



Mageu & 2 others v Smep Microfinance Bank & 3 others (Environment & Land Case E003 of 2022) [2024] KEELC 1132 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E003 OF 2022**

CK YANO, J

FEBRUARY 29, 2024

BETWEEN

GIDDIEL MUCEE MAGEU 1ST PLAINTIFF

JAMES MWENDA MAGEU 2ND PLAINTIFF

DAVID KIMATHI MAGEU 3RD PLAINTIFF

AND

SMEP MICROFINANCE BANK 1ST DEFENDANT

VIEWLINE AUCTIONEERS 2ND DEFENDANT

DAVID G MAGEU 3RD DEFENDANT

JOHN GITHINJI MBUI 4TH DEFENDANT

RULING

1. This ruling is in respect of two applications dated 26th June 2023 and 26th July, 2023.

Notice of Motion Dated 26th June 2023

2. In the application dated 26th June 2023, John Mbui Githinji the 4th Defendant/Applicant, is seeking to have his name struck out from the suit for misjoinder and to have the suit against him struck out for being frivolous, vexatious and an abuse of the court process.
3. The application is premised on the grounds thereon and supported by the affidavit of the applicant. It is the Applicant's contention that he was improperly joined as a party in the suit by the plaintiffs. That the 3rd defendant is the sole registered owner of the land parcel Kathwana/845. That the applicant and the 3rd defendant mutually agreed and borrowed a loan from the 1st defendant bank in which they offered title to the suit land Kathwana/845 as security. That the plaintiffs claim against the 3rd defendant



is that of trust and the applicant has no interest in the said land, and the plaintiffs have no specific claim against him as he has no family relationship with them.

4. In the supporting affidavit, the applicant has reiterated the above grounds and annexed copies of the plaint, defence and official search of the suit land and argued that no prejudice will be suffered by the respondents if the applicant's name is struck out from the suit.
5. In opposing the application, the plaintiffs filed a preliminary objection and a replying affidavit dated 8th August 2023 sworn by Giddiel Mucee Mageu, the 1st plaintiff herein. He avers that the 3rd defendant who is his brother guaranteed the 4th defendant a sum of Kshs. 2,656,655.17 borrowed from the 1st defendant with the suit land offered as security. That the notification of sale and the 45 days redemption notice by the 2nd defendant shows that the 4th defendant is the principal debtor while the 3rd defendant is the guarantor. Copies of the said notices have been annexed.
6. The plaintiffs contend that their claim against the defendants jointly is that they never sought proper customary trust consent from them, and therefore the 4th defendant is a necessary party in the suit. That the inclusion of the 4th defendant in the suit is necessary in order to enable the court to adjudicate the matter to finality. They refuted the applicant's contention that he has only been mentioned once in the plaint, and referred to the averments in paragraph 12 of the amended plaint as well as the prayers sought. It is further contended that filing a separate suit against the 4th defendant would lead to multiplicity and bad practice in case the court arrives at different decisions over the same subject matter. Relying on advice, the plaintiffs aver that no suit shall be defeated by reason of misjoinder or non-joinder of parties. They also contend that the application is improper as it was not brought through a chamber summons as provided by law while the supporting affidavit is undated.
7. The 1st defendant opposed the application through a Replying Affidavit dated 31st October 2023 sworn by Ruth Njuguna, a legal officer of the 1st defendant. It is the 1st defendant's contention that the application is an after-thought, brought in bad faith and with the sole intention of impeding the 1st defendant's right of statutory power of sale and also deny this court an opportunity to hear this matter on its merits. The deponent narrated how the applicant and the 3rd defendant who were in a partnership by name Matokeo Animal Feeds approached the 1st defendant for a loan of Kshs. 2,100,000/= in 2018 which was secured by the registration of a charge on the suit land in favour of the 1st defendant. That the loan amount was released to the applicant in accordance with the terms and condition of the loan agreement. That the Applicant and the 3rd defendant breached the terms of the loan agreement by defaulting in remitting the monthly payment as required of them under the agreement prompting the 1st defendant set the law in motion against the chargor by instructing the 2nd defendant with the task of repossession in accordance with the proper procedure and the chargee's statutory power of sale under the Land Act, 2012. That despite numerous notices, the applicant and the 3rd defendant have not shown any effort in attempting to service the loan and the arrears plus interest which was Kshs. 2,656,665.17/=:, and that the application is a calculated scheme to defeat the 1st defendant's rights of power of sale since the applicant is at the centre of the dispute herein, and therefore a necessary party in the suit to enable the court to determine the issues herein conclusively. The court was urged to dismiss the application with costs.
8. The application is also opposed by the 3rd defendant who filed a replying affidavit dated 6th October 2023 wherein he avers that he guaranteed the applicant a sum of Kshs. 2,100,000/= offered by the 1st defendant with the suit land registered in his name being the security. That it is that land that the plaintiffs who are his brothers live in.



9. The 3rd defendant