issue temporary ex parte orders restraining the Defendant by himself, his agents, heirs, administrators, Attorneys from entering into or interfering with the Plaintiff's possession and/or quiet enjoyment of parcel number Makueni/ Utangwa/3663.
 3. That a permanent injunction be issued restraining the Defendant from trespassing or encroaching into the Plaintiff's property known as land reference number Makueni/ Utangwa/3663.
 4. That this Honourable Court do issue an order for delivery up and revocation of title number Makueni/Utangwa/3704 purportedly issued to the Defendant unlawfully and without any consideration.
 5. That the Defendant be condemned to bear the cost of the suit.
 6. Any other order or remedy which may be just and expedient in the circumstances of the suit.



2. The application is premised on the grounds on its face together with the supporting affidavit of the Applicant sworn on the even date.

The Applicant's Case

3. It is the Plaintiff's case that he is the registered owner of land parcel number Makueni/Utangwa/3663. That on 30th of June, 2022 the Defendant without any colour of right trespassed on his property and caused wanton destruction thereon.
4. That on 13th of August, 2021 he was served with a boundary dispute summons by the Land Registrar Makueni which indicated that the Defendant was the complainant, his neighbour and owner of land parcel number Makueni/Utangwa/ 3704.
5. He further averred that upon conducting a search, he discovered that land parcel number Makueni/Utangwa/3704 was hived off from his parcel of land without his knowledge or involvement or that of his siblings.
6. The Applicant maintains that at no time did he or his siblings sell or dispose part of their land to the Defendant. He argued that the Defendant obtained the title fraudulently since no consideration was paid nor consent obtained from the Land Control Board.

The Respondent's Case

7. Opposing the application, the Defendant vide his replying affidavit sworn on 19th of April, 2022 averred that he is the registered owner of land parcel number Makueni/Utangwa/3704 while the Plaintiff is the registered owner of land parcel number Makueni/Utangwa/3663. He denied the allegations that he had trespassed or encroached on the Plaintiff's land parcel number Makueni/Utangwa/3663 and caused wanton destruction thereon.
8. That furthermore, the Plaintiff did not present any evidence to prove his allegations. He further averred that he purchased land parcel Makueni/Utangwa/3704 in 2011 from Matata Makove the Applicant's brother and immediately took possession thereof.
9. He further averred that he was issued with a title deed after the adjudication process was completed. He further averred that the Applicant did not raise the issue of ownership of land parcel number Makueni/Utangwa/3704 during his late brother's lifetime. He alleged that the Plaintiff and his siblings have blocked him from accessing or cultivating his land.
10. The application was canvassed by way of written submissions.

The Submissions

11. As at the time of writing this ruling the Plaintiff had not filed his submissions.
12. The Defendant/Respondent's submissions were filed on 14th of June 2022.
13. Counsel submitted that the only issue for determination is whether the Applicant has met the threshold for the grant of an injunction. Counsel submitted that the law on injunctions is set out in Order 40 of the Civil Procedure Rules and reiterated in the case of *Giella vs Cassman Brown & Co Ltd* (1973) EA 358.
14. Counsel further submitted that the Applicant has not established a prima facie case with a probability of success. It was argued that the Respondent is the registered owner of land parcel number



Makueni/Utangwa/3704 which is distinct from the Plaintiff's property land parcel number Makueni/Utangwa/3663.

15. He went on to submit that the Respondent purchased the suit property from the Applicant's late brother and was issued with a title deed after the completion of the adjudication process. Counsel argued that the Applicant did not produce any evidence to demonstrate that the Respondent had trespassed or encroached on his land.
16. To buttress this argument, Counsel relied on the case of *Mrao Vs First American Bank of Kenya & 2 Others* (2003) eKLR. In a nutshell, Counsel reiterated the contents of the Defendant's replying affidavit in support of his submissions.
17. On the second limb, Counsel submitted that the Applicant has not demonstrated that he will suffer any loss if the orders sought are not granted and that if anything, it is the Defendant who will suffer since the Plaintiff and his siblings have barred him from cultivating on his land.
18. Counsel argued that the Applicant did not adduce any evidence to prove that he reported the destruction of his property to any local authority.
19. On the third limb, Counsel submitted that the balance of convenience tilts in favour of the Defendant since he is the registered owner of the suit property. Counsel argued that the Plaintiff has approached the Court with dirty hands since he knew that his late brother had sold the land to the Defendant.

