



REPUBLIC OF KENYA



**KENYA LAW**  
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**Makoti v Ntumu (Land Case E012 of 2023)**  
**[2023] KEELC 19828 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19828 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KWALE**  
**LAND CASE E012 OF 2023**  
**AE DENA, J**  
**SEPTEMBER 19, 2023**

**BETWEEN**

**NTEMBE SAIDI MAKOTI ..... APPLICANT**

**AND**

**MWANAISHA MASUDI NTUMU ..... RESPONDENT**

**RULING**

- 1 The application subject of this ruling is dated 27/2/2023 and seeks the following prayers;
  - a. Spent
  - b. That pending the hearing and determination of this application, this honourable court be pleased to grant an order of temporary injunction restraining the defendant whether by herself or her agents, servants, family members, employees and/or any other person acting on her instructions from blocking the plaintiff from accessing, surveying, conducting a boundary identification exercise, constructing, farming, putting up a perimeter wall and/or otherwise interfering with the Plaintiffs enjoyment and or dealing with the suit property.
  - c. That pending the hearing and determination of this suit, this honourable court be pleased to grant an order of temporary injunction restraining the defendant whether by herself or her agents, servants, family members, employees and/or any other person acting on her instructions from blocking the Plaintiff from accessing, surveying, conducting a boundary identification exercise, constructing, farming, putting up a perimeter wall and/or otherwise interfering with the plaintiffs enjoyment and or dealing with the suit property.
  - d. That this honourable court be pleased to order the officer commanding Diani Police Station to provide security during the boundary identification exercise and construction of the perimeter wall on the suit property and ensure law and order is maintained.



- e. That costs of this application be provided for.
2. The application is premised upon grounds set out on its face and the supporting affidavit sworn on 28/2/2023 by the Applicant Ntembe Saidi Makoti which summarily state she is the duly registered proprietor of land parcel Kwale/Diani/468 (the suit property) measuring 0.41 Hectares having purchased the same from one Masudi Juma Mwarabaya on 24/3/1991. A copy of the land sale agreement is exhibited.
  3. The plaintiff deposes that she has always exercised her proprietary rights over the suit property and which includes payment of land rates and has been in occupation of the same until the year 2015 when the defendant raised boundary issues that were referred to the district surveyor. The applicant states that the defendant is the owner of plot No 2911 which neighbours her own plot. The Applicant states that sometime in September 2022 efforts were made to have an exercise to ascertain and establish the correct boundaries but the same never took place due to the defendant's interference.
  4. It is stated that the defendant has trespassed on the suit property and constructed temporary structures thereon and has denied the plaintiff access of the same. The Applicant states that she had made plans to commence construction on the site and had even purchased building material and obtained a building plan which was annexed to the affidavit. That the defendant and her family have removed beacons on the suit property and as such rendering the orders sought herein necessary.
  5. In response to the application the defendant/respondent filed a replying affidavit sworn by the defendant Mwanaisha Masudi Ntumu. According to the respondent, her late father Masudi Juma Mwarabaya was allocated the suit property measuring 5 acres in 1978 by the Settlement Fund Trustee within Diani Settlement Scheme. That a letter of offer dated 7/2/1978 was issued and the requisite fee paid. That the deceased made several attempts to get a title deed to the suit property but the same was in vain. That upon carrying out an official search of the suit property on 26/5/1997, the deceased made a discovery that the suit property was registered in the name of one Joseph Gacheru Mungai on 30/7/1992 and a title deed issued, a copy of the same was annexed.
  6. It is averred that the deceased made a complaint to the District Officer Msambweni and the said Gacheru was summoned to appear before the District Officer. That unfortunately the defendant's father passed on before the meeting was held. The defendant states that she went to the District Officer Msambweni and made a complaint which initiated a letter being forwarded to Mr Gicheru, that in response Mr Gicheru stated he had no knowledge of the transfer of the suit property and asked that the same be allotted back to the original owner.
  7. The defendant/respondent avers that she was then issued with a title to plot No. Kwale/Diani SS/442 measuring approximately 1.7Ha and which has been in use and occupation until recently when the plaintiff started interfering with the same. It is stated that the applicant obtained 0.14Ha from the suit property by fraud and that it is recently that the defendant and her family have been shown the title. In that case the title to Kwale/Diani/468 is not indefeasible as the same was acquired by fraudulent means. The respondent opposes the boundary identification exercise and states that no beacons have ever been placed on the suit property as alleged. The respondent further avers that from the documents relied upon by the applicant, it is not clear whether the applicant purchased the land or the same was given to her as a gift. The court is asked to dismiss the application with costs.
  8. The applicant filed a further affidavit on 11/5/2023 where she avers that the search conducted on 26/5/1997 does not indicate the results of the search in favour of Joseph Gacheru Mungai as alleged. It is further stated that no title deed has been annexed to confirm that indeed the suit property was registered in the names of Mr Gicheru. It is also averred that the allegation that the allottee went to



