



**Matoi v Kimau & another (Environment & Land Case
E014 of 2021) [2022] KEELC 2777 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E014 OF 2021**

CG MBOGO, J

JULY 6, 2022

BETWEEN

JUMA MATOI PLAINTIFF

AND

KILEI KIMAU 1ST DEFENDANT

MANTHI NTHIA 2ND DEFENDANT

RULING

1. The application for determination is dated 13th May, 2021 and was filed under certificate of urgency. It is brought under Order 40 Rule 1(a), 2 & 4(1) of the Civil Procedure Rules, Section 13 (7)(a) of the Environment & Land Court Act and Sections 1A, 1B & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. It seeks:-
 - a) Spent.
 - b) Spent.
 - c) That an order of injunction do issue pending hearing and determination of the suit herein restraining the defendant, his agents and/or servants from entering parcel of land known as 1766/Mukuyuni Ukia and constructing structures thereon or in any other way interfering with the said parcel of land.
 - d) That costs of this application be paid by the defendant/respondent.
2. The application is supported by the grounds on its face and the undated affidavit of Juma Matoi filed on 19th May, 2021. The applicant's deposition is that he is the legal owner of the suit land which he bought from the 1st respondent. That after buying the land, he was involved in an accident and took a long process to heal. Meanwhile, the 1st respondent resold the suit land to the 2nd respondent who



in turn erected structures thereon. The sale agreements are exhibited as JM-1 and the photographs of the structures as JM-2.

3. That the applicant tried to solve the matter through the area chief but it was unsuccessful. The summons by the chief are exhibited as JM-3. That the family elders met over the issue and resolved that reselling of the suit land to the 2nd respondent was illegal. The decision of the family meeting is exhibited as JM-4. Further, he deposed that wanton damage is being caused on the suit land and irreparable damage will result unless stopped by this Court.
4. The application is opposed through the replying affidavit of Manthi Nthia sworn on 07th June, 2021. He deposed that he has authority to swear the affidavit on behalf of the 1st respondent. The gist of the opposition is that he has been wrongly dragged in this suit as the land being claimed by the applicant is not the same one in his possession to wit Okia/Mukuyuni/ 2357. A Title Deed of the land is exhibited as MN-1. He deposed that he purchased the land in 2012 and took quiet possession immediately. That the applicant was a witness in the purchase and is also a long time friend. The sale agreement is exhibited as MN-2a-f.
5. He deposed that the money given by the applicant to the 1st respondent (JM1) was a loan which the 1st respondent has tried to refund through the chief but the applicant has declined.
6. Further, he deposed that the agreement which the applicant is trying to enforce has been overtaken by *Limitation of Actions Act* and that the only recourse for the applicant is to recover his money.
7. Directions were given that the application be canvassed through written submissions. The parties complied and filed their respective submissions.
8. Relying on the case of *Giella -vs- Cassman Brown* (1973) EA, the applicant submitted that the application has met the threshold for grant of an injunctive order.
9. On whether he has a prima facie case with probability of success, he submitted that he has demonstrated being the legal and rightful owner through purchase. He contends that the allegation of a loan agreement is collusion between the respondents in order to deny him his constitutional right to own property. He submitted that the respondents took advantage of his sickness to defraud him and contends that the 1st respondent could not sell that which did not belong to him.
10. On whether he will suffer irreparable damage that cannot be compensated by award of damages, he cited the case of *Hoffman la Roche & Co. Industry -vs- Secretary of State for the Trade and Industry* (1975)AC 295 (H.L) where Lord Wilberforce stated;

“The object of an injunction is to prevent a litigant who must necessarily suffer the Law’s delay, from losing that delay the fruit of his litigation.”
11. On whether the balance of convenience tilts in his favour, he submits that the collusion between the respondents shows that there was mischief on their part hence tilting the balance of convenience in his favour.
12. Relying on the principles in the *Giella* case (supra), they submitted that an applicant is expected to surmount each principle sequentially. They cited the case of *Kenya Commercial Finance Co. Ltd -vs- Afraba Education Society* (2001) Vol. 1EA 86 where the Court stated that;

“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 are 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."

