



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

ENVIRONMENT AND LAND CASE NO E022 OF 2024

JACKSON KILILI MAITHYA.....PLAINTIFF/APPLICANT

VERSUS

GEORGE KILILI MAITHYA.....DEFENDANT/RESPONDENT

RULING

THE APPLICATION

The application before me is dated 20/6/2024 and was filed on 21/6/2024. It was filed by the plaintiff who seeks the following main orders, other prayers having been spent:

- 1) That this honourable court does issue temporary orders of injunction restraining the defendant by himself, his agents, servants or anybody acting on his behalf from trespassing, clearing bushes, farming, cutting trees, interfering with boundaries, demolishing structures, constructing, sub-dividing, selling, leasing, transferring and/or dealing with the 9.03 acres of land contained inside parcels numbers Makindu/Kisingo/2430 and Makindu/Kisingo/2431, in any manner that offends the plaintiff's right to quiet and peaceful possession pending the hearing and determination of the main suit;
- 2) That the Officer Commanding Makindu Police station be ordered to ensure compliance of the orders granted in this application;

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

The application is supported by an affidavit sworn by the Plaintiff and is premised on the following grounds:

- a) The plaintiff/applicant is the original owner of land parcel number Makindu/Kisingo/2430 measuring 9.6 acres;
- b) The plaintiff entered into an agreement with the defendant to the effect that the latter would purchase 9.6 acres of Makindu/Kisingo/2430 at a price of Ksh. 3,360,000/=;
- c) The plaintiff agreed to transfer the parcel of land to the defendant in advance, on condition that the defendant would complete the balance of the purchase price within one year from the date of the agreement;
- d) The defendant failed to pay the plaintiff the balance of Ksh. 2,145,500/=;
- e) If the defendant is not stopped, the suit will be rendered nugatory and the plaintiff will suffer irreparable loss which cannot be compensated by way of damages;

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 plaintiff deposed that the defendant is threatening to evict the plaintiff's son from the suit property. The plaintiff further deposed that he was entitled to be paid the full purchase price and if the defendant is not willing to pay, the title deed should be cancelled or the land sub-divided so as to extract the 3.47 acres that the defendant paid for. On 1/9/2025, the plaintiff filed a further affidavit and maintained that the suit property ought to be preserved in order to determine the issue of ownership. That the allegation that the plaintiff had obtained the sale agreement fraudulently is an issue for determination at the main suit.

THE DEFENDANT'S RESPONSE

The Defendant opposed the application by filing a Replying affidavit sworn by himself. He deposed that he was the registered owner of land parcel number Makindu/Kisingo/2430, having purchased the same from the plaintiff, who is his father. The defendant further deposed that he paid the full purchase price of Ksh. 1,000,000/= but the plaintiff later demanded for more money claiming that the purchase price was Ksh. 3,360, 000/= and

forged a sale agreement to that effect. The defendant deposed that the plaintiff is out to frustrate him into surrendering the title deed so that he could sell the land to third parties. The defendant attached copies of documents in support of his position.

MAIN ISSUES FOR DETERMINATION

In my view, the main issues for determination are:

- a) Whether the plaintiff is entitled to orders of injunction as against the defendant as prayed for in the application;
- b) Who should bear costs of the application?

SUBMISSIONS BY THE PLAINTIFF/APPLICANT

The plaintiff submitted that he was the rightful owner of the suit property and that there was need to protect the property pending the determination of the main suit. That the defendant did not act in good faith and has threatened to evict the plaintiff's other son. The plaintiff argued that the balance of convenience tilts in his favour as he is yet to be paid the full purchase price. He urged the court to allow the application. The plaintiff filed a list of authorities to support his case.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

The defendant also filed written submissions. The defendant submitted that the plaintiff has failed to muster his case and has not sufficiently established his beneficial right to the suit land and cannot thus pray for the protection of an interest he does not possess. That the Plaintiff/Applicant needs to demonstrate to this Honourable court that he has a *prima facie* case with a higher probability of success after trial. The defendant argued that based on the material evidence adduced by the Plaintiff/Applicant, he has not demonstrated his interest on the suit land and has not established an arguable case with a probability of success after the trial.

The defendant contended that the Plaintiff/Applicant has provided a forged sale agreement guised as the *bonafide* agreement between the parties, with the intention of hoodwinking the Honorable Court that he has existing interest in property. That the duplicitous conduct of the Applicant ought to be taken into consideration in finding that he

is only keen on frustrating the Respondent and denying him the right to enjoy quiet possession of the Property. The defendant argued that the Plaintiff/Applicant is not likely to suffer irreparable harm and damage if the Defendant/Respondent is not restrained from the usual use of the suit property. That the property is registered in the defendant's name and further, he has demonstrated good faith through the entire court process and even aided court by exposing the Applicant's duplicitous conduct and bad faith. The defendant submitted that the balance of convenience tilts in favour of the Respondent who has paid the full purchase price for the property and even gone further as agreeing to return the title should be compensated Kshs. 2,000,000/=. That it is the defendant who is likely to suffer harm if the orders sought are granted. The defendant also filed a list of authorities in support of his position.

ANALYSIS AND DETERMINATION

This matter presents a regrettable dispute between a father and his son, arising from conflicting claims to property. It is lamentable that parties bound by close blood ties and expected to coexist in mutual trust and respect have found themselves litigating before this Court, rather than resolving their differences amicably within the family. Nonetheless, having been invoked to intervene, the Court is obliged to consider the issues raised, apply the relevant law, and render a determination based on the evidence and submissions presented. At the heart of this case is the question of ownership and entitlement to the disputed property. Each party blames the other for acting unfairly or contrary to their prior understanding. The dispute has therefore escalated to a legal contest, placing the Court in the unenviable position of adjudicating matters that ideally would have been resolved through reconciliation. Nevertheless, the Court must now evaluate the evidence, apply the governing principles of law, and determine the rights and obligations of the parties.

The Legal provisions

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".

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".

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".

I have carefully considered the application together with the documents in support thereof as well as the response by the defendant. 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.

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.

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.

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 "

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.

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..."

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.

There are certain facts that are not in dispute:

- a) The plaintiff sold land parcel number Makindu/Kisingo/2430 to the defendant;
- b) The plaintiff voluntarily transferred the land to the defendant;
- c) Land parcel number Makindu/Kisingo/2430 is registered in the name of the defendant;
- d) The defendant is in occupation of the land.

Has the plaintiff established a *prima facie* case with a probability of success? My answer would be in the negative. I say so because from the pleadings and the application as well as the affidavits in support thereof, it is clear that the plaintiff's interest lies in being paid the alleged full purchase price and not ownership of land parcel number Makindu/Kisingo/2430. Both parties accuse each other of forging the sale of land agreement. There is a serious dispute as to what the purchase price was and both parties have filed documents to support their divergent positions. As already indicated, the defendant is the registered proprietor of land parcel number Makindu/Kisingo/2430 which was voluntarily transferred to him by the defendant on account of sale.

The authenticity of the defendant's title is not in dispute. In the circumstances, it would not be easy to state at this stage that the plaintiff has a *prima facie* case with a probability of success. I do not see any edge that the plaintiff has over the defendant, unless evidence is taken herein. The scales are balanced between the plaintiff and the defendant, and there is room for an argument that the defendant could have an edge over the plaintiff by virtue of

being the registered proprietor. Moreover, there is no acceptable or reasonable indication that the defendant has interfered with land parcel number Makindu/Kisingo/2431. Nothing has been exhibited to support the allegation. A careful perusal and analysis of the application and submissions by the plaintiff reveals that his interest is actually in land parcel number Makindu/Kisingo/2430 but land parcel number Makindu/Kisingo/2431 has been mentioned in a bid to justify the application.

What of irreparable loss? The plaintiff has made a frail attempt, and struggled at it, to explain the issue of irreparable loss or damage. The plaintiff has not explained how he is likely to suffer irreparable loss if the orders sought are not granted. He claimed that the likely loss cannot be compensated by way of damages but contradicts himself by asking for payment of the alleged balance of the purchase price. The latter position indicates that whatever loss that the plaintiff is likely to suffer if the application is refused can be remedied in monetary terms. I find that the plaintiff has failed to satisfy the second condition.

The plaintiff having failed to satisfy the two conditions for the grant of a temporary injunction, it would be unnecessary to consider the balance of convenience. However, for academic sake, I would also find that the balance of convenience does not tilt in favour of the plaintiff. The plaintiff is not even sure of what he wants. He wants the land and also wants to be paid the alleged balance of the purchase price. The plaintiff is not even in occupation of the suit land. He has not established that the defendant has encroached on land parcel number Makindu/Kisingo/2431. Not even photographs of the scene were exhibited to court. The plaintiff purports to act for his other son who has allegedly been threatened with eviction by the defendant. He is mourning more than the bereaved.

I agree with the defendant that if the orders are granted as prayed for by the plaintiff, it is the defendant who is likely to suffer loss and damage, since he will have been prevented from occupying and utilizing a parcel of land that both parties agree was sold to him. There is nothing to show an act of trespass by the defendant or denial of access to the detriment of the plaintiff. This is not the kind of application in which stories would suffice. Without evidence, there is no *prima facie* case. In the authority of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, the Court of Appeal observed:

“It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.....In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available”.

Incidentally, the plaintiff relied on this authority, not realizing that it worked against him.

DISPOSITION

In view of the foregoing, I find that the application dated 20/6/2024 is devoid of merit. For the reasons given hereinabove, it is my opinion that the plaintiff has failed to meet the threshold of granting a temporary injunction. Consequently, I proceed to dismiss the application. The plaintiff shall bear the costs of the application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 10TH DAY OF
DECEMBER, 2025.**

**Y.A SHIKANDA
SENIOR PRINCIPAL MAGISTRATE.**