



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. E60 OF 2021

HANNAH WAMBUI MBUGUA & CHRISTINE WANJIRU (*suing as the legal representatives of the state of*

MARGARET NJOKI MWENJA.....PLAINTIFFS/APPLICANTS

VERSUS

BENSON MWAURA MIRINGU.....1<sup>ST</sup>DEFENDANT/RESPONDENT

PATRICK MUNGAI.....2<sup>ND</sup>DEFENDANT/RESPONDENT

LAND REGISTRAR NAKURU.....3<sup>RD</sup> DEFENDANT/ RESPONDENT

**R U L I N G**

**INTRODUCTION**

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated 22<sup>nd</sup> July 2021. The said application is brought under certificate of urgency and seeks the following orders:

*i) Spent.*

*ii) Spent.*

*iii) That pending the hearing and determination of this application suit, ( sic) this honourable court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, agents, servant from trespassing, entering, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, interfering, and/or in any way from encroaching into the plaintiff's parcel of land known as MITI MINGI/ MBARUK BLOCK 1/120 (NDEGE). Measuring approximately 0.048 Ha.*

*iv) The costs of this Application be provided for.*

2. The application is based on the grounds set out on its face and supported by the affidavit sworn by Hannah Wambui Mbugua, one of the Plaintiffs/Applicants herein.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed a replying affidavit in response to the application. The said affidavit is sworn by the 1<sup>st</sup> Defendant (Benson Mwaura) on the authority of the 2<sup>nd</sup> Defendant.

4. The 3<sup>rd</sup> Defendant did not file any response to the application but have filed a written statement of defence.

**FACTUAL BACKGROUND**

5. The application came up for hearing ex-parte and the on the 29<sup>th</sup> July, 2021 and the duty Judge ordered that the application be served on the other parties, the application was fixed for hearing before me on 20<sup>th</sup> September 2020 and an order of status quo as pertains to the suit property was issued.

6. On the 20<sup>th</sup> September,2021 when the application came up for inter-partes hearing, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and counsel for the Plaintiff appeared before me. There was no appearance for the 3<sup>rd</sup> Defendant. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant sought and was granted more time to put in their response to the application. The Application was adjourned to the 27<sup>th</sup> September, 2021.

7. On the 27<sup>th</sup> September, 2021, parties (with the exception of the 3<sup>rd</sup> Defendant) appeared and agreed to canvass the application by way of written submissions.

8. On the 21<sup>st</sup> October, 2021, the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant confirmed the fact of filing submissions and the application was reserved for ruling.

#### **ISSUES FOR DETERMINATION.**

9. The Plaintiffs in their submissions have identified and listed the issues for determination as follows:

***a) Whether the Plaintiff has established a prima facie case.***

***b) Whether the registration of the parcel of land to Isaiah Muchina Njihia and subsequently to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was valid.***

10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have, in their submissions, identified and listed the issues for determination as follows:

***a) Whether the injunctive orders should issue.***

***b) Whether the applicant herein is entitled to the orders sought.***

***c) What court orders this honourable court ought to issue.***

***d) Costs.***

11. In my view, the issues for determination at this stage are:

***a) Whether the Plaintiffs/Applicants have met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit.***

***b) Who shall bear the costs of the application?***

#### **THE PLAINTIFFS'/ APPLICANTS' CONTENTION.**

12. The Plaintiffs are the sister and daughter of the deceased- one Margaret Njoki Mwenja. The grounds in support of their application are that the deceased is the registered owner of the parcel of land **MITI MINGI/ MBARUK BLOCK 1/120 (NDEGE)**, that they, the Plaintiffs, still hold the original title deed to the subject parcel of land the same having been issued to the deceased on 20<sup>th</sup> September, 1994. The application is also based on the ground that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have fraudulently caused themselves to be registered as the owners of the parcel of land and that this happened after the death of Margaret Njoki Mwenja. The fourth ground on the face of the application is that the Defendants are in the process of selling the subject parcel of land and that unless they are restrained, the Plaintiffs stand to suffer irreparable loss and damage.

