



REPUBLIC OF KENYA



**Masale v Zonga & another (Environment & Land Case E022 of 2023)  
[2023] KEELC 20551 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20551 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E022 OF 2023**

**AE DENA, J**

**OCTOBER 11, 2023**

**BETWEEN**

**ELIAKIM MILTON MASALE ..... PLAINTIFF**

**AND**

**LAND REGISTRAR, KWALE COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**OMAR MBWANA ZONGA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1 The application subject of this ruling is dated 20/3/2023. The same is made pursuant to the provisions of Order 40 Rule 1,2,2,4 of the [Civil Procedure Rules](#) section 1A,3A,63[e] of the [Civil Procedure Act](#). Counsel for the applicant seeks for orders;

1. Spent
2. That pending hearing and determination of this application interpartes this honourable court do issue an injunction restraining the 1<sup>st</sup> defendant/respondent by himself, agents, servants, contractors or in any other manner howsoever from entering upon, carrying on any construction or otherwise dealing or interfering with the property registered as Kwale/Diani Beach Block/670
3. That pending hearing of this application inter partes the 2<sup>nd</sup> defendant be restrained from making any further entries in the proprietorship register of the property Kwale/Diani Beach Block/670 to the plaintiffs detriment
4. That pending hearing and determination of the suit this honourable court do issue an injunction restraining the 1<sup>st</sup> defendant/respondent by himself, agents, servants, contractors or in any other manner howsoever from entering upon, carrying on any construction or otherwise dealing or interfering with the property registered as Kwale/Diani Beach Block/670



5. That pending the hearing and determination of the suit the 2<sup>nd</sup> Defendant be restrained from making any further entries in the proprietorship register to the plaintiff's detriment.
  6. Spent
  7. That there be an order for costs thereof.
- 2 The application is supported by the affidavit of Eliakim Milton Masale and is premised on the following verbatim grounds; -
1. That the plaintiff holds title as first allottee and registered owner of the suit property
  2. That unknown persons have within the course of January 2023 or thereabout embarked on putting up a boundary wall around the property
  3. That the said activities have been informed by an attempt to fraudulently alter the ownership/ registration status of the property
  4. That it has taken time and effort to gain information regarding the person associated with these activities
  5. That the plaintiff stands to be seriously prejudiced should the fraudulent scheme to deprive him off the property and the activities informed thereby proceed without abatement
  6. That on the facts there are grounds sufficient to warrant the courts intervention in the manner sought herein.
- 3 The application is opposed by a replying affidavit sworn by the 1<sup>st</sup> defendant Omar Mbwana Zonga. The deponent avers that the applicant is a stranger to the defendants and that he is not aware the Applicant is the registered proprietor of property Kwale/Diani Beach Block/670 (hereinafter referred to as the suit property). It is averred that the applicant has not annexed any document in proof that he is the registered owner of the suit property.
- 4 He further states that the photographs annexed by the applicant appear to be of a perimeter wall he had built on his property and which is the suit property herein. The deponent refers to a copy of the title deed to the suit property registered in his favour. He denies the allegation that the title in his possession is a forgery and states that the same is lawful, valid and genuine.
- 5 It is averred that no evidence has been tendered of reconstruction of the registrar's records. He states that he has put up a perimeter wall on his property and it is the applicant that does not know where his alleged title falls on the ground. The court is urged to dismiss the application.
- 6 The plaintiff/applicant filed a further affidavit on 15/5/2023. It is averred that his title flows from government and was transferred to him by the Settlement Fund Trustees, dates back to 1992 and issued to him on 21/3/1995. He states that the 1<sup>st</sup> defendant omitted a copy of an official search in respect of the suit property purportedly issued to him in the year 2014 hence bespeaking his ownership from 2005. The applicant refers to the annexed official receipts for rates payments made by him over the suit property.
- 7 Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders of temporary injunction.



- 8 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 [Rev. 2012] Civil Procedure cap. 21 [Subsidiary] C17 – 165;
- (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."

