



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E044 OF 2021

CATHERINE NDINDA NDUNDA.....PLAINTIFF/APPLICANT

-VERSUS-

SYOKIMAU FARM LTD.....1ST DEFENDANT/RESPONDENT

SAMUEL NDERITU.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 6th May, 2021, the Plaintiff/Applicant sought for the following orders;

a) Spent.

b) Spent.

c) That the OCPD Athi River do ensure compliance of the orders herein by the Respondents together with their agents and servants.

d) That the Honourable court be pleased to grant a permanent injunction restraining the Respondents either by themselves, their agents and or servants from trespassing, entering, constructing and or developing the suit property Grant No. IR 47953 Land Reference Number 12715/713 Syokimau Athi River and or in whatsoever manner interfering with the Applicant's peaceful possession of the suit property until the *inter partes* hearing of this suit.

e) That the costs of this application be provided for.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on 6th May 2021 in which she deposed that she holds a power of Attorney registered under IRA 73419/1 on 5th February 2021 and dated 15th October 2020, from her son Mutisya Ndunda. That Mr. Mutisya Ndunda is the registered owner of Land Reference Number 12715/713 located in Syokimau. That she was the one who purchased shares from Syokimau Farm Limited in 1990 and upon allocation of the suit land she gave it to her son as a gift. That her son has been away in the US and it is her who works on the suit land, and makes the statutory payments of rates and ground rent.

3. The Applicant further deposed that on 19th November 2020, having found that the 2nd Defendant had put up some structures on the suit property, she proceeded to demolish the same. That thereafter she constructed her own structures and placed her own caretaker on the suit land. That on 27th April 2021, she found 20 men excavating a foundation on the suit property allegedly on instructions from the Defendants, which prompted her to report the matter to Mlolongo police station. That she learnt that the 2nd Defendant purports to have title documents to the suit land, and was shown a title for a leasehold in the name of the 1st Defendant issued on 12th November 2020.

4. She further averred that her son's title was transferred to him on 14th June 1990 and that the same has never been transferred to anyone else, hence the 1st Respondent's title is suspicious as it has a different IR number. That Syokimau Farm Limited was dissolved on 26th July, 2013 as per Gazette Notice No. 11485 dated 8th August 2013. She stated that the Respondents had trespassed on her son's property and forged a title deed as evidenced by a different IR number. She states that all title deeds for Syokimau were registered under the Registration of Titles Act and not the Land Titles Act. That the Respondents should be restrained from further development, construction and trespassing on the suit property until the determination of this suit. That unless the orders sought are granted, the Applicant stands to suffer irreparable loss and damage that cannot be compensated by damages as she has demonstrated a prima facie case.

5.The Application is opposed. On 25th May 2021, Paul Masila Kimeu, the caretaker/ Administrator of the 1st Defendant filed a replying affidavit sworn on 24th May 2021. He deposed that he was appointed as Administrator of Syokimau Farm Limited under the repealed Companies Act. That Syokimau Farm Limited was registered in 1965, but on 26th June 2013, the company's shareholders passed a resolution for voluntary winding up of the company. That the Company was granted a 99-year lease in 1983 over land under IR 221983, and LR No. 12715/713. That the company had 713 shareholders/members who complied with terms of the letters of allotment issued with share certificates for plots allotted to them indicating the plot numbers and the owners. That he was appointed as administrator of the Company to ensure members obtain titles and that he has to keep membership record book and any other relevant documents.

6.He further deposed that the company, its members and shareholders have been in quiet possession and uninterrupted ownership of the suit property and that the title is still owned by Syokimau Farm Limited. That the suit property belongs to the 1st Defendant and had been allocated to Mutisya Ndunda who is different from the Mutisya Ndunda referred to by the Plaintiff. That the correct Mutisya Ndunda's Identity card number is 06536878/64. That although the right Mutisya Ndunda was member number 597, holder of beacon number 687, and whose shares were No. 5961- 5970; was allocated the suit property, he however failed to comply with the company's policies and rules by failing to pay the required share subscription fees together with survey fees. That due to this failure, the land reverted to the 1st Defendant and the same is registered in the company's name. That he has paid up all the land rates and rent.

7.He also stated that on 12th January 2021, the Plaintiff together with her agents attempted to trespass on the suit property, causing unnecessary fear among the 1st Defendant's members. That the matter was reported to Mlolongo and Athi River Police station, and that a letter from the Chief Land Registrar shows that the 1st Defendant is the current owner of the suit land. That the Plaintiff has never been a shareholder of the 1st Defendant, nor her alleged son. He also stated that the said Catherine Ndunda has been using fictitious names to claim ownership of several parcels of land in Syokimau, like in the case of land parcel number 12715/709 where she refers to herself as Nduku Ndunda and refers to Mutisya Ndunda and Ndunda Mutisya, who are different people.

