



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. E004 OF 2021**

**JOYCE MUTINDI NDILI .....PLAINTIFF/APPLICANT**

**VERSUS**

**MULU NDILI.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated 23rd February 2021 wherein the Plaintiff/Applicant seeks orders that:

1) *Spent.*

2) *Spent*

3) *THAT pending the hearing and determination of the suit herein, an order of injunction do issue restraining the defendant/respondent whether by himself, his agents, servants and /or any other person claiming under him from in any way at all destroying orange trees, crops, evicting the plaintiff or in any way at all engaging in any acts of dispossessing and/ curtailing use by the plaintiff all those parcel of land known as NZAUI/ KALAMBA/475 and 486*

4) *THAT costs of this application be paid by the Defendant/Respondent.*

2. The application is supported by the applicant's affidavit and is premised on the grounds that: -

*a. THAT the Plaintiff is a surviving daughter of the late Ndili Moko who was the owner of all those parcels of land known as NZAUI/ KALAMBA/475 and 486. As such therefore the same forms part of ancestral land.*

*b. THAT the late Ndili Moko who died in the year 1967 had the following children who claim entitlement to his properties;*

*i. Mulu Ndili*

*ii. Mutuku Ndili*

*iii. Joyce Mutindi Ndili and;*

*iv. Matheka Ndili*

*c. THAT the plaintiff is a beneficial owner of ¼ of all those parcels of land known as NZAUI/ KALAMBA/475 and 486 registered in the names of the defendant.*

*d. THAT the Plaintiff avers that by the time survey came to now Kalamba area, her father Ndili Moko had died and her mother (now deceased) had long separated with her father.*

*e. THAT the defendant being the oldest son of the late Ndili Moko and as per the then Kamba Customary Law, he was registered as the owner of the two parcels of land in trust for himself and the other siblings but fraudulently failed to cause that trust entered into the register.*

*f. THAT the fraud was perpetuated by the Defendant by registering the parcels of land in his name alone well aware that it was family land thus ancestral land, failing to cause a registration of customary trust in the register of the parcels of land well aware of the same, failing to cause sub division and transfer of ¼ share of the same to the plaintiff and failing to give the plaintiff her*

quarter share of all those parcels of land known as NZAUI/ KALAMBA/475 and 486.

*g. THAT subsequently the plaintiff's mother came back to her husband's homestead and in the year 2005, she shared the 2 parcels of land amongst her 4 children namely Mulu Ndili, Mutuku Ndili, Joyce Mutindi and Matheka Ndili.*

*h. THAT since her birth, the plaintiff has been in occupation of the suit land and has been in active possession and has extensively developed her share.*

*i. THAT the plaintiff, the defendant and other siblings continued to co-exist peacefully with each occupying their respective share until their mother passed on in July 2018. The defendant has started interfering with the plaintiff's occupation of her share and has resulted to destroying the plaintiff's oranges and other crops without lawful excuse.*

*j. THAT the defendant has declined to cause the properties to be subdivided and the ¼ share belonging to the plaintiff transferred to her thus this cause of action and suit.*

*k. THAT as a result, the plaintiff avers that the actions of the defendants are illegal and unlawful thus actionable in a court of law thus this suit.*

*l. THAT unless the orders sought are granted, the applicant shall suffer irreparably which cannot be compensated by way of damages. Her home and crops will be destroyed and she shall have been evicted from a place she has called home since birth.*

*m. THAT it is in the interest of justice to grant the orders sought.*

3. The defendant/respondent opposed the application through the replying affidavit dated 19<sup>th</sup> April 2021.

4. He has deposed that at all material times relevant to this application and the main suit herein, he is the registered and sole owner of the land parcels *NZAUI/ KALAMBA/475 and 486*, hence the properties are private.

5. That the land cannot be ancestral as the defendant/Respondent purchased it solely.

6. That the defendant/Respondent did let her sister live on it by virtue of being his sister and no other reason whatsoever. Therefore, he can have her off his land at any time he wishes as he has ownership rights.

