



Murage (Suing as the administrator of the Estate of Bernard Chiori) v Land Registrar,, Kilifi County & another; KCB Bank Kenya Limited (Interested Party) (Environment & Land Case 46 of 2022) [2023] KEELC 16216 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 46 OF 2022**

MAO ODENY, J

MARCH 9, 2023

BETWEEN

JOSEPH NICHOLAS MURAGE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF BERNARD CHIORI) PLAINTIFF

AND

LAND REGISTRAR,, KILIFI COUNTY 1ST DEFENDANT

MASUMBUKO YERRY KOMBE 2ND DEFENDANT

AND

KCB BANK KENYA LIMITED INTERESTED PARTY

RULING

1. This ruling is in respect of a notice of motion dated August 3, 2022 by the plaintiff/applicant seeking the following orders; -
 - a. Spent
 - b. That pending the hearing and determination of the application herein, the honourable court be pleased to issue an order restraining the 1st defendant/respondent herein from cancelling the plaintiff/ applicant's title issued on September 22, 1978, amending and or otherwise interfering with the current Land Register and records pertaining to Land Reference Number: Chembe/Kibabamshe/393.
 - c. That pending the hearing and final determination of the application herein the honourable court be pleased to issue an order restraining the 2nd defendant/respondent his servants, agents and or employees and or anyone else claiming under him from selling, marketing/advertising for sale, disturbing, trespassing, alienating, claiming ownership and or interfering with the



plaintiff/applicant's quiet possession, peaceful enjoyment and or ownership of the parcel of land known and registered as Land Reference Number: Chembe/Kibabamshe/393 or any part thereof.

- d. That pending the hearing and final determination of the application herein, the honourable court be pleased to order the 1st defendant/respondent to attend court and produce the land register (green card) for Land Reference Number: Chembe/Kibabamshe/393 for purposes of confirming the registered proprietor.
 - e. That the honourable court be pleased to order the County Land Registrar, Kilifi to register the certificate of confirmation of grant issued in High Court at Nairobi, Succession Cause No 438 of 1988 upon the plaintiff/applicant submitting an application and paying the requisite fees.
 - f. That pending the hearing and final determination of the suit herein, the honourable court be pleased to issue an order restraining the 1st defendant/respondent herein from amending, rectifying and or otherwise interfering with current land register and records pertaining to Land Reference Number: Chembe/Kibabamshe/393 unless from an application lodged by the plaintiff/applicant.
 - g. That pending the hearing and final determination of the suit herein the honourable court be pleased to issue an order restraining the 2nd defendant/respondent his servants, agents and or employees and or anyone else claiming under him from selling, marketing/advertising for sale, disturbing, trespassing, alienating, claiming ownership and or interfering with the plaintiff/applicant's quiet possession, peaceful enjoyment and or ownership of the parcel of land known and registered as Land Reference Number: Chembe/Kibabamshe/393 or any part thereof.
 - h. That costs of this application be provided for.
2. The application is supported by the sworn affidavit of Joseph Nicholas Murage the applicant who stated that he is the only son of Bernard Chiori Murage (deceased) who was the registered proprietor of the suit properties. That upon his demise, the applicant was issued with a grant of letters of administration and a confirmation of grant in High Court at Nairobi, Succession Cause No 438 of 1988 which transmitted the suit land to him and has remained been possession to date.
 3. The applicant further averred that the applicant has made attempts to register the transmission pursuant to the succession cause on two occasions and the 1st defendant has declined to accept the forms alleging there existed a civil suit over the property. Further, the 2nd defendant has attempted to cause the 1st defendant to rectify the records over the property on the ground that there is a declaratory judgment in Malindi High Court ELC No 30 of 2011.
 4. The 2nd defendant filed grounds of opposition dated September 22, 2022 on grounds that the matter is res judicata.
 5. The 1st defendant filed a replying affidavit sworn by J.B Oketch dated October 26, 2022 the land registrar officer Kilifi County who stated that the suit property was registered in the name of Bernard Chiori Murage (deceased) and a title deed was issued in 1978. Further that the registered owner used the property as security to advance facilities from various banks resulting to charges registered as encumbrances.
 6. Counsel agreed to canvas the application vide written submissions which were duly filed.



