



REPUBLIC OF KENYA



Chitsimba & 3 others v Kapitao & 3 others (Environment and Land Case Civil Suit 106 of 2021) [2022] KEELC 14507 (KLR) (2 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 106 OF 2021
EK MAKORI, J
NOVEMBER 2, 2022**

BETWEEN

**MWABAYA JUBA CHITSIMBA 1ST APPLICANT
FUNDI JUBA KANGWANA 2ND APPLICANT
RAMADHAN MCHARO KANGWANA 3RD APPLICANT
ALI MCHARO MWABAYA 4TH APPLICANT**

AND

**KALUME MCHARO KAPITAO 1ST RESPONDENT
SAID RASHID WEHU 2ND RESPONDENT
JAYESH VIJAY DHUTIA 3RD RESPONDENT
LAND REGISTRAR KILIFI 4TH RESPONDENT**

RULING

1. Application dated the 1st day of December 2021 seeks *inter alia* the following reliefs: -
 - a. Spent.
 - b. Pending the hearing and determination of this suit, the Defendants by themselves, their servants, and or agents or otherwise howsoever be restrained by a temporary injunction from charging, leasing, selling, transferring, or in any other way or manner whatsoever and howsoever interfering with a parcel of land known as Buni/Kisimani/871.
 - c. Costs of the application be provided.
2. The application is based on the reasons stated in the body of the application as well as the affidavit of one Mwabaya Juba Chitsimba, deposed on December 1, 2021. The application has been challenged



by the 3rd Respondent Jayesh Vijay Dhuta who filed Replying Affidavit deposed on 28th of February 2022 and a further supplementary affidavit deposed on 7th of June 2022. The 1st and 2nd Defendants have filed no replies to the application nor did the Land Registrar do the same. The court ordered the parties to submit written arguments in the case.

Applicants' Case

3. The Applicants contend that land parcel Buni/Kisimani/871 was at all material times held by one Mcharo Mdzomba (now deceased) in trust and for the benefit of the Mcharo family. The said Mcharo Mdzomba was the great-grandfather of the Plaintiff herein.
4. Before he died, he entrusted his brother Kapitao Bedofu Dofu with the care and protection of the suit property on behalf of the Mcharo family. He did so out of brotherly trust and local traditions prevailing in the community.
5. Although the ownership thereof was later registered in the name of the said Kapitao Bedofu Dofu as reflected in the adjudication register, it was well known and recognized by the entire Mcharo family, the community, and the administration, that the beneficial interest in the suit property belonged to the Mcharo family.
6. Kapitao Bedofu died in 1999 his son Mcharo Bedofu Dofu petitioned for letters of administration intestate in respect to the estate of his father Kapitao Bedofu Dofu. In his petition, he allegedly misled the court by stating that the suit property belonged exclusively to his father, whereas he held it in trust for his brother Mcharo Mdzomba. He further misled the court by listing his siblings Medza Mwabaya Mkuba, Fatuma Kwekwe Mwalimu, and Mnyanzi Dsuya Saha as the only beneficiaries of the suit property which led to the Kilifi Magistrates Court granting letters of administration in respect to the estate of Kapitao Bedofu Dofu, including the suit property, to Mcharo Kapitao Bedofu on November 3, 2017.
7. Upon the grant of letters of administration, Mcharo Kapitao Bedofu commenced the process of selling the suit property and hoodwinking his illiterate siblings to sign consents to facilitate the same and completely keep the Mcharo family in the dark. The sale of the property was well before the grant was confirmed, contrary to the Succession Law.
8. The Applicants delve into the Kilifi Succession Cause No 24 of 2017 and conclude that the process followed was illegal, the land belongs to the Mcharo family, and the purported sale to the 3rd Respondent was illegal and fraudulent. The land is ancestral land.

Respondent's Case

9. As already stated, the 1st and 2nd Defendants, filed a Memorandum of Appearance on December 31, 2021 through the law firm of Okanga and Company Advocates but did not file any defence nor reply to the current application. The Land Registrar Kilifi was also non-responsive.
10. In contrast, the 3rd Respondent has filed a defense, reply, and additional affidavits contesting the entire suit and the pending application. The 3rd Respondent claims that he legally purchased the land in question following all known legal and statutory provisions. According to the annexures, the land belonged to one Kiptao Bedofu Dofu, who inherited it after obtaining letters of administration intestate. All of the necessary beneficiaries filed consents in the Succession Cause. The current suit is sustained because the Applicants were never satisfied after the sale due to the distribution of the purchase monies.



