



**Marakia v Simiyu & another (Environment & Land Case
E019 of 2024) [2025] KEELC 1065 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E019 OF 2024**

EC CHERONO, J

MARCH 6, 2025

BETWEEN

JEREMIAH MUSYOKI MARAKIA PLAINTIFF

AND

ROBAI NAMISI SIMIYU 1ST DEFENDANT

LAND REGISTRAR BUNGOMA COUNTY 2ND DEFENDANT

RULING

1. This ruling is in respect to the Applicant's Notice of Motion dated 12/04/2024 filed contemporaneously with the Originating Summons. In the said application the Applicant seeks the following orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That there be temporary injunction restraining the respondents, their agents and or servants from interfering with, alienating, disposing off and or transferring the suit parcel of land Malakasi North/Central Namwela/ 162 measuring 2.0 acres and Malaksi North/Central Namwela/236 measuring 1 ¼ pending hearing and determination of this suit.
 - e. That this honourable court be pleased to issue an inhibitory order, inhibiting the registration of any dealings in respect of suit parcel of land Malakasi North/Central Namwela/ 162 measuring 2.0 acres and Malaksi North/Central Namwela/236 measuring 1 ¼ pending hearing and determination of this suit.
 - f. That costs be provided for.



2. The application is premised on the grounds set forth on the face of the application Supported by the Affidavit of the applicant herein sworn on the 12/08/2024. The gist of the application is that the 2nd defendant/Respondent through a fraudulent scheme and an illegal court order caused the 1st Respondent to be registered as owner of his land parcel NO. Malakasi North/Central Namwela/ 162 measuring 2.0 acres and Malakasi North/Central Namwela/236 measuring 1 ¼(hereinafter referred to as ‘the suit properties). That the 1st Respondent registered the above named portions as part of her land. That unless the orders sought are granted, the 1st Respondent may dispose of the same causing him irreparable losses despite being in occupation.
3. In opposition thereto, the 1st Respondent filed grounds of opposition dated 24/08/2024 and a replying affidavit sworn on 09/10/2024. In his Replying affidavit, the 1st Respondent deposed that his parents Robai Namisi Simiyu and the late Peter Simiyu Wafula purchased the suit properties from one Festo Wakhabu who was the registered owner of land parcel NO. Malakasi North/Central Namwela/162 while Malakasi North/Central Namwela/236 was registered in the name of Cheloti Tenge in the year 1968. That they took possession of the two parcels of land and the said Festo Wakhabu relocated. That they have enjoyed occupation and possession of the two parcels of land until the year 2019 when one Elkana Nyongesa came claiming ownership as a result of a succession cause.
4. That they challenged the said Elkana Nyongesa’s registration as the proprietor of the suit properties in Bungoma ELC Case No. 27 of 2019(OS) which case was heard and determined and judgment issued on 01/02/2022. That transfer was effected and a title deed dated 06/07/2022 issued to the 1st Respondent. It was his contention that they are in possession and occupation of the suit properties by planting food crops and trees and termed the applicants application as incompetent.
5. When the application came for directions, the parties agreed to have the same canvased by way of written submissions. The Plaintiff/Applicant filed his submissions dated 20/08/2024 and 18/11/2024 where he argued that he has demonstrated the requirements for the grant of the orders sought and that this suit is not res judicata. The 1st Respondent filed her submissions dated 26/010/2024 where she submitted that this suit is res judicata and that the Applicant/Appellant is attempting to appeal the judgment in Bungoma ELC Case No. 27 of 2019(OS), that this court has no jurisdiction to determine the same and that the requirements for the grant of the orders sought have not been established.

Legal Analysis and Decision

6. I have considered the application, affidavit in support of the application, grounds of opposition, replying affidavit, and their accompanying annexures. I have also considered and weighed the rival submissions in this application as regards the grant of orders of temporary injunction and also taken into consideration the judicial decisions cited and attached.
7. The first issue for determination is whether the suit is res judicata. The substantive law on Res Judicata is found in Section 7 of the [*Civil Procedure Act*](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”



8. In *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others* (2017) eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:-
- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'
9. From an examination of the pleadings, it is clear that the cause of action in the two cases is not similar and that the parties therein are also distinct. In as much as the subject matter in the two suits is similar, from the foregoing, my view is that both parties ought to be afforded an opportunity to present their case for determination on merit. The position I take is affirmed in the case of *Kundan Singh Construction Limited & Another v Tanzania National Roads Agency* [2019] eKLR where the Judges of the Court of Appeal held that the interests of justice dictate that the parties in the case should proceed to have their day in court to have it fully heard and determined on its merits once and for all. As such, I find that the suit is not res judicata and this court has jurisdiction to hear and determine the same.
10. The second issue for determination is whether the applicant has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.
11. The guiding principles for the grant of orders of temporary injunction and an order of inhibition as sought. It is well settled and set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) (2014) eKLR where the Court of Appeal held that;
- “in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
- These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
12. Consequently, the applicant ought to, first, establish a prima facie case. The applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd Versus First*



American Bank of Kenya Ltd (2003) EKLK where the Court of Appeal defined prima facie case in the following terms:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

13. In the plaint, the Plaintiffs/Applicants have attached copies of sale agreements dated 15/11/2016 and 06/08/2016, demonstrating that they acquired the suit properties through purchase.

14. Secondly, The Plaintiff has to demonstrate that they would suffer irreparable injury if a temporary injunction is not granted. The judicial decision in the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLK provides an explanation for what is meant by irreparable injury and it states;

“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.

15. The Applicant deposed on oath that he is in possession and occupation of the suit property. The 1st Respondent on her part stated that she is also in use and possession of the land and that her occupation led to her obtaining the title. When the present application was filed under certificate of urgency, this court granted temporary injunction orders restraining the Respondents by themselves, their servants or agents from interfering with, disposing off or transferring the suit properties pending hearing and determination of this application. The 1st Respondents did not file an application to set aside/vacate the said ex-parte orders if indeed she was in possession and occupation of the suit properties. I agree with the Applicant that he is the one in actual possession and occupation of the suit properties. As such, I find that he has established a prima facie case and also demonstrated that he will suffer irreparable loss unless the orders sought are not granted.

16. Thirdly, the applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLK, the court attempted to define the term ‘balance of convenience’ as follows;

‘The meaning of balance of convenience will favour of the Plaintiff’ 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”.

17. Bearing all the above in mind, I am convinced that there is a higher risk in declining to grant the injunction orders pending the hearing of the main suit on merits. This is because I have noted that the Applicant in his supporting affidavit deposed that he is currently in occupation of the suit property



and stands a higher risk if he is evicted and the subject property disposed of before the suit is heard and determined thereby rendering the suit an academic exercise.

18. In view of the foregoing, I find that the Applicant has met the threshold for the grant of the equitable injunction orders sought.
19. The upshot of the above is that the application dated 12/04/2024 is merited and the same is allowed in the following terms;
 - a. That the temporary injunction orders issued in the first instance on 14th August 2024 is hereby confirmed and extended for a further eight (8) within which this suit must be heard and determined.
 - b. That the plaintiff/Applicant to take pragmatic steps to prosecute this suit within the eight Months failing which the injunction orders herein shall lapse.
 - c. That the costs of the application shall be costs in the cause.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 06TH DAY OF MARCH, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of:

- 1 Mr. Makokha for 1st Respondent
2. Applicant/Advocate-absent
3. 2nd Respondent/Advocate-absent.
4. Bett C/A