8.It was further stated on behalf of the 1st Defendant/Respondent that as at 31st December 1984, the first Defendant could not allocate any shares and therefore anyone who wished to acquire property was supposed to enter into a sale agreement with shareholders. That any member who had complied with conditions in the letter of allotment, was issued with a share certificate, three subscription receipts and allotment letter, which the Applicant lacks. He further stated that the receipts provided by the Applicant are not for the suit property, as what was paid for was plot numbers 477 and 382. That plot number 477 is LR No. 12715/419 and not LR No. 12716/713; and plot No. 382 is not LR No. 12715/ 713, as plot No. 687 is the genuine LR No. 12715/713. That as for receipt No. 1665 showing payment of rent and rates to the 1st Defendant, those receipts did not originate from the 1st Defendant. He also deposed that he was always in possession of the suit land and had constructed a house which was brought down by the Plaintiff's agents. That he had authorized the 2nd Defendant to ensure there is no trespass on the land. That the Plaintiff's title was fraudulently obtained.

9.The application was canvassed by way of written submissions. The Applicant filed her submissions dated 28th September 2021 on 25th October 2021 while the Respondents filed their submissions dated 20th July 2021 on 21st July 2021.

APPLICANT'S SUBMISSIONS

10.The Applicant submitted that her husband the late George Mulwa Ndunda and herself had purchased a total of seven shares from Syokimau Farm Limited, the 1st Respondent in this matter. That each share was converted to a parcel of land measuring five acres. That out of the seven shares, they gave their son Mutisya Ndunda one of the portions being land Reference No. 12715/713, which was transferred to his name on 14th June 1990, and another portion was transferred to their daughter Nduku Mulwa being land Reference No. 12715/709 on 14th June 1990. That her daughter sold her portion to Ubora Housing Cooperative Society Ltd, while the other parcels are still in her name and her husband's name. That the Respondents have laid claim over Land Reference No. 12715/709 and the matter is pending investigation at the C.I.D headquarters. That the properties were purchased by buying shares from the 1st Defendant/Respondent and that the Applicant has been paying all the statutory charges at the Ministry of Lands and at Mavoko sub-county.

11.The Applicant further argued that the process of voluntarily winding up of a company as required under Section 272 of the Companies Act was not complied with as the date of the special resolution for winding up was said to have been on 26th June 2013 when the Gazette Notice stated that the resolution was passed on 26th July 2013, and therefore the Gazette notice is not supported by a resolution to wind up. Counsel also argued that Section 278 of the Companies Act which provides for appointment of a liquidator was breached as the person appointed is a stranger called Caretaker/ Administrator, hence Paul Masila Kimeu is not a liquidator as envisaged in law. It was also averred that the process of voluntary winding up was marred by illegalities as the purported list of 665 members who attended the meeting and signed the membership record book was not produced by the Respondents.

12.It was further argued that under the repealed Companies Act, the liquidator ought to be a fully licensed practitioner and that if the winding up takes more than a year, the liquidator must give account of his dealings to members, which was never done by Paul Masila Kimeu. It was asserted that Paul Masila Kimeu is engaged in defrauding members of Syokimau Farm Limited of their properties which are yet to be developed as is demonstrated by the many cases filed against the 1st Respondent, a fact the court should take judicial notice of. The Applicant argued that the cases relied upon by the Respondent being **KSC International Limited (Under Receivership and 5 Others Vs. Bank of Africa (K) Limited & 6 Others [2018] eKLR, Suraya Holdings Limited & 4 Others Vs. ICICI Bank & Another [2018] eKLR and In the Matter of the Winding Up of Blue Bird Aviation Limited, W.C.No.7 of 2016**, were made under the Repealed Companies Act cap 486 Laws of Kenya and therefore inapplicable in the circumstances of this matter.

13.The Applicant also submitted that she had established a *prima facie* case with a high probability of success to warrant the grant of an injunction pending hearing of the suit, by proving ownership of the suit property and showing that she lawfully got the said ownership by buying shares from the 1st Respondent, obtaining share certificates and allotment letter, paying for the subscription fees as well as survey fees. That the 1st Defendant duly transferred the land to Mutisya Ndunda in June 1990, and the Applicant has been in possession since.