collect the title deed for plot no 442 cannot be truthful as the deceased's father had passed on in 1997. Further that the alleged title deed for Kwale/Diani/442 in the name of the defendant has not been annexed. The applicant insists that she purchased the suit property from the defendant's father and refutes the allegation that she is a land grabber.

9. The application was dispensed by way of written submissions. The applicant's submissions are filed before court on 26/5/2023 and the respondent's on 21/6/2023. The court has duly considered the same.
10. The law governing the granting of interlocutory injunction 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..”

11. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, 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.”

12. On whether the applicant has established a prima facie case, the court in [Mrao Ltd v First American Bank of Kenya and 2 others](#), (2003) KLR 125 which was cited with approval in [Moses C Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others](#), (2014) eKLR, the Court of Appeal defined a prima facie case as: -

“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”.

13. The applicant has exhibited two agreements in evidence that she has purchased the suit property from the deceased as alleged. Interestingly, the defendant actively participated in one of the agreements and even received part of the purchase price on behalf of her deceased father. In my understanding, the suit property Kwale/Diani/468 is a sub division of plot No 442. The court has been invited to probe the subdivision and ownership of the suit property by the respondent and how the same ended



up being registered in the applicant's name. The applicant's ownership is disputed. It is clear that the suit property is the substratum of this litigation which must be protected pending the hearing and determination of this case. I am guided by the case of *Exclusive Estates Ltd Vs Kenya Posts & Telecommunications Corporation & Another*, Civil Appeal No 62 of 2004 where the court held that: -

“A temporary injunction is issued in a suit to preserve the property in dispute in the suit or the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter”

14. This court finds that the applicant has established an interest over the suit property and has therefore established a prima facie case.
15. On whether the plaintiff/ applicant will suffer irreparable injury which would not adequately be compensated by an award of damages; - ‘Irreparable loss’ was described in the case of *Paul Gitonga Wanjau Vs Gathuthi Tea Factory Co Ltd & 2 Others*, Nyeri HCC No 28 of 2015, as simply injury or harm which would not adequately be compensated by damages and would be continuous. The applicant has stated that she had the intent to develop the suit property, had even started to purchase the building materials annexed a copy of the building plan.
16. I note that the applicant contends she has been in use of the suit property and which is being interfered with by the defendant who insists on owning the property. The defendant's actions have stopped the applicant from putting the suit property into her use and benefit and in my view no amount of damages will be payable for compensation of time and resources wasted. In continuing to deny the applicant access and use of the property, the defendant is taking an advantageous position over the applicant. I find that the applicant will suffer irreparable harm, I am guided by the holding in the case of *Said Almed vs Mannasseh Benga & Another* [2019] eKLR where the court held that:

“Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of *Aikman vs Muchoki* (1984) KLR 353.’See the case of *Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd* (2005) eKLR.”
17. It is rather obvious that the balance of convenience tilts in favor of the applicant. I wish to address the contents of prayer No 4 of the application on identification of the boundaries to the suit property. Before delving into the said issue, it is imperative to take note of the Provisions of Section 18(2) of the *Land Registration Act, 2012*, which provides as hereunder;

"18. Boundaries

- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section."



18. It is apparent that the court is deprived of jurisdiction on matters touching on determination of boundaries. The provisions of Section 18(2) of the [Land Registration Act, 2012](#) provide a specific recourse for determination of boundary disputes. The Applicant is advised to pursue the same through the office of the Land Registrar before approaching this court.
19. Based on the foregoing, I find that the applicant has met the threshold for grant of temporary injunction. The application dated 27/2/2023 is partly merited and the same is hereby allowed in terms of prayer (b) and (c). Parties to comply with order 11 and have the matter set down for pretrial directions. The costs shall abide the outcome of the main suit.
- It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Jadi for for the Plaintiffs/Applicants

Ms. Mutune Holding brief for Mr. Simiyu for 1<sup>st</sup> Defendant/Respondent

Mr. Daniel Disii- Court Assistant.