- 9 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.

- 10 The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely, there must be a serious/fair issue to be tried, damages are not an adequate remedy and the balance of convenience lies in favour of granting or refusing the application.

- 11 From the provisions of Order 40 rule 1 of the Civil Procedure Rules, the courts paramount consideration before granting injunctive orders is proof that the subject property is in danger of being wasted or damaged. In the instant suit it is noted that the suit property has two title deeds with the respective parties claiming ownership of the same. The applicant's title was issued on 21/3/1995 and a search conducted on 4/11/2020 indicates that he was still the registered owner as at that time. The 1<sup>st</sup> Respondent's title on the other hand was issued on 29/10/2002.

- 12 The question which therefore arises is whether the applicant has established a prima facie case. 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 contends that he is the lawfully registered proprietor of the suit property and the title deed by the 1<sup>st</sup> defendant is fraudulent. He further states that the 1<sup>st</sup> defendant/respondent has trespassed into the suit property and is putting up a perimeter wall. The same is evidenced by photographs attached to the application. The Respondent has not disputed the construction of the perimeter wall and states that the same is on his suit property. The court is yet to establish the validity of the titles held by the parties herein. But before then it is important to preserve the substratum of the suit and which is the suit property herein. I am therefore satisfied that the applicant has established a prima facie case to warrant the granting of the orders of injunction.

14 Having found that the Applicant has established a prima facie case, the court will proceed to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No 77 of 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

15 The above are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraba Education Society* [2001] Vol 1 EA 86.

16 The applicant has deponed that the Respondent is undertaking developments on the suit property and the same has been demonstrated by the construction of the perimeter wall. In my view the said construction is sufficient demonstration of irreparable loss being occasioned to the applicant. The court is further alive to the allegations of disappearance of documents concerning the suit parcel at the lands registry as informed by the gazette notice seeking to replace the land register and the letter by the applicant intimating to the 2<sup>nd</sup> defendant that records of the suit parcel could at one point not be traced after the request for an official search of the same. The applicant's anxiety is therefore justified. It is my view that the second limb has been proved.

17 It is evident that the balance of convenience tilts in favour of the plaintiff/applicant. I am guided by the decision in *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the learned judge offered further elaboration on what is meant by "balance of convenience" thus:-

The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

18 From the foregoing, I am convinced that there is a lower risk in granting the orders sought than not granting them. The court will make a determination on ownership of the suit parcel after weighing the evidence of both parties on the scales of justice upon full hearing of the main suit. It is therefore safe to preserve the suit property as the court has not had opportunity to interrogate all the documents that might be relevant in providing a history of events leading to the double registration of title in the name



of the Plaintiff and that of the respondent. In *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR the court in deciding on an injunction application stated;

Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

19 I am convinced that the plaintiff/ applicant has met the criteria for grant of the orders sought and proceed to order as follows;

- i. An order of injunction is hereby issued restraining the 1<sup>st</sup> defendant/respondent by himself, agents, servants, contractors or in any other manner howsoever from carrying on any construction or otherwise dealing or interfering with the property registered as Kwale/Diani Beach Block/670 pending the hearing and determination of this suit.
- ii. The 2<sup>nd</sup> defendant be and is hereby restrained from making any further entries in the proprietorship register of the property Kwale/Diani Beach Block/670 to the Plaintiffs detriment pending the hearing and determination of this suit.
- iii. I further order the 2<sup>nd</sup> defendant shall register an order of inhibition in terms of (ii) above against land parcel No. Kwale/Diani Beach Block/670 pending the hearing and determination of this suit.
- iv. Costs will abide the outcome of the suit.

It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023**

**A.E. DENA**

**JUDGE**

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

Mr. Mwakisha for the Plaintiff /Applicants

Odhiambo holding brief for Mr. Asige for the 1<sup>st</sup> Defendant/Respondent

No appearance for the 2<sup>nd</sup> Defendant

Mr. Da--niel Disii- Court Assistant

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