Analysis And Determination

20. Having considered the pleadings, the application, affidavits and the Defendant/Respondent's submissions, I find that the only issue that arises for determination is whether the Applicant has met the threshold for the grant of an order of injunction.
21. The Applicant is seeking for a temporary injunction to restrain the Defendant from interfering with the Plaintiff's possession and quiet enjoyment of land parcel number Makueni/Utangwa/3663. He is also seeking for a permanent injunction to restrain the Defendant from trespassing or encroaching on the Plaintiff's property. The Plaintiff's application for injunction is premised on Order 40 Rules 1, 2, 3, 4 and 10 of the Civil Procedure Rules amongst other provisions of the law.
22. In the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 the Court set out the principles applicable in an application for an injunction as follows: -First the 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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
23. I will start by considering whether the Applicant has established that he has a prima facie case with a probability of success.
24. The Court of Appeal in *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR defined a prima facie case as follows;

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



25. The Applicant averred that he is the registered owner of land parcel number Makueni/Utangwa/3663. In this regard, he produced a copy of the title deed and a certificate of official search for the said property. He further alleged that on 30th of June, 2022, the Respondent without any colour of right trespassed on his land and caused wanton destruction thereon by cutting down trees.
26. He further averred that it took the intervention of the local administration officers for the Defendant to stop carrying out his unlawful acts.
27. The Respondent on the other hand stated that he is the registered owner of land parcel number Makueni/Utangwa/3704 and denied having trespassed onto the Plaintiff's land.
28. From the material placed before me, I find that the Applicant has not demonstrated that the Respondent trespassed onto his land parcel number Makueni/Utangwa/3663. Similarly, the Plaintiff did not adduce any evidence to demonstrate that the Defendant caused wanton destruction of his property.
29. The Applicant averred that upon being served with a boundary dispute summons, he decided to conduct a search since he did not know the neighbour who was indicated in the summons. In this regard he produced a boundary dispute summons dated 15th of August, 2021 issued by the Land Registrar, Makueni County.
30. He went on to state that he was shocked to discover that land parcel Makueni/Utangwa/3704 was hived off from his parcel of land without his knowledge or consent or that of his siblings.
31. The Respondent on the other hand averred that he is the registered owner of land parcel number Makueni/Utangwa/3704 having purchased the same from the Applicant's brother in 2011. In this regard he produced a sale agreement dated 2/11/2011 and a title deed for the said property. The Respondent contended that the Plaintiff started laying claim to his land after the demise of his brother.
32. Looking at the documents presented by the parties herein, it is not in dispute that the Plaintiff is the registered owner of land parcel number Makueni/Utangwa/3663 while the Defendant is the registered owner of land parcel number Makueni/Utangwa/3704. The Plaintiff stated that after he was served with a boundary dispute summons by the Land Registrar he conducted a search and discovered that a portion of land parcel number Makueni/Utangwa/3663 was hived off and registered in the name of the Defendant.
33. The Plaintiff alleged that land parcel number Makueni/Utangwa/3704 was fraudulently registered in the name of the Defendant as he did not sell or receive consideration from the Defendant. That further, no consent was obtained from the Land Control Board to transfer the property to the Defendant. The Applicant maintains that the Defendant fraudulently obtained title to land parcel number Makueni/Utangwa/3704.
34. The issues of fraud and ownership are contested issues which can only be determined by evidence in a full trial by calling evidence and interrogating it through cross examination. At this stage the Court is not required to determine the issues which will be canvassed at the trial.
35. The Court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy.



36. In the case of *Mbutbia Vs Jimba Credit Finance Corporation & Anor* [1988] eKLR the Court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
37. Similarly, in the case of *Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd* NBI HCCC No. 1118 of 2002, the Court held that;
- “In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”
38. The issues of ownership and fraud can only be determined in a full trial where the parties will have the opportunity to call evidence and have the same challenged by way of cross examination. This was the holding in the case of *Joash Ochieng Ougo & Anor vs Virginia Edith Wambui Otieno* [1987] eKLR, where 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.”
39. Looking at the documents annexed to the Applicant’s supporting affidavit, I am not persuaded that the Applicant has established a prima facie case with a probability of success in line with *Giella Vs Cassman Brown* (Supra).
40. With regards to the issue of whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.
41. The Court of Appeal in *Nguruman Limited Vs Bonde Nielsen & 2 Others* (2014) eKLR held that: -
- “On the second factor, 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 stand 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.”
42. The Applicant argued that the Defendant’s unlawful acts have threatened his right to possession and enjoyment of his property. The Applicant contends that unless an order of an injunction is issued, the Defendant’s actions will result to physical or emotional injury to the Plaintiff and his extended family.
43. The Plaintiff has not demonstrated what loss if any he stands to suffer if the orders sought are not granted and further, that the loss cannot be compensated with an award of damages. The Court is therefore not convinced that the Applicant stands to suffer irreparable harm that cannot be compensated by way of damages.



44. On the issue of balance of convenience, the Court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction, against the hardship to be borne by the Respondent by granting the injunction.
45. In light of the foregoing, I find that the balance of convenience does not tilt in favour of the Applicant.
46. Consequently, the application dated 23rd March, 2022 is dismissed with costs to the Respondent. The parties herein are directed to comply with Order 11 of the Civil Procedure Rules within 30 days from the date hereof.
47. Mention on 16th of January, 2023 before the Deputy Registrar for Pre-trial Conference.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 9th DAY OF NOVEMBER, 2022.

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Gichuhi for the Plaintiff/Applicant

Muthiani for the Defendant/Respondent.

