



Ngolota v Mutiku (Sued as the administrator and legal representative of the Estate of Mutiku Nganda Kiamba - Deceased) (Environment & Land Case E031 of 2021) [2022] KEELC 15270 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E031 OF 2021
TW MURIGI, J
DECEMBER 7, 2022**

BETWEEN

LAZARUS MUTHINI NGOLOTA PLAINTIFF

AND

EDWARD KIVUVA MUTIKU (SUED AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF MUTIKU NGANDA KIAMBA - DECEASED) DEFENDANT

RULING

1. By a Notice of Motion dated 14th October, 2021 brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act and Order 40 Rules 1 (a), 2 and Order 51 of the Civil Procedure Rules, 2010 the Plaintiff/Applicant seeks the following orders: -
 - i. Spent.
 - ii. THAT this Honourable Court be pleased to make interim orders of injunction that the Defendant/Respondent by himself, his agents and/or servants be restrained from leasing, selling and/or in any manner disposing and/or whatsoever interfering with Land Parcel No. Nzai/kalamba/738 pending the hearing and determination of this application.
 - iii. THAT this Honourable Court be pleased to make interim orders of injunction that the Defendant/Respondent by himself, his agents and/or servants be restrained from leasing, selling and/or in any manner disposing and/or whatsoever interfering with Land Parcel No. Nzai/kalamba/738 pending the hearing and determination of the main suit.
 - iv. That an order of status quo to be maintained to issue.
 - v. That the cost of this application be provided for by the Defendant/Respondent.



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

The Applicant's Case

3. The Applicant averred that he purchased approximately one acre comprised within land parcel No. NZAUI/KALAMBA/738 from one Richard Mutiso Kimuli, the son to the Deceased. That the Defendant/Respondent being the Legal Representative of the Estate of the Deceased, wants to subdivide the suit property for sale without acknowledging his share of claim to the land. He further averred that the Defendant instituted Makueni ELC Case No. 62 of 2019 against him but later on withdrew the same after he supported his claim to the piece of land. He urged the Court to grant the orders sought.
4. Opposing the application, the Defendant filed an undated Replying affidavit in Court on 10th February, 2022. He denied having any knowledge of the sale of land to the Plaintiff. He further averred that he withdrew Makueni ELC Case No. 62 of 2019 because he wanted to pursue an amicable out of Court settlement. He averred that he is holding the suit property for himself and his co-beneficiaries.
5. The application was canvassed by way of written submissions.

The Plaintiff's Submissions

6. The Plaintiff's submissions dated 30th May, 2022, were filed in Court on 31st of May, 2022. Counsel for the Plaintiff raised the following issues for the Court's determination:-
 - i. Whether the Plaintiff/Applicant has a legal interest in the suit property herein.
 - ii. Whether the Plaintiff/Applicant has met the threshold to be granted the orders sought.
7. With regards to the issue of whether the Applicant has a legal interest in the suit property, Counsel submitted that on 14th of May, 2006, the Plaintiff entered into a sale agreement with one Richard Mutiso Kimuli(deceased) for the sale of one acre comprised in the suit property. That over the years the Applicant planted various fruit trees and other plants. Counsel went on to submit that the Applicant has been urging the Respondent who is the Legal Representative of the Estate of the deceased to sub divide the suit property so that he can get his land with its own title. Counsel contended that the Respondent was not truthful when he stated in his replying affidavit that the was unknown to him since he had previously instituted a suit against him. Counsel maintains that the Respondent is not only holding the land in trust for the other beneficiaries but for the Applicant as well.
8. With regards to the second issue, Counsel argued that the legal threshold for grant of an order of an injunction was outlined in the case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 where the Court laid down the conditions to be met by an Applicant.
9. On the first condition, Counsel submitted that the sale agreement between the Applicant and one of the beneficiaries of the Deceased establishes a prima facie case to justify his claim to the suit property. Counsel further submitted that after the Applicant purchased the land, he took possession of the same, and planted fruit trees and other plants. It was further submitted that the elders duly witnessed the sale transaction and planted sisal to indicate ownership of the same.



