



**Mwangangi v Muunda & 2 others; Ngurish Investment Limited & another (Interested Parties)
(Environment & Land Case 329 of 2017) [2023] KEELC 783 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 329 OF 2017
A NYUKURI, J
FEBRUARY 8, 2023
FORMERLY ELC NO. 1260 OF 2013 – NAIROBI)**

BETWEEN

ESTHER MBULA MWANGANGI PLAINTIFF

AND

NELSON MUTISYA MUUNDA 1ST DEFENDANT

DANIEL ONGERA ONDERI 2ND DEFENDANT

RUTH MORAA ONGERA 3RD DEFENDANT

AND

NGURISH INVESTMENT LIMITED INTERESTED PARTY

ICIPE STAFF HOUSING CO-OPERATIVE INTERESTED PARTY

RULING

Introduction

1. Before court are two applications for determination. The first application is dated January 28, 2019 and filed on December 1 2020 by the plaintiff and the 1st interested party, while the 2nd application is dated August 12, 2020 and filed by the defendants.

The 1st application

2. The application dated January 28, 2019 seeks for a temporary injunction to restrain the 2nd interested party members from selling, transferring, disposing, charging or constructing on the parcel known as Mavoko Town Block 3/29835 (suit property) or in any way alienating the said parcel pending hearing and determination of this suit. They also sought for the costs of the application.



3. The application is supported by the affidavit of Michael Wainaina Ngure who is the director of the 1st interested party. The applicant's case is that the 1st interested party purchased 10 acres part of the suit property, from the plaintiff but the 1st defendant fraudulently disposed off the same to the 2nd interested party who subdivided it into several parcels and sold it to its members. Further that the members of the 2nd interested party are constructing permanent structures on the suit property, and that unless an injunction is granted as prayed, the applicants will suffer irreparable loss.
4. The application was opposed. Bernard Musembi Muia, a member of the 2nd interested party swore a replying affidavit dated January 31, 2022. Their case was that having ascertained that the 2nd defendant was the registered proprietor of the suit property, the members of the 2nd interested party purchased the suit property upon due diligence on August 5, 2014. That thereafter, the property was registered in the name of the 2nd interested party and subsequently subdivided into 58 parcels and transferred to the members of the 2nd interested party who now have titles thereto.
5. The respondent maintained that the members of the 2nd interested party are independent persons whose ownership rights over the suit property are distinct from the 2nd interested party and since they are not party to this suit, no injunctive orders should issue against them. That at the time of the transaction, the 2nd interested party was not aware of the existence of this suit, neither was there any caution restriction, inhibition or any court order against the title.

The 2nd application

6. The application dated August 12, 2020 was filed by the defendants seeking for orders of this court to transfer this suit to the chief magistrates court at Mavoko for hearing and determination. They also sought for costs. The application is supported by the affidavit of Nelson Mutisya Muunda, the 1st defendant sworn on August 12, 2020. The applicant's case is that the value of the subject matter of the suit is kshs 2,800,000/- only and the sale agreement between the plaintiff and the 1st interested party for the purchase of the suit property was kshs 2,800,000/-, while the agreement between the 1st defendant and the 2nd defendant was for a sum of kshs 450,000/-. Further that the suit property is near Mavoko Law Courts which court has both pecuniary and territorial jurisdiction to determine this matter.
7. The application was opposed. Esther Mbula Mwangangi filed a replying affidavit sworn on November 28, 2021. The respondent's case was that the application was made in bad faith with the intention of delaying the expeditious disposal of the suit as this suit was filed on October 18, 2013 in Nairobi and later transferred to this court by consent of the parties. Further, that the applicants had opportunity to seek the transfer of the suit for all these years but failed.
8. The respondent further stated that there was no evidence before court to show that the suit property was valued below kshs 20 million and that reliance was placed on agreements made in 2008 and 2010 respectively. That the value of any property cannot be the same after 13 years. It was further averred that the location of the property and its size of 10 acres reveals that the value is more than 20 million.
9. The respondent also contended that this court has original jurisdiction to hear and determine this matter and no prejudice will be suffered by the applicant if the matter is heard and determined in this court.
10. The applications were canvassed together by way of written submissions. On record are the 2nd interested party's submissions dated January 31, 2022 and the plaintiff's submissions dated November 28, 2021, both of which this court has considered.



