



**Karura Investment Limited v Magugu & 3 others (Environment & Land Case 329 of 2016) [2022] KEELC 15405 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15405 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 329 OF 2016  
AA OMOLLO, J  
DECEMBER 20, 2022**

**BETWEEN**

**KARURA INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**MARGARET WAIRIMU MAGUGU ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 3<sup>RD</sup> DEFENDANT**

**THE NLC ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> defendant/applicant filed the notice of motion application dated November 7, 2022 brought under the overriding objectives of the *Civil Procedure Act* and inter alia order 7 and 8 of the *Civil Procedure Rules*. The defendant hereinafter referred to as the applicant sought orders for;
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of the suit herein, this honourable court be pleased to grant an order or temporary injunction barring, prohibiting and/or stopping the 1<sup>st</sup> respondent and the Proposed 5<sup>th</sup> respondent/defendant from further dealing either by subdividing, hiving off, advertising for sale, selling charging or in any way interfering with the registration and/or possession of all the land known as LR No 12422/21 situate in Muthaiga area, Nairobi city county.
  - d. Spent



- e. That in the alternative, pending the hearing and determination of the instant suit herein, the honourable court does issue an order of the preservation of the status quo over all the land known as LR No 12422/21 obtaining at the time of commencement of the instant suit.
  - f. That one Deka Plantations Limited be enjoined as 5<sup>th</sup> defendants/respondents in the suit herein.
  - g. That the costs of this application be in the cause.
2. That application is supported with 21 grounds listed on its face which gave a background status of the case. The applicant swore an affidavit dated November 7, 2022 to further support the granting of the orders sought. She deposed inter alia that the hearing of the substantive suit already commenced and on September 26, 2022 she took out a motion dated September 26, 2022 seeking for injunctive reliefs and amendment of the defence. That the said application is still pending having been fixed for hearing on December 14, 2022. The applicant deposes that she learnt that the Plaintiff/respondent had transferred the suit property LR No 12422/21 to Deka Plantations Ltd (the proposed 5<sup>th</sup> defendant) on May 12, 2022 and on October 30, 2022, the plaintiff together with the proposed 5<sup>th</sup> respondent advertised the property for sale after an alleged subdivision.
  3. The applicant continued that on information within her knowledge, on November 5, 2022, the proposed 5<sup>th</sup> defendant hosted an open day on the suit premises with a view to selling the same to various individuals. It is her contention that unless the orders sought are granted, the respondents actions which is an abuse of the court process will divest this court of jurisdiction. That it is only fair that the suit property be preserved so as to protect her interests which cannot be compensated by an award of damages.
  4. The application was opposed through a replying affidavit sworn by Rahul Bid on behalf of the plaintiff Mr Rahul deposed that the application was brought over six years from date of filing of the case and after the plaintiff had closed it is case on October 14, 2021. The plaintiff paraphrased the prayers contained in the plaint and the statement of defence on record. That as at the date of filing this application, the 1<sup>st</sup> defendant/applicant had no claim against the plaintiff so the orders should not be issued against a non-existence counter-claim.
  5. The plaintiff gave a narrative of how they acquired the suit property in paragraph 11 – 15 of the replying affidavit, arguing that the 1<sup>st</sup> defendant has no registrable interest in the suit property. In paragraph 18 and 19, the plaintiff deposes thus;
    18. That I am aware that by a letter dated April 5, 2016, the 3<sup>rd</sup> defendant informed us that a request had been made by the 1<sup>st</sup> defendant for the issuance to her of the deed plan No 111597.
    19. That despite our objections to the intended issuance of the deed plan no 111597, the 3<sup>rd</sup> defendant proceeded to unilaterally release to the 2<sup>nd</sup> defendant the certificate true copy of the deed plan no 111597, LR No 12422/21 for registration and eventual conveyance to the 1<sup>st</sup> defendant without the plaintiff's explicit permission.
  6. The plaintiff/respondent urged that the presence of the proposed 5<sup>th</sup> respondent is not necessary in this proceedings in facilitating the court adjudicate upon and settle the questions involved. They further contend that the interest of the proposed 5<sup>th</sup> respondent will not be affected by any orders to be issued by this court in light of the declaratory orders sought by the plaintiff. Mr Rahul concluded by deposing that the application is improperly founded on law, is premature and misconceived. He urged the court to dismiss the application with costs.