7. That the plaintiff/applicant is free to institute succession proceedings at the magistrate's court if she had justifiable claim over the portions of land she claims.

8. That the plaintiff/applicant is still in occupation of the land and the defendant/respondent has not interfered.

9. That in the interest of justice the orders sought should not be granted. That it is clearly the plaintiff/applicant is misusing the powers of this court and therefore the application ought to be dismissed with costs as it lacks merit.

10. The Plaintiff/Applicant submitted that her claim is one which raises a prima facie case with chances of success. It is not in dispute the plaintiff applicant is in occupation of the suit and, therefore, the fact of being in occupation is in itself a prima facie case. In addition her claim pertains customary rights over suit land after which declaratory orders will issue. That it is not mandatory to register a customary trust. She relied in the case of *Bryan Chebii Kipkoach V Barnabas Tuitoek Bargarora & Another [2019] eKLR, Section 28 of the Land Registration Act and Isack M'inanga Kiebia V Isaaya Theuri M'lintari & Another [2018] eKLR.*

11. The plaintiff/applicant submitted that she stands to suffer irreparable loss which could not be compensated by an award of damages. That she has been in occupation of the suit land since she was born and has extensively developed it by planting various citrus trees and crops. She also has her house there and she has no other place to call home. That in the event she is evicted and the suit succeeds she would have lost her sentimental attachment, value of property and no amount of money can compensate her.

12. The plaintiff/applicant submitted that she will be highly inconvenienced if the injunction is not granted. That the inconvenienced caused to her if eventually the suit is decided in her favour will be greater than that which will be caused to the defendant/respondent if an injunction is granted than when the suit is dismissed. She therefore prayed that the application be allowed as prayed.

13. The defendant/respondent submitted that the plaintiff/ applicant has not proved prima facie case with a probability of success. That an order restraining the defendant/respondent in his own land would be prejudicial to him and a violation of his ownership rights under Article 40(1) and (2) of the Constitution of Kenya 2010. That the plaintiff/applicant has not produced any evidence that she reported to any local authority the destruction of her fruits. Further the plaintiff/applicant has not challenged the manner in which the defendant/respondent acquired his title to the suit parcel of land. He cited the case of *Kipkoach Langat T/A Kaptarakwa Enterprises & 23 Others V William Bayas & 3 Others [2013] eKLR.*

14. The defendant/respondent submitted that the plaintiff /applicant has not proved that she will suffer irreparable loss and harm if the injunction is not granted. That the defendant/respondent has not at any given time attempted or acted in a way to evict the plaintiff/applicant and no evidence of the same has been provided. Therefore, what is before court is just mere allegations and things that the plaintiff/applicant can foresee.

15. The defendant/respondent submitted that the plaintiff/applicant has not proved her case on a balance of convenience. That by virtue of the defendant respondent being the registered owner of the suit land, the balance of convenience tilts in his favour. The status quo of the applicant has not been interfered with as she is still in the suit land.

16. In conclusion the defendant/respondent submitted that the applicant has not demonstrated a case that merits an injunction to issue against the defendant/respondent. He prayed for the application to be dismissed with costs to the defendant/respondent.

17. 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.

18. The plaintiff/applicant having sought for injunctive orders is only entitled to either grant or denial of the same at this stage. It is not in doubt that there has been contradictory and contentious issues that have been raised by both parties that require proper interrogation during the main trial, by calling of evidence, testing the same through cross examination and arrival of determination of the same. However, the suit is still at an interlocutory stage and the Court cannot deal with the merit of the case at this stage. See the case of *Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003*, where the Court held that:-

**“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”**

19. 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*

*(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."*

20. 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."*

21. 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: -

*i. There must be a serious/fair issue to be tried,*

*ii. Damages are not an adequate remedy,*

*iii. The balance of convenience lies in favour of granting or refusing the application.*

22. 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, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, it is not clear whether the suit property; *NZAU/ KALAMBA/475 and 486* is in danger of being alienated as the defendant/respondent has denied interfering with the occupation by the plaintiff/applicant. The plaintiff/applicant has also provided scanty evidence in respect of this subject.

23. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others, (2003) KLR 125* which was cited with approval in *Moses C. Muhia 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".*

24. Has the plaintiff/ applicant herein established a prima facie case? It is not in doubt that the defendant/respondent is the registered owner of parcel no. *NZAU/ KALAMBA/475 and 486*. The defendant/ respondent has alleged that the said title was acquired legally, the said contention cannot be settled at this juncture. the plaintiff /applicant claims that the suit land was held in trust for her and her siblings by the

defendant/respondent and he fraudulently registered it in his sole name yet it is an ancestral land. As already stated above, these are contentious and contradictory statements of facts that cannot be determined at this stage. This Court will have to determine the same at the main hearing. However, as a registered owner, the defendant/respondent is deemed to be an **absolute** and **indefeasible** proprietor whose proprietorship can only be challenged as provided by the law. See Section 26(1) (a) & (b) of the Land Registration Act.

25. The instant application relates to land parcel no. **NZAU/ KALAMBA/475 and 486**. As earlier on stated, it is not in doubt that the said parcel is registered in the name of the defendant/ respondent.

26. Prima facie, being in occupation of the suit land, the plaintiff/applicant has therefore established that she has an interest over the suit property. The plaintiff/applicant has further alleged that the defendant/ respondent has started damaging orange trees and other crops and threatened to chase her away, interfering with the plaintiff/applicant's occupation without a lawful cause. It is, therefore, not in doubt that her rights over the suit property (being the right of being in quiet possession) have allegedly been infringed upon by the defendant/ respondent by threatening to chase her away from what she claims is land held under customary trust. Consequently, the court finds and holds that the plaintiff/ applicant has established a prima facie case with probability of success as her rights can only be curtailed in accordance with the law.

27. On whether the plaintiff/ applicant will suffer irreparable injury which would not adequately be compensated by an award of damages;- 'Irreparable loss' was described in the case of Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015, as simply injury or harm which would not adequately be compensated by damages and would be continuous.

28. Courts have pronounced themselves in many cases touching on injunctions restraining parties from intermeddling with suit land which is subject to succession causes.

29. It is not in doubt that the plaintiff/ applicant is in occupation of the suit property. If for any reason the plaintiff/ applicant is put out of occupation and taking into account that there have been various developments on the suit property and after the main hearing the plaintiff/ applicant becomes the successful litigant, this court finds and holds that the plaintiff/applicant will have suffered irreparable harm that cannot be compensated by way of damages. It is trite that a crystalized right which if violated cannot be equated to compensation by damages. See the Case of Niaz Mohamm Janmohammed Vs Commissioner for Lands & 4 Others (1996) eKLR, where the Court held that:-

***"It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought."***

30. Equally in this case, the Court finds that if the plaintiff/applicant's rights are infringed, and no amount of money can compensate such infringement. For the above reasons, the Court finds that the plaintiff/applicant has established that she is likely to suffer **irreparable loss** and/or injury which cannot be adequately compensated by an award of damages.

31. On the third limb wherein if the Court is in doubt, then it will determine the matter on the balance of convenience, the Court finds that the balance of convenience tilts in favour of maintaining the status quo. It is not in doubt that this matter raises serious conflicts of facts. Further it is not in doubt that a temporary injunction is meant to preserve and protect the suit property. See the case of Exclusive Estates Ltd...Vs.... Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004 where the court held that:-

***"A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter"***

32. Further in the case of Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR, the Court of Appeal held that:-

***"The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial."***

33. In this instant matter, the Court finds and holds that the **status quo** ought to be maintained and the **status quo** herein is that which existed before the wrongful act. The wrongful act herein is the alleged interference of the suit property by the Defendant/Respondent.

34. Having now carefully considered the available evidence, the Court finds and holds that the **Notice of Motion Application** dated **23<sup>rd</sup> February 2021**, as brought by the Plaintiff/ Applicant is **merited** and an order of status quo is hereby issued pending hearing and determination of this suit. Costs to be in the cause. It is hereby ordered.

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

**MBOGO C.G**

**JUDGE**

**8/2/2022**

**IN THE PRESENCE OF:**