11. The 3rd Respondent states further that he is a purchaser for value without notice and cannot be held at ransom by the pendency of this suit.

Issues for Determination

12. The issues for determination are whether at this stage the court can issue an interlocutory injunction pending the hearing and determination of the main suit. What are the appropriate remedies, if any, in this situation, and who should bear the costs of the application?

Submissions by the Applicants

13. The Applicants submit that the principles governing the issuance of an injunction are as stated in the *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 as restated in *Mrao Limited Vs First American Bank Of Kenya Limited* [2003] eKLR, *Nguruman Limited Vs Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Joel Kipkurui Arap Koech Vs Alice Wambui Magandu & 3 Others* [2018] eKLR and *Suleiman Vs Amboseli Resort Ltd* [2004] eKLR. The significant argument by the Applicants is that in the current application, the test in the *Giella* Case has been achieved, there is a *prima facie* case with the probability of success, and the Applicants will suffer irreparable harm if no orders of an injunction will be issued at this stage and the balance of convenience tilts to the Applicants' side. The Applicants further contend that the court should look at the circumstances of this case and find that there will be a higher risk of doing an injustice if no orders are issued for them since the property, we are dealing with is ancestral land which has been disposed of to a 3rd party fraudulently.
14. On an innocent purchaser for value without notice, the Applicants have quoted the case of *Lawrence P Mukiri Mungai Vs Attorney General & 4 Others* [2017] eKLR where the court stated what needs be to consider when dealing with a bona fide purchaser for value without notice. The test is - he holds a certificate of title; he purchased the property in good faith; he did not know about the fraud; he purchased it for valuable consideration; the vendor had an apparent valid title; he purchased without notice of fraud; he was not a party to the fraud. The Applicants conclude that the 3rd Respondent was well aware of the fraud by purchasing the land well before the grant was confirmed.

Respondent's Submissions

15. On the contrary, it's the 3rd Respondent's Submissions, the Applicants have failed at this stage to achieve the principles set out in the *Giella* Case. There is no *prima facie* case with a probability of success, the Applicants do not stand to suffer an irreparable loss that cannot be compensated in an award of Damages, and the balance of convenience tilts in favour of the 3rd Respondent.
16. The 3rd Respondent further submits that the grant of injunction is a discretionary and equitable remedy that must be premised on a decision made judiciously and not on caprice or whim with the duty of the court being not to make final findings of fact but weigh the relevant strength of each side as enunciated in the case of *Thomas Mumo Maingey (suing on his behalf and behalf of the Franciscan of our Lady of Good Counsel Sisters Registered Trustees) Vs Sarah Nyiva Hollman & Others* [2018] eKLR.
17. The 3rd Respondent states that there cannot be any argument that he purchased the land in question from duly recognized administrators of the estate of the late Kapitao Bedofu Dofu to whom a certificate of confirmation had been duly issued. Upon registration as proprietor and issuance of the title deed to him, he acquired an indefeasible and absolute right of ownership together with all appurtenant rights and privileges attached thereto and the certificate of the title held by him is conclusive evidence of proprietorship as per Section 24, 25, and 26 of the *Land Registration Act 2012*. The 3rd Respondent further argues that the only way to impeach the title is as provided in Section 26



- (1)(a) or (b) of the [Land Registration Act 2012](#) and none have been alleged against the 3rd Respondent in the instant case.
18. Regarding the allegations that the land is ancestral and was held in trust, no cogent evidence has been adduced to that effect. It is mere speculation and the application fails on the first limb by failure to disclose a *prima facie* case with a probability of success. If the allegations were true, then the Plaintiff ought to have challenged the same in the Succession Cause and not instituting a fresh suit altogether. The cases of [Susan Mumbi Waititu & 2 Others Vs Mukuru Ndata & 4 Others](#) [2008] eKLR and [Jackson Mwiti M'rinnyiru Vs Silas M'rinnyiru Mbui](#) [2020] eKLR are quoted in support of that assertion.
19. It is the 3rd, Respondent's further assertion that the Chief's letter in the Succession Cause discloses the beneficiaries of the estate of the deceased. It also discloses that the suit property was never ancestral land. The Applicants are mere opportunists out to extort money from the 3rd Respondent, having been dissatisfied with the manner the sale proceeds were apportioned amongst themselves.
20. The 3rd Respondent alludes to Section 44 of the [Evidence Act](#) and states that the findings in the Succession Cause were conclusive. No appeal was preferred on the issues concluded in that cause and cannot be reopened here.

