



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC CASE NO 60 OF 2020**

**PAUL ITOTIA DAVID.....PLAINTIFF**

**(1<sup>st</sup> Administrator of the Estate of the Late Nzioki Wambua deceased)**

**VERSUS**

**MUTHIO NZIOKI.....DEFENDANT**

**(2<sup>nd</sup> Administrator of the Estate of the Late Nzioki Wambua deceased)**

**RULING**

1. Vide a Notice of Motion dated 23<sup>rd</sup> July, 2020 anchored on the provisions of **Section 3A of the Civil Procedure Act and Order 40 Rules 1(a) and 10(1) (a) of the Civil Procedure Rules 2010**, the Plaintiff/Applicant sought for the following orders:

**i. That pending hearing and determination of this suit the Respondent by herself, her agents, servants and/or employees be restrained through an order of injunction from alienating, selling, charging or further charging, leasing, transferring, wasting, disposing or in any similar manner dealing with the parcels of land known as Mavoko Town Block 2/3 and Mavoko Town Block 2/104.**

**ii. That the costs of the application be provided for.**

2. The Application is premised on the grounds on the face of the Motion and supported by the affidavit of the Plaintiff/Applicant, the 1<sup>st</sup> Administrator of the Estate of the Late Nzioki Wambua sworn on the 23<sup>rd</sup> July, 2020. The Applicant deponed that he became an administrator following the death of his grandmother, Mbatha Nzinga Nzioka, who was a widow to the deceased and one of the joint administrators of the deceased's estate.

3. It was the deposition of the Applicant that vide a Ruling of the High Court in Succession Cause No. 6 of 1992 dated 7<sup>th</sup> of May 2015, the court ordered that six properties, including the suit properties herein being Mavoko Town Block 2/3 and Mavoko Town Block 2/104, be excluded from the summons for confirmation of grant because there was a dispute as to whether or not they belonged to the deceased and that the dispute was triggered by the Respondent's claim that she was the rightful owner of six parcels of land, including the suit properties herein.

4. It was deponed by the Applicant that the Respondent listed the shares in respect to the suit properties as part of the assets of the deceased when she petitioned for Letters of Administration in Succession Cause No 5 of 1992; that during the pendency of Succession Cause No. 6 of 1992 (consolidated with cause 5 of 1992 filed by the 1<sup>st</sup> original Administrator), the Respondent caused to be transferred to herself two of the six properties and had titles issued in her name after the mysterious removal of a caveat placed by himself and that further, the Respondent is in the process of transferring Mavoko Town Block 2/3 to a third party being Homeward Agencies Limited for Kshs 30,000,000 and has already received the 10 % deposit being Kshs 3,000,000.

5. The Applicant deponed that vide an Application dated 22<sup>nd</sup> March, 2019 filed in Succession Cause No 6 of 1999, he sought to have the Respondent's titles to the suit properties annulled and further sought for orders compelling the County Land Registrar-Machakos to register the parcels in the joint names of the Administrators herein and that vide a Ruling delivered on the 28<sup>th</sup> April, 2020, the aforesaid Application was dismissed and the court gave directions maintaining the status quo of the suit property for a period of 45 days to allow him to ventilate his interests over the suit property in this court.

6. According to the Deponent, the question of the Respondent being the wife of the deceased was settled vide a Ruling of the court on the

19<sup>th</sup> of May 1999 where the court held that the Respondent misrepresented herself as the deceased's sole wife to Mitaboni Katani Co Ltd in 1991 and 1992 pursuant to which the suit properties were registered in her name.

7. The Applicant deponed that the court found that rather than registering the properties in the name of the estate, the Respondent fraudulently registered the same in her own names and titles were issued to her on the 20<sup>th</sup> of October 1991, which was a public holiday and that when the 1<sup>st</sup> Administrator of the estate of the deceased, Mbatha Nzioki, became aware of the aforesaid affairs, she caused a restriction to be registered against the two titles.

8. The Applicant deponed that the presentation book for Machakos District Land Registry shows that on 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> October, 1991 no transfer of titles was effected in favour of any person as none of those days was a working day; that the Respondent's contention that she was issued with a Title Deed on 19<sup>th</sup> February, 1992 for LR No. Mavoko Town/Block 2/3 is equally false as none of the titles transferred by Mitaboni Katani Ltd on that date related to the Respondent and that the list of plot owners for Machakos Town Block 2 clearly shows that the deceased had four plots allocated to him on account of his ownership of land parcels Mavoko Town Block 2/104 and Mavoko Town/Block 2/3.

