



**Sambu & 2 others v Chirchir & 3 others (Environment & Land Case 10 of 2023) [2024] KEELC 130 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 130 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 10 OF 2023**

**EO OBAGA, J  
JANUARY 25, 2024**

**BETWEEN**

**DANIEL KIMAIYO SAMBU ..... 1<sup>ST</sup> PLAINTIFF  
BENJAMIN KIPROTICH BIWOTT ..... 2<sup>ND</sup> PLAINTIFF  
VITALIS KIBET MAIYO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**BARNABAS KIMUTAI CHIRCHIR ..... 1<sup>ST</sup> DEFENDANT  
UASIN GISHU COUNTY, LAND ADJUDICATION & SETTLEMENT  
OFFICE ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR, UASIN-GISHU COUNTY ..... 3<sup>RD</sup> DEFENDANT  
HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of two separate applications. The first application is dated 2.10.2023. It is brought by the Plaintiffs/Applicants and it seeks the following orders: -
  - a. Spent
  - b. That a temporary injunction do issue restraining the 1<sup>st</sup> Defendant, his servants, agents and/or assigns from in any way dealing and/or interfering with the Plaintiffs' quiet possession, use and/or occupation, fencing, constructing and /or to do any act that is inconsistent with the Plaintiffs' right as the bonafide and legal owners of Land parcel namely Uasin Gishu/Illula/178 measuring approximately 2.8 Ha. pending the hearing and determination of this Application inter-parties and thereafter the main suit.



- c. That the O.C.S Kapsoya Police Station to ensure compliance of and enforce the orders issued herein.
  - d. That costs of this Application be provided for.
  - e. Any such further order this Honourable Court may deem fit and just to grant.
2. The second application is dated 13.10.2023. It is brought by the 1<sup>st</sup> Defendant/Applicant and it seeks the following orders:-
- a. Spent
  - b. A Prohibitory Order be and is hereby issued prohibiting the 3<sup>rd</sup> Defendant/ Respondent from alienating, registering, effecting transfer, charging or in any way dealing with all that parcel of land known as Uasin Gishu / Illula/ 178 in favour of the Plaintiffs and all other persons from taking any benefit from such purported registration, transfer or charge.
  - c. The 3<sup>rd</sup> Respondent be and hereby directed to register a Restriction over all that parcel of land known as Uasin Gishu/Illula/ 178 pending the hearing and determination of this suit.
  - d. Costs be in the cause.

**The first application;**

3. The Applicants contend that they applied for a plot within Illula Settlement Scheme and their application was successful. They were allotted plot Number Uasin Gishu/Illula/178 measuring 2.8 hectares (suit property). They took possession and utilized the same until around October 2023 when the 1<sup>st</sup> Defendant/Respondent started claiming the same.
4. When the Applicants went to the Lands office, they discovered that the suit property had been registered in the name of the Respondent. They contend that initially the suit property had been allotted to the Respondent who failed to meet conditions of the Settlement Fund Trustee (SFT) who in return re-possessed the suit property and allocated it to them.
5. The Applicants further contend that the suit property was discharged and the same was transferred in their favour by the SFT after they made payment for the same. It is on this basis that they are praying for the orders as shown in paragraph 1 above.
6. The Applicant's application was opposed by the Respondent based on a replying affidavit sworn on 13.10.2023. The Respondent states that the Applicants' affidavit is full of falsehoods. The Respondent states that he applied for a settlement plot at Illula Settlement Scheme and was given plot No. 178. He has been in possession of the suit property since 20.3. 1982 and he has put up two homes on the suit property.
7. In 1989, he obtained title to the suit property. He states that he is not aware of any cancellation of his title by the SFT and that in any case SFT has no capacity to cancel title let alone allocating a plot which is not available for allocation. He states that the address to which the letter of cancellation was sent belongs to SFT and that he had always had his own postal address.
8. I have carefully considered the application by the Applicants and the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the Applicants have met the threshold for grant of injunctive orders in the manner sought.



9. The principles for grant of an injunction were set out in the celebrated case of *Giella –Vs- Cassman Brown & Co. Ltd* (1973) EA 358. First an applicant must show that he has a prima facie case with probability of success. Second, the Applicant has to demonstrate that he will suffer loss which will be incapable of being compensated in monetary terms. Third, if the court is in doubt it will decide the application on a balance of convenience.
10. A prima facie case was defined in the case of *Mrao –Vs- First American Bank of Kenya & 2 others* (2003) KLR K5 as follows:-
- “ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.
11. In the case of *Showind Industries –Vs- Guardian Bank Limited & another* (2002) 1 EA 284 the Court held as follows:-
- “ An injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity or his equity has been defeated by laches.”
12. In the instant case, the Applicants have annexed correspondence from the SFT showing that the Respondent’s plot was re-possessed for among other grounds that he failed to reside on the suit property or make the requisite amounts required by the SFT. The Respondent on the other hand has annexed documents to show that he made payments to SFT and is in occupation of the suit property. He has title to the suit property which was obtained in 1989. This being the case, the Applicants have not demonstrated that they have a prima facie case with a probability of success.
13. An injunction is an equitable remedy. Whoever desires to have the same in his favour has to come to court with clean hands. In the instant case, the Applicants have claimed that they have been in possession of the suit property since the same was allotted to them. Contrary to their assertions, the Respondent has demonstrated that he is the one in possession. This explains why the Applicants are seeking Police assistance to enforce any orders which the court will give and this is most likely evicting the Respondent.
14. As was held by the court in *Kenya Commercial Finance Co. Ltd –Vs- Afraba Education Society* (2001) Vol 1 EA 86, if prima facie case is not established, then irreparable injury and balance of convenience need no consideration. As the Applicants have not established a prima facie case, I find that their application lacks merit. The same is dismissed with costs to the Respondent.
- It is so ordered.

### **The second Application;**

15. The Applicant contends that he is the registered owner of the suit property. The suit property was allotted to him in 1982. In 1989, he obtained title. He took possession in 1982 and has since remained so to date. He has built two homes on the same. He recently learned that the 2<sup>nd</sup> Respondent (SFT) had purported to cancel his title and allocated the suit property to the Respondents. He states that the Respondents are in the process of having the land transferred in their name and that if a prohibitory orders and restriction are not granted, his defence will be rendered nugatory.



16. The Applicant's application was opposed by the Respondents based on grounds of opposition dated 2.11.2023 and a replying affidavit sworn on 2.10.2023. The Respondents contend that the Applicant's application is incompetent as the same is not based on any pleading. They state that the Applicant has not filed any counter-claim or originating summons the basis of which he would have prayed for the orders he is seeking.
17. The Respondents contend that the Applicant's title was obtained fraudulently as the Applicant did not obtain a discharge from the SFT which shows that he is yet to clear Kshs 6,100,000/= due to the SFT. They therefore argue that the Applicant's title is amenable to challenge on grounds of fraud.
18. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions by the parties. The Applicant is seeking an injunctive relief as well as a restriction against the title. The law is clear that one cannot seek a relief which is not based on either a plaint, counter-claim or originating summons.
19. In the instant case, the Applicant has not filed any counter-claim in this suit. There is therefore no basis upon which he can seek orders of prohibitory injunction. The Applicant has also not demonstrated that there is fraud which is likely to be committed as to call for registration of a restriction against the title.
20. In the case of *Paul K. K. Birech -Vs- Barclays Bank of Kenya Ltd & 2 others* (2013) eKLR, Justice Munyao stated as follows:-

“A party must file pleadings either by way of plaint, defence or counterclaim so as to support an application in a suit. There are no pleadings filed by the applicant in this case -and thus the application lacks a foundation... To direct otherwise would be tantamount .to saying that all that a party needs to do is walk into court, file no pleadings at all and yet beseech the court to invoke its inherent powers to grant him orders. That would be absurd, and that is precisely the position that the applicant finds himself.”

21. Similarly, in *Geoffrey Ndungu Theuri -Vs- Law Society of Kenya* (1988) eKLR Kwach Ag. JA (as he then was) held as follows:-

The order specifically refers to a suit which is defined under section 2 of the *Civil Procedure Act* in these terms: "suit" means all civil proceeding commenced in any manner prescribed under the Civil procedure Rules and an applicant is not entitled under order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused section 34 of the *Civil Procedure Act* does not give the court the power to act without jurisdiction.

22. It is clear that the Applicant has not filed a counter-claim in this suit. He cannot therefore seek injunctive relief or be granted an order for registration of a restriction where there are no grounds laid for grant of the same. I find that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**E. OBAGA**

**JUDGE**



In the virtual presence of;

M/s Kosgei for Mr. Omboto for Plaintiffs.

Mr. Warigi for 1<sup>st</sup> Defendant.

Court Assistant –Brian

**E. OBAGA**

**JUDGE**

**25<sup>TH</sup> JANUARY, 2024**