Analysis and determination

11. Having considered both applications, the responses thereto as well as submissions, my considered view is that the following issues arise for determination;
 - a. Whether the Plaintiff and the 1st interested party had met the threshold for grant of injunction.
 - b. Whether this matter ought to be transferred to the chief magistrates court at Mavoko for hearing and determination.
12. The principles for grant of temporary injunction are well settled. The applicant must demonstrate a *prima facie* case with chances of success, they must show that if the injunction is not granted, they stand to suffer irreparable loss that cannot be compensated in damages, and where the court is in doubt, it ought to decide the application on a balance of convenience (See *Giella vs Cassman Brown Co Ltd* [1973] EA 358.)
13. The plaintiff's case was that they sold the suit property but that the 1st defendant fraudulently sold the suit property to the 2nd interested party who in turn sold to their members. In the application, the plaintiff and the 1st interested party have not explained the basis of their allegations of fraud as against the defendant. On their part, the 2nd interested party has stated that the suit property was purchased from the 1st defendant after due diligence and the same was later transferred to their members who now each hold a title thereto.
14. As the plaintiff and the 1st interested party do not hold title to the suit property, and having failed to elaborate the nature of the fraud allegedly committed by the 1st defendant and the 2nd interested party, they have failed to demonstrate a *prima facie* case with any chances of success. In addition, it has not been disputed that the suit property was subdivided into 58 portions and transferred to the members of the 2nd interested party. Those members are separate entities from the 2nd interested party, yet they are not parties to this suit. Therefore, it would be unjust and against the tenets of natural justice to issue orders to bind persons that are not parties in this matter as that will amount to condemning them unheard. Without a *prima facie* case, it would serve no purpose to interrogate the other conditions for grant of injunction. In the result the Plaintiff and the 1st interested party have not met the threshold for grant of temporary injunction.
15. On whether this suit ought to be transferred to the chief magistrates court at Mavoko, I must point out that there was no objection to the jurisdiction of this court to hear and determine this matter. The only issue raised by the defendants is that the value of the subject matter is kshs 2,800,000/-. Is the defendant's prayer justified? I do not think so. This is because this matter was filed way back in 2013 in Nairobi. In 2017, it was transferred to this court for hearing and determination. It is therefore surprising that between 2013 and 2020, the defendants did not see the need for the matter to be transferred to the chief magistrates court.
16. I agree with the plaintiff that the application has no other purpose apart from delaying the expeditious disposal of this suit. Besides, a property in Kenya worth kshs 2,800,000/- in 2008 cannot have the same value in 2020, as the same would naturally appreciate in value. No evidence was presented by the defendants to show that the suit property measuring 10 acres and situated in Mavoko was worth less than kshs 20,000,000/- which is within the jurisdiction of the lower court. Even if the suit property were to be less than kshs 20,000,000/- in value, that would not take away the jurisdiction of this court which has unlimited original jurisdiction.



17. Considering that this matter has been pending for the last ten years, this court is enjoined by article 159 of the *Constitution* as read with section 3 of the *Environment and Land Court* and sections 1A and 1B of the *Civil Procedure Act* to ensure that the same is heard and determined expeditiously without delay. That will not be achieved by sending the matter to the lower court. Therefore, in the interest of justice, I decline the request to transfer this matter to the chief magistrates court at Mavoko.
18. The upshot is that both the applications dated January 28, 2019 and August 12, 2020 lack merit and the same are dismissed with no order as to costs.
19. Since this is an old matter, the parties are directed to file and serve their respective trial bundles within 30 days of this ruling, in preparation of the hearing of the main suit.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the presence of;

Mr Masinde holding brief for Mr Mungai for the plaintiff

Ms Konya holding brief for Mr Nyaga for the defendants

Josephine – Court assistant