Analysis and Determination

21. I have set out the issues that the court ought to address in disposing of the pending application. The main issue is, whether the court can issue injunctive reliefs at this stage of the trial and then the attendant costs.
22. Several authorities have been quoted by both parties on the principles applicable in the issuance of injunctive orders generally. I have gone through the authorities and need not restate what they all say suffice to reiterate that as stated in the case of [Thomas Mumo Maingey \(suing on his behalf and behalf of the Franciscan of our Lady of Good Counsel Sisters Registered Trustees\) Vs Sarah Nyiva Hollman & Others](#) [2018] eKLR - Musinga, Ouko & Gatembu JJ A held as follows: -
- “As this Court stated in the case of Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No 315 of 2004:
- “Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the Applicants. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a *prima facie* case with a reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”
23. The case for the Applicant is as stated in the plaint and the affidavit of the Applicants who allege there was fraud in the obtaining of letters of administration in Kilifi Succession Cause No 24 of 2017. This cause was fully heard and determined and the estate of the deceased Mcharo Mdzoma was determined and distributed. Out of the grant which was issued to one Mcharo Kapitao Bedofu, who later, with the concurrence of the other beneficiaries, sold it to the 3rd Respondent. That grant and later sale are challenged as having been fraudulent hence this cause and pending application.



24. Before I proceed further, the 3rd Respondent contends that the purchase was regular. The succession Cause decided on the mode of distribution and the issue ended there. The Administrator in that case could sell and pass a good title. That title cannot be challenged in this suit. It will be reversing the pendulum This court cannot reopen and rehear a matter that has long been decided. This is the wrong forum.
25. Whenever the jurisdiction of a court or a forum is questioned, the court has to consider the same outright and at the earliest, if found to lack jurisdiction before it the moment it holds the opinion that it is without jurisdiction – down its tools as stated by Nyarangi JA in the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR: -
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter”
26. Along with the claim that the court lacks jurisdiction to hear this case, the 3rd Respondent cited Section 44 (2)(d) of the *Evidence Act*, which deals with judgments in rem and states that such judgment, order, or decree is conclusive proof: -
- “that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.”
27. From the pleadings and the affidavits and the evidence I have, there was in existence a Succession Cause in Kilifi (supra) which dealt with the issue of the current parcel of land as among the properties for distribution in respect to the estate of the late Kapitao Bedofu Dofu. The cause went a full cycle. There was a confirmation of the grant on December 14, 2017. It is that grant which was used to dispose of the property in issue to the 3rd Respondent. It is alleged that the current Applicants participated in the Succession Cause and consented to the land being sold. It is after the sale that they turned around to say they did not get their fair share leading to the wrangles we now have here.
28. The Applicants in this suit have not shown what steps they took in the Kilifi Succession Cause to ventilate their grievances and have the grant revoked. They have not shown whether they objected to the confirmation or not. The question then to settle, is whether this court has jurisdiction to deal with the suit in its current form or whether the issues were fully and finally settled by the Succession Cause at Kilifi Magistrates Court, the grant having been confirmed.
29. The issue of overlapping jurisdiction between the Succession Court and the Environment and Land Court particularly on ownership and where trust has been pleaded has been raging in our Kenyan Courts. There are several authorities on the subject. For instance, being confronted with a similar issue, Justice Anthony Ndungu in the case of *In Re Estate of The Late Jonathan Kinyua Waititu - (Deceased)* [2017] eKLR. Held as follows: -
- “This court (MK Ibrahim J as he then was) in a decision cited with approval by this court in In the Matter of the Estate of Peter Igamba Njoroge, Succession Cause No 432 of 2009 (unreported) had this to say on the issue of probate court's jurisdiction to resolve a claim based on land held in trust. He stated:
- “I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the



deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father. In my view, this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed. The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependents nor beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of the trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I, therefore, do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearings or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of the hearing does not confer any jurisdiction to the court. This will only go to the question of costs.”

