



Mboroki v Nchebere (Suing through Attorney and Agent Nkatha Rose Munya) (Environment and Land Appeal E077 of 2024) [2024] KEELC 13705 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E077 OF 2024
CK NZILI, J
DECEMBER 4, 2024**

BETWEEN

GERALD KATHURIMA MBOROKI APPLICANT

AND

DOUGLAS THIANE NCHEBERE RESPONDENT

SUING THROUGH ATTORNEY AND AGENT NKATHA ROSE MUNYA

RULING

1. The appellant has filed an application dated 29.10.2024, seeking for inhibition orders on any transaction relating to L.R No. Ntima/Igoki/12271 pending the hearing and determination of this appeal.
2. The reasons are contained on the face of the application and a supporting affidavit of Gerald Kathurima Mboroki, sworn on 29.10.2024.
3. The applicant averred that he is the registered owner of the suit land which is family land after obtaining out of transmission from the estate of his late father. He attached copies of the official search title deed and a confirmed grant as annexures GKM 1 (a), (b) and “2”.
4. The applicant averred that by a sale agreement dated 3.12.2014, he sold the land to the respondents without involving his family and before the succession process had commenced. He attached the sale agreement as an annexure marked GKM “3”.
5. The applicant averred that when his family members learned of the transaction they objected to the same terming it as intermeddling with the deceased’s land.
6. In addition, the applicant averred that the trial court ordered him to transfer the said land to the respondent, in default the court administrator to do so. He attached a copy of the decree and judgment as an annexure marked as GKM “4”.



7. Again, the applicant averred that the suit land is where all his children were born and brought up and they derive their livelihood from the land.
8. The applicant further averred that it was his wish and that of the family to refund the purchase price to the respondent. He urged the court that it would be in the interest of justice and fairness to allow his application, otherwise there would be no prejudice to any party.
9. The application is opposed by a replying affidavit of Rev. Dr. Douglas Thiane Nchebere sworn on 13.11.2024. He averred that the applicant freely and willingly sold the suit land to him on 3.12.2014 so that he could bring back his wife from Nakuru, circumcise his son build a house for him, meet his personal need and file the intended succession cause as per the annexed agreement for sale marked as DN "1".
10. The respondent averred that in the presence of his family members, the applicant freely surrendered to him vacant possession of the suit land measuring $\frac{3}{4}$ an acre in 2014, fenced it using poles and barbed wire and fixed a gate and has since been in exclusive possession and development of the suit land as per attached photographs and a certificate marked DN "2" and "3".
11. The respondent aver that he paid the entire purchase price though in installments in full as agreed by the parties and when the applicant refused to transfer the land he sued him for constructive trust and proprietary estoppel and then obtained a temporary injunction at the lower court as per the annexed plaint and order marked DN "4" & "5".
12. The respondent averred that due to his exclusive possession since 2014, it was not true that the applicant and his family live or utilize the land for they have an alternative residence on the balance of the initial land, a few meters from the suit land, out of which the applicant later on sold $\frac{1}{4}$ of an acre to one neighbour called Elias. The respondent annexed a copy of the rectified grant, defence and counterclaim marked DN "6" & "7".
13. Subsequently, the respondent averred that he had executed the lower court decree and was the registered owner of the land since 20.9.2024 before this appeal was filed on 14.10.2024. He attached a copy of the title deed as an annexure marked DN "8".
14. Again, the respondent averred that for the last 10 years, the applicant has never offered to refund the purchase price which he declines to accept because he has developed the suit land with millions of money and his current value has since appreciated.
15. Further, the respondent averred that though he has no houses on the suit land he does not intend to sell, alienate or charge the land, hence the orders sought should not be issued.
16. By way of oral submissions, the applicant submitted that he was not given an opportunity to appeal by the trial court, the suit property immediately after the judgment was read changed its status and within two days, the respondent obtained a title deed in his name, without cancellation of his title deed or without being consulted. He termed the process employed by the respondent as unusual. Further, the applicant submitted that he was yet to obtain a current official search for the suit land or the lower court proceedings, though he paid for them. Further, the applicant relied on written submissions dated 15.11.2024.
17. It was submitted that the order sought was prohibitory in nature and shall act to preserve the suit property from being disposed off to his detriment. Reliance was placed on *Giella vs Cassman Brown & Co. Ltd (1973) E.A 358* and *Josphine Kagiri M'Tuaruchiu vs M'Mwirichia M'Iguatu & another ELC No. E003 of 2021 (OS)*, on the principle governing the issuance of inhibition orders which he urged the court to find that he had satisfied.



