



Muthanje v Kungula & 2 others (Environment & Land Case 6 of 2023) [2024] KEELC 4465 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 6 OF 2023**

A KANIARU, J

MAY 7, 2024

BETWEEN

FLORENCE MUTHANJE PLAINTIFF

AND

MARK WANJALA KUNGULA 1ST RESPONDENT

ISAIAH TITO NYAGA 2ND RESPONDENT

LAND REGISTRAR EMBU 3RD RESPONDENT

RULING

1. Before me for determination is a Notice of Motion application dated 14.02.2023 and filed on 15.02.2023 brought under a Certificate of Urgency. It is expressed to be brought under Order 51 rule 1, Order 40 rules 1,2 and 4 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act*, Section 17 of the *matrimonial property act*, Article 159 of *the constitution* of Kenya, and all enabling laws. The applicant – FLORENCE MUTHANJE – is the Plaintiff in the suit while the 1st – 3rd respondents– MARK WANJALA, ISAIAH TITO NYAGA and THE LAND REGISTRAR EMBU – are the 1st -3rd defendants in the suit respectively. The application is seeking the following orders;

1. Spent
2. Spent
3. That pending the hearing and determination of the suit a conservatory order do issue restraining the 1st and 2nd respondents either by themselves, their agents and/or servants from selling, transferring, charging, leasing, disposing or in any manner adversely dealing with title L.R NO. Mbeti/Gachoka/2228.



4. That pending the hearing and determination of the suit a conservatory order do issue restraining the 1st and 2nd respondents either by themselves, their agents and/or servants from harassing, interfering, evicting, denying access to the plaintiff, or the commission or omission of any act in any manner that may adversely affect the interest of the plaintiff in title no LR NO. MBETI/GACHOKA/2228.
 5. That there be a stay of proceedings in CMCC No. E147 of 2021 Embu between Mark Wanjala Kungula and Florence Muthanje, David Ndwiga Gititi pending the hearing and determination of the suit.
 6. That costs of and incidental to this application be provided for.
2. The application is premised on the grounds on the face of it and on the supporting affidavit sworn by Florence Muthanje dated 14.02.2023. The applicant's main contention is that the suit land, being LR MBETI/GACHOKA/2228, is matrimonial property acquired during the subsistence of the marriage between her and the 1st respondent in 1997 and which land was registered in the name of the 1st respondent to hold in trust for her and their children. That without the applicant's spousal consent and knowledge, the 1st respondent transferred the suit land to the 2nd respondent on 18.10.2021, which transfer was irregular and fraudulent as it disregarded the applicant's spousal interest in the land and for being done without following due process in handling matrimonial property. That their daughter the late Grace Nelima Wanjala was interred on the suit land on 20.09.2021.
 3. That the 1st respondent has filed civil suit no. E147 of 2021, Embu, against the applicant, seeking to have the remains of the late Grace Nelima exhumed and buried elsewhere with the aim of rendering vacant possession to the 2nd respondent. That the actions by the 1st respondent have denied the applicant the right to property and peaceful occupation of the land which has caused her emotional pain, anguish and grief as she has had no time to mourn the death of her daughter whose body is now at risk of being exhumed should Civil suit E147 OF 2021 be allowed to proceed. That a customary trust would be presumed to have been created in favour of the applicant and their children whether or not they are in possession or actual occupation of the land. That the applicant depends on the suit land for subsistence farming.
 4. That unless restrained, the respondents will continue to interfere and/ or may sell the suit property to defeat the claim and/or waste the same causing the applicant irreparable damage. That the 1st respondent has interfered with the applicant's peaceful and lawful entry into the property and she cannot access the grave. That should the respondents not be restrained, she stands to suffer irreparable damage. That she has established a prima facie case to warrant the orders sought. That her constitutional right to own property should not be violated.
 5. The application was responded to by the 1st respondent vide a replying affidavit dated 17.03.2023 and filed on the same date and he deposed inter alia; that the suit land which previously belonged to him belongs to the 2nd respondent lawfully. That he acquired the said land solely without the contribution either financial or otherwise from the applicant, and that the land was not matrimonial property as alleged. That the applicant together with him have never lived on the suit land as there has never been any home or house on the land. The land is bare and does not have any structure on it except the fence put up by the 2nd respondent. That he never consented to his late daughter being interred on the suit land as that was solely decided by the applicant and her brothers to his exclusion, hence the filing of civil suit E147 of 2021 challenging the decision to bury his late daughter on the land.



