



Devi Limited & another v Muthui (Environment & Land Case E034 of 2023) [2024] KEELC 1161 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E034 OF 2023
OA ANGOTE, J
FEBRUARY 29, 2024**

BETWEEN

DEVI LIMITED 1ST PLAINTIFF

MILLICENT WAMBUI MUGI 2ND PLAINTIFF

AND

DAVID MUTHUI DEFENDANT

RULING

1. This ruling is in respect of the Plaintiffs' Notice of Motion application dated 27th July, 2023 which seeks the following orders:
 - i. That the Defendant/Respondent be restrained by himself, his agents or servants from entering into or being on L.R. No. 2327/174 Karen Hardy pending the hearing and determination of this suit.
 - ii. That this Honourable Court be pleased to issue a mandatory injunction requiring the Defendant to demolish a shed or any other structure or building constructed on 24th July, 2023 or thereafter.
 - iii. That costs of this application be provided for.
2. The application is premised on the grounds adduced on the face of it and supported by the Affidavit sworn on 27th July, 2023 by Millicent Wambui Mugih, the 2nd Plaintiff. The 2nd Plaintiff deponed that she purchased L.R. No. 2327/102 and caused it to be registered in her and her late husband's name, one Dickson Jomo Kebata, and that they later transferred it to the 1st Plaintiff Company which was incorporated by their accountants Mr. Kiarie and Mr. Waithaka who held the shares in trust for them.
3. It was deponed by the 2nd Plaintiff that in 1992, the 1st Plaintiff subdivided the land into four portions being 2327/171, 2327/172, 2327/173 and 2327/174 (the suit property); that the suit property was to



- be transferred to her but that never happened and that in early July, 2023 some people went to the suit property requesting to be allowed into what they referred to as their property.
4. According to the Plaintiff, she conducted searches and discovered that her late husband and the Defendant fraudulently had the suit property transferred to the Defendant; that since 22nd June, 1993 when the suit property was purportedly transferred to the Defendant, he never entered into the land and that in addition, it is the 1st Plaintiff who has been paying rates thereon as evidenced by receipts.
 5. The 2nd Plaintiff deponed that her late husband admitted that she was the sole owner of L.R. No. 2327/102 which created the suit property; that the trustees, Mr. Kiarie and Mr. Waithaka, who are now dead, never informed her of any plan to sell the suit property; that she has been growing crops on the suit property since 1981 (42 years now) and that on 24th July, 2023, some people armed with pangas and power saws went to the suit property and destroyed the fence, created a gate and put up a corrugated iron shed.
 6. On 31st August, 2023, the Defendant swore a Replying Affidavit in response to the application. He deponed that upon transfer of L.R. No. 2327/102 to Gevi Limited, the 2nd Plaintiff and her husband ceased to have any proprietary interest over the same; that Gevi Limited sold and transferred the suit property to him vide a Conveyance dated 22nd June, 1993 and that part of the proceeds thereto were used to pay off a mortgage of KShs. 800,000 in favour of Kenya Post and Savings Bank, which then issued a Partial Reconveyance dated 22nd June, 1993 releasing the suit land to the Company who then transferred it to him.
 7. It was deponed by the Defendant that the 2nd Plaintiff's interest does not override his because he is a bonafide purchaser and now the registered owner; that Gevi Limited gave him vacant possession of the suit property which he fenced, planted trees and has remained in possession thereof without interference and that in June, 2022, the Plaintiff with the help of police officers, forcefully removed his agents from the suit property on allegations of fraud, for which he was summoned to the DCI Headquarters to answer to.
 8. According to the Defendant, upon presenting proof of purchase and ownership, he was cleared of the allegations; that the 2nd Plaintiff was aware of his interests as she was informed of the progress of the transaction by the advocates of Gevi Limited, but he allowed her to use the property over the years and that in 2021, in a bid to procure transfer of the suit property to one Tracy Virginia Mugure, the 2nd Plaintiff attempted unsuccessfully to obtain another title over the land from the Land Registry.
 9. The Defendant deponed that his claim was confirmed by the 2nd Plaintiff's search; that he has over the years visited the suit property or sent his agents to oversee it and there were only trees and bushes; that the 2nd Plaintiff always allowed him access the suit property through her adjacent property and only became hostile after her husband died in 2020 and that the 2nd Plaintiff's allegations of fraud can only be made against the Directors of Gevi Limited.
 10. It is the Defendant's case that there is no justification for the 2nd Plaintiff's indolence in bringing the suit 30 years after the transfer to the Defendant; that he has had possession and occupation of the suit property since the transfer on 22nd June, 1993 and that protective orders should be issued against the Plaintiffs who continue to damage the property and dismiss the application with costs.
 11. By leave of court granted on 19th September, 2023, the Plaintiffs filed a Further Affidavit sworn by the 2nd Plaintiff, who deponed that the Defendant participated in the fraudulent transaction and that by an Affidavit sworn by her late husband on 31st July, 1992 and annexed to the Supporting Affidavit, he admitted that he did not contribute to the purchase of L.R. No. 2327/102.



