



REPUBLIC OF KENYA



Makhanu & 3 others v Makhanu & another (Environment & Land Case E023 of 2024) [2025] KEELC 472 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E023 OF 2024**

EC CHERONO, J

FEBRUARY 6, 2025

BETWEEN

MARY NASIMIYU MAKHANU 1ST PLAINTIFF

MARY MAKOKHA MAKHANU 2ND PLAINTIFF

PETER JUMA MAKHANU 3RD PLAINTIFF

BENJAMIN MAKHANU 4TH PLAINTIFF

AND

JOHN WAMALWA MAKHANU 1ST DEFENDANT

RASTO MAKHANU SITUMA 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed this suit contemporaneously with a Notice of Motion application under certificate of urgency dated 14th November, 2024 seeking the following orders;
 1. (Spent).
 2. That this Honourable court be pleased to issue temporary orders of injunction restraining the Respondents whether by themselves or their agents or anyone else purporting to act in any capacity as accorded by the Respondents from disposing, utilizing, leasing and construction on any part of Land parcel E.Bukusu/n.sangalo/5822 Measuring approximately 0.05Ha. and parcel No. E.Bukusu/n.sangalo/2623 pending the hearing and determination of this application.
 3. That this Honourable court be pleased to issue temporary orders of injunction restraining the Respondents whether by themselves or their agents, or anyone else purporting to act in any capacity as accorded by the Respondents from disposing, utilizing, leasing and construction on



any part of Land parcel No. E.Bukusu/s.kanduyi/5822 Measuring approximately 0.05Ha. and parcel No. E.Bukusu/n.sangalo/2623 pending the hearing and determination of the main suit.

4. That costs of this application be provided for.
2. The application is supported by grounds on the face of the said application and the affidavit of Mary Nasimiyu Makhanu, the 1st plaintiff/Applicant herein sworn on even date.
3. The Defendants/Respondents opposed the application through their respective Replying affidavits sworn on 4th December 2024.

Plaintiffs/applicants Summary Of Facts

4. In her supporting affidavit, the 1st plaintiff/Applicant deposed that they are co-wives with Mary Makokha Makhanu, the 2nd Plaintiff/Applicant herein and that the 2nd Defendant/Respondent is their husband. She stated their husband acquired Land parcel No. E.Bukusu/n.sangalo/5822 Measuring Approx. 0.05Ha. and parcel No.E.Bukusu/n.sangalo/2623 Measuring Approx. 3.6Ha. through monies contributed by her and the 2nd Applicant. She stated that they used to milk their cows and sell the milk which proceeds were the handed over to their husband for purposes of purchasing the said properties.
5. They contend that they were also farming sugarcane and upon sale, the proceeds would similarly be handed over to their husband for purposes of purchase of the two parcels. She stated that when the transactions were completed, they gave spousal consent to have the two properties registered in the name of their Husband, the 2nd Defendant/Respondent herein as the sole proprietor with the agreement that the same would be held in trust for the benefit of all their children. She stated that their husband held a family including his sons and daughters excluding her and the 2nd Applicant on 29th September 2024. After the said meeting, it was brought to their attention by the boys that the 2nd Respondent intimated to them of his intention to lease Land Parcel No. E.Bukusu/N.Sang'alo/5822 Measuring Approximately 0.05HA. to the 1st Respondent for 30 years.
6. The 1st Applicant further deposed that they realized that the consent agreement which had been prepared for them to sign stated that the 1/2 of the parcel was to be transferred to the 1st Respondent herein and in fact did not mention anything concerning the purported lease.
7. She stated that she knows of her own knowledge that her husband cannot read as he is illiterate and it is therefore her believe that that may be a ploy by the 1st Respondent in an attempt to trick her husband into signing away half of their jointly acquired property. She stated that her consent was not sought in reaching the said decision and neither was the consent of her co-wife. She stated that the 1st Respondent has gone ahead and brought down the structures that were on the said parcel and is presently in the process of constructing permanent structures thereon. She stated that it is further her believe that parcel No.E.Bukusu/N.Sang'alo/2623 Measuring Approx. 3.6HA. may have been charged by the 1st Respondent herein to obtain funds he is using to construct the aforementioned permanent structures.

The 1St Respondents Summary Of Facts.

8. In his replying affidavit sworn on 4/12/2024, the 1st Respondent stated that he has been advised by his advocates on record which advice he believes to be true that the Applicants have not established a prima facie case as set out in the celebrated case of Giella v Casman Brown Co. Ltd (1973) E.A. 358 and in the unlikely event that the Applicants herein are successful in their case, they can be adequately compensated by an award of damages and therefore do not deserve the equitable remedy of



an injunction. The 1st Respondent further stated that to the best of his knowledge, no prejudice and/or irreparable loss and damage would be suffered by the plaintiffs/Applicants if the injunctive orders sought are disallowed. He stated that the allegations by the plaintiffs that he must have charged land parcel No. E.Bukusu/N.Sang'alo/2623 to a financial institution to obtain funds to develop land parcel No. E.Bukusu/N.Sang'alo/5822 is false and misleading as he is using his retirement benefits to develop the land with blessings from his father, the 2nd Respondent herein. He also stated that to the best of his knowledge, his father purchased land parcel No. E.Bukusu/N.Sang'alo/5822 from Wepukhulu Okwisia in 1969-1972 way before he married the 1st and 2nd plaintiffs herein.