18. The respondent relied on both oral and written submissions dated 14.11.2024. C.P Mbaabu counsel submitted that the application lacks merits. The respondent submitted that the way the prayer on the application is couched is for both inhibition and injunction but in a rather ambiguous convoluted and confusing manner, yet parties are bound by their pleadings under Order 2 Rule 6 (1) & (2) of the Civil Procedure Rules and parties should not be allowed to depart from them without amendment.
19. On the grant of prayers sought, the respondent submitted that to grant them would amount to according to the applicant a carte blanche and an open cheque which was likely to be used to illegally evict the respondent from his land.
20. Accordingly, the respondent submitted that the applicant should have pleaded the prayer separately and distinctively and having failed to do so, the court should hold and find the application fatally defective, incompetent ab initio and incapable of being granted since a court can only issue a clear, precise, specific and easy to understand order. Reliance was placed on *Jihan Freighters Ltd vs Hardware & General Stores Ltd (2015) eKLR*.
21. The respondent submitted that for the last 10 years, it is him who has been in exclusive occupation of the land with developments therein, he obtained a temporary injunction during the hearing and eventually a permanent injunction as per the attached decree, which has fully been executed hence there was nothing for the court to restrain him from doing on the land.
22. The respondent submitted that the applicant had failed to disclose material facts as to his exclusive occupation since 2014 hence the court should decline to issue the orders sought. Reliance was placed on *Samuel Njoroge (Suing on behalf of the estate of the late Geoffrey Gikaru Njoroge vs Wanje Holdings Ltd (2018) eKLR*
23. Again, the respondent submitted that the appeal stands no chance of success, since the applicant wants to retain both the money and the land, by seeking restraining and inhibition orders against the respondent contrary to the equitable doctrine of constructive trust and proprietary estoppel which are provided for by Article 10 1(b) & 2 (b) of *the Constitution*. Reliance was placed on *Francis Soita vs John Simiyu Ndalila (2018) eKLR* otherwise the appeal stands no chance of success.
24. Similarly, the respondent submitted that the title deed held by him vests absolute and indefeasible ownership, plus all rights and privileges that cannot be defeated by the applicant except as provided under Sections 24, 25, and 26 of the *Land Registration Act*, otherwise he did not intend to alienate the land.
25. The respondent submitted that the applicant has failed to discharge the burden of proof under section 108 – 112 of the *Evidence Act* to prove otherwise to show that the suit property is in any danger of disposal.
26. Consequently, the respondent's counsel in oral submission emphasized that at the scene visit commissioned by the trial court, the occupation of the suit land by the respondent was confirmed. The counsel urged the court to decline the issuance of any interim orders.
27. Section 68 (1) of the *Land Registration Act* grants the court powers to issue inhibition orders so as to preserve the suit land during the subsistence of a suit or an appeal by preventing any adverse transactions over the title to land the subject of litigation.
28. In *Philip Mwangi Githinji vs Grace Wakarima Githinji (2004) eKLR* Okwengu J as she then was held that before the court could issue an inhibition it must be satisfied that the person moving the court has good grounds for requesting such an order.