12. It was deponed that the Defendant had never paid rates or taken possession of the suit property; that the records at the lands office shows the fraud the Defendant has perpetrated; that the said records show that the entire stamp duty was not paid at the time of registration; that there was a caveat lodged on 11th June, 1993 yet the conveyance in favour of the Defendant was registered on 30th June, 1993 and that the said registration is therefore fraudulent, null and void.
13. It was deponed by the 2nd Plaintiff that the Defendant lied about the Conveyance he holds and totally disregarded the Affidavit of Dickson Jomo Kebata (Deceased); that the Company is a legal person used to enjoy property as the 2nd Plaintiff and her family has for the 42 years; that she had never met the Defendant or been cordial to him and that she did lodge a complaint with the DCI and the Defendant was not cleared of wrong doing and has continued to repeat his fraudulent claim.
14. It was deponed that the Defendant has not explained who he had dealt with in his purported purchase; that had the Defendant communicated his offer to the Directors, the same would have been rejected because the family had decided that the suit property was to be registered in her name; that her late husband never involved her or the company and that she did not consent to the purported sale of the suit property to the Defendant.
15. The 2nd Plaintiff reiterated that she has been in possession of the suit property for 42 years with no claim from the Defendant; that the Defendant admitted that she was the one in possession of the suit property since 1993 and there is no explanation or basis for cutting the fence and creating a gate and that the 1st Plaintiff never appointed the firm of Gakuri & Company to act for it and did not know the circumstances under which the said firm drew up the conveyance dated 22nd June, 1993.
16. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

17. In the Plaintiff, the 1st Plaintiff is referred to as Devi Limited, but the Certificate of Incorporation annexed on the Plaintiff's affidavit is for an entity known as Gevi Limited. Notably, the Defendant refers to a company known as Gevi Limited as the entity that sold the suit property to him. There is no doubt that the name appearing in the Plaintiff was as a result of a typing error. The 1st Plaintiff's correct name is Gevi Limited. Therefore, any reference hereinafter to the 1st Plaintiff will mean the said Gevi Limited.
18. According to the 2nd Plaintiff, she is the sole beneficiary of the suit property which is a subdivision of L.R. No. 2327/102 (the Mother Title). She avers that she purchased the property and solely paid the purchase price without contribution from her deceased husband even though she had it registered in both their names.
19. It is the 2nd Plaintiff's case that they had their accountants, Mr. Kiarie and Mr. Waithaka, incorporate a company for them where they held shares in trust for them; that the 1st Plaintiff was incorporated in the year 1987; that they transferred the mother title to the said company and that on their instructions, the nominee directors subdivided the mother title into 4 parcels, the suit property being one of them.
20. The 2nd Plaintiff's case is that the Defendant colluded with her deceased former husband to sell and transfer the suit property into the Defendant's name; that the Defendant did not take possession of the suit property, and his title is extinguished by virtue of adverse possession and that in the year 2023, the Defendant turned up at the suit property with a group of armed people and destroyed the fence and put up a corrugated iron shed.