9. According to the Applicant, the Respondent fraudulently registered the deceased's properties as her own by purporting to be a member of Mitaboni Katani Co Ltd with share certificate No. 49; that the said certificate is clearly a forgery and that the Respondent's name does not appear in the list of the Company's members registered as at 1<sup>st</sup> May 1979.

10. It is the Applicant's case that other than the share certificate, the Respondent does not have any other documentary evidence of any dealings with Mitaboni Katani Co Limited; that the company records show that after his demise, the deceased was represented by his son Nzioki Mboya during the AGM held on the 22<sup>nd</sup> October 1994 and that the Respondent's ownership of the suit properties was subject to criminal investigations by the Land Fraud Unit of the Directorate of Criminal Investigations culminating in her being charged at the Machakos Chief Magistrates Court in Criminal Case No 265 of 2018.

11. In conclusion, the deponent indicated that he is apprehensive that unless the orders sought are granted, the Respondent is likely to dispose of the properties and in turn prejudice the beneficiaries including the Applicant.

12. In response to the Application, the Respondent filed a Replying Affidavit in which she deponed that she became a member and a shareholder of Mitaboni Katani Co Ltd on the 17<sup>th</sup> of June 1979 after payment of Kshs 5000 and was issued with a share certificate number 49; that none of the current directors were present at the time of her membership and that although she was listed in the original membership list, there was a change of guard of the company and the old members of the board refused to co-operate and hand over the register of members to the new board.

13. According to the Respondent, the new board of the company subsequently created a new register when the company's land was surveyed in which she was registered as the owner of Plot No 3; that the deceased was never a member of the company but merely represented her at the company meetings and that the register showing her husband to be member number 88 of the company was a register with regard to members who had received transport allowance after attending a meeting.

14. It was deponed by the Respondent that the register exhibited by the Applicant has no identity numbers nor the number of plots allocated to the members and cannot be said to be a proper members register; that whereas she has produced the share certificate, none has been produced in favour of the deceased and that further, vide a letter dated 12<sup>th</sup> March 2012, the Chairman of the Company confirmed that she is a member of the company.

15. It was the Respondent's deposition that she is illiterate and the inclusion of Mitaboni Katani Co Ltd of shares No. 002012 and 001003 in the application for grant of letters of administration was incorrect since the deceased did not have any such shares; that the shares at Mitaboni Katani Co Ltd belong to her and not the deceased and that the letter by F.M Mwanza Advocate stating that plot numbers 12088, 12272, 12316 and 12392 belong to the deceased is erroneous.

16. It is the Respondent's further deposition that the Applicant's Grandmother was not a wife of the deceased as evinced by the fact that she had maintained her father's name calling herself Mbatha Nzinga Mbithi; that the Applicant is not a son of the deceased and cannot inherit his properties and that the criminal proceedings instituted against her was an intimidation tactic by the Applicant.

17. The Respondent deponed that the Applicant's grandmother had two parcels of land registered in her name including L.R No 12715/634; that the Applicant has not established a prima facie case as the suit properties are not in the Applicant's Grandmother's name and that the Applicant is not in possession of the suit properties, has not done anything on the land and will not suffer any harm if the injunctive orders are declined.

18. The Application was canvassed by way of written submissions which I have considered.

#### **Analysis & determination**

19. Having considered the pleadings and the submissions, the sole issue that arises for determination is;

- i. Whether the Applicant/Plaintiff has met the threshold to warrant the grant of a temporary injunction.

20. Being an application for injunctive orders, the same shall be weighed against the requisite essentials set out in the celebrated case of ***Giella vs Cassman Brown (1973) EA 358*** thus:

**“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 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 Applicant in this case is expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Ors [2014] eKLR* where the Court stated thus;

**“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) Ally 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. Afraha 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.”**

22. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR* defined a *prima facie* case as follows:

**“...So what is a prima facie case? I would say that 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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

23. More recently, the Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others(supra)* while agreeing with the definition of a *prima facie* case in the *Mrao Case (supra)* went ahead to further expound as follows;

**“We adopt that definition save to add the following conditions by way of explaining it. 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. 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. 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.”**

24. The dispute herein revolves around parcels of land known as Mavoko Town Block 2/3 and Mavoko Town Block 2/104. It is the Applicant’s case that the Respondent fraudulently caused herself to be registered as the proprietor of the parcels of land which belonged to the estate of the deceased, who is his grandfather; that the Respondent presented herself to Mitaboni Katani Co Ltd as the deceased’s sole wife sometime in 1991 and 1992 pursuant to which the suit properties were registered in her name and that instead of transferring the suit properties to the estate, the Respondent fraudulently registered the same in her name.

