



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. E001 OF 2021**

**JOSEPH MUENDO NDUMBUTHI**

**(Suing as the legal representative of the Estate of**

**NDUMBUTHI MWANIA MUOKA-DECEASED).....PLAINTIFF/APPLICANT**

**VERSUS**

**MULWA KYUTI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RICHARD KIOKO KYUTI**

**(Suing as the Legal Representatives**

**of the estate of the late KYUTI MBOLE**

**alias KYUNDE MBOLE-DECEASED).....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR, MAKUENI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion application dated 14<sup>th</sup> January, 2021 brought under **Sections 1A,1B and 3A** of the **Civil Procedure Act, Order 40 Rule 1(a) and Rule 2(1) and Order 51** of the **Civil Procedure Rules** seeking the following prayers: -

**1. Spent**

**2. Spent**

**3. That this honourable court be pleased to grant an order of injunction restraining the respondents either by themselves, their servants, agents and or anyone claiming under them or through them from subdividing, registering any subdivisions, alienating and or disposing off and or in any other way interfering with land parcel no. Nzau/Mumbuni/207 pending the hearing and determination of the suit herein.**

**4. That the costs of this application be in the cause.**

2. The application is premised on the grounds on the face of it and more so as set out in the supporting affidavit of Jones Muendo Ndumbuthi, the plaintiff/applicant herein, sworn on 14<sup>th</sup> January, 2021. The plaintiff/applicant avers that he is the legal administrator ad litem to the estate of the late Ndumbuthi Mwanja Muoka (deceased) who purchased land parcel number Nzau/Mumbuni/207 from the late Kyuti Mbole vide a sale agreement dated 12<sup>th</sup> December, 1969. He contends that since the purchase of the suit land, the family of the plaintiff's/applicant's deceased father together with the applicant have been in interrupted use and occupation of the suit land.

3. The plaintiff/applicant further avers that the defendants/respondents filed a petition in respect of the estate of the late Kyuti Mbole in Makindu Succession Cause No. 57 of 2016 without involving their family despite the defendants/respondents knowledge of the sale and occupation of the suit land by the plaintiff's/applicant's family. The plaintiff/applicant deposed that the grant was confirmed on 27<sup>th</sup> February, 2018.

4. The plaintiff/applicant contends that in the month of June, 2019, the respondents through a letter dated 14<sup>th</sup> June, 2019 purported to carry

out subdivisions on the suit land. The plaintiff/applicant admits that the defendants/respondents are at liberty to implement the certificate of confirmation of grant, however, implementation of such would involve subdivision of the suit land into twelve portions and whose effect would amount to eviction of the plaintiff/applicant and his family from the suit land.

5. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents filed their joint replying affidavit sworn on 9<sup>th</sup> April, 2021 in which they deposed that they obtained certificate of confirmation of grant in Makindu Succession Cause Number 57 of 2016. Thereafter the plaintiff/applicant filed two applications consecutively seeking revocation or annulment of the certificate of confirmation of grant and both the applications were dismissed. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents further deposed that the applicant went ahead and registered a caution on the suit land and further wrote a letter to Geomark Surveyors Limited.

6. It is their contention that the plaintiff/applicant is not a beneficiary of their late father's estate and that the property attached to their estate Land Parcel number Nzau/Mumbuni/205 is different from the suit land which is land parcel number Nzau/Mumbuni/207 which is owned by their late father and only shares a common boundary with the plaintiff/applicant's late father's land.

7. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents further deposed that the adjudication process for the area was carried out in the years 1971/1972 and if at all the plaintiff's/applicant's deceased father had a claim, he would have raised the same during the adjudication process before the title deeds were issued. If at all the plaintiff's/applicant's late father had a claim, then the same was not registered before the committee and as such his rights to the land were extinguished.

8. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents further aver that the applicant made developments on the suit land between the year 2013 and 2021 with the full knowledge that there was a succession cause in court in which the suit land was part of. They contend that on two occasions they have tried to solve the problem through the council of elders but it has been futile. Also, in the year 2016 they requested the surveyors to visit the site and establish boundaries which was the major problem but the plaintiff/applicant refused and did not cooperate.

9. It is their contention that the plaintiff/applicant continues to trespass and construct illegal structures despite several warnings. That the suit is a frantic attempt by the plaintiff/applicant to use the avenues of justice to unjustly justify his acts of trespass. It is their contention that failure by the applicant to identify his boundaries continue to deny them their quiet enjoyment of their lawfully inherited land.

10. The plaintiff/applicant filed his written submissions dated 28<sup>th</sup> June, 2021. He submits that he has established a prima facie case with a probability of success against the deponents/respondents for the reasons that they have been present in the suit land since it was sold to them by Kyuti Mbole (deceased) and they have further made developments thereon. The plaintiff/applicant relies on the case of **Central Bank of Kena & another versus Uhuru Highway Development Limited & 4 Others** and **Mrao Limited versus First American Bank of Kenya & 2 Others (2003) KLR**.