10. Counsel submitted that the Respondent had previously sued the Applicant in Makueni ELC Case No. 62 of 2019 and later on withdrew the same to pursue an amicable out of Court settlement. Counsel argued that the withdrawal was an admission that the Plaintiff has a good claim to support his title.
11. On irreparable injury, Counsel submitted that the Applicant has been in possession of the suit property since 2006. Counsel argued that the Plaintiff will suffer irreparable loss if the fruit trees planted by the Applicant end up being uprooted or destroyed since he will not be easily compensated. He went on to submit that the Applicant will suffer irreparable loss as the Respondent had embarked on destroying the stone fence and is eager to sell the land to unsuspecting buyers.
12. Lastly, on the balance of convenience, Counsel submitted that unless the orders sought are granted, the Defendant will continue to trespass, destroy the fence and sell the suit property. The Plaintiff relied on the list and bundle of authorities dated 30th May, 2022.

The Defendant's Submissions

13. The Defendant filed his submissions on 14th July, 2022. Counsel submitted that the main issue for determination is whether the Applicant has met the threshold for the grant of an injunction.
14. Counsel submitted that the Plaintiff has not established a prima facie case. Counsel argued that as per paragraph 3 of the supporting affidavit, the Plaintiff purchased the suit property from the Defendant's brother on 14th May, 2006 while the owner of the suit property who is the Defendant's father passed away on the 10th of July, 2009. It was contended that the sale agreement is misleading.
15. Counsel further submitted that the Defendant has no power to sell the suit property because he is holding the same on behalf of the other beneficiaries. Counsel further submitted that the Respondent withdrew the ELC suit at Makueni in good faith after it was agreed by the beneficiaries of the Estate that they should pursue an out of court settlement so as to save on costs.
16. Counsel contended that the Applicant does not stand to suffer irreparable injury because the orchid trees on the suit property were planted by the Defendant's late father. It is further submitted that the Plaintiff will not suffer irreparable injury because the Defendant has no powers to sell the suit property.
17. Lastly, on the balance of inconvenience, Counsel submitted that the Applicant will not suffer any inconvenience as he has not done any improvements on the suit property.

Analysis And Determination

18. Having considered the application, the affidavits and the rival submissions, I find that that the only issue that arises for determination is whether the Plaintiff has established the legal threshold for the grant of an injunction.
19. The law that governs applications for injunction is outlined under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides as follows: -
 1. Where in any suit it is proved by affidavit or otherwise-
 - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,



The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

20. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giella Vs Cassman Brown & Co. Ltd* [1973] EA 358 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.
21. I will first determine whether the Applicant has established that a prima facie case with a probability of success.
22. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case in the following terms: -

“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.”
23. The Applicant averred that on 14th May, 2006, he purchased one acre comprised in the suit property from the Defendant’s brother one Richard Mutiso Kimuli(deceased). In this regard he produced a sale agreement (annexure “LMN1”) in his supporting affidavit. He further averred that after he purchased the land, he took possession and planted trees and other crops.
24. The Respondent on the other hand averred that he was the Legal Representative of the Estate of his late father. He further averred that his late father is the registered owner of the suit property. He averred that his late father died on 10th July, 2009. That averment was not controverted by the Plaintiff/Applicant. He further averred that he was holding the land in trust for other beneficiaries.
25. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides as follows;
Subject to this Act;
The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
26. Section 25 of the *Land Registration Act* provides for the rights of a proprietor. It provides as follows:
I. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;...
27. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the right can be taken away.
28. It is not in dispute that the suit land is registered in the name of the late Mutiku Nganda Kiamba. The sale agreement was executed by the Applicant and Richard Mutiso Kimuli(deceased). The deceased did not have the capacity to sell the land as he was not the registered owner. He therefore did not have



the capacity to pass title to any other person. In any event, Section 26 of the Land Registration Act, 2012 recognizes a certificate of title issued to a proprietor of land as the only prima facie evidence of absolute and indefeasible ownership.

29. On the basis of the material placed before me, I find that the Plaintiff has not established a prima facie case with a probability of success.
30. For the Plaintiff to succeed in this application, all the three elements must be demonstrated. This was the finding by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, CA No. 77 OF 2012 which held thus: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

31. The Plaintiff having failed to establish a prima facie case, it would be immaterial for me to consider the other principles governing the grant of an injunction enunciated in the case of *Giella Vs cassman Brown* (Supra).
32. The upshot of the foregoing is that the Plaintiff’s application is devoid of merit and the same is dismissed with costs to the Defendant.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF DECEMBER, 2022.

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Munyasya for the Applicant.