21. The current application has been filed to ensure preservation of the suit property pending hearing and determination of the suit. The Plaintiffs are also seeking for a mandatory injunction in respect of a structure that the Defendant erected on the suit property.
22. The first issue for determination is whether the Plaintiffs have met the criteria for the grant of an order of temporary injunction restraining the Defendant from entering into or and being on the suit property pending the hearing and determination of this suit.
23. The guiding principles for the grant of orders of a temporary injunction are well settled and are set out in *Giella v Cassman Brown Limited* (1973) EA 358, as follows:

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (EA Industries v Trufoods, [1972] EA 420.)”
24. The position in *Gilella v Cassman Brown (supra)* was explained in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to (a) establishes his case only at a *prima facie* level (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”
25. Consequently, the Plaintiffs ought to first establish a *prima facie* case, which was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR as follows:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself 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.”
26. The Plaintiffs’ case is premised on the alleged fraud by the Defendant in conjunction with the 2nd Plaintiff’s deceased husband. In support of their case, the 2nd Plaintiff adduced an Affidavit purportedly sworn by her late husband on 31st October, 1992 where he deponed that the 2nd Plaintiff had solely purchased the land before the same was sub divided.
27. The evidence before the court shows that the mother title was sub divided into four portions. The suit property herein is one of those portions, which was purportedly sold by the company to the Defendant vide the Conveyance dated 22nd June, 1993 signed by the Directors of the 1st Plaintiff.
28. From the documents, these are the same directors who executed the other conveyances in favour of the 2nd Plaintiff’s son and the other portion to her and her late husband jointly. The 2nd Plaintiff has not questioned the validity of these other conveyances.
29. The Indenture of Conveyance is clear that the 1st Plaintiff was the vendor. There is no evidence, *prima facie*, to show that the said Directors who appended their signatures thereon acted fraudulently.



This court agrees with the Defendant that a Company is a judicial person with a separate corporate personality as was established in *Salomon v Salomon & Co* (1897) AC 22, where Lord Macnaghten affirmed the separation between the corporation and its members in the following words:

“The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.”

30. It has come to the attention of this court that the 2nd Plaintiff had reported the alleged fraud to the Directorate of Criminal Investigations (DCI) - Land Fraud Unit. The Defendant's Annexure DM - 4(a) is a copy of the Investigation Report from the DCI. The report shows that the DCI came to the conclusion that the Conveyance was signed by the Directors of the 1st Plaintiff and recommended closure of the file without further police action.
31. In addition, the Director of Public Prosecutions vide a letter dated 19th June, 2023 informed the DCI that after independently reviewing the inquiry file, he found the evidence did not disclose criminal culpability on any party and directed that the file be closed. The DCI wrote to the 2nd Plaintiff on 27th July, 2023 and informed her of this outcome.
32. Turning to the claim for adverse possession, the 2nd Plaintiff has averred that the Defendant failed to take possession of the suit property for 30 years since its purchase and that she has been planting crops like beans on the property, and has generally had the use of the land all this time. However, she did not produce any evidence to support these allegations.
33. On the other hand, the Defendant has annexed aerial photographs/ maps showing the state of the suit property spanning over a number of years. Although some of the photos are not legible, the rest are quite clear and do not show any food crops being grown on the land. Instead, they show what appears to be trees and shrubs.
34. That aside, the 2nd Plaintiff also alleged that she has been paying rates for the suit property for the entire 30 years. A perusal of the evidence adduced in support of this allegation reveals that there are only two Rates Receipts found at page 50 and 51 of the Plaintiff's Annexures dated 24th November, 2021 and 31st March, 2023. Page 52 and 53 of the Annexures contains Rates Bills dated 28th January, 2022 and 29th January, 2023. The allegation that the Plaintiffs have been paying rates over the suit property for the last 30 years is therefore unsubstantiated.
35. The end result is that at this preliminary stage, and without fully going into the merits of the suit, this court is not convinced that the Plaintiffs have a *prima facie* case with regards to the claim of adverse possession.
36. The 2nd Plaintiff has deposed that the Defendant and his agents went to the suit property, destroyed the fence and put up a corrugated iron shed. However, the photographs annexed as MWM - 6 as evidence of the alleged damages do not show a destroyed fence and/or a corrugated iron shed as alleged.
37. Since the court has not been shown any proof of the food crops allegedly growing on the suit property, or any demolition purported to have been carried out by the Defendant, this court is reluctant to apportion blame on him. Apart from this, the Plaintiffs have not shown the specific injury that they will suffer if the orders herein are not granted. The Plaintiffs thus fail on that limb also. That being the case, the Plaintiffs have failed to show that they are entitled to an order of prohibitory injunction sought in the application.



38. Courts have been reluctant to grant mandatory injunctions at the interlocutory stage. Where, however, a clear case is established, then the court may grant a mandatory injunction before the hearing of the entire case. The Court of Appeal in *Kenya Breweries Limited & Another v Washington O. Okeyo* [2002] eKLR stated that:-

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

39. In *Locabail International Finance Ltd. v Agroexport and Others* [1986] 1 ALL ER 901 at pg. 901 it was stated as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

40. It is trite that the threshold for a mandatory injunction is higher than that for a prohibitory injunction as was held in *Maher Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR where the court stated that:-

“The test for granting a mandatory injunction is different from that enunciated in the *Giella v Casman Brown* case which is the locus classicus case for prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions...”

41. It goes without saying that the Plaintiffs having failed to satisfy this court that they have a *prima facie* case to entitle them to the prohibitory injunction, it cannot be said that they have a clear case that would qualify the grant of a mandatory injunction.

42. In addition, whereas there are competing claims by both parties that require further interrogation, neither the Plaintiffs nor the Defendant live on the suit property or depend on it for any source of livelihood. It is the Defendant’s case that the shed sought to be demolished was brought down by the 2nd Plaintiff despite the orders of this court to maintain the status quo on 29th July, 2023.

43. For the above reasons, this court is not convinced that special circumstances exist in this matter that warrant the grant of a mandatory injunction, or that this case is so clear that it ought to be decided at once. In the circumstances, the court finds that the Plaintiffs have not established a case for the grant of a mandatory injunction at this stage, and therefore, that prayer also fails.

44. It is however true that the Court under Order 40 Rule 1 is empowered to make any order for purposes of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as it thinks fit. In appropriate cases, the court may exercise its discretion and impose such terms as may be appropriate to preserve the property subject matter of a suit, as may be necessary, in ensuring that the ends of justice are met before the suit is heard and determined on merit.



45. There seems to be no threat of the Defendant disposing of the land, but it goes without saying that it is a prime property. If anything, there has been an allegation that the 2nd Plaintiff herself defied the interim orders issued by this court. Indeed, it has been alleged that the 2nd Plaintiff attempted to have the suit property registered in the name of her daughter. From the foregoing, the court is alive to the danger that would result if no orders are issued to preserve the suit property pending the hearing and determination of the suit.
46. For those reasons, and in the interest of justice, the court is of the opinion that there is need to preserve the suit property pending the hearing and determination of this suit. As a result, the court hereby issues the following orders:-
- a. The Notice of Motion dated 27th July, 2023 lacks merit and is hereby dismissed.
 - b. An order that the status quo prevailing as at the date of delivery of this ruling be maintained, which order, for the avoidance of doubt shall entail the following:
 - i. There shall be no issuance of a new title over the suit property.
 - ii. There shall be no advertising for sale, selling, transferring, leasing, charging or in any way disposing of the suit property or any portion thereof.
 - iii. There shall be no change of the status of the suit property in any manner whatsoever including eviction, cutting down of trees, demolition, farming, construction or development on the suit property or any portion thereof by both the Plaintiffs and the Defendant herein or anyone claiming under them.
 - iv. The said status quo to remain in force pending the hearing and determination of this suit.
 - c. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mwenda for Kamau (S.C) for Plaintiffs/Applicants

Mr. Kimotho for Defendant/Respondent

Court Assistant – Tracy