7. The parties argued the application through oral submission made on November 10, 2022. Mr Kago, learned Counsel for the applicant reiterated the grounds pleaded in support of the motion. Mr Githui advocate in reply admitted that they filed this suit to cancel a deed plan issued by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Counsel submits that the plaintiff has been in possession of the suit property since 1994 and that they had annexed ownership documents.
8. The issue for determination is to find out whether the 1<sup>st</sup> defendant/applicant has met any of the three principles laid out in the renowned case of *Giella v Cassman Brown* (1973) EA 358 for consideration of the granting of injunctive reliefs. The plaintiff argues that the application has failed to measure up as it discloses no prima facie case since the applicant has no registrable interest in the suit property. At paragraph 19 of the replying affidavit, the plaintiff explained that the 3<sup>rd</sup> defendant issued deed plan number 111597 to the 2<sup>nd</sup> defendant which was then conveyed to the applicant. It is this deed plan which the plaintiff/respondent has moved the court to be cancelled. At prayer (c) of the plaint, the plaintiff sought for an order compelling the 3<sup>rd</sup> defendant to re-call from the 2<sup>nd</sup> defendant and cancel the certified true copies of the deed plan 111597, LR 12422/21 already issued. They also sought an order to restrain the 2<sup>nd</sup> defendant from effecting any registration of the deed plan No 111597, LR 12422/21 that would convey any ownership to any 3<sup>rd</sup> parties. The plaintiff mentioned the prayers sought in the defence which include an order seeking to have her title cancelled and also for their eviction from the suit property.
9. Therefore, it is evident from the plaintiff's response that the defendants are holding some documents of ownership which the plaintiff wants cancelled. In the case of *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 prima facie case was defined as;

“Recently, this court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“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.”

We adopt that definition save to add the following conditions by way of explaining it. 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.”(underline mine for emphasis)



10. The plaintiff has not denied the averment by the applicant that in May, 2022 they transferred the suit title to the proposed 5<sup>th</sup> defendant. They have also not denied the activities of the proposed 5<sup>th</sup> defendant on the land including advertising this property for sale. The fact that there is no counter-claim on record does not mean the prayers contained in the existing statement of defence can be ignored. In order to afford the applicant an opportunity to present their defence on whether the documents in their possession are illegal, it is imperative that an order do issue to preserve the suit property.
11. The plaintiff deposed that this application was brought six (6) years from the date of filing of the case. However, from the pleadings filed in support of the actions complained of started in May 2022, September 2022 and on 5<sup>th</sup> November, 2022. The applicant cannot be faulted for any delay when the motion has been filed within 6 months of transfer to the proposed 5<sup>th</sup> defendant and two days of the date when the public open day was undertaken on the suit property.
12. With respect to whether the proposed 5<sup>th</sup> defendant should be joined to these proceedings, again the title having passed on to the proposed 5<sup>th</sup> defendant, the rules of natural justice require that such a party should not be condemned unheard. The plaintiff having not disclosed that the proposed 5<sup>th</sup> defendant is her agent, it follows that the said party be joined for final and inclusive determination of the dispute. order 1 rule 3 of the Civil Procedure Rules provides thus;

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
13. In light of the foregoing analysis, I find merit in the application and allow it in terms of prayers (c), (f) and (g) to wit;
  - i. That pending the hearing and determination of the suit herein, this honourable court be pleased to grant an order of Temporary Injuncting barring, prohibiting and/or stopping the 1<sup>st</sup> respondent and the Proposed 5<sup>th</sup> respondent/defendant from further dealing either by subdividing, hiving off, advertising for sale, selling charging or in any way interfering with the registration and/or possession of all the land known as LR No 12422/21 situate in Muthaiga area, Nairobi city county.
  - ii. That Deka Plantations Limited be and is hereby joined to this suit as 5<sup>th</sup> defendants/ respondents. The applicant shall serve them with pleadings in this suit to which they have a right of reply within 15 days of such service
  - iii. That the costs of this application be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY ON 20<sup>TH</sup> DECEMBER, 2022.**

**A. OMOLLO**

**JUDGE**

