



**Habib & another v Okumu & 3 others (Environment & Land Case E001 of 2023) [2023] KEELC 557 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 557 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E001 OF 2023**

**E ASATI, J**

**FEBRUARY 7, 2023**

**BETWEEN**

**SHABAN OKUMU HABIB ..... 1<sup>ST</sup> PLAINTIFF**

**SHABAN ABDI OKUMU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOHAMED SHABAN OKUMU ..... 1<sup>ST</sup> DEFENDANT**

**YUSUF KWEYU GANGUU ..... 2<sup>ND</sup> DEFENDANT**

**FATUMA SHABAN OKUMU ..... 3<sup>RD</sup> DEFENDANT**

**SAFI SHABAN OKUMU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide the notice of motion application dated January 17, 2023, the plaintiffs/applicants seek for an order of temporary injunction restraining the defendants by themselves their servants and/or agents from charging, leasing, selling, transferring or in any way interfering with the parcel of land known as Kisumu/Mukendwa/1 pending the hearing and disposal of the suit. The application is brought under provisions of order 40 rule 1, 2, 3 and 4, order 51 rule 1, sections 1A, 1B, 3, 3A, 63 (c) and (e) of the *Civil Procedure Rules* and *Act*, section 13 of the *Environment and Land Court Act* and article 159 of the *Constitution* of Kenya and the *Fair Administration Action Act*. It is based on the grounds that the defendants are in the process of fraudulently transferring to themselves and or other parties the plaintiffs' share of land known as Kisumu/Mukendwa/1. That the plaintiffs have not transferred their shares of the suit land to any person, that any agreement for sale and or for transfer purportedly executed by the plaintiff in favour of the defendants is a forgery. That the defendants are hurriedly subdividing the suit property for sale.



2. The application is supported by the averments in the supporting affidavit of Shaban Okumu Habib and Shaban Abdi Okumu sworn jointly on January 17, 2023.
3. The application was unopposed. Though served with the application and hearing notice, the defendants neither responded to the application nor attended court for the hearing thereof.
4. The grounds for grant of temporary injunctions as set out in the case of *Giella v Cassman Brown Co Ltd [1973] 358* are firstly, that the applicant must establish a *prima facie* case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages and thirdly that when the court is in doubt, it will decide the application on a balance of probabilities. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v 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.”

5. I have considered the contents of the supporting affidavit and the annexures thereto. The applicants depose that they are the sons of Habib Shaban Sewe and Abdi Shaban Okumu who are among the five registered owners of the suit land. That their fathers who were brothers of the defendants are deceased. That each of the five registered owners of the suit land owns 1/5 share of the land. That the defendants filed a suit in the Kadhi's Court secretly whose ruling the applicants are yet to receive from the Kadhi's Court despite requesting for it in the year 2020. That the respondents have failed to agree on the mode of distribution of the property.
6. A copy of certificate of official search annexed to the application shows that the suit land measuring 2.2 hectares is registered in the names of five (5) people namely; Mohammed Shabani, Habib Shabani, Yusufu Shabani Saidi Shabani and Abdi Shabani and that each one of them owns 1/5 share of the land. The shares are indicated against their respective names. It is clear that the applicants are not registered owners of the suit land. Their claim is based on their relationship with the deceased registered owners. However, there is no evidence in the form of letters of administration, or otherwise connecting the applicants to the deceased registered owners and to demonstrate that the applicants have capacity to bring the action on behalf of the deceased registered owners' estates.
7. It also evident from the plaint and supporting affidavit that the suit land has been the subject of judicial proceedings before the Kadhi. In paragraph 4 of the supporting affidavit, the applicants refer to Succession Cause No 4 of 2018 filed by the 2<sup>nd</sup> defendant against the 1<sup>st</sup> defendant to surrender title to the suit land so as to enable distribution of the land to the registered owners or their heirs. This court has not seen the decision of the Kadhi. The applicants claim that they requested for the said decision *vide* a letter dated November 17, 2020 and are yet to receive the same. I have perused the said letter which is annexed to the supporting affidavit. There is nothing on it to show that it was ever delivered to or received at the Kadhi's Court. There is no evidence that there has ever been any follow up after the letter. Yet the decision of the Kadhi is central in these proceedings. It is important for the court to know the contents of the Kadhi's decision. There is no evidence as to whether the said decision has been executed or not. Further, there is no evidence of the current status of the suit land. The title deed annexed to the application is dated October 5, 1973 while the certificate of official search is dated February 12, 2021 and the suit was filed in 2023. An injunctive order is meant to preserve the status



quo of the subject matter for a given period or pending an event. In the instant suit, the status quo of the suit land is unknown to the court.

8. The applicants contend that the respondents are hurriedly subdividing the land for sale. There is also no evidence to show this.
9. I have noted that the application is brought under section 13 of the *Environment and Land Court Act* and article 159 (2) of the *Constitution* of Kenya as well. Section 13 of the *Environment and Land Court Act* spells out the jurisdiction of this court. Whether or not the court has jurisdiction in the instant matter may depend on the contents of the decision of the Kadhi mentioned herein. In other words, whether or not the issues raised herein are the same issues that have already been raised between the parties herein and over the suit land and competently decided on by the Kadhi. Though under article 159 (2) of *the Constitution* the court is obligated to among other things administer justice without undue regard to procedural technicalities, the issues that arise herein are substantive.
10. Having found firstly, that there is no evidence that the applicants have capacity to file the suit on behalf of the deceased registered owners, secondly, that there is no evidence to support the allegations in the application and thirdly, that in the absence of the decision by the Kadhi this court is unable to ascertain whether the matter is *res judicata* or not, this court holds that no prima facie case has been demonstrated and none of the other grounds for grant of temporary injunction have been proved. The application thus lacks merit. It is hereby dismissed with no order as to costs.

Orders accordingly.

**RULING DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**ASATI,**

**JUDGE.**

**In the presence of:**

**Maureen: Court Assistant.**

**No appearance for the applicants.**

**No appearance for the respondents.**

