



REPUBLIC OF KENYA



Okunga v Sheelali; Diamond Trust Bank Kenya Limited (Interested Party) (Environment & Land Case E030 of 2023) [2024] KEELC 5271 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E030 OF 2023
EK MAKORI, J
JULY 11, 2024**

BETWEEN

FRANCIS OTIENO OKUNGA PLAINTIFF

AND

ABDALLAH ATHMAN SHEELALI DEFENDANT

AND

DIAMOND TRUST BANK KENYA LIMITED INTERESTED PARTY

RULING

1. Notice of Motion dated 11th October 2023 seeks, among other prayers:

An order of injunction directing the defendant/respondent by himself or his agents to cease the ongoing constructions on all that property known as Portion No. 13294, Malindi Municipality, pending the hearing and determination of this suit.

The Ocs Malindi Police Station, as the designated authority, is tasked with enforcing the orders.

Costs be provided.

2. The application is supported by the annexed affidavit deposed on 11 October 2023 by the applicant Francis Otiemo Okunga and the replying affidavit deposed on 21 November 2023 by Faith Ndonga, the Legal Manager in Charge of Recoveries at the interested party's Debt Recovery Unit, by the legal process.

3. The applicant, supported by the interested party, avers that he bought the suit property portion No. 13294 Malindi Municipality in an auction undertaken by the third party on or about 22 November 2022 in these proceedings. All necessary steps were taken in the purchase, and the applicant has paid



a substantial amount on the purchase and is still making payment of the purchase price by way of instalments. When he is done, the transfer will be effected by the third party in his favour, thereby establishing his rights to the property.

4. On the 4th of October 2023, the respondent trespassed on the suit property and commenced construction. The police and the interested party were duly informed. It necessitated the commencement of this suit.
5. Abdallah Athman Sheelali, the respondent, in his replying affidavit deposed on 19 February 2024, states that the suit property is not registered in his name. He says that his family and relatives own various portions of land in Kivulini. He only appeared to check on the perimeter wall the applicant was constructing to see whether he had infringed on his neighbouring piece of land or that of his relatives. He further states that his visit should not be construed to mean trespass. He further proceeded to admit that;

“I have wrongly been sued on a parcel of land not registered in my name. My property, which is adjacent to the suit property, has got nothing to do with the suit property herein.”

6. I framed the issues for this Court's determination as whether an interlocutory injunction can be issued at this point and who should bear the costs of the application.
7. The threshold to achieve before the grant of an injunction is as held in the *Giella v Cassman Brown & Company Limited* [1973] E.A. 360:

“The applicant should satisfy the Court that he has a *prima facie* case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages, and thirdly, if the Court is in doubt, it should decide on a balance of convenience.” (This is the standard that the applicant must meet to justify the grant of an injunction; in this case, emphasis is supplied).

8. A *prima facie* case with the probability of success was held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125, to mean:

“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 in rebuttal from the latter.”

9. The applicant has demonstrated that he purchased the suit property from the interested party in an auction. He is still making installment payments of the remaining balance. The respondent readily admits the suit property is not registered in his name or that of his relatives. The only reservations he has could be on the boundary. The applicant has shown a *prima facie* case with a probability of success that he owns the suit property.
10. The principles stated in the *Giella* case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraba Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

11. I need not discuss the other limbs, the applicant having achieved the *prima facie* test.



12. The current application dated 11th October 2023 will succeed in this manner;

- i. That temporary order of injunction is hereby issued barring the respondent from sale, alienation, or construction on all that land known as LR Portion No. 13294 Malindi Municipality pending the hearing and determination of this suit.
- ii. Costs in the cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 11TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Wanga, for the Applicant

Mr. Otara, for the Respondent

Mr. Ojonga for the Interested Party

Happy: Court Assistant

