



**Simiyu v Mukenya & 3 others (Environment & Land Case
E002 of 2023) [2023] KEELC 20569 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E002 OF 2023
EC CHERONO, J
OCTOBER 5, 2023**

BETWEEN

ELVIS SIMIYU APPLICANT

AND

FANUEL WEKESA MUKENYA 1ST RESPONDENT

MARGARET NANJLA WEKESA 2ND RESPONDENT

ALICE NASIMIYU WANDIOSI 3RD RESPONDENT

AGNES NANJALA WEKESA 4TH RESPONDENT

RULING

Background

1. The application before me is dated January 18, 2023 brought under Section 54 & 67 and the 5th schedule (14) of the *Law of succession Act*, Rule 12 of the *Probate & Administration Rules* seeking the following orders;
 1. Spent.
 2. Spent.
 3. The court be pleased to grant a temporary injunction restraining the defendant/ respondent whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiff/applicant's late father's property being Title Number Bokoli/bokoli/621 pending the hearing and determination of this suit.
 4. The Officer Commanding Webuye Police Station do enforce compliance of the orders above.



5. The costs of this application be provided for.
 6. The Honourable court be pleased to make such further or other orders.
2. The application is grounded on the annexed affidavit of Elvis Simiyu sworn on January 18, 2023 and the grounds on the face of the application. The respondents upon service entered appearance and filed their replying affidavit sworn by Agnes Nanjala on her behalf and on behalf of the other respondents dated June 20, 2023.

Applicants Case and Submissions

3. It was the applicant's case that he was the son and administrator ad-litem for the estate of Dr Charles Dickens Maloba who died on July 26, 2006 leaving behind his now deceased wife Mary Redemptar Kengechi and three children including the applicant herein. It was averred that the Dr Charles Dickens Maloba-deceased was the registered owner of Bokoli/Bokoli/621(suit land) and that the respondents were wasting away the suit land by illegally sub-dividing, building on and disposing of the same.
4. The applicants submitted that they had satisfied the requirements of Order 40 Rule 1 (a) of the *Civil Procedure Rules* and met the threshold for granting the orders sought as provided for in the case of *Giella vs Cassman Brown & Co Ltd (1973) EA 358*. It was argued that the applicant had demonstrated that Dr Charles Dickens Maloba-deceased was the registered owner of the suit land and that the respondents were just but intruders who had obtained title over the suit land fraudulently. The applicants further submitted that their case was arguable and that if the orders sought were not granted they would suffer losses that cannot be compensated in damages. It was also their submission that the balance of convenience tils in their favour and as such their case passed the test for the grant of an injunction.

Respondents Case and Submissions

5. It was the respondent's case that Fanuel Wekesa Mukenya-the 1st respondent herein died in the year 2012 leaving behind his three widows (his co-respondents herein). The respondents averred that Fanuel Wekesa Mukenya-deceased purchased the suit land vide an agreement dated October 10, 1986 after securing a loan from one Joash Wa Mangoli sometime in July 31, 1987 and upon full payment of the consideration the suit land was registered in his name and a certificate of title issued on January 12, 1996. It was further their case that upon the death of Fanuel Wekesa Mukenya they subdivided the suit land into eight (8) portions and sold the same to various people. It was averred that after the applicants no longer reside in the suit land.
6. It was submitted on behalf of the respondents that the applicant had not met the requirements for granting the orders sought and that the application ought to be dismissed.

Analysis and Determination

7. I have considered the Application, the responses filed thereto and submissions filed by the Applicants and the Respondents. I have also considered the decisions that were relied on by the parties in respect of their respective positions. The single issue which in my opinion commend for determination is whether the Applicants have met the threshold for the grant of equitable orders of injunction sought.



8. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 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.'
9. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co v Ethicom Limited* (1975) AA ER 504 where three elements were noted to be of great importance namely:-
- i) There must be a serious/fair issue to be tried,
 - ii) Damages are not an adequate remedy,
 - iii) Where the Court is in doubt, the application may be decided on a balance of convenience.
10. The important consideration before granting a temporary injunction under order 40 Rule 1 of the Civil Procedure Rules is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property and where it is satisfied that those conditions have been established, the court is enjoined to grant a temporary injunction to restrain such acts.
11. As earlier set out, it is the applicant's case that his deceased father is the registered owner of the suit land. However, the applicant did not annex a certified copy of the title in support of his assertions although the same is said to have been attached in his supporting affidavit. It should also be noted that the applicant stated that the issue of title over the suit land is pending investigations with the relevant authorities.
12. However, the respondents have annexed a copy of sale agreement between Fanuel Wekesa Mukenya-deceased and Dr Charles Dickens Maloba-deceased, a copy of a title and Official search showing that Fanuel Wekesa Mukenya-deceased purchased the suit land and was registered in his name and that it has since been sub-divided into numerous portions. It has also been stated that the respondent herein sold the suit land and are not in possession of the same and that any orders issued may not apply to them as they do not enjoy use of the suit land. I am inclined to believe the respondent's version, at least at this preliminary stage.
13. For the above reasons, I am not convinced that the applicant has demonstrated a prima facie case with a probability of success. I need not therefore consider the other principles as set out in the *Giella vs Cassman Brown* (supra) Consequently, I hereby dismiss the application for injunction and vacate the interim orders issued on February 2, 2023. The respondent shall have the costs of the application.

DATED AND SIGNED AT BUNGOMA THIS 5TH DAY OF OCTOBER, 2023.

HON.E.C CHERONO

ELC JUDGE

In the presence of



Mr. Sabwami H/B for Mr. Captain for Respondent

Mr. Wangila H/B for MR. Khaminwa for Applicant.

Joy C/A

