



REPUBLIC OF KENYA



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Mugwika v Mbuhi & 2 others; Magiri & another (Applicant) (Environment & Land Case E006 of 2023) [2024] KEELC 3649 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 3649 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E006 OF 2023
CK YANO, J
JANUARY 25, 2024

BETWEEN

MWITATI MUGWIKA PLAINTIFF

AND

CARLO MICHENI MBUHI 1ST DEFENDANT

M'MBIJIWE M'KUURA 2ND DEFENDANT

ALEX MURIUKI M'MBIJIWE 3RD DEFENDANT

AND

ELIZABETH WAKONYO MAGIRI APPLICANT

ALEX MURIUKI M'MBIJIWE APPLICANT

RULING

1. There are two applications for determination. The first application is the Notice of Motion dated 14th July 2023 by the Plaintiff seeking a temporary order of injunction restraining the defendants, their agents servants, employees and/or anybody working or claiming under them from any dealings, alienation, carrying out survey exercise, subdivision, transfer, entering and/or intermeddling or in any way dealing with the parcels of land registration numbers Abothuguchi/Makandune/527 and 610 (hereinafter referred to as the suit properties) pending the hearing and determination of this suit. The second application is a notice of motion dated 11th October 2023 by Elizabeth Wakanyo Magiri and Alex Muriuki M'Mbijiwe seeking to be joined in the suit as co-defendants to enable them file their pleadings, including a defence and counterclaim.



Plaintiff's Application Dated 13th July, 2023

2. The application is brought under Order 51 Rule 1, Order 40 rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Section 3 and 19 of the *Environment and Land Act*, Article 159 of *Constitution* of Kenya and all enabling provisions of the law. The application is made on the grounds on the face of the motion and supported by the affidavit of the plaintiff sworn on 13th July, 2023 and 9th October 2023.
3. The Plaintiff states that he is the registered owner of land parcel number Lower Abothuguchi/Makandune/107 to which he got registered as proprietor on 24th September, 1977 and the land certificate issued on 3rd July, 1978. He has annexed a copy of the Green Card marked "MM/1". That during the survey and demarcation of land in the area, the said land measured approximately 44.10 acres but the same got reduced gradually to approximately 26.70 acres. A copy of the schedule of acreage of the property has been annexed and marked MM/2.
4. The plaintiff has deposed that without his knowledge and consent, land parcel number Abothuguchi/Makandune/527 and Abothuguchii/Makandune/610 were unlawfully excised out of the plaintiff's land and allocated to the 1st and 2nd defendant by the 3rd defendant. Copies of the official sketch plan and certificates of official search marked MM/3 and MM/4(a) & (b) have been annexed. It is the plaintiff's contention that the 1st and 2nd defendant's have been occupying his land unlawfully and denying him the right to enjoy his property. That upon filing this suit, the 1st and 2nd defendants have threatened to dispose of the suit properties to third parties to frustrate the outcome of the suit if it is decided in the plaintiff's favour. That it is therefore in the interest of justice that an order of temporary injunction be issued lest the plaintiff will suffer irreparable loss not compensable in damages. That no prejudice will be occasioned to the defendants if the order is issued.
5. The application is opposed by the 1st defendant who filed a replying affidavit sworn on 19th September, 2023. He states that he is aware that the 2nd defendant is deceased having died in the year 2015. The 1st defendant avers that the original owner of land LR No. Abothuguchi/Makandune/527 was one Jeremiah Mburugu M'Rintangu who charged the said land to Kenya Commercial Bank Limited, Meru Branch and failed to repay the loan, prompting the bank to sell the said land and was purchased by the 1st defendant in the year 1983. A copy of the register marked "CMM1" has been annexed.
6. The 1st defendant states that he bought the land together with mango trees and other structures thereon. That in the year 2003, he subdivided the land into 3 portions being LR No. Abothuguchi/Makandune/1674 -1676. A copy of the Mutation marked "CMM2" has been annexed.
7. The 1st defendant further states that on 29th December, 2003, he sold LR No. Abothuguchi/Makandune/1676 to Elizabeth Wakonyo Magiri who was issued with a title deed on 14th April, 2004. A copy of the Agreement for Sale marked "MM3" has been exhibited. The 1st defendant added that he sold LR Abothuguchi/Makandune/1674 and 1675 to Ashford Donald Micheni and Alex R. Njeru respectively who later sold the same to Elizabeth Wakonyo Magiri. Copies of the agreement for sale and register marked "CMM5a" and "CmM5b" have been annexed.
8. The 1st defendant states that the said Elizabeth Wakonyo Magiri and her husband Julius Kirimi Magiri have extensively developed their land by planting therein gravelia trees, bananas and mangoes. Photographs marked "CMM6, CMM7" and "CMM8" have been annexed. The 1st defendant avers that the plaintiff does not occupy any of land parcels Nos. Abothuguchi/Makandune/1674, 1675, 1676 and 610 but is seeking to enter and annex the said land parcels before this case is heard and determined at the detriment of their rightful owners who are not parties to this suit. That the plaintiff



