



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

ENVIRONMENT AND LAND CASE NO E042 OF 2024

MOSES KIOKO MUTETI.....PLAINTIFF/
APPLICANT

VERSUS

AMOS MUMO MUSUKI.....1ST
DEFENDANT/RESPONDENT

SAMSON MUSYOKI NDUULU.....2ND DEFENDANT/RESPONDENT

THE COUNTY LAND REGISTRAR, MAKUENI COUNTY.....3RD
DEFENDANT

THE ATTORNEY GENERAL.....4TH
DEFENDANT

RULING

THE APPLICATION

The application before me is dated 28/10/2024. It was filed on 29/10/2024 together with the main suit. The plaintiff seeks the following main orders, other prayers having been spent:

- 1) That an order of injunction be and is hereby issued restraining the 1st and 2nd defendants/respondents by themselves, their employees, agents and/or nominees

from entering, trespassing, possessing, surveying, sub-dividing, selling, alienating, transferring, charging, remaining on, constructing, continuing to construct, developing, carrying out any operations and/or activities of any nature or doing such other nature or thing or things whatsoever or taking control of all those properties known as Makueni/Kiboko B/1231 and 1232 situated in Kiboko B settlement scheme, pending the hearing and determination of this suit;

- 2) The costs of the application be borne by the 1st and 2nd defendants;
- 3) The orders of the Honourable court be enforced by the OCS Makindu Police station and/or Officer commanding Kiboko Police post.

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

- a) The plaintiff is the *bonafide* and true owner of the suit properties having been allocated the same and complied with all necessary procedural and legal requirements;
- b) The plaintiff has been in open, peaceful possession and use of the properties for over 15 years following the allocation;
- c) The 1st and 2nd defendants violently destroyed the fence, entered the properties and started constructions thereon;
- d) The 1st and 2nd defendants fraudulently and/or illegally processed and/or caused issuance of title deeds in their names;
- e) The plaintiff has suffered and stands to suffer irreparable loss and damage if the 1st and 2nd defendants are allowed to continue trespassing on the land;
- f) The 1st and 2nd defendants will suffer no prejudice if the application is granted;
- g) It is in the interest of justice and equity if the application is granted.

The plaintiff annexed copies of documents in support of the application.

THE 1ST AND 2ND DEFENDANTS' RESPONSE

The 1st and 2nd defendants opposed the application by filing a Replying affidavit sworn by the 1st defendant on his own behalf and on behalf of the 2nd defendant. The following grounds can be discerned from the replying affidavit:

- a) The 1st defendant is the registered owner of Makueni/Kiboko B/1231 whereas the 2nd defendant is the registered owner of Makueni/Kiboko B/1232 by virtue of lawful reallocation;
- b) The two parcels of land had been allocated to Justus Mbithi Mutua and Nancy K. Kioko respectively but when they failed to comply with the terms, the parcels were reallocated to the 1st and 2nd defendants;
- c) The 1st and 2nd defendants paid the requisite fees and complied with the conditions and were subsequently issued with title deeds;
- d) The plaintiff has never been in occupation of the suit land;
- e) The titles were not issued fraudulently and illegally as the 1st and 2nd defendants followed due process;
- f) That any injunction would amount to eviction as the 1st and 2nd defendants are in occupation of the land;
- g) It is only fair that everyone continues living where they are until all the issues raised are determined by the court.

The 1st and 2nd defendants also annexed copies of documents in support of their case.

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 1st and 2nd defendants as prayed for in the application;
- b) Who should bear costs of the application?

SUBMISSIONS ON BEHALF OF THE PLAINTIFF/APPLICANT

The plaintiff submitted that he had laid out a *prima facie* case with a high probability of success. He relied on the affidavits and documents filed by himself. The plaintiff reiterated the grounds contained in his affidavits. The plaintiff contended that that the processing or acquisition of the titles for the suit parcel of land in the names of the 1st and 2nd Defendants

is a trail of continuous perpetuation of fraud which should not escape the eyes of this court. The plaintiff purported to testify by way of submissions. I will disregard any reference to new information not contained in the affidavits.

SUBMISSIONS ON BEHALF OF THE 1ST AND 2ND DEFENDANTS

The 1st and 2nd defendants also filed written submissions. They submitted that the plaintiff had not proven a *prima facie* case. The 1st and 2nd defendants relied on section 26(1) of the Land Registration Act which provides that a Certificate of title is 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.

The 1st and 2nd defendants submitted that he who alleges must prove. That since the Plaintiff has alleged that the title deeds issued to the 1st and 2nd Defendants are fraudulent, he must prove the same, until then, the 1st and 2nd Defendants are the lawful and registered owners of the suit properties. It was further submitted that the allocation to the initial owners was validly and lawfully cancelled. That there is no record to establish that the plaintiff has ever owned the suit properties as initial allocations were validly and lawfully cancelled following due notice, the properties reverted to the Settlement Fund Trustees, and a fresh, procedurally irrefutable allocation and registration was completed in favour of the 1st and 2nd Defendants. The 1st and 2nd defendants contended that allegations of fraud or procedural impropriety remain entirely unproved.

The 1st and 2nd defendants argued that the plaintiff had not established that he will suffer irreparable injury if the interlocutory injunction is not granted. That additionally, the Plaintiff technically lacks the locus to bring this suit because he does not appear in any of the records so as to depict that he has ever owned the said properties. The 1st and 2nd defendants contended that if anything, they hold the certificates of title to the suit

properties and are also in occupation of the same and any injunctive orders will amount to their eviction from their lawfully acquired land. It was argued that should the Plaintiff ultimately succeed, the land remains intact and damages will suffice. While on the other hand, should the 1st and 2nd defendants be kept out meanwhile, they lose the presumption of indefeasibility attached to their title. That in that respect, the plaintiff has failed to demonstrate that the balance of convenience tilts in his favour, thus, the injunctive orders should be denied. They prayed for dismissal of the application with costs. The 1st and 2nd defendants cited authorities but did not bother to attach copies thereof.

ANALYSIS AND DETERMINATION

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 1st and 2nd 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. 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. The following stand out:

- a) The 1st and 2nd defendants are the registered proprietors of the suit parcels of land, although their titles are disputed;
- b) It is not clear whether the plaintiff is in actual occupation of the suit parcels of land;
- c) Both parties claim ownership of the suit land. There is even a counter-claim by the 1st and 2nd defendants.

One thing is clear to me. That there is need to preserve the suit properties pending the hearing and determination of the suit. The court must however be cautious with 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. Given the circumstances of the case, it would be difficult to restrain the 1st and 2nd defendants in the manner proposed by the plaintiff. There is need to maintain the *status quo* upon defined terms.

DISPOSITION

In view of the foregoing and in the interest of justice, I make the following orders:

- a) The application dated 28/10/2024 is hereby compromised in the following terms;
- b) Both parties are hereby restrained either by themselves, their agents, servants, employees or anyone acting on their behalf, from sub-dividing, charging, selling, alienating or in any other manner substantially changing the character of land parcels Nos. MAKUENI/KIBOKO B/1231 and MAKUENI/KIBOKO B/1232, pending the hearing and determination of the suit;
- c) No further developments such as constructions should be undertaken by either party pending the hearing and determination of the suit;
- d) No party should interfere with the other's property currently on the suit land pending the hearing and determination of the suit;
- e) Parties are directed to keep the peace and should there be a breach of the same, the aggrieved party will be at liberty to move the court appropriately or the relevant authorities for redress;
- f) The costs of the application shall abide by the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA CTS THIS 16TH DAY OF MARCH, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