14. She further submitted that the Respondent's title is not genuine and was not lawfully acquired. She argued that Section 275 of the Companies Act provides that any transfer of shares which is not made with the sanction of a liquidator and any alteration in the status of the members of a company made after commencement of a voluntary winding up shall be void. She also argued that the Respondent had not explained how they were registered as proprietor of the suit land and the circumstances that allowed the nullification of the Applicant's title, and that since the Applicant acquired the title as a first registration, her ownership cannot be challenged.

15. On the question of whether she had established a *prima facie* case, she relied on the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 Others [2003] eKLR 125**. She argued that she had established that she has a right and a genuine and arguable case which has been infringed by the Respondents.

16. She also argued that her pleadings demonstrate that she stands to suffer irreparable injury that cannot be compensated by way of costs if the injunction is not granted. She argued that since the 1st Respondent was wound up, no accounts of the 1st Respondent had been filed in court. On the question of irreparable loss, she relied on the case of **Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** and the case of **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR**.

17. The Applicant further argued that the balance of convenience tilts in her favour as she stands to suffer more harm if the injunction is not granted than the Respondents would suffer if it is granted. She concluded that she had met the threshold for grant of injunction set out in the case of **Giella vs Cassman Brown (1973) E.A 385**.

THE RESPONDENTS' SUBMISSIONS

18. In their submissions, the Respondents restated verbatim the assertions contained in their replying affidavit. They submitted that the 1st Respondent was registered in 1965 having 713 shareholders. That members passed a resolution to appoint Paul Masila Kimeu as the Administrator of the voluntary winding up of the company. That the Administrator was to appear in court and ensure all members obtained their titles. They further submitted that the company, its members and shareholders collectively, jointly and severally were in occupation of the suit property and that the land is still owned by the 1st Respondent. That Mutisya Ndunda who is a different person from the Applicant's son, was a member of the 1st Respondent but failed to comply with the latter's terms which led to the suit property reverting to the 1st Respondent. That the Chief Land Registrar confirmed that the land is registered in the 1st Respondent's name.

19. The Respondents emphasized that they were in occupation of the suit land and that the Applicant obtained registration of the suit property fraudulently and that the 1st Respondent had constructed a house on the suit property which was demolished by the Applicant's agents.

20. It was further submitted by the Respondent that the appointment of Paul Masila Kimeu was done pursuant to Section 278 of the repealed Companies Act. The Respondent further relied on Section 734 (2) of the Insolvency Act to argue that parts VI and IX of that Act shall apply to past events. They also relied on Section 271 of the repealed Companies Act to argue that the company's voluntary winding up was lawfully carried out. Citing Section 273, they asserted that after voluntary winding up, transfer of shares should not be done. They argued that no objection to the winding up was raised, and that the Company shall only cease to exist when the winding up process is complete.

21. The Respondents also argued that appointment of a receiver in respect of a company, effectively suspends powers of Directors. The Respondent further argued that the 1st Respondent ceased to exist on appointment of an Administrator. They relied on several provisions of the repealed Companies Act to argue that Paul Masila Kimeu has the legal mandate to do what he was doing in respect of the suit land. They relied on the cases of **KSC International Limited (Under Receivership and 5 Others Vs. Bank of Africa (K) Limited & 6 Others [2018] eKLR** and **Suraya Holdings Limited & 4 Others Vs ICICI Bank & Another [2018] eKLR** and **In the Matter of the Winding Up of Blue Bird Aviation Limited, W.C.No.7 of 2016** to argue that where a receiver and manager of a company was appointed under the repealed Companies Act and before the commencement of the Insolvency Act, their actions continued to be regulated under the companies Act Cap 486 of the Laws of Kenya.

22. The Respondent argued that the principles for grant of injunction were laid out in the case of **Giella v Cassman Brown (1973) E.A 358**, which state that the Applicant must demonstrate a *prima facie* case with a probability of success, an injunction will not issue unless the Applicant will suffer irreparable injury and that when the court is in doubt, it will decide the application on a balance of convenience.

23. The Respondent further placed reliance on the case of **Exclusive Estates Limited Vs. Kenya Ports & Telecommunications Corporation & Another, Civil Appeal No. 62 of 2004**, to argue that the purpose of an injunction is to preserve the subject matter pending disposal of the suit. Additionally, the Respondent referred the court to the case of **Kenlab Cons Ltd Vs. New Gatitu Station & Another [1990] eKLR** where the court was of the view that an application for injunction will succeed only when the Applicant makes full and frank disclosure of relevant facts and also demonstrate that they have a right legal or equitable which needs protection by injunction.