- has not suffered any loss and damage and his application has no merits. The 1st defendant prays that the application be dismissed with costs.
9. By way of rejoinder the plaintiff filed a supplementary affidavit dated 4th October, 2023 wherein he states inter alia that the 1st defendant's averment that the 2nd defendant is deceased is not supported by any documentary proof such as a death certificate. That if it is true that the 2nd defendant is deceased, the plaintiff will be craving for leave to file an application to substitute him with the administrator of his estate.
 10. The plaintiff avers that Jeremiah Mburugu M'Rintaugu, the alleged original owner of LR No. Abothuguchi/makandune/527 could not acquire ownership/title unlawfully and use the same to obtain a loan from a bank and/or transfer that title lawfully to any second party, and termed the alleged purchase by the 1st defendant null and void ab initio. The plaintiff further states that he will crave to seek leave from the court to have Elizabeth Wakonyo Magiri joined in this suit as a 4th defendant. He states that contrary to the averments that Title Nos. Abothuguchi/Makandune/1674 -1676 are as a result of subdivision of Abothuguchi/Makandune/527, the position is that the same arise from the order issued in the matter of Land Parcel NO. Abothuguchi/Makandune/107 and in the matter of Meru Central District LDT Case No. 98 of 2005 and in the matter of Meru CMC. LDT No. 19 of 2016 which was however quashed by the High Court in Misc. Civil Application No. 163 of 2006. A copy of the decree marked "MM/1" has been annexed. That upon filing this suit and this application, the 1st and 2nd defendants have started to cut down trees as shown in the bundle of photographs annexed and marked "MM/2".
 11. The application was canvassed by way of written submissions. The plaintiff filed his submissions dated 24th October, 2023 through the firm of Gori, Ombugi & Company Advocates who cited the provisions of order 40 Rule 1, of the *Civil Procedure Rules* and relied on the loans classic case of *Giella v Cassman Brown & Company Limited* [1973]EA 358 and urged the court to allow the application.
 12. The firm of Kiogora Ariithi & Associates Advocates filed submissions dated 27th November, 2023 on behalf of the defendants wherein they also relied on the Giella Case. It is submitted that it is clear that the plaintiff did not even conduct due diligence before filing this application and the whole suit. That the 1st and 2nd defendants have provided evidence showing that they are currently in occupation of their parcels of land, which they have developed over time. That there is no indication or evidence of the supposed likelihood of them dealing, alienating, or intermeddling in any way with the suit parcels.
 13. It is submitted that the plaintiff has not established a prima facie case and the court was urged not to grant the orders sought since they would be prejudicial to the defendants. Learned counsel for the 1st and 2nd defendants also relied on the case of *Hezron Kamau Gichuru v Kianjoya Enterprises Limited & Another* [2022] eKLR, *Ngurumau Limited v Jan Bonde Nielson & 2 Others* [2014]eKLR and *Mrao Limited v First American Bank of Kenya Limited* [2003] eKLR.
 14. It is also submitted that the plaintiff has not demonstrated that irreparable injury will be occasioned to him if the order of temporary injunction is not granted. Counsel relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018]eKLR and submitted that the plaintiff has not met the threshold for grant of orders of temporary injunction, and urged the court to dismiss the application with costs to the defendants.
 15. I have considered the application, the replying affidavit and the rival submissions by the parties. The issue for determination is whether the orders of temporary injunction should be granted as sought by the plaintiff.



16. Temporary injunctions that are granted by the court under order 40 rule 1 & 2 of the [Civil Procedure Rules](#) are discretionary in nature. The three requirements that need to be established were laid down in *Giella Versus Cassman Brown case (supra)*. An applicant must establish that he or she has a prima facie case with a probability of success, that he or she is likely to suffer irreparable harm not compensable in damages if an injunction is not granted and finally where the balance of convenience tilts if the court is in doubt.
17. In the present case, the plaintiff avers that he was the registered owner of land parcel No. Lower-abothuguchi/Makandune/107 and was issued with title on 3rd July 1978. He states that during demarcation, the land measured approximately 44.10 acres, but was reduced gradually where some portions were given to Kanywee Primary School, Salvation Army Church and as easement/road. He further avers that the said land was unlawfully excised out and allocated to the 1st and 2nd defendant as land parcel No. Abothuguchi/Makandune/527 and 610 respectively. It is the plaintiff's contention that the said excision was fraudulent, wrongful and unlawful.
18. The 1st defendant has filed a defence denying the plaintiff's claim. He pointed out that his interest in land parcel No. Abothuguchi/Makandune/527 and 610 ceased in the year 2003 and therefore has been wrongly been sued. He also denied that the plaintiff land was measuring 44.10 acres as alleged. The 1st defendant further avers that the 2nd defendant died in the year 2005 and therefore the plaintiff suit against the deceased is fatally defective, incompetent and bad in law.
19. The plaintiff's claim is based on alleged fraud. Allegations of fraud are serious and they need not only be alleged but proved on a higher standard than of normal civil suits. I have perused the documents annexed to the affidavit of the plaintiff in support of the application. The copy of Green Card marked MM/1 indicates the plaintiff's land parcel No. Lower-abothuguchi/Makandune/107 is approximately 4.0 hectares and not 44.10 acres alleged by the plaintiff. It has also been pointed out that the 2nd defendant is deceased and died way back in the year 2005. I have perused the affidavit of service filed by the plaintiff on 29th May, 2023. Geoffrey Mburugu M'Mukiri, the process server alleges that he served the 2nd defendant on 13th April, 2023 but he declined to sign the documents. I have also perused the documents annexed to the 1st defendant's replying affidavit. The Green Card shows that the Land parcel No. Abothuguchi/Makandune/527 was initially registered to one Jeremiah Mburugu M'Rintaugu on 24th September, 1977 and title issued on 14th April, 1978. The title was later charged to a bank and the land subsequently sold and transferred to the 1st defendant on 20th July 1978. He later subdivided the said parcel of land, and sold it to third parties who were also issued with new titles. Among the said third parties is Elizabeth Wakonyo Magiri who in a separate application herein is seeking to be joined to this suit.
20. From the material on record, I am not satisfied that the plaintiff has made out a *prima facie* case. I am also not persuaded that the plaintiff would suffer irreparable harm if the injunction sought is not granted as he can still be compensated in damages in the event he is successful at trial. For these reasons, this court finds that the Notice of Motion dated 13th July, 2023 is not merited and is dismissed.

Application Dated 11th October, 2023

21. The application dated 11th October, 2023 has been brought by Elizabeth Wakonyo Magiri and Alex Muriuki M'Mbijiwe seeking leave to be joined in the suit as co-defendant. It is their contention that they have interests in land parcels Nos. Abothuguchi/Makandune/1674, 1675 and 610 and therefore are affected by this suit yet they are not parties. They have annexed copies of agreements for sale, register and photographs marked "ENM2a", "EWM2b", "EWM3a", "EWM3b", "EWM4a", "EWM4b" and "EWM4c" respectively. The application is not opposed by the plaintiff.



22. The provisions of order 1, rule 10(2) & (14) of the *Civil Procedure Rules* states as follows: -

3(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(14) Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.

23. It is clear from the above provisions of law that the court has discretion to order the name of a person who ought to be joined whether as plaintiff or defendant, or whose presence before the court may be necessary, to enable the court effectually and completely adjudicate upon and settle all questions involved in the said suit. Since Elizabeth Wakonyo Magiri and Alex Muriuki M’Mbijiwe the proposed defendants are directly affected by the matter in this suit and will be affected by the judgment to be issued herein and considering that the application is not opposed by the plaintiff, the application is merited and allowed.

24. For the reasons set out above, I make the following final orders: -

- a. The plaintiff’s application dated 13th July, 2023 is dismissed.
- b. The application dated 11th October, 2023 is allowed.
- c. Pursuant to the provisions of Order 1 rule 10(4) the plaintiff is directed to amend the plaint in such manner as may be necessary within 14 days and thereafter the amended copies of the summons and the plaint be served on the new defendants and the original defendants within 14 days of filing.
- d. The defendants shall within 14 days of service of the amended plaint file their amended defence or defence as the case may be, after which the matter will proceed for pre-trial directions.
- e. The costs of both applications will be in the cause.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF JANUARY, 2024.

HON. C. YANO

ELC – JUDGE

In the presence of:-

Court Assistant: Kiragu

No appearance for Mukaburu for 1st, 2nd, 4th & 5th Defendants/Respondents

Makura for Applicants

No appearance for the Plaintiff