30. It is clear from the authorities cited, that the probate court's mandate is limited. A distinction should be made between a claim against a deceased person's estate and a claim on inheritance concerning the deceased person's estate.
31. To reaffirm this legal position, I turn to Justice Musyoka's decision in HC Succession Cause No 864 of 1996 *In Re Estate of Mbai Wainaina (Deceased)* (2015) eKLR, where he stated: -

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for the determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.



In this case, therefore, the only path legally open to the Applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

The upshot is that this court lacks jurisdiction to resolve the proprietary interest on land based on the alleged trust. The available option was for the objectors to articulate their claim by instituting proceedings against the estate of the deceased suing the administrators to obtain orders on a declaration of a trust leading to enforcement of their proprietary interests on the land.” Also see in re Estate Of Njuguna Igwima [2017] eKLR, in which it was held inter alia, that a brother of the deceased is not a beneficiary of his estate unless he can show that he was a dependant of the deceased.”

32. Based on the authorities cited, it is my conclusion that the Applicants approached this court to challenge the title to the land in question, pleading the trust concept, fraud, and misrepresentation in the Succession Cause in Kilifi. This Court has jurisdiction to hear them. Section 44 (2)(d) of the *Evidence Act* does not preclude this court from hearing this suit. The Succession Cause dealt solely with the issue of inheritance. It made no findings on ownership or trust. It lacked the necessary capabilities in law by the nature of Succession Causes and procedures under the Succession Act.
33. Having found that this Court has jurisdiction to entertain this suit, the next question to resolve is whether based on the available evidence, this Court can issue injunctive reliefs at this stage.
34. The Applicants plead the land in question is ancestral land it belonged to their forefathers and therefore family land. It was registered in trust for them. the Succession Cause was fraudulent and the subsequent sale illegal, null and void. The transactions leading to the sale were well before the succession trial was concluded. The 3rd Respondent, on the other hand, pleads that he got the title from persons who had the legal capacity to sell. He was an innocent purchaser for value without notice. His title is indefeasible as against the whole world. Besides, nothing has been placed before this court to show this was ancestral land. It is mere allegations.
35. At this point my mind should be directed to the issuance of injunctive orders. I should not delve so much into what the future holds for the entire case. It is to balance the interests of the warring parties and reckon who is likely to suffer more injuries than the other if no orders are issued at this stage. The subject matter in this suit is a land parcel Buni/Kisimani/871. Applicants claim it is their ancestral land. Already a Succession Cause has determined the heirs who later sold it to a 3rd party who is the 3rd Respondent, who claims to have purchased it for value. From the record, he plowed as consideration over Kshs 17 million. He took possession. He claims there was nobody in occupation, at least nothing to show. During the succession cause, no objection was raised which led to the confirmation of the grant. The Chief’s letters show who the rightful heirs of the land were, and whether it was ancestral land or not. It is alleged the issue here is on the share of the purchase monies which was not fairly distributed.
36. I now have a claim based on the customary trust and a purchaser for value without notice. It’s what I need to balance. Looking at the authorities quoted on the same, they are relevant but they are based on matters already concluded, evidence taken and holistically analyzed and a conclusion arrived at. On purchaser for value without notice, the authority quoted is also germane and the principles to consider. It has also to be weighed vis a vis the claim of the Applicants on customary trust aforesaid. Evidence has also to be taken. The alleged fraud by the 3rd Respondent has to be laid bare and put on test at the hearing hereof.



37. On the subject matter in issue - land parcel Buni/Kisimani/871, the land is still available – at least from the photos forming part of the 3rd Respondent’s evidence in the sworn affidavit. Nothing was placed before this court to suggest that the land is in imminent danger of being sold, charged, alienated, wasted, or passed on to another 3rd party. It has never happened since 2017 and during the pendency and determination of the Succession Cause. It is intact. If there was a such danger the Applicants would have said so, at this point then I see no reason to issue injunctive orders. Let the matter proceed to trial and the parties prosecute their respective cases and positions on merit.
38. The upshot is that the application dated the 1st day of December 2021 is hereby dismissed with costs to the 3rd Respondent.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 2ND DAY OF NOVEMBER 2022.

E.K. MAKORI

Judge

In the Presence of: -

Mr. Waweru for the Plaintiffs/Applicants

Mr. Khagram for the 3rd Defendant/Respondent

In the Absence of: -

Mr. Okanga for 1st and 2nd Defendants/Respondents

A.G for the 4th Defendant/Respondent

