



REPUBLIC OF KENYA



**Muriuki v Njeru & 5 others (Environment & Land Case E032 of 2022)
[2023] KEELC 22559 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E032 OF 2022
A KANIARU, J
NOVEMBER 9, 2023**

BETWEEN

JAIRO MWANGI WASHINGTON MURIUKI PLAINTIFF

AND

JESINTA MUTHONI NJERU 1ST DEFENDANT

ALICE RWAMBA MUNYI 2ND DEFENDANT

KALPESH LALJI PATEL 3RD DEFENDANT

MALYA LALJI PATEL 4TH DEFENDANT

THE LAND REGISTRAR EMBU COUNTY 5TH DEFENDANT

THE HON. THE ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. This ruling is on a Notice of Motion dated November 16, 2022 filed in court on the same date. It is anchored on Sections 13 and 19 of the *Environment & Land Court Act*, 2011 Sections 1A and 63 (c) of the *Civil Procedure Act*, Section 68 of the *Land Registration Act* No. 3 of 2012, Order 40 rules 1(a), 2(1), 4, Order 51(1) of the *Civil Procedure Rules* and all enabling provisions of the Law. The applicant – Jairo Mwangi Washington Muriuki – is the Plaintiff in the suit while the 1st, 2nd, 3rd & 4th Respondents - Jesinta Muthoni Njeru, Alice Rwamba Munyi, Kalpesh Lalji Patel & Malya Lalji Patel - respectively are the 1st, 2nd, 3rd & 4th Defendant's in the suit. It is essentially an application for Temporary injunction and the prayers sought are as follows:

1. Spent
2. Spent
3. Spent



4. That this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st, 2nd, 3rd and 4th Defendants by themselves, servants, agents, employees or any other person acting at their behest from alienating, charging, disposing of, transferring, trespassing on, erecting any object, constructing any structure or building on, or in any other way whatsoever interfering with land parcel no. Mbeere/Wachoro/1359 until this suit is heard and determined.
 5. Spent
 6. That the 1st-5th Defendants be condemned to jointly and severally pay the costs of this application.
2. The application is premised on the grounds inter alia; that the 1st and 2nd Respondents fraudulently, through the use of forged documents caused land parcel no. Mbeere/Wachoro/1359 to be transferred to themselves and subsequently transferred the said land to the 3rd & 4th Respondents with the alleged help of the 5th Defendant; that the Respondents have been taking strangers to the suit land and the Applicant is apprehensive that the Respondents may commence massive construction on the suit land and or transfer the same to third parties to his detriment unless the orders sought are issued.
 3. The application came with a supporting affidavit in which it is deposed by the Applicant inter alia, that he is the lawful owner of the suit land herein having being registered as proprietor in the year 2012; that he lives at Baricho and he recently received numerous calls from his neighbors where the suit land is situate that they had seen strangers going round his land and inspecting boundaries and that they looked like prospective buyers; that upon obtaining a copy of the register, he was shocked to learn that the suit land had been registered in the names of the 1st & 2nd Respondents who are strangers to him who subsequently transferred the land to the 3rd & 4th Respondents who are also strangers; that he reported the matter to Kiritiri Police Station where the 1st & 2nd Respondents were charged with fraud; that the 1st & 2nd Respondents registered forged documents with the Applicant's forged signature to obtain registration as proprietors without the 5th Defendant demanding the production of the original title deed as he still retains the same. He urges that the Respondents being the wrong doers will not suffer any prejudice if the orders sought are granted.
 4. The application was responded to vide grounds of opposition by the 3rd & 4th Respondents dated November 28, 2022 on the grounds that; the application is incompetent, bad in law and an abuse of the court process; that the application lacks merit. They further filed a Replying Affidavit deposed by the 3rd Respondent with the authority of the 4th Respondent on December 2, 2022 dated the same date. She deposed inter alia; that they are bonafide purchasers of the suit land for value without notice and as such their proprietary rights are protected as such under article 40 of the Constitution of Kenya; that the 1st & 2nd Respondents offered to sell the suit land on April 12, 2022, that at the time they stated that they were the beneficial owners of the said land since the registered owner of the land had acquired the requisite land control board consent and executed transfer of land forms in their favour; that they were given all the legal documents in a land transfer and that the documents appeared genuine to her and on April 12, 2022 they entered into a sale agreement with the 1st & 2nd Respondents as the vendors for the sale of the suit land; that the agreed purchase price was 9,500,000 Kenya Shillings and on April 12, 2022 they paid a deposit of Kenya Shillings 3,800,000.
 5. She deposed further, that the 1st & 2nd Respondents acquired and registered all the legal documents for the transfer of the land and the land was transferred to their names; that they paid the balance of the purchase price and before they entered into the agreement with the 1st & 2nd Respondents they were



