



Waithima (Suing on Behalf of and as the Donee of a Power of Attorney From Edwin Wagura Kimondo) v Chembe & 2 others (Environment & Land Miscellaneous Case E056 of 2024) [2025] KEELC 61 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEELC 61 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND MISCELLANEOUS CASE E056 OF 2024
FM NJOROGE, J
JANUARY 20, 2025**

BETWEEN

CHARLES WAITHIMA (SUING ON BEHALF OF AND AS THE DONEE OF A POWER OF ATTORNEY FROM EDWIN WAGURA KIMONDO) PLAINTIFF

AND

**SAMMY CHEMBE 1ST DEFENDANT
ROBERT KAMWANYI 2ND DEFENDANT
MATANO MUGANGA 3RD DEFENDANT**

RULING

1. The plaintiff filed an application dated June 14, 2024 in which sought the following prayers:
 - a. spent;
 - b.spent;
 - c. A temporary injunctive order do issue against the respondents either by themselves their servants agents or any other person from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty disposing of or otherwise completing by conveyance, transfer of any sale , re-entering leasing , letting, dumping solid waste, charging, or otherwise interfering with that parcel of land known as portion 19869 Malindi pending the hearing and determination of the main suit;
 - d. That the OCS Malindi do ensure compliance with the orders;
 - e. That the costs be in the cause.



2. The application has the grounds it is premised upon listed at its foot. It is also supported by the affidavit of the plaintiff sworn on even date.
3. The plaintiff's grounds are that the 1st respondent began to misrepresent himself as the owner of Portion 19869 Malindi (the suit property) in 2024 and has, without any justification whatsoever, purported to demarcate portions thereof to the 2nd and 3rd respondents, thus exposing the property to grabbing and waste. The 2nd and 3rd respondents have commenced construction of structures on the suit land.

1st Respondent's Replying Affidavit Dated 17/7/24.

4. In that response the 1st respondent depones that he is authorized by the rest of the respondents to swear the affidavit; that he is the chair of casuarina self-help group comprised of 200 families; that Malindi ELC E026 of 2020 is related to this case and he represents the group in that case as it was joined as an interested party; he challenged the power of attorney of the applicant as deficient; that there is absence of adequate evidence to substantiate the donor's claim to title to the suit land; that the exhibited title was fraudulently obtained; he challenged the photographs exhibited as lacking the necessary certificate; that he and his co-defendants have not squatted on the suit land; in the same breath he states that according to his physical observation, the dumping on the suit land has been carried out by the Malindi Sub-County Council.

The Plaintiff's Further Affidavit dated 11th October 2014.

5. In this document the plaintiff deponed that the suit land has never been community land but has been private property and as such could not ever have been owned by the defendants' ancestors. He gives a narrative of how the land came into being and exhibits an allotment letter issued to one Frederick Kimondo Wagura the father, now deceased, to the donor of the power of attorney. A certificate of title issued in the names of the administrators of the deceased's estate is exhibited. A copy of a certificate of confirmation of grant was also exhibited, by which the donor of the power of attorney obtained his interest in the land. He draws the attention of this court to the fact that the parcel of land involved in Malindi E026 of 2020 is LR 6461 which differs from the parcel herein which is Portion No 19869 and faults the defendants for failing to exhibit any evidence of ownership.

Submissions.

6. The plaintiff filed submissions dated 11/10/2024. I have not seen any submissions of the defendants on the file. I have taken consideration of the filed submissions in preparation of this ruling.

Determination.

7. The only issue arising from the application is whether or not the orders of injunction should issue till the hearing and final determination of the suit.
8. In this court's view, the affidavits of the applicant have demonstrated that he has capacity under the power of attorney granted to him, and that the donor has a claim to the suit land. Further, the affidavit of the respondents in reply to the application is quite evasive and argumentative. The allusion to the need to have the present applicant be joined to the suit they mention, that is, ELC O26 of 2020 is but a red herring. The land mentioned in that suit is different from the land mentioned herein. Besides, the only issue that arose for determination in that ruling was joinder. In the present case there is no such issue outstanding. Also, the respondents have not denied any of the actions attributed to them in the application save the dumping of solid waste on the suit land which they claim is being done by



the Malindi Sub-County Council. Their ability to observe who dumps garbage on the suit plot or on a portion thereof implies that they are either on the suit land or just nearby. The plaintiff is deemed to know his land and its boundaries, the subdivisions having been effected just recently according to documents that have been availed to the court and the respondents. In *Giella Vs Cassman Brown & Go Ltd* 1973 EA 358, it was held that an applicant for an injunction has to demonstrate that first he has a prima facie case with a probability of success. Secondly he has to demonstrate that he will suffer irreparable loss or damage if the interlocutory injunction is not granted.

9. A prima facie case, it was stated in *Mrao Ltd V First American Bank of Kenya Ltd* 2003 eKLR, is a case in which, on the material presented the court, properly directing itself, it 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. Where a title has been issued to an applicant the court ought to consider it in issuing orders in an injunction application, for the rights of a registered proprietor are protected by law. That is more so where the respondent has not demonstrated that he has title to his name in respect of the disputed land. Section 25 of the *Land Registration Act* provides for such protection as follows:

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

10. The provisions of Section 26(1) of the *Land Registration Act* are as follows:

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”



11. In this case the respondents are said to be not already settled on the suit land, but they are said to be attempting to obtain settlement. They have failed to dispute that assertion. There being no express denial that the respondents are currently attempting to settle upon and to subdivide the suit land for their own and others' benefit, and the claimant in this case having established that a certificate of title registered in favour of the estate of the deceased from which the beneficial interest of the donor of his power of attorney devolves, I find that he has established a prima facie case.
12. Perchance it is eventually established that the mother parcel was family property, noting the great sentimental value attached to such property, if the respondents are not prohibited by injunction from interfering with the suit land and it is finally lost, the enjoyment of his beneficial interest and all the sentimental value may be at risk of being completely obliterated; thus this court finds that he may suffer irreparable damage if the orders sought are not granted.
13. For the above reasons this court is of the view that the applicant's application dated 14/6/2024 has merit and the interim orders are hereby confirmed, with the effect that prayers no 3 and 4 thereof are hereby granted to last pending hearing and determination of the main suit.
14. The following additional directions shall be strictly complied with for expedition of the matter in view of the time lost in pursuit of the injunction application:
 - a. The parties shall file their respective witness lists, witness statements and consolidated trial bundles of documents duly paginated and indexed, the plaintiff within 14 days and the defendant within 14 days from the date of expiry of the period granted to the plaintiff;
 - b. This matter shall be mentioned on February 19, 2025 for issuance of a hearing date for the main suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JANUARY 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