29. In Joseph Mumita Kipees (Suing as a Legal Representative of the estate of Moses Kisento) vs Nteri Merk Obo Kiparka & others (2014) eKLR, the court observed that a party seeking inhibition orders has to satisfy the following:
- i. The suit land was at risk of being alienated to his detriment unless preservative orders of inhibition were issued.
 - ii. The refusal to grant the orders would render the suit nugatory.
 - iii. He has an arguable case.
30. In Josephine Kagiri M’Tuaruchiu vs M’Mwirichia M’Igwtu (supra) the court cited *Giella vs Cassman Brown Co. Ltd* (supra) and *Mrao Ltd vs First American Bank of (K) Ltd & others* (2003) eKLR, that an inhibition being in the nature of prohibitory orders, a party has to establish a prima facie case with a probability of success demonstrates irreparable loss and damage and that the balance of convenience tilts in favour of granting the orders of inhibition. In *Gacheri vs Gatobu E & L Application E041 of 2023* (2023) KEELC 11.10.2023 cited in *Kitho Civil & Engineering Co. Ltd vs National Bank of Kenya & another KLR (Civil Appeal Application E706 of 2021 (2023) KECA 387 (KLR) (31st March 2023) (Ruling)* the court cited *Alfred Mincha Ndubi vs Standard Ltd* (2020) eKLR, *Multimedia University and another vs Gitile Naituli* (2014) eKLR and *Stanley Kangethe Kinyanjui vs Tony Keter & others* (2013) that in granting an injunction or inhibition pending appeal the court should consider if the appeal is arguable and if without the order of it would be rendered nugatory.
31. Further the court cited *African Safari Club Ltd vs Safe Rentals Ltd* (2020) eKLR on the proposition that if the hardship of the parties was almost equal, the court should pursue the overriding objective to act fairly and justly, by putting the difficulties on a scale and balance them by treating the parties with equality or placing them on equal footing in as far as practicable.
32. As to the threshold of an arguable appeal, in *Munge vs Munge* (2023) KECA 75 (KLR) (3rd February 2023) (Ruling), the court observed that the low threshold of an arguable appeal is to establish at least one sufficient or plausible grounds that was likely to succeed upon hearing of the appeal that may have the effect of overturning the impugned decision.
33. The purpose of an inhibition pending appeal is to preserve the status quo and to prevent an appeal if successful from being rendered nugatory. See *Grace Kinoru Mark vs Mark Murungi Mark and 2 others* (2022) eKLR citing with approval *Charterhouse Bank Ltd vs CBK Ltd & others* (2007) eKLR.
34. In this application, the applicant does not dispute that execution has taken place and the title deed for the suit land is in the name of the respondent. The delay in applying for inhibition since the delivery of judgment on 18.9.2024 has not been explained.
35. The appeal was filed on 16.10.2024 while this application was lodged on 29.10.2024. Title deed was issued on 20.9.2024 in the name of the respondent. The sale took place on 3.12.2014.
36. The grant was rectified on 22.1.2018 whereof the applicant acquired L.R No. Ntima/Igoki/1538 measuring 0.0933 ha apart from other parcels of land with others held in trust such as L.R No. Ntima/Igoki/1360 but with his defined share of 0.413 ha.
37. The applicant has not denied that the respondent has been in exclusive occupation of the suit land since 2014. The applicant at the trial court did not offer a refund or tender the refund in court. He instead sought for the sale agreement to be voided. If there was an outstanding balance of the purchase price the applicant failed to counterclaim it.



38. As much as the memorandum of appeal appears to be raising arguable points still the applicant has not demonstrated how the appeal shall be rendered nugatory in the absence of inhibition order.
39. Practice No. 32 of gazette No. 5157 of the Practice Directions of this court grants this court the power to issue orders of status quo.
40. The best this court can do in balancing the interests of the two parties under the circumstances is to order that the status on the ground and registration of the title register of the suit land as at the filing of this application, be maintained pending hearing and determination of this appeal. The orders shall last for one year only. Lower court file to be availed. Mention on 10.2.2025.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4TH DECEMBER, 2024.

In presence of

C.A Kananu

C.P Mbaabu for respondent

Gerald Applicant

HON. C K NZILI

JUDGE