24. On whether the Applicant has demonstrated a *prima facie* case with a probability of success, the Respondents argued that they were the registered proprietor of the suit land and that the letters from the Ministry of Lands dated 20th January 2021 and 12th March 2021, confirm that records held confirm that the suit property belongs to the 1st Respondent. The Respondents relied on the doctrine of *nemo dat quod non habet* to argue that a person cannot give that which they do not have. The Respondent stated that the Applicant did not present evidence to show that she was a member of the 1st Respondent, neither did she produce a share certificate, letter of allotment and share subscription. They relied on the case of **Macfoy Vs. United Africa Limited (1961) 3 AII E.R. 1169** where the court held that where an act is void, it is a nullity in law and incurably bad. They therefore argued that the Applicant's title was fraudulently obtained hence it is a nullity in law. They relied on the cases of **Arthi Highway Developers Ltd & 6 Others Vs West End Butchery Ltd [2015] eKLR**, and **Igbal Singh Rai Vs. Mark Lecchini and the Registrar of Titles, Civil Case No. 1054 of 2001** to argue that it would be unjust and inequitable that an innocent proprietor can be disposed of their title by a fraudster, as this was not the intention of Section 23 of the Registration of Titles Act.

25. The Respondents also relied on the cases of **Robert Mugo Wa Karanja Vs. Eco bank (Kenya) Limited & Another [2019] eKLR**

where it was held that an injunction will issue only when it is shown that the suit property is in danger of being wasted, damaged or alienated. They also cited the case of **Nation Media Group & 2 Others Vs. John Harun Mwau [2014] eKLR**, where the court held that, for a court to issue a mandatory injunction it must be shown that there exist special circumstances. Reliance was also placed on the case of **Board of Management of Uhuru Secondary School Vs. City County Director of Education & 2 Others [2015] eKLR**, where it was held that an injunction will only issue where an arguable *prima facie* case with a likelihood of success has been demonstrated. Further, reference was made to the case of **Mrao Vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125** on what constitutes a *prima facie* case. They argued that the Applicant has no arguable case.

26. On the question of the balance of convenience, they argued that the same tilts in their favour. They referred the court to the case of **Jaj Super Power Cash and Carry Ltd Vs. Nairobi City Council & 20 Others. Civil Appeal No. 111 of 2002**, where the court held that a wrong doer cannot keep what he has taken just because he can pay for it. They also relied on the cases of **Nguruman Limited Vs. Jan Bonde Nielsen [2014] eKLR** and **Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai [2018] eKLR**, to argue that an injunction will be refused if the inconvenience to the Applicant will be less than the inconvenience to the Respondent. They stated that they have been in occupation and therefore there will be no inconvenience to the Applicant if the injunction is declined.

ANALYSIS AND DETERMINATION.

27. I have considered the application, the affidavit in support, the replying affidavit, the rival submissions of the parties as well as the authorities relied upon. The issue that arise for determination is whether the Applicant has met the conditions for grant of an injunction.

28. Order 40 Rule 1 of the Civil Procedure Rules provides as follows;

“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 orders.”

29. For a temporary injunction to be granted, it must be demonstrated that the subject matter in the dispute is in danger of being wasted, damaged, alienated, disposed of or be dealt with in a manner that may obstruct or delay the Applicant in the execution of any decree that may be passed in their favour against the defendant in the suit.

30. Principles for grant of temporary injunctions are well settled. In the case of **American Cyanamid Co vs. Ethicon Limited 1975 AAER 504**, the court stated the elements to be satisfied before grant of a temporary injunction as follows;

a) There must be a serious/fair issue to be tried;

b) Damages shall not be an adequate remedy

c) The balance of convenience lies in favour of granting or refusing the application.

31. Similar principles had earlier been set out in the case of **Giella v Cassman Brown (1973) E.A 358**, as follows; the Applicant must establish a *prima facie* case with a probability of success; if the injunction is not granted, the Applicant will suffer irreparable injury that may not be compensated by an award of damages, and where a court is in doubt, it should decide the application on a balance of convenience.

32. In the case of the case of **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court held that all the three conditions set out in **Giella v Cassman Brown** (supra) are distinct and logical hurdles which must be surmounted sequentially.

33. A *prima facie* case was described in **Mrao Ltd v First American Bank of Kenya and 2 Others (2003) KLR** as follows;

“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 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 latter.”

