



**Kalumba v Kiswii (Environment & Land Case 334 of 2017)
[2024] KEELC 6723 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 334 OF 2017
TW MURIGI, J
OCTOBER 9, 2024**

BETWEEN

FREDRICK KALUMBA PLAINTIFF

AND

MATHIAS MULI KISWII DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated June 14, 2024 brought under Sections 1A, 1B and 3A of the Civil Procedure Act in addition to Order 40 Rule 1(a) and Order 51 Rule 1 of the Civil Procedure Rules in which the Plaintiff/Applicant seeks the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to issue a conservatory order and/or order of *status quo* to preserve land Parcel No. Makueni/Kiou/1694 pending the hearing and determination of the suit herein.
 4. That the costs of this application be provided for by the Defendant/Respondent.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Fredrick Kalumba sworn on even date.

The Applicant's Case

3. The Applicant averred that he is the owner of a portion of land measuring 2.5 acres to be excised from Land Parcel No. Makueni/Kiou/1694 having purchased the same from the Defendant in December, 2007.



4. He further averred that judgment in Kilungu MCELC No. 13 of 2022 was delivered in favour of Jacqueline Munini against the Defendant for the transfer of one (1) acre to be excised from Land Parcel No. Makueni/Kiou/1694. That pursuant to the court order, the Mukaa Sub-County Surveyor issued a letter dated May 30, 2024 to the Defendant and to Jacqueline Munini informing them of the intended subdivision of the suit property.
5. That subsequent to the said letter, his Advocate wrote to the Mukaa Sub-County Surveyor highlighting that the land was the subject matter in Makueni ELC Case No. 334 of 2017 which is pending for hearing and determination. According to the Applicant, the intended subdivision of the suit property will affect his 2.5-acre portion thereby rendering the litigation herein useless. He urged the court to allow the application as prayed.
6. The Respondent did not file any response to the application despite being duly served.
7. The application was canvassed by way of written submissions.

The Applicant's Submissions

8. The Applicant filed his submissions dated September 3, 2024.
9. On his behalf, Counsel identified the following issues for the court's determination: -
 - i) Whether the Plaintiff/Applicant has met the criteria for the grant of a conservatory order and/or order of *status quo* pending the hearing and determination of this application and the main suit.
 - ii) Who bears the costs.
10. Counsel submitted that the purpose of a conservatory order is to maintain the *status quo* pending the hearing and determination of the main suit without going into the merits of the case. Counsel submitted that the conditions for the grant of a conservatory order were set out in the case of [Board of Management of Uhuru Secondary School v City County Director of Education & 2 others](#) [2015] eKLR as follows:-
 - a. First the Applicant must demonstrate an arguable *prima facie* case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - b. Whether the grant or denial of the conservatory relief will enhance the constitutional value and objects of a specific right or freedom in the Bill of rights.
 - c. The court should consider whether, if an interim conservatory order is not granted the petition or suit or its substratum will be rendered nugatory.
 - d. Whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.
11. On the first condition, Counsel submitted that the Applicant has established a *prima facie* case with a probability of success. To buttress this point, Counsel relied on the case of [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] eKLR. Counsel further relied on the copies of the sale agreement and the photographs showing the developments on the suit property to submit that the Applicant is the owner of the 2.5 acre portion comprised in the suit property.
12. On the second condition, Counsel submitted that unless a conservatory order is granted, the Applicant's Constitutional right to property will be violated as the Sub-County Surveyor will enforce the order issued in Kilungu MCELC No. 13 of 2022.



13. On the third condition, Counsel submitted that the threatened subdivision will affect the boundaries of the suit property and thereby render the present litigation an academic exercise. Concluding his submissions, Counsel urged the court to allow the application as prayed.

Analysis And Determination

14. Having considered the application and the submissions filed by the Applicant, the only issue that arises for determination is whether the Applicant is entitled to the orders sought. The Applicant is seeking for a conservatory order and/or an order of *status quo* to preserve the suit property pending the hearing and determination of this suit.

15. The law on the issuance of conservatory orders is well settled. Conservatory orders were defined in the case of *Judicial Service Commission Vs Speaker of the National Assembly & Another* (2013) eKLR as follows;

“Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individuals against another but are meant to keep the subject matter of the dispute in suit. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

16. Similarly, in *Centre For Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

17. The principles for the grant of interim conservatory orders were outlined by the Supreme court in the case of *Gitirau Peter Munya Vs Dickson Mwenda Kitbinji & 2 Others* (2014) eKLR where it was held that:-

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”,

18. Conservatory orders are not issued in ordinary civil law cases as they are public law remedies.

19. The application herein is brought under Order 40 Rule 1 of the Civil Procedure Rules which provides as follows:-



Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
20. The principles applicable for the grant of an injunction were set out in the celebrated case of *Giella Vs Cassman Brown & Co Ltd* 1973 EA 358 as follows:-First the Applicant must show a *prima facie* case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
21. The first issue for determination is whether the Applicant has made out a *prima facie* case with a probability of success to warrant the grant of an injunction.
22. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd Vs First American Bank of 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.”
23. The Applicant’s proprietary claim is based on the sale agreements executed between himself and the Respondent herein. The Applicant relied on the sale agreement (annexure FK1a) to prove ownership of 2.5 acres comprised in the suit property.
24. The main issue for determination is whether the Applicant purchased 2.5 acres comprised in the suit property and whether he is the legitimate owner thereof. These are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the court is not required to determine the issues which will be canvassed at the trial.
25. In the case of *Mbutia Vs Jimba credit Corporation Ltd* (1988) KLR the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
26. Similarly, in the case of *Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd* Nbi HCCC No 1118 of 2002, the court held that;
- “In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”



27. Looking at the documents annexed to the affidavit in support of the application, it is evident that the Plaintiff's claim is not baseless. On the basis of the material that is on record, I find that the Plaintiff/Applicant has established a *prima facie* case with a probability of success.
28. On whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.
29. The Court of Appeal in *Nguruman Limited Vs Jan Bonde Nielsen & 2 Others* (2014) 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.”
30. The Applicant contended that he is apprehensive his suit will be rendered an academic exercise if the subdivision is carried out. He produced photographs (annexure FK1b) to show the developments that he has made on his portion of the suit property and the court order for subdivision and excision of the suit property(annexure FK2).
31. Indeed, if the subdivision of the suit property is carried out, the subsisting Title will be closed and new titles will be issued. This will no doubt alter the character of the suit property and subsequently change the substratum of this suit.
32. The court is therefore convinced that the Applicant stands to suffer irreparable harm that cannot be compensated by an award of damages if the suit property is subdivided.
33. On balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction, against the hardship to be borne by the Respondent by granting the injunction.
34. The purpose of an injunction is to preserve the suit properties pending the hearing and determination of the suit. In the case of *Virginia Edith Wambui Vs Joash Ochieng Ougo* Civil Appeal No. 3 of 1987, the Court of Appeal held that;
- “The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the *status quo* until the dispute has been decided on a trial.”
35. Looking at the evidence presented by Applicant, I find that the balance of convenience tilts in favour of maintaining *status quo* on the suit property.
36. In the end, I find that the application dated June 14, 2024 is merited and the same is hereby allowed in the following terms: -



1. An injunctive order and/or order of *status quo* is hereby issued to preserve land Parcel No. Makueni/Kiou/1694 pending the hearing and determination of the suit herein.
2. The Applicant is awarded costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF OCTOBER, 2024.

HON. T. MURIGI

JUDGE

In the presence of:

Muthiani for the Plaintiff/Applicant.

Defendant.

Court Assistant - Steve