13. On whether the applicant has a prima facie case with chances of success, they submitted that they have provided documents to show ownership of Ukia/Mukuyuni 2357 and 2358 and as such, they are entitled to protection of the law. They cited the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* (2003)KLR 125 at 138 where Bosire J.A stated;

"A prima facie case is more than an arguable case. It is not sufficient to raise issues. 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."

14. They submitted that the applicant has clearly failed to demonstrate this principle as he has not provided any document to prove ownership. They submitted that the applicant's claim is for 1766/ Mukuyuni Okia which is different from theirs and contend that the application seeks an injunction to a property which does not exist. They relied on the case of *Raila Amolo Odinga & Anor. -vs- IEBC & 2 Others* (2017) eKLR where the Supreme Court of Kenya held as follows:-

"In absence of pleadings, evidence if any produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."

15. They submitted that the applicant has failed to prove the first ground hence the other two should automatically fail. They relied on the case of Kenya Commercial Finance Co. Ltd (supra) where the Court stated;

"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is...sequential so that the second condition can only be addressed if the first one is satisfied..."

16. On whether the applicant will suffer irreparable harm, they submitted that the applicant's claim is based on an agreement which was done in the year 2012 hence it should have been brought before expiry of 6 years. They wondered how the applicant could have suffered loss for all those years yet fail to bring the action on time. They relied on the case of *Nguruman Ltd -vs- Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012 where the Court of Appeal stated as follows;

"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 of 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.”

17. On whether the balance of convenience favors the applicant, the respondents submitted in the negative. They contend that limitation of actions has caught up with the applicant based on the contract action. It is also their submission that the applicant has never used the suit land for over 9 years and he never objected to its sub-division. They cited the case of *Paul Gitonga Wanjau –vs- Gathuthis Tea Factor Co. Ltd & 2 Others* (2016) eKLR where the Court stated that;

“Where any doubts exist as to the applicants’ rights, or if the right is not disputed, but its violation is denied, the Court in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the other hand would suffer if the injunction was granted and he should ultimately turn out to be right and what injury the applicant, on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right....thus the Court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The Court will seek to maintain the status quo in determining where the balance of convenience lies.”

18. Arising from the above, it is clear the applicant wants this Court to issue an injunction against any dealings in a land parcel known as 1766/Mukuyuni Ukia. The respondents deny being in possession of such land and contend that the one known to them is Okia/Mukuyuni/ 2357. First, and as noted by this Court during consideration of the certificate of urgency, the sale agreement exhibited by the applicant (JM-1) is not in the Court’s language. The applicant did not make an effort of filing a supplementary affidavit in order to provide a translation.
19. Be that as it may, the applicant did not exhibit any title document to prove ownership. He alleges to have purchased the land in 2012 and the current suit was filed in 2021. Clearly and as correctly submitted by the respondents, the law bars actions based on contract after expiry of six years. The applicant attempted to explain the delay by deposing that he has been unwell for a long time yet he did not exhibit a single medical document.
20. From the title deed exhibited by the respondents, it is clear that Okia/Mukuyuni/ 2357 resulted from a subdivision of parcel 1766, the one being claimed by the applicant. From the application, it is impossible to tell whether the applicant bought the entire parcel 1766 or a portion thereof. In the event that he bought a portion, this Court has no way of knowing whether the sub-division sold to the 2nd respondent was the same one bought by the applicant.
21. Even if the applicant had proved that a sale occurred, there are still other requirements which would pose a challenge to his quest for specific performance, for instance, did he obtain the relevant consent of the Land Control Board within the stipulated time? I bet not. The upshot is that the applicant has not demonstrated that he has a prima facie case with probability of success.
22. Having found as much, there is no need of delving into the other principles enunciated in the locus classicus of *Giella –vs- Cassman brown* (supra).



23. The application has no merit and is hereby dismissed with costs.

SIGNED AND DELIVERED AT NAROK VIA EMAIL ON 6TH JULY, 2022

MBOGO C.G

JUDGE

6/7/2022

In the presence of:

T.Chuma CA