34. The Applicant stated that she purchased shares from the 1st Respondent which shares translated to the suit land, which she transferred to her son Mutisya Ndunda. She has the power of Attorney from Mutisya Ndunda. That the said Mutisya Ndunda was registered proprietor of the suit land in June 1990. She has attached a title to her affidavit. She states that she was surprised to learn that the 1st Respondent was registered as proprietor of the suit property in the year 2020. She states that the registration of the 1st Respondent as proprietor of the suit land was unlawful and fraudulent.

35. The 1st Respondent on the other hand states that the Applicant was never a shareholder or member of the 1st Respondent. That it is true that one Mutisya Ndunda was the 1st Respondent's member but that he failed to comply with the terms for allocation of shares and therefore

the land reverted to the 1st Respondent. The 1st Respondent also alleges that the Applicant's registration was obtained by fraud and therefore she should not benefit from an illegality.

36. The Applicant submitted that she had established a *prima facie* case by proving ownership of the suit property and demonstrating that she lawfully got ownership of the same by buying shares from the 1st Respondent, obtaining share certificates and allotment letter, paying for the subscription fees as well as survey fees. She stated that the 1st Respondent duly transferred the suit property to Mutisya Ndunda in June 1990, and the Applicant has been in possession thereof since. I have noted that Mutisya Ndunda was registered as proprietor of the suit property in June 1990. The 1st Respondent alleges that after Mutisya Ndunda failed to honour the 1st Respondent's terms, the suit property reverted to the latter. I note that the 1st Respondent has not explained how the property was transferred from Mutisya Ndunda to them in the year 2020. If indeed Mutisya Ndunda had not complied with the 1st Respondent's conditions, it is expected that there would be a legal process before title would revert to the 1st Respondent. The 1st Respondent has not placed before this court evidence how the land was transferred from Mutisya Ndunda to them. The 1st Respondent alleges that the Ministry of Lands has written letters to confirm that they are the current registered owners. That cannot be proof that the process of their registration was lawful. I take the view that the Applicant has an arguable case. I therefore find and hold that the Applicant has established a *prima facie* case with a probability of success.

37. The concept of irreparable injury seeks to protect the *prima facie* case established by the Applicant from being rendered nugatory, hence there must be a *prima facie* case, before the existence of an irreparable injury. To prove that the Applicant shall suffer irreparable injury, they must show that the injury cannot be adequately compensated by costs. In the case of **Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai [2018] eKLR**, the court sated as follows;

“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.”

38. In the instant case, the Applicant submitted that the 1st Respondent was wound up and no accounts of the 1st Respondent had been filed in court. She deposed that on 27th April 2021, 20 men were found excavating a foundation on the suit property having been instructed to do so by the Respondents. She seeks for an injunction to restrain the Respondents together with their agents and servants from trespassing, entering, constructing or developing the suit property. I take the view that if the injunction is not granted, the Respondent may enter, construct and or develop the suit property, which may damage or waste the suit property, eventually rendering the suit nugatory. Therefore, I hold that unless the injunction is granted, the Applicant shall suffer irreparable injury that may not be adequately compensated by way of damages.

39. On the question of balance of convenience, the Applicant must prove that if the injunction is not granted they will suffer greater inconvenience than the inconvenience that may be suffered by the Respondents if the injunction is granted and the suit is dismissed in the end. In the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai** (supra), the court held that for the balance of convenience to tilt in favour of the Applicant, they must 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 it.

40. The Applicant in this suit stated that she is in possession of the suit property. The Respondent also stated that the 1st Respondent's members, shareholders jointly and severally were in possession of the suit property. Although the Respondents allege that the 1st Respondent has 713 members they did not state which members were in possession of the suit property and why they would be in a property whose shares they did not purchase. I therefore find that the Applicant having demonstrated that they are on the land have established that the balance of convenience tilts in their favour.

41. The upshot of the above is that the Applicant's Notice of Motion dated 6th May, 2021 is allowed as follows;

a) That an injunction do issue restraining the respondents either by themselves, their agents and or servants from trespassing, entering, constructing and or developing the suit property Grant No. IR 47953 Land Reference Number 12715/713 Syokimau Athi River and or in whatsoever manner interfering with the Applicant's peaceful possession of the suit property until the determination of this suit.

b) That the OCPD Athi River do ensure compliance of the orders herein by the Respondents together with their agents and servants.

c) Costs of the application shall be borne by the Respondents.

RULING DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 15TH DAY OF NOVEMBER 2021.

A. NYUKURI

JUDGE