



**Peter v Salim & another (Environment and Land Case E59 of 2022)
[2023] KEELC 21445 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E59 OF 2022
MAO ODENY, J
NOVEMBER 8, 2023**

BETWEEN

NICHOLUS KATUMO PETER PLAINTIFF

AND

KHALID SALIM 1ST DEFENDANT

HUSSEIN SALIM NAAMAN 2ND DEFENDANT

RULING

1. This Ruling is in respect of a Notice of Motion dated 10th February 2023 by the 2nd Defendant/Applicant seeking the following orders;
 - a. Spent
 - b. Spent
 - c. A temporary injunction restraining the Plaintiff and the 1st Defendant from evicting and interfering with the 1st Defendant's quiet enjoyment possession, occupation and possession of the land and any development therein or in any manner dealing with plot title Number Subdivision No. 4014 Original No. 539/179 Section 111 MN CR 9087/241 pending hearing of the suit.
 - d. That the order be registered against the title.
 - e. Costs.
2. The application was supported by the affidavit sworn by Khalid Salim Naaman who deponed that the 1st Defendant fraudulently sold to the Plaintiff the suit property without involving all the beneficiaries of the late Moza Toban and in particular the Administrators of the Estate of Moza Toban (deceased).



3. He further deponed that the Plaintiff/Respondent has been a tenant in a building on the suit plot since 2007 and he is aware that the suit property belongs to the family of Mozan Toban (deceased).
4. It was further his testimony that the Plaintiff has mortgaged the suit property to Equity Bank for Kshs. 21Million and there is a likelihood that if the money is not paid the suit property may be sold if the Plaintiff defaults in payment.
5. The Plaintiff in response filed a Replying Affidavit sworn on the 22nd October, 2023 by Nicholus Katumo Peter where he deponed that the 2nd Defendant is under a misapprehension that the suit property namely Subdivision Number 4014 (Original No. 539/179) Section 111 Mainland North at any time comprised the estate of Moza Toban (deceased) who died on 13th August 2005.
6. He further deponed that he has demonstrated that the suit property was registered in the name of the 1st Defendant on 3rd December 2003 prior to the death of the 2nd Defendant's mother. That prior to purchasing the suit property he carried out a search, which showed that the 1st Defendant was the registered owner of the suit property.
7. The Plaintiff also stated that the suit property was transferred to him and is now the registered proprietor of the same and has charged the suit property to Equity Bank. The Plaintiff has annexed to his Replying Affidavit a copy of the certificate of title, the transfer of land and copies of 2 certificates of official searches.
8. He also deponed that the 1st Defendant sold the suit property to him for valuable consideration, therefore he is an innocent bonafide purchaser for value of the land. Further that the 2nd Defendant's application has been overtaken by events as he has been evicted from the suit premises which is now in his lawful occupation.
9. Counsel filed submissions and relied on the principles for grant of injunctions.

Analysis And Determination

10. The issue for determination is whether the Plaintiff has satisfied the conditions set out in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 wherein it was held that:

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. 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.”
11. Similarly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others*; Civil Appeal No. 77 of 2012 the court held 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. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

12. It is incumbent upon the Applicant to prove that he has a prima facie case with a probability of success as was held in the Court of Appeal, in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 123.
13. This is a case that has undergone distribution of the estate of Moza Toban (Deceased) who died on 13th August 2005 and Letters of Administration issued on 14th May 2010 with the Certificate of Confirmation of Grant issued on 16th April 2015.
14. From the properties distributed as per the grant, it is evident that the suit property does not form part of the assets to be distributed amongst the beneficiaries. It should also be noted that the Certificate of title to the suit land was issued in 2003 before the demise of Moza Toban(deceased).
15. It follows that the Applicant has not met the threshold for grant of an injunction. The Applicant has not established a prima facie case with a probability of success and in essence, the balance of convenience would lie in favour of not granting the injunction.
16. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR the concept of balance of convenience was defined as :

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

17. The upshot is the application lacks merit and is therefore dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