11. The plaintiff/applicant submits that it would be absurd to presume that the plaintiff's/applicant's trespassed and put permanent structures in the suit land without knowing that their father had purchased it. It is his submission that the defendants/respondents have not produced any documents to show proof of warning or otherwise. That the defendants/respondents acquired title to the suit land fraudulently by failing to indicate the plaintiff's/applicant's deceased father as a creditor to the estate of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's/respondents' late father. The plaintiff/applicant further submits that in the event the plaintiff/applicant is evicted from the suit land, no amount of money can compensate him. That his home will be destroyed, his developments destroyed and he will have lost sentimental value attached to his investments on the suit land. He relies on the case of **Bryan Chebii Kipkoech versus Barnabas Tuitoek Bargarioria & Another [2019] eKLR** which authority dealt on the issue of irreparable harm and loss. In conclusion he submits that the balance of convenience tilts in his favour since he is already in occupation and has established permanent structures thereon.

12. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents filed their written submission dated 9<sup>th</sup> April, 2021. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents submit that the plaintiff/applicant has no claim in the estate of the late Kyuti Mboli. It is their submission that the plaintiff/applicant has not come with clean hands for failure to disclose that twice he challenged the outcome of the succession cause the result of which both applications were dismissed. It is their submission that there was no secrecy at all because they knew well that no liability was attached to the suit land. It is for these reasons that the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents submit that the plaintiff's/applicant's case has no merit and the order of injunction ought not to be granted.

13. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents further submit that they have demonstrated that their right to the property has been infringed upon to the extent that the plaintiff/applicant has placed a caveat on the title barring any further action on the suit land by the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents rely on the case of **Kenleb Cons Limited versus New Gatitu Service Station Limited & Another {1990} KLR 557**. It is their submission that the plaintiff/applicant has not demonstrated irreparable damage that would occur to him if the orders sought are not granted. In any case, the plaintiff/applicant has placed a caution on the title to the suit land and it is the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents who are likely to suffer as opposed to the plaintiff/applicant. In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents submit that the plaintiff/applicant has not proved the test as per **Giella versus Cassman Brown** and the application ought to be dismissed.

14. I have considered the application, relying affidavit and the written submissions filed by both parties and the issues for determination are:-

- i. Whether the applicant has established a prima facie case to warrant grant of temporary injunction,
- ii. Whether the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages,
- iii. If the court is in doubt it will decide the application on a balance of convenience

15. The locus classicus case that sets out the conditions necessary for the grant of interlocutory injunctions is that of **Giella v Cassman Brown**, the court set out as follows:

***“The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”***

16. The question of what constitutes a *prima facie* case was

determined by the Court of Appeal in the case of **Mrao Limited V First American Bank of Kenya and 2 Others** as follows;

***“A prima facie case in a Civil Case include but is not confined to a “genuine or 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”***

17. While adopting the same position, the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** added that:

***18. “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 an urgent necessity to prevent the irreparable damage that may result from the invasion..... 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.”***

19. In the instant application, the plaintiff/applicant claims purchaser’s interest of the suit land, the said land having been purchased by his late father from the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents’ late father. The plaintiff/applicant alleges that his late father bought the suit land in the year 1969 via a valid sale agreement written in the Kamba language. The plaintiff/applicant in his application has not disclosed the outcome of the two applications he filed for revocation of the grant as raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents but in the same breath admits that implementation of the certificate of confirmation of grant would result to his eviction from the suit land. The plaintiff/applicant has also not challenged the reasons for his refusal to attend to the meeting with the surveyors when called upon and the meeting held twice between themselves and the council of elders in an attempt to solve issues surrounding the suit land. The plaintiff/applicant has not demonstrated to this court how he is likely to suffer irreparable loss if the orders are not granted. I will reiterate that a party seeking the orders of temporary injunction must demonstrate and not merely state the monetary investments and sentimental value attached to the claim. I, therefore, see no irreparable damage or loss likely to be suffered by the applicant.

20. In any case, the applicant has placed a caution on the suit property. The effect of this would then infer that it would be almost impossible for any party including a third party to deal in the land until the caution is removed.

21. Having analyzed the pleadings and the documents relied upon, it is my view that the issue in dispute relates to the boundary of the suit land. I, will therefore, not be quick to balance the convenience in favour of either party as this is an issue that can only be determined through trial before the court.

22. For the reasons stated above, I do find that the notice of motion application dated 14<sup>th</sup> January, 2021 lacks merit and the same is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**Mbogo C.G**

**Judge**

**8/2/2022**

In the presence of: -

CA: T.Chuma