6. That the said civil suit is not about ownership of the suit land but a burial dispute and therefore has no bearing on this case and vice versa. That there are no grounds for staying the proceedings in the said suit as the same is not a land case and therefore is not under the supervisory jurisdiction of this court. That no spousal consent or any other consent was required from the applicant as he was the sole proprietor of the said land. That the applicant has never lived on or utilized the suit land and she cannot therefore claim to be at the risk of being evicted from the land. That the allegations by the applicant that she is being harassed or threatened by the 2nd respondent are false as she does not live on the said land. That the applicant is seeking orders that are meant to infringe on the 2nd respondents proprietary rights to the suit land which will be prejudicial to him. That the applicant is seeking orders in the wrong forum. He urges that the application be dismissed with costs to him.
7. The 2nd respondent on the other hand equally responded to the application by way of a replying affidavit sworn on 17.03.2023 where he deposed that; he is the lawful proprietor of the suit land which he acquired from the 1st respondent lawfully and therefore he is entitled to exercise proprietary rights over the same without any interference. That he is an innocent purchaser of the suit land without notice of any claim or interest in the said land from the applicant or any other person. That after he bought the land, he took vacant possession of the same which land did not have any house, structure or development on it and on which nobody was living in or utilizing. That the applicant cannot pray not to be evicted from the land when she does not and has not lived on the land at any time.
8. That the applicant has not explained why she wants to access the land yet she has nothing therein. That he conducted due diligence prior to acquiring the land and the same was registered in the name of the 1st respondent and there were no encumbrances on the register of the land. That at the time he bought the land, the applicant was not the spouse of the 1st respondent and therefore no spousal consent was required to be sought from her. He urged that the application be dismissed with costs.
9. The application was canvassed through written submissions. The Applicant's submissions were filed on 05.12.2023. It was submitted that in this case, the applicant has sought orders that the sale of the suit property was null and void on account of lack of spousal consent. That the applicant has established a prima facie case as is defined in the case of *Mrao Ltd v First American Bank of Kenya & 2 others*. That the applicant has established a prima facie case based on the argument that there was no spousal consent obtained when the law did require one and also on the fact that upon divorce, the applicant has been living on the suit land where their daughter is also interred. That the applicant continues to suffer irreparable loss that cannot be compensated by an award of damages as she has been rendered homeless and destitute as the suit property is the only place she knew and called home.
10. That the 2nd respondent has gained access to the suit land and the applicant is apprehensive that unless this court intervenes, the respondents are in the process of selling the property to render the whole suit nugatory. The cases of *MWK V PKM Interested party Equity Bank (Kenya) Ltd (2019) Eklr*, *JKN V JWN & 3 Others (2022) Eklr*, *Mugo Muiru Investments Ltd v EWB & 2 others (2017) Eklr* were cited in support of the submissions.
11. The 1st & 2nd Respondents on the other hand filed their submissions on 12.02.2024. It was submitted that the application herein is defective in the manner in which the prayers are framed. That the application seeks conservatory orders which are orders in rem and not orders in personam which defect cannot be cured by Article 159(2)(d) of *the constitution*. The case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014) eklr (civil application 5 of 2014)* was cited in support of this submission. It was submitted further that the applicant has not proved that she lives on the suit land and therefore under threat of eviction. She has not provided any evidence of her alleged developments,



or trees or subsistence farming on the suit land that is under threat of being destroyed and in the absence of that, the court should not exercise discretion in her favour.

12. That civil case no. 147 of 2021 was determined in favour of the 1st respondent and the prayer seeking for stay of the said suit has therefore been overtaken by events. The cases of Charter House Investments Ltd v Simon K. Sang & 3 others (2010) Eklr, Nguruman Ltd v Jan Bonde Nielsen & 2 Others (2014) Eklr were cited. It was urged that the applicant has not proved that she has a prima facie case against the respondents neither has she demonstrated that she stands to suffer irreparable loss that cannot be compensated by damages. That the balance of convenience shifts towards the respondents bearing in mind the 2nd respondent is in occupation of the suit land as the registered proprietor and it would be unfair to curtail his rights without any justification as in this case. That the respondents are capable of compensating the applicant for any loss she might suffer. They urge that the application be dismissed.
13. I have considered the Notice of Motion as filed, the Respondents' Replying affidavits together with the rival submissions and I find that two issues are for determination;
 - i. Whether the Applicant is entitled to restraining orders;
 - ii. Whether the applicant is entitled to an order of stay of proceedings.
14. On the first issue of whether the Applicant is entitled to restraining orders, the guiding principles in handling this were principles laid down in the case of Giella vs Cassman Brown Co. Ltd (1973) 358 which are that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages, and finally that when the court is in doubt, it will decide the application on a balance of probabilities.
15. On whether the Applicant has established a prima facie case with probability of success. A prima facie case was defined by the Court of Appeal in Mrao Ltd vs First American Bank Kenya Ltd & 2 Others [2003] eKLR as follows:

