



Makothe v Mulei & 10 others (Environment & Land Case E015 of 2024) [2025] KEMC 89 (KLR) (28 April 2025) (Ruling)

Neutral citation: [2025] KEMC 89 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
ENVIRONMENT & LAND CASE E015 OF 2024
YA SHIKANDA, SPM
APRIL 28, 2025**

BETWEEN

RUTH WANTHI MAKOTHE PLAINTIFF

AND

**KASWII NDUNYU MULEI 1ST DEFENDANT
MUNGO NDUNYU 2ND DEFENDANT
STEPHEN MUTUNGA NDAMBUKI 3RD DEFENDANT
KAVUTHU MUTUMWA 4TH DEFENDANT
DANIEL KIETI 5TH DEFENDANT
WAMBUA NDUNYU 6TH DEFENDANT
KALAMBA MULATYA 7TH DEFENDANT
JOHN MUTINDA 8TH DEFENDANT
JOYCE KAVOI 9TH DEFENDANT
ONESMUS KYALO KIILU 10TH DEFENDANT
MUEMA MULATYA 11TH DEFENDANT**

RULING

The Application

1. The application before me is dated 19/4/2024. It was filed by the plaintiff who seeks the following main orders, other prayers having been spent:



1. That this honourable court be pleased to grant a temporary order of injunction restraining the defendants, their agents, servants, employees or whoever is claiming through them from encroaching, trespassing, cultivating, grazing, disposing, developing, sub-dividing, cutting down vegetation or in any other way whatsoever from interfering with land parcel number Makueni/Kambu Scheme/1031, pending the hearing and determination of this suit;
 2. That this Honourable court be pleased to issue an order to the Sub-county Surveyor Kibwezi to visit the disputed area and place beacons clearly indicating the boundaries of the four proprietors in land parcel number Makueni/Kambu Scheme/1031;
 3. That the OCS Kambu Police Station Police station to ensure compliance with the orders;
 4. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by the Plaintiff and is premised on the following grounds:
- a. The plaintiff/applicant is one of the registered proprietors of all that parcel known as Makueni/Kambu Scheme/1031 which she owns in common with the 1st and 2nd defendants and David Mulei Ndunda (deceased);
 - b. The 1st and 2nd defendants have gone ahead and sold the property including the shares designated for the plaintiff to the 3rd to 11th defendants;
 - c. The 1st and 2nd defendants and their agents have used all manner of ways including assaulting and intimidating the plaintiff in order to remain on the disputed land;
 - d. The 1st and 2nd defendants burnt all the houses of the plaintiff and chased her away from the land;
 - e. The Plaintiff is now residing in a church as her house and household goods were burnt;
 - f. The 2nd and 3rd defendants have frustrated all efforts for boundary verification in a bid to occupy the entire land to the exclusion of the plaintiff;
 - g. Unless the orders sought herein are granted, the plaintiff will continue to suffer irreparable loss that cannot be compensated by way of damages;
 - h. The defendants will not be prejudiced at all if the orders sought are granted;
 - i. It is in the interest of justice that the orders sought be granted.
3. In the affidavit in support of the application, the Plaintiff reiterated the grounds on the face of the application and annexed copies of documents in support of the application.

The Defendants' Response

4. The Defendants opposed the application by filing a Replying affidavit sworn by the 2nd defendant. The 2nd defendant deposed that she, together with the 1st defendant, acquired the suit property in 1967 but took physical possession of the same in 1972. That the plaintiff was her sister in law who moved on the land in 1990 but did not have land or a house on the suit property. The 2nd defendant deposed that when survey was done, the plaintiff had already returned to her matrimonial home. The 2nd defendant denied being a joint owner of the suit property with the plaintiff and/or the deceased David Mulei Ndunda and that if such title exists, the same was issued without her knowledge or that of the 1st defendant and was issued fraudulently.