13. The affidavit in support of the application is deposed by Hannah Wambui Mbugua. She describes herself as the administrator of the estate of Margaret Njoki Mwenja and has annexed a copy of the grant of letters of administration ad litem. She has also attached a copy of the title deed for **MITI MINGI/ MBARUK BLOCK 1/120 (NDEGE)** and deposes that the said title was issued on 24<sup>th</sup> September, 1994. Hannah deposes, further, that the deceased was survived by a daughter, one Christine Wanjiru Njoki who at the time of her mother's demise was very young and could not pursue the estate. Hannah has also deposes that they recently followed up on the whereabouts of the subject parcel of land only to find posters intimating that the parcel was up for sale. Copies of the said notices of sale have been attached to the affidavit in support of the application.

14. Hannah further deposes that they conducted a search which revealed that the parcel of land is jointly registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. A copy of the search is annexed to the application. Hannah finally deposes that her deceased sister neither sold the parcel of land to the Defendants nor did she change ownership.

#### **THE 1<sup>ST</sup> and 2<sup>ND</sup> DEFENDANTS' RESPONSE.**

15. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a replying affidavit sworn by Benson Mwaura who has authority from the 2<sup>nd</sup> Defendant to act and plead on his behalf. The 1<sup>st</sup> Defendant deposes that application is misconceived, incompetent and is an attempt by the Plaintiffs to subvert the intention on the land agreement (sic) between one Isaiah Muchina Njihia, the registered owner at the time, the 2<sup>nd</sup> Defendant and himself.

16. The 1<sup>st</sup> Defendant deposes that sometime in the year 2015, the 2<sup>nd</sup> Defendant and him approached one Isaiah Muchina Njihia with a proposal to purchase the suit parcel. He further deposes that they were able to establish that the said Isaiah Muchina Njihia was the registered owner on the suit parcel. A copy of a title deed in respect of the suit land and registered in the name of Isaiah Muchina Njihia is annexed to the replying affidavit. He also deposes that Isaiah Muchina Njihia purchased the suit parcel of land from Margaret Njoki Mwenja and that the purchase price was kshs. 500,000.

17. The 1<sup>st</sup> Defendant further deposes that after conducting due diligence, they purchased the parcel of land from Isaiah Muchina Njehia vide a sale agreement dated 6<sup>th</sup> November 2015 and subsequently embarked on having the suit parcel transferred to themselves. This, he explains, culminated in a title deed being issued in their names. The said title deed is annexed to the application.

18. It is the 1<sup>st</sup> Defendant's deposition that the Plaintiffs are acting on malice for failing to join Isaiah Muchina Njehia to the suit. He also deposes that they are in occupation and have no intention to sell, lease or convey the land but that their intention is to develop the said parcel of land in exercise of their proprietary right as enshrined in Article 40 of the Constitution of Kenya 2010.

19. The 1<sup>st</sup> Defendant further deposes that the Plaintiffs have not presented a prima facie case worthy of injunctive reliefs and that the balance of convenience tilts in their favour considering that they are bonafide purchasers for value without notice (sic). He concludes by making a prayer for the dismissal of the Plaintiffs/Applicants' application with costs to the Defendants.

#### **ANALYSIS AND DETERMINATION.**

20. The Plaintiffs'/Applicants' submissions reiterate the grounds of the face of the application and the matters deposed in affidavit in support of the application. The Defendants'/Respondents' submissions also reiterate the contents of their replying affidavit.

21. I have read the application, affidavit in support of the application, replying affidavit and their accompanying annexures together with the submissions filed by both the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. I have also read the judicial decisions attached to both submissions.

22. I have considered and weighed the conflicting submissions as regards establishment of a prima facie case, the balance of convenience and in which position the same tilts to as regard granting or rejecting the application for injunction. I have also considered all facts in this application as regards which party stands to suffer greater harm following a grant of orders of injunction.

23. As already stated in paragraph 11 above, the first issue for determination is whether the Plaintiffs have met the criteria for the grant of an order of temporary injunction.

24. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of **Giella Versus Cassman Brown** (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR** where the Court of Appeal held that;

***“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”***

25. Consequently, the Plaintiff's/Applicant's ought to, first, establish a prima facie case. The Plaintiffs/Applicants submitted that they have established a prima facie case and relied on the judicial decision of **Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLR** in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

26. In support of their application, the Plaintiffs have attached a copy of the title to the suit property. This title is in the name of their deceased mother and sister one Margaret Njoki Mwenja. The existence of this title and the fact of the original being held by them necessitates an explanation and/ or rebuttal from the Defendants. The Defendants have indeed offered an explanation in their replying affidavit. In my opinion, therefore, the Plaintiff have met the first criteria.

27. Secondly, the Plaintiffs have to demonstrate that irreparable injury will be occasioned to them if the order of temporary injunction is not granted. The judicial decision of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** provides an explanation for what is meant by irreparable injury and it states;

***“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.***

Both counsels (for the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant) have cited this judicial decision.

28. The Plaintiffs have stated in ground No. 4 on the face of the application that the Defendants are in the process of selling the subject parcel of land and that unless they are restrained, the Plaintiffs stand to suffer irreparable loss and damage. The Plaintiffs have annexed photographs of sale notices that have been put up on the suit parcel.

29. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents have submitted that no irreparable injury will be occasioned to the Plaintiffs. They have also deposed that their intention is to develop the said parcel of land in exercise of their proprietary right as enshrined in Article 40 of the Constitution of Kenya 2010.

30. From these depositions it is clear that if orders of injunction are not granted, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant shall proceed with this development, which they have every right to but not until the suit is determined on its merits. In my view, therefore, the allegation of an impending sale and a deposition on the intention, by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, to develop the suit parcel is sufficient demonstration of irreparable loss being occasioned to the Plaintiffs.

31. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) ECLR** which defined the concept of balance of convenience as:

*The meaning of balance of convenience in favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.*

*In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”*

32. In the case of **Paul Gitonga Wanjau Vs. Gathuthis Tea Factory Company Ltd & 2 others (2016) eCLR**, the court dealing with the issue of balance of convenience expressed itself thus:-

*“Where any doubt exists as to the applicants’ right, 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 that which 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 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”*

33. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents state that they are in occupation of the suit parcel and that it is more convenient to protect their proprietary interests adding that they are bonafide purchasers for value without notice. They submit that granting orders of injunction would be tantamount to evicting them. They have also relied on the decision in **Amir Suleiman Vs Amboseli Resort Limited [2004] eCLR** where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated

*“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”*

34. Bearing in mind submissions by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on the third criteria relating to balance of convenience, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I await to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. By way of example, the agreement of sale between Isaiah Muchina Njihia and Margaret Njoki Mwenja is not attached to the replying affidavit.

35. Both Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and the Plaintiffs’ Counsel have cited the case of **Robert Mugo Wa Karanja Vs Ecobank (Kenya ) Limited & Another [2019] eCLR** where the court in deciding on an injunction application stated;

*“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of 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 situation enjoined to a grant a temporary injunction to restrain such acts.....”*

36. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute is in danger of being alienated as has been shown in the photographs annexed to the affidavit in support of the application.

37. In view of the foregoing, I find that the Plaintiffs/ Applicants have met the criteria for grant of orders of temporary injunction.

37. On the issue on costs; section 27 of the Civil Procedure Act provides that costs shall follow the event. The successful party shall ordinarily have costs.

38. Consequently, I make the following order:

*i) That pending the hearing and determination of this suit, an order of temporary injunction do issue, restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, agents, servant from trespassing, entering, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, interfering, and/or in any way from encroaching into the parcel of land known as MITI MINGI/*

*MBARUK BLOCK 1/120 (NDEGE). Measuring approximately 0.048 Ha.*

*ii) Cost of the application is awarded to the Plaintiffs/Applicants.*

39. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22<sup>ND</sup> DAY OF NOVEMBER.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Miss Moenga for the Plaintiffs/Applicants.**

**Miss Kinuthia for Abuga for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent.**

**No Appearance for the 3<sup>rd</sup> Defendant/Respondent.**

**Court Assistant; Monica**