“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.”
16. The suit land is said to now be registered in favor of the 2nd respondent who acquired it from the 1st respondent, a fact which is not in dispute. What is in dispute however is the legality of the transfer of the suit land to the 2nd respondent as the applicant claims that's she did not grant spousal consent which according to her, was supposed to be obtained from her first before the land was transferred by the 1st respondent as the same was matrimonial property. The 1st respondent on the other hands states that he was the sole proprietor of the suit land and therefore he did not require spousal consent or any type of consent before transferring the suit land from the applicant.
17. The court at this point is however not in a position to make a conclusive determination on whether the suit land was acquired through the joint effort of the applicant and the 1st respondent as that would require a full hearing. However it is not disputed that the land was obtained in the year 1996 during the subsistence of the marriage between the applicant and the 1st respondent, which is a factor that points to the possibility that the suit land could be considered to be matrimonial property as per section 6 of the *matrimonial property act*. The same was also transferred to the 2nd respondent in the year 2021 after it was made a requirement for a party to obtain spousal consent before transfer of matrimonial



property, which the 1st respondent does not deny he did not obtain. On the basis of this, I do find that the applicant has established a prima facie case with probability of success.

18. As regards the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages.

The Court of Appeal in *Nguruman Limited Vs Bonde Nielsen & 2 Others* (2014) eKLR as cited in *Isaac Musyoki Komoni v Sammy Kaumbulu Mbuvi* [2022] eKLR held that: -

“On the second factor, the Applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

19. The Applicant’s claim is that she is apprehensive that the respondent may sell the suit property which would render her claim nugatory though no evidence of such threat has been tendered. She also says that she stands the risk of being evicted from the suit land. However, as has been pointed out by the respondent, she has not been able to show that she is in occupation of the suit land or that she has been utilizing the land for subsistence farming as alleged. This court is therefore not persuaded that there is any danger of the suit property being interfered with or that she stands to be evicted from the suit land as she has not shown that she is in occupation of the land. I find that the Applicant has not demonstrated that she stands to suffer irreparable harm that cannot be compensated by way of damages should the orders sought not be granted.
20. Again on the issue of whether the applicant has been denied access to visit her daughter’s grave, the 1st respondent in his submissions indicated that he was already granted the orders sought in civil suit no. E147 of 2023 to exhume the body of the deceased which fact was not confirmed or denied by the applicant. It is therefore unclear whether the deceased body is still interred in the suit land or not for the applicant to be granted access to the grave by this court. For that reason the court cannot grant orders of access to the applicant as courts do not make orders in vain or orders that cannot be enforced
21. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the restraining orders, against the hardship to be borne by the Respondents by granting the same. Having found that the applicant has not demonstrated that she stands to suffer irreparable harm, this court finds that the balance of convenience tilts in favor of the 2nd respondent who is the lawfully registered owner of the suit land unless and until proven otherwise.
22. On the issue of stay of proceedings in CMCC E147 of 2021, Embu, it has been intimated that the said suit was already decided in favour of the 1st respondent which if true would mean that the applicant’s prayer has been overtaken by events. Again, it is not clear on what grounds the stay of proceedings was being sought as was rightly put by the respondents, the cause of action in that case was on the issue of exhumation of the parties deceased daughter, which is different from the cause of action herein. The cause of action herein is on ownership of the suit land. The orders sought in that case have no bearing on the outcome of the case herein and therefore this court finds no justification to grant this particular order.



23. Again as was observed in the case of Meru Civil Appeal 40 of 2018, Kenya Wildlife Service Vs James Mutembei (2019) eKLR as cited in Mocha Hotel Ltd v Kwanza Estates Ltd (Environment & Land Case 14 of 2022) [2023] KEELC 21729 (KLR) (21 November 2023) (Ruling) where the judge stated thus :

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

24. The learned judge went further to quote Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, where it was stated that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

25. This court is not persuaded that there is any justifiable reason given to stay the proceedings in Civil Case E147 of 2021 if at all the same is yet to be concluded.

26. In light of the foregoing, I am inclined to dismiss the notice of motion application dated 14.02.2023 in its entirety. I will however not make any orders as to costs

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of MAY, 2024.

In the presence of Njagi Collins for Kiongo for 3rd defendant, Njiru Mbogo for 1st and 2nd defendant, Kahiga for plaintiff.

Court Assistant - Leadys

A.KANIARU

JUDGE-ELC, EMBU

07/05/2024

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