25. The Applicant produced in evidence a copy of the Ruling of 7<sup>th</sup> May 2015 in Succession Cause No. 6 of 1992, a copy of the Application for Grant of Letters of Administration by the Respondent dated 2<sup>nd</sup> December, 1991 and copies of official searches for Mavoko Town Block 2/104 and Mavoko Town Block 2/3 dated 19<sup>th</sup> August 2015 showing the restrictions that were placed on the properties on 15<sup>th</sup> April 1996 pending finalization of the succession cause.

26. The Applicant also exhibited copies of official searches for Mavoko Town Block 2/3 and Mavoko Town Block 2/104 dated 27<sup>th</sup> May 2016 showing that there are no encumbrances and/or restrictions on the suit properties. The said searches also show that the Title Deeds to the suit properties were issued in the names of the Respondent.

27. It is an undisputed fact that the title to the suit properties herein were registered in the name of the Respondent in the 1990’s. It is trite that under the **Registered Land Act**, title to land could be defeated if the same was obtained fraudulently or by misrepresentation. In *Eunice Grace Njambi Kamau & Another vs Attorney General & 5 Others (2013) eKLR*, the court held as follows:

**“...the determination whether a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided that the title is regularly issued by the duly authorized officers entitled to do so by the government, it is my opinion that such title can only be impugned under Article 40(6) of the Constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of sanctity of title is anchored on the premises that a registered owner of land who holds a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that the title of a registered owner to be impugned on account of fraud, such owner must have had knowledge that the title was fraudulently obtained or procured and /or the owner was party to the fraud.”**

28. The Applicant has set out the particulars of fraud and misrepresentation in respect to the title documents that were issued to the Applicant. The Applicant's claim of the deceased's ownership of the property is primarily anchored on various lists produced in evidence indicating that the deceased was a member of Mitaboni Katani Co Ltd and that he owned various plots therein, including the suit property. Indeed, the evidence before this court shows that the Respondent did include the share certificate, which she used to have the suit properties registered in her name, as belonging to the deceased.

29. Further, while dealing with the issue of whether the Respondent was entitled to the suit property, the court in the succession case observed its Ruling of 19<sup>th</sup> of May 1999 that the Respondent misrepresented herself as the deceased's sole wife to Mitaboni Katani Co Ltd in 1991 and 1992 pursuant to which the suit properties were registered in her name.

30. The issue that the trial court will determine is whether indeed the Respondent obtained the titles to the suit properties by misrepresentation. Based on the evidence presented to this court by the applicant, and the fact that the suit properties were registered in favour of the Respondent notwithstanding the restrictions that had been registered against the title, it is the finding of this court that the Applicant has established a prima facie case with chances of success.

31. With regard to irreparable harm, the damage caused to the Applicant should be such that it cannot be remedied by damages. In Nguruman Limited vs Jan Bonde Nielsen & 2 Others (supra) the Court stated as follows on irreparable injury or damage:

**“On the second factor, that the applicant must establish that he might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”**

32. In this instance, the Applicant has stated that the Respondent has entered into an agreement of sale in respect to the suit property with a third party, an allegation that the Respondent has not disputed. The sale of the suit property is likely to occasion the Applicant irreparable injury that cannot be compensated with damages.

33. Based on the foregoing, the court makes the following determination;

**a. An order be and is hereby issued maintaining the prevailing *status quo* in respect of the parcels of land known as Mavoko Town Block 2/3 and Mavoko Town Block 2/104 pending the hearing and determination of the suit.**

**b. Pursuant to the *status quo* order herein, the Respondent is prohibited from selling, transferring, charging or in any other manner alienating or disposing of the said parcels of land.**

**c. Costs shall be in the cause.**

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022

O. A. ANGOTE

JUDGE

**In the presence of:**

No appearance for the Plaintiff

Mr. Masika for the Defendant

Court Assistant: Okumu