



**Azhar v Tayabali & another (Environment & Land Case  
E148 of 2023) [2024] KEELC 3640 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3640 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E148 OF 2023**

**MD MWANGI, J**

**MAY 2, 2024**

**BETWEEN**

**AZHAR MAQSOOD AHMED FAKIR ALIASAZHAR TAYABALI ... APPLICANT**

**AND**

**NAZIR NOORDIN TAYABALI ..... 1<sup>ST</sup> RESPONDENT**

**KENZI RESIDENCY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

(In respect of the Plaintiff's Notice of Motion dated 31<sup>st</sup> October, 2023 and the Preliminary objection by the 1<sup>st</sup> Defendant/Respondent under the Limitations of Actions Act)

**Background**

1. The Plaintiff filed this suit on 2<sup>nd</sup> November, 2023 by way of a Plaint dated 31<sup>st</sup> October, 2023. In the Plaint, the Plaintiff pleads that she is a sibling of the 1<sup>st</sup> Defendant. The Plaintiff essentially seeks to challenge the transfer of LR No 1870/111/381 (hereinafter referred to as 'the suit property') by the 1<sup>st</sup> Defendant solely to himself on 20<sup>th</sup> July, 2012 terming it as fraudulent, wrongful and unlawful. It is the Plaintiff's case that the suit property was supposed to have been transferred to herself and the 1<sup>st</sup> Defendant to hold in common in equal shares being a gift from their deceased mother.
2. The Plaintiff alleges fraud against the 1<sup>st</sup> Defendant which she has particularized under paragraph 28 of the Plaint. She prays for a declaration that the purported transfer by the 1<sup>st</sup> Defendant of the suit property solely to himself was fraudulent, wrongful and unlawful, an order of specific performance, compensation and in the alternative an order that she be paid compensation equivalent of the market value of her half share of the suit property amongst other prayers.
3. Alongside the Plaint, the Plaintiff filed the Notice of Motion dated 31<sup>st</sup> October, 2023 seeking for an order of temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents by themselves,



their agents, servants, employees and or otherwise from proceeding with construction/development being erected upon the suit property pending the hearing and determination of this suit. The Plaintiff/Applicant further prays for an order inhibiting the registration of any dealing with the suit property until the determination of this suit or upon consequent order of this court.

4. The Plaintiff's application is premised on the grounds on the face of the application and on the supporting affidavit deposed by the Plaintiff on 31<sup>st</sup> October, 2023. The Plaintiff alleges that she noticed some massive development coming up on the suit property in mid-2023 which was taking place without any consultations or information to her as an equal owner of the suit property. Her consent too was not sought by the 1<sup>st</sup> Defendant with whom she supposedly owns the suit property in equal shares.
5. The upcoming development on the suit property is what prompted her to carry out investigations and to her dismay, she discovered that on 20<sup>th</sup> July, 2012, the 1<sup>st</sup> Defendant/Respondent had fraudulently transferred the suit property solely to himself excluding her in spite of the fact that the property was willed and gifted to both of them in common and in equal shares by their late mother.

### **Responses by the Defendants/Respondents**

6. The Plaintiff's application is opposed by both Defendants/Respondents who responded to it by way of replying affidavits. The 1<sup>st</sup> Respondent additionally filed a preliminary objection. The 1<sup>st</sup> Defendant/Respondent's Preliminary Objection is to the effect that the Plaintiff's claim is time barred. The 1<sup>st</sup> Defendant avers that the Plaintiff's cause of action herein relates to recovery of land and is time barred as the same arose on or about 2<sup>nd</sup> September, 2011. Therefore, the 1<sup>st</sup> Defendant contends that the Plaintiff's suit was filed after the lapse of 12 years from the date that the cause of action accrued, contrary to Section 7 of the [Limitation of Actions Act](#).

### **Issues for determination**

7. The issues for determination are only two, namely:
  - i. Whether the Preliminary Objection by the 1<sup>st</sup> Respondent is merited.
  - ii. Whether the Plaintiff/Applicant's application is merited.

### **Analysis and Determination**

8. The Provisions of Section 7 of the [Limitation of Actions Act](#) limits an action to recover Land to twelve years. The Section provides that:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
9. As I had already pointed out, the Plaintiff's case challenges the registration of the transfer of the suit property by the 1<sup>st</sup> Defendant solely to himself on the 20<sup>th</sup> July, 2012, which she terms as fraudulent, wrongful and unlawful.
10. The Plaintiff's pleadings in my view are clear on this issue. The cause of action accrued on 20<sup>th</sup> July, 2012. The cause of action having arisen on 20<sup>th</sup> July, 2012, the Plaintiff was within the twelve years' timespan when she filed her suit on the 2<sup>nd</sup> November, 2023.



11. The Preliminary Objection by the 1<sup>st</sup> Respondent is therefore unmerited and is hereby dismissed with costs to the Plaintiff.
12. On the 2<sup>nd</sup> issue, the law is well settled since the *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 case. The conditions for the grant of orders of temporary injunction are:
  - a. The Applicant must show a *prima facie* case.
  - b. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not be adequately compensated by an award of damages.
  - c. If the Court is in doubt, it will decide the Application on a balance of convenience.
13. In the case of *Nguruman Ltd v John Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal stated that the three conditions (stipulated in the *Giella* case) are to be applied as separate, distinct and logical hurdles which are to be surmounted sequentially. Meaning that, an Applicant must establish all the conditions one after the other.
14. In the case of *Nicholas Njeru Muturi v Thome Dynamics Limited & another* [2022] eKLR this court analyzed the essence of the holding in the *Nguruman* case and found that:

‘...if a *prima facie* case is not established, the Court need not go farther to consider if the Applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.’
15. In this case, whereas I have no doubt that the Applicant has surmounted the 1<sup>st</sup> condition on *prima facie* case, she has not definitely surmounted the 2<sup>nd</sup> one. I say so because, looking at the prayers that the Plaintiff has sought in her *Plaint*, it is clear that she can be compensated by way of damages. She has sought amongst other prayers for an order directing that she be compensated at the market value for her half share of the suit property. Such market value is ascertainable. She has further sought general damages for fraud.
16. I too need to point out that the Plaintiff has not sought an order of permanent injunction in her *Plaint*. That again, on its own, is sufficient reason to deny her prayer for a temporary injunction.
17. The upshot is that the Plaintiff’s application lacks merit. It is dismissed with costs to the Defendant/ Respondents.
18. I direct that the pre-trial procedures be set in motion forthwith to expedite the hearing of this suit.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY, 2024.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms Mbirwe for Mr. A.G.N. Kamau for the Plaintiff/Applicant

Ms Salim holding brief for Mr. Kimathi for the 2<sup>nd</sup> Defendant/Respondent

Mr. Hasham holding brief for Mr. Maloba for the 1<sup>st</sup> Defendant/Respondent



Yvette: Court Assistant:

**M.D. MWANGI**

**JUDGE**