Plaintiff/applicant's Submissions

7. Counsel for the applicant submitted that the matter is not *re judicata* as the plaintiff was not a party in Malindi ELC No 30 of 2011 therefore no orders were issued against the plaintiff or the estate which he administers and relied on the case of [John Florence Maritime Services Ltd & another v Cabinet Secretary, Transport and Infrastructure & 3 others](#) [2021] eKLR.
8. Mr Juma submitted that the decree clearly shows that the plaintiff/ applicant herein was not a party to the said suit; no orders were made and or issued as against the plaintiff/ applicant and or the Estate which he administers; and being a declaratory judgment, no enforceable orders were made as against the plaintiff/ applicant, his title, and/ or his interest in Land Reference Number Chembe/ Kibabamshe/ 393 the suit property herein hence the suit is not *res judicata*.
9. Counsel submitted that the applicant sought to be joined in the suit which application was disallowed and, in a Judgment, delivered on May 13, 2020, in ELC 30 of 2011, a suit in which the applicant nor his deceased father were parties, hon Olola J declared that the 2nd defendant/ respondent herein was a *bona fide* purchaser of the suit property.
10. It was counsel's submission that the applicant being aggrieved by the said declaratory judgment touching on the applicant's property and the 2nd defendant/ respondents' several visits to the Kilifi land registry seeking execution of the decree, and alleged prospective purchasers attempting to disrupt the applicant's quiet use and possession of the suit property, the applicant filed a successful application for injunctive orders.
11. Further that Court of Appeal, in ((Malindi COA Application E10 of 2020) determined that the plaintiff/ applicant was in possession of, and had a Title to, the Suit Property, Land Reference Number: Chembe/ Kibabamshe/ 393, granted injunctive orders against the Defendants in High Court at Malindi ELC No 30 of 2011, which orders lapsed on July 29, 2022, when the plaintiff/ applicant's main appeal (Malindi Court of Appeal Civil Appeal E15 of 2020) was determined.
12. Counsel submitted that the Court of Appeal struck out the plaintiff/ applicant's appeal stating that this was a fresh cause of action as he was not a party to, nor did he participate in the proceedings before the High Court in ELC No 30 of 2011, which findings by the court have necessitated this application and suit.
13. Mr. Juma submitted that save for the 2nd defendant/ respondent's grounds of opposition dated September 22, 2022, none of the Parties hereto, though served, have filed any affidavit in response to the applicant's application and as such the sworn testimony remains unchallenged.
14. As regards, the interlocutory orders sought, counsel relied on several cases and submitted that the applicant has established a *prima facie* case with a probability of success. Counsel cited the cases of [Philip Kairu Kabura v Embakasi Ranching & Co Ltd & 3 others](#) [2017] eKLR, [Giella v Cassman Brown](#) (1973) EA 358, [Nguruman Ltd versus Jan Bonde Nielsen](#) (2014) eKLR,
15. Counsel for the 2nd defendant filed submissions and urged the court to dismiss the application as the suit is *res judicata*. Counsel elaborated on the doctrine of *res judicata* which I need not reproduce.

Analysis and determination

16. The issue for determination is whether the applicant has met the threshold for grant of the interlocutory orders sought.



17. The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides that: -

“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.”

18. The conditions for consideration in granting an injunction are well settled as per the case of *Giella v Cassman Brown & Company Limited* [Supra] where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. The Court of Appeal in [Moses C Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others](#), (2014) eKLR, defined a *prima facie* case as follows;

“A *prima facie* case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

20. The applicant is under a duty to establish that he/she has a *prima facie* case which means an arguable case where the evidence on record must show an infringement of a right or the probability of success of the applicant's case at the trial.

21. The applicant has demonstrated that the suit land belongs to his late father of which he is the administrator of the estate having been granted a grant of letters of administration. The 1st defendant the land registrar filed a replying affidavit whereby he confirmed that the suit land is registered in the name of Bernard Chiori Murage (deceased) corroborating the plaintiff's assertion. It therefore follows that the applicant has established a *prima facie* case which has been fortified by the evidence of the land registrar who is the custodian of land records.

22. Apart from the grounds of opposition the 2nd defendant did not file any replying affidavit to the application. I agree with the applicant's counsel the fact that all parties were served and failed to file replying affidavits, the application and the facts in the supporting affidavit remain unchallenged.



23. In the case of *Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited* [2010] eKLR the court held as follows: -

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus, what was deponed to was not entered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.”

24. Similarly, in the case of *Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Ltd* Civil Case No 2143 of 1999 the court held that: -

“From the facts and the law, I have analyzed in this case, i do find the defendants have no defence to this suit..... having filed no replying affidavit to rebut the averments in the plaintiff’s affidavit in support of the application. I, therefore, have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability...”

25. In the case of *Mohammed & another v Haidara* [1972] EA 166 at page 167 paragraph F-H, Spry VP considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows: -

“the respondent made no attempt to reply to these allegations and they therefore remain unrebutted... Here, the respondent’s affidavit gives no material facts, and the only real evidence of facts is that contained in the appellant’s affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix, but it should have made clear which of the facts alleged by the appellants were denied...”

26. The factual averments in the Supporting affidavit were as follows; -

- a. The suit land is registered to Bernard C. Murage who was issued with his title in 1978;
- b. The lands records reflect that Land Reference Number: Chembe/ Kibabamshe/ 393 is registered to Bernard C. Murage;
- c. The plaintiff/ applicant is the beneficial owner of the suit property by way of transmission;
- d. There is an order by the High Court of Kenya at Nairobi for the transfer of the suit property by way of transmission to the plaintiff/ applicant which is yet to be complied with by the 1st defendant/ respondent;
- e. There exists a restriction placed against the register over the suit land by the 1st defendant/ respondent; and
- f. There is no reason, justifiable or at all, for the 1st defendant/ respondent to maintain the restriction, there being no order cancelling the plaintiff/ applicant’s title and or ordering the said 1st defendant/ respondent to rectify the register over the suit property.

27. These facts have not been rebutted hence the court will assume that they are true as set out. The respondents had an opportunity to rebut vis a replying affidavit but they squandered that chance apart



from the land registrar who gave the record at the land registry that confirms the registration of the deceased as the owner of the suit land.

28. I will therefore not belabor much on the issue as the Court of Appeal in *Joseph N Murage (As the Administrator of the Estate of Bernard Chiori Murage) v Softwhite Beach Limited* [2022] KECA 803 (KLR) stated: -

“It is not in dispute that the appellant was not a party in the ELC, nor were the issues he raises in this appeal pleaded or canvassed in the suit in the ELC or addressed in the impugned judgment appealed from. His claims are therefore essentially a new cause of action.”

29. Having found that the plaintiff has established a *prima facie* case, and that the facts in the supporting affidavit are undisputed and looking at the history and nature of this case, and in order preserve the substratum of the suit, i therefore order that a temporary injunction is hereby issued restraining the 1st and 2nd defendants from interfering with the suit land pending the hearing and determination of this suit. The other orders sought shall be determined during the trial of this suit. costs in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF MARCH, 2023

M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