5. The 2nd defendant further deposed that she was, together with the 1st defendant, registered proprietors of land parcel number Makueni/Kambu Scheme/1032, while her brother in-law David Mulei Ndunda is the registered owner of land parcel number Makueni/Kambu Scheme/1033. The 2nd defendant contended that they came to learn of the existence of land parcel number Makueni/Kambu Scheme/1031 after they were served with the suit papers herein. That the said land is part of over half of their land and the same was done by fraud. The 2nd defendant alleged that when the titles were issued in 2019, she and her family had been in possession of the suit land for over 50 years, which possession has been continuous and uninterrupted. That the plaintiff has never been in possession of the suit land.
6. The 2nd defendant pointed out that the 6th defendant was the son to the 1st defendant. That he was born on the suit land and lives thereon with his family, including grandchildren. It was deposed that the 7th and 11th defendants are the 1st defendant's grandchildren whereas the 9th defendant is the 2nd defendant's daughter. The 2nd defendant stated that the land referred to by the plaintiff does not exist on the ground. That the defendants live on the suit land and granting the prayers would lead to their eviction before the suit is heard and determined. The 2nd defendant deposed that since she was in occupation of the land before registration, she had an overriding interest in the land. The 2nd defendant attached copies of documents to support the defendants' position.

Main Issues For Determination

7. In my view, the main issues for determination are:
 - a. Whether the plaintiff is entitled to orders of injunction as against the defendants as prayed for in the application;
 - b. Who should bear costs of the application?

Submissions By The Plaintiff/applicant

8. The plaintiff submitted that she had established a prima facie case with a probability of success. She relied on the copy of the search certificate annexed to her affidavit in support of the application. That the defendants spoke of different parcels of land. The plaintiff argued that production of the search certificate is conclusive proof that the parcel of land exists and is owned by the persons mentioned in the certificate. The plaintiff relied on section 91 of the [Land Registration Act](#) and argued that the 1st and 2nd defendants violated the provision by selling part of the land without the plaintiff's consent. The plaintiff further argued that no evidence had been adduced by the defendants to rebut her evidence. The plaintiff contended that she stands to suffer irreparably as her land has been sold and that she has been sent away from the suit land and that the balance of convenience tilts in her favour. She urged the court to find that she had met the threshold for granting of an injunction.

Submissions On Behalf Of The Defendants

9. The defendants also filed written submissions. The defendants argued that the applicant had not met the threshold for granting of a temporary injunction as laid out in the celebrated case of *Giella v Cassman Brown*. They relied on the replying affidavit sworn by the 2nd defendant. The defendants further submitted that any registration on the suit land was subject to the overriding interests of the defendants who are owners in possession. The defendants argued that the applicant had not established that she is likely to suffer irreparable harm as she does not even reside on the suit land. That the defendants live on the suit land and granting the orders would amount to evicting them. The defendants contended that it is them who stand to suffer irreparable harm if the orders sought



are granted. That the balance of convenience tilts in favour of the defendants. They urged the court to dismiss the application.

Analysis And Determination

The Legal provisions

10. Section 1A of the [Civil Procedure Act](#) provides as follows:

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

11. Section 1B provides as thus:

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology".

12. Section 3A provides:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

Order 40 rule 2 provides as follows:

- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit".

13. I have carefully considered the application together with the documents in support thereof as well as the response by the defendants. I have further considered submissions by the parties and directed my mind to the applicable law. In the case of *Assand v Pettitt* [1989] KLR 241, it was held that the object of a temporary injunction is to keep things in status quo so that if at the hearing the plaintiff obtains



a judgment in his favour, the defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.

14. The principles to be considered by the court when considering an application for a temporary injunction were laid down in the leading authority of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. The principles are that:
 - i. The applicant must establish a prima facie case with a probability of success;
 - ii. The applicant must show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages;
 - iii. If the court is in doubt, it should decide the application on the balance of convenience.
15. However, in considering such an application, the court should be careful not to decide substantive issues at the interlocutory stage. My view is fortified by the Court of Appeal's finding in the case of *Shitakha v Mwamodo & 4 Others* [1986] KLR 445. A similar view was held by the same court in the case of *Mbuthia v Jimba Credit Finance Corporation & Another* [1988] KLR 1 where the court held that the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The court further held that where the disputed facts raised doubt in the court's mind as to which party would be proved right at the trial, the court would comfortably consider the balance of convenience.
16. The Court of Appeal in the case of *Mureithi v City Council of Nairobi, Nairobi Civil Appeal No. 5 of 1979* (UR) held that the power to grant or deny an application for a temporary injunction is within the discretion of the court but such discretion must be exercised judiciously. It is a fundamental rule that the court will grant an injunction only to support a legal right. This position was buttressed in the English case of *Montgomery v Montgomery* [1964] 2 ALL ER 22. It has been held that the injunction sought must relate to the claim in the suit or rather the relief sought in the suit. The case of *Winstone v Winstone* [1953] 3 ALL ER 580 is germane on this point. In the said case, Winn J held as follows:

In my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made ".
17. A similar view was made in the case of *McGibbon v McGibbon* [1973] 2 ALL ER 836, where it was held that an injunction must bear some relationship to the cause of action.
18. From the above authorities, it is my considered view that while considering an application for a temporary injunction, the court must consider the plaint and the statement of defence alongside the affidavits in support of or in opposition to the application. The injunction must be based on the relief claimed by the plaintiff in the plaint. Numerous court decisions have held the position that an interlocutory injunction ought not to be granted if the prayers in the application are at variance with the suit. The leading case on this point appears to be the case of *Dismas Oduor Owuor v Housing Finance Co. (K) Ltd & Another*, HCCC No. 630 of 2001 where Ringera J (as he then was) held as follows:

The plaintiff's interlocutory application of 7th June, 2001 is inconsistent with the prayers sought in the suit. Whereas in the suit he is seeking an injunction to restrain the sale of the charged property, in the application he is seeking to restrain the transfer of the said property to the auction purchaser and other consequential or subsequent dealings with the property. The plaintiff, in my opinion, cannot be granted interlocutory orders, which are at variance with the permanent orders sought. I think he goofed in not amending his plaint



before amending the chamber summons. He could not be allowed to injunct a transfer by the chargee to the auction purchaser without amending his plaint to challenge the auction sale complained of..."

19. I have perused the plaint and find that the prayers sought have a bearing on the application. The Supreme Court of India in the case of State of Orissa v Madan Gopal Rungta [1952] AIR 12, 1952 SCR 28 held that it was a well stated principle of law that an interim relief can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a suit or any other proceeding. The foundation of an interlocutory application such as the instant one is the plaint. I have considered the averments made by both parties. One thing is clear to me. That there is need to preserve the suit property pending the hearing and determination of the suit. The court must however be cautious of the extent of the preservation. In my view, neither party will be prejudiced if the suit property is preserved in a manner that will not cause hardship to the parties.
20. There is prima facie evidence to show that land parcel number Makueni/Kambu Scheme/1031 exists and that the plaintiff is one of the co-owners. Whatever the true parcel number is, there is also undisputed evidence that the defendants are in possession and occupation of the land. I agree with the defendants that granting the orders sought as prayed at this stage will be tantamount to evicting the defendants from the suit land before the suit is heard and determined. The issues raised by the parties can best be canvassed at the hearing of the suit. However, as already indicated, there is need to preserve the suit property pending the hearing and determination of the suit. The fact that the defendants have alleged fraud also lends credence to the need for preserving the suit property.

Disposition

21. In view of the foregoing and in the interest of justice, the application dated 19/4/2024 is hereby dispensed with in the following terms;
 - a. The Plaintiff and Defendants are hereby restrained either by themselves, their agents, servants, employees or anyone acting on their behalf, from sub-dividing, selling, alienating or in any other manner substantially changing the character of land parcel No. Makueni/Kambu Scheme/1031, pending the hearing and determination of the suit;
 - b. There shall be no further major developments or projects by either party or persons claiming through them, on land parcel number Makueni/Kambu Scheme/1031, pending the hearing and determination of the suit. Major developments or projects include but are not limited to construction of houses or buildings, whether residential, commercial or other use, roads or bridges or such other projects and agricultural developments or projects that are likely to substantially change the character of the suit land;
 - c. The prayer for an order directing the Sub-county Surveyor, Kibwezi to visit the suit land and place beacons thereon is declined at this stage as I find it to be premature. The same prayer is contained in the plaint and can only be granted after evidence has been taken herein;
 - d. The prayer for an order directing the officer commanding Kambu Police post (wrongly indicated as OCS Kambu Police Station) to enforce the orders of the court is also declined as there is nothing for the police to enforce at this stage;
 - e. The costs of the application shall abide by the outcome of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 28TH DAY OF APRIL, 2025.



Y.A SHIKANDA
SENIOR PRINCIPAL MAGISTRATE.