- taken to the land on the ground and showed beacons; that the 1st & 2nd respondents were the ones in possession of the land and on May 3, 2022 they gave the 3rd & 4th Respondents vacant possession of the suit land where they have been in actual, physical, open and uninterrupted possession of the land since then; that they have invested heavily by fencing the whole land using concrete poles and barbed wire and that if any fraud was committed they were not party to it; that as duly registered proprietors of the land, and having purchased it for valuable consideration, it would be grossly unfair to injunct them from using the land before the court has heard the main suit on merit. They pray that the Notice of Motion be dismissed with costs.
6. The 1st & 2nd Respondent also filed replying affidavits on April 13, 2023 and on December 9, 2022 respectively where they deponed interalia; that they attended the Gachoka Land Control Board session that was conducted in Kirititri town where they were listed as item no. 298/2/22 as per the L.C.B Minutes in respect of the transfer of the suit land; that they both presented themselves to the Land Control Board and were issued with a letter of Consent by the L.C.B and thereafter transferred the suit land in their favour; that upon being registered as proprietors, they decided to sell the suit land to the 3rd & 4th Respondents and that the same was done procedurally as per the requirements of law. They urge that due process was followed in the transactions in respect to the suit property and that the application should not be allowed as it only seeks to prevent the 3rd & 4th Respondents from enjoying their proprietary rights over the suit property.
 7. The Applicant filed a Response to the Replying Affidavits where he denied that the 3rd & 4th Respondents are bona fide purchasers for value without notice as they participated in fraudulent transfer of the suit property despite being warned by neighbors and caretakers that the suit land did not belong to the 1st & 2nd respondents; that all the transactions leading to the transfer of title from the Applicant upto the 3rd & 4th Respondents were tainted with fraud; that there has been no investments done by the 3rd & 4th Respondents as alleged on the suit land except for fencing around as they have never been in actual physical possession of the suit land nor utilized the same.
 8. The application was canvassed through written submissions. The applicant's submissions were filed on 9/5/2023. He submitted that the orders sought if issued will ensure that in the event the Applicant's suit succeeds, no waste will have been committed on the land and that should the orders sought not be granted, then the Applicant will suffer irreparable loss as the Respondents will have dealt with the land in ways that will fundamentally change its basic nature and make it useless to the Applicant. That further, should the Applicant lose, then the land will still be there for the Respondents to effect any development they desire to effect. He submits further that the orders sought will preserve the status quo on the said land as it will minimize applications arising from activities introduced to the suit land which may also provoke amendments of pleadings hence delaying the finalization of the suit. That finally, the Applicant has shown that he is entitled to the injunctive orders under the landmark case of *Giella v Cassman Brown & Co Ltd* (1973) EA.
 9. The 1st & 2nd Respondents filed their submissions on June 19, 2023 where they submitted that they are not in occupation of the suit land and therefore the orders sought do not apply to them since they are neither the registered proprietors; that they have proved through affidavit evidence that the allegations of fraud are baseless and that the prayers sought lack legal basis as the Applicant has not proved a *prima facie* case; that the orders sought will only impugn on the rights of the current registered proprietors.
 10. The 3rd & 4th respondent's submissions were filed on June 15, 2023 where they submitted that since they are the owners and in possession of the suit land, then it would not be just to injunct their property. That the Applicant has no interest to protect as he is clearly not in possession of the suit property as he does not live on the same. That the property has been successfully inhibited and no sale can happen



without notice to the Applicant. That no amount of loss can be suffered by the Applicant which cannot be compensated in form of damages in case the orders sought are not granted and that there is no evidence or credible reason that has been given by the Applicant to grant the orders sought. They also seek for costs of the application. They have relied on the cases of *Sitevia v Gitome & 3 others* (2015) eKLR, *Kenleb Cons Ltd v New Gatitu Service Station Ltd & Anor* (1990) eKLR, *Kuria Kiarie & 2 others v Sammy Magera* (2018) eKLR, *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* (2018) eKLR among others.

11. I have considered the application, the responses made to it, rival submissions, and the entire court record in general. The issue for determination is whether the Applicant is entitled to a temporary injunction.
12. The principles which guide the court when considering an application for a temporary injunction were set out in the case of *Giella v Cassman Brown* [1973] EA 358 where the court set out three conditions that ought to be met for grant of a temporary injunction. It was stated:

“First, 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.”
13. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No. 39 of 2002, described a *prima facie* case as:

“In civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
14. In another case of *Jan Bonde Nielsen v Nguruman Limited & 2 others* [2016] eKLR the court of appeal stated as follows;

“The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damages that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or as otherwise put, on a preponderance of probabilities”.
15. The Applicant claims to have been at all material times the lawful registered proprietor of the suit land being Land parcel No. Mbeere/Wachoro/1359 and that the 1st & 2nd Respondents fraudulently caused the suit land to be transferred to themselves and thereafter disposed of the same to the 3rd & 4th Respondents. The 1st & 2nd Respondents on the other hand claim that the Applicant procedurally transferred the land to them which fact is denied by the Applicant. He says he is a stranger to all the



Respondents and denies having been part of the transactions that led to the transfer of the suit land herein and that he only came to learn that his land had been transferred to other parties after heading to the neighbors cautions on the same and after investigations in the lands registry. According to the material before me the court observes that there are serious allegations of fraud herein which can only be determined during trial. Given the above evidence and circumstances, the court is satisfied that the Applicant has established a *prima facie* case with probability of success.

16. However, in the case of *Nguruman Limited V. Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012 as quoted in *Stanley Anyamba Ageyo & another v Musa Matu Riunga & 5 others* [2022] eKLR 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.

These 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. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis mine).

17. The applicant’s main contention is that he is apprehensive that if the orders sought are not granted then the 3rd & 4th Respondents might commence massive construction on the suit land which will in turn make the land unsuitable for settlement and agricultural purposes which are the uses the Applicant had in mind when he acquired the land. He says that he will suffer irreparable loss as the Respondents will have dealt with the land in ways that will fundamentally change its basic nature and make it useless to the Applicant. That further, should the Applicant lose, then the land will still be there for the Respondents to effect any development they desire to effect. The Applicant is also apprehensive that the Respondents since they are currently registered as proprietors might dispose of the suit property to another party. In my view and given the circumstances of the case, I find this to be legitimate concerns and therefore find that the Applicant will suffer irreparable harm should the orders sought not be granted.
18. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the temporary injunction, against the hardship to be borne by the Respondents by granting the same. Looking at the evidence presented by the parties herein, I find that if the suit property is not preserved, it may be wasted away. On the issue of balance of convenience,



I find that it tilts in favour of maintaining the status quo on the suit property. In *Otieno v Ougo & Another (No. 2)* [1987] KLR 400, the court held, *inter alia*, that the established rule is that an injunction is granted to preserve the subject matter pending hearing and determination of the action. It is very necessary to do so here.

19. In the circumstances, I do find that the applicant has proven a case for grant of a temporary injunction pending hearing and determination of the suit. I therefore allow the application dated November 16, 2022 in terms of prayer no. (4). Costs to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF NOVEMBER, 2023.

A.K. KANIARU

JUDGE

In the presence of:-

M/s Ndorongo for M/s Maina for 1st & 2nd defendant

M/s Hamba for 3rd & 4th defendants;

Kiongo for 5th & 6th defendants; and

In the absence of Muchiri I.W. for plaintiffs.