9. He stated that the 1st plaintiff/Applicant and her family stays on land parcel No. E.Bukusu/N.Sang'alo/1362 Measuring 2.83 HA. which land his father bought from Wasike Mukwei. That the 2nd plaintiff/Applicant and her family live on land parcel No.E.Bukusu/N.Sang'alo/1395 Measuring 2.65 which was bought by his father from one Khamala Situma Kwachila. He stated that to the best of his knowledge, the dairy and sugarcane farming activities started in the year 1975 and 1977 respectively and therefore the same could not have been used to acquire land that was purchased in the year 1969 and 1972. That to the best of his knowledge, the raised from sugarcane proceeds were used to pay school fees for his siblings and were never used for the purchase of land. He stated that he was authorised by the 2nd Defendant herein to build the temporal structures on the land which structures have assisted him raise an income for his upkeep after realizing that his step-mothers were not taking care of him. He stated that after he retired last year 2024, he discussed with his father the possibility of removing the temporal structures so that he would develop the property. He stated that his father promised to meet and discuss with all the family members and thereafter come back to him. He stated that the meeting was held on 29th September, 2024 and after several deliberations, the general consensus was that his was free to do what he wants with the land. He said that his father approached him and requested him to develop the entire property but divide it into two portions so that one portion belongs to his father and the other portion belongs to him. He then sought approval from the relevant authorities including the County Government of Bungoma, NEMA & NCA who approved the said construction. He stated that at the time the order was served upon him, the construction had been completed at least 90%

Legal Analysis And Decision

10. I have considered the application, the supporting affidavit, the supplementary affidavit, the Replying affidavit, the rival submissions and the relevant law. The application under review is brought under Sections 3, 3A and 63(e) CPA and Order 51 CPR. What the Plaintiffs/Applicants are seeking is an order of injunction. The principles for the grant of injunction was set out in the celebrated case of *Giella v Cassman Brown & Co. Ltd* (1973) E.A 358. These are that first the applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly, that if the court is in doubt, as to the existence or otherwise of a prima facie case, it should decide the application on a balance of convenience. I am reminded that at this interlocutory stage, I am not called upon to make definitive findings of fact and law and particularly on conflicting and contentious propositions of law.
11. The position taken by the Applicants is that though the 2nd defendant who is the Husband to the 1st and 2nd plaintiffs is the registered proprietor of the suit properties, he holds the same in trust for himself and the rest of the family members. They deposed in the supporting affidavit that the suit properties were acquired from monies raised from the proceeds of milk and sugarcane. I have perused the documents annexed to the supporting affidavit and find no single receipt attached showing any monies received from any of the sugar buying/milling companies or dairy societies. The Applicant also referred to an



agreement where they alleged to have allowed the two properties to be registered in the name of the 2nd Defendant on agreement that the 2nd Defendant will hold the same in trust for the benefit of all their children. No such agreement has been annexed to the application. The copies of title deeds and the certificates of official search for the suit properties do not indicate that the 2nd Defendant as a trustee but an absolute proprietor. In my view, the Applicants have not established a prima facie case to warrant the grant of the orders sought. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125, the Court of Appeal fashioned a definition for prima facie in the following terms;

“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 later. 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 appellant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

12. I agree with the reasoning by the superior court which is binding on me. The Applicants whom the burden of proving prima facie case have not demonstrated 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. 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. I find that the Applicants have not established the same.

13. In regard to the second issue, the Applicant must demonstrate that he will suffer irreparable injury which cannot be compensated by an award of damages. In the case of *Pius Kipchirchir Kogo V Frank Kimeli Tenai* (2018) eKLR, the court explained the term irreparable injury as follows;

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

14. I have looked at both the supporting affidavit and the supplementary affidavit and find nowhere the Applicant has stated how they will suffer irreparable injury unless the injunction order is granted. It is only in their submissions that the 1st and 2nd Applicants submitted that they stand to lose property approximately 20,000,000/ which was acquired jointly during the course of their marriage and the 3rd and 4th Applicants stand to lose a substantial portion of their inheritance. However, the Applicants have not shown or demonstrated that the Respondents are incapable of paying them the said amount if the injunction is not granted and the suit is subsequently allowed. On this issue, I also find that the Applicants have not satisfied this court that they will suffer irreparable injury that cannot be compensated by damages if the injunction order is not granted.

15. On the last condition, the law provides that where the court is in doubt, the Applicants are required to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo V Frank Kimeli Tenai*(supra) also defined the concept of balance of convenience in the following terms;

“The meaning of balance of convenience will favour of the plaintiffs is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show



that the inconvenience caused to them will be greater than that which may be caused to the defendants.

Inconvenience be equal, it is the plaintiff who will suffer. In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”

16. The Applicants have not shown that the inconvenience caused to them will be greater than that which may be caused to the Defendants/Respondents if the injunction order is not granted.
17. For the foregoing reasons, I find the Notice of Motion application dated 14th November 2024 devoid of merit and the same is hereby dismissed with each party to bear their own costs. I also discharge the interim injunction orders issued in the first instance on 14/11/2024.

Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 06TH DAY OF FEBRUARY, 2025

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr Makokha for the Respondent.

M/S Masengeli for the Applicant

Bett C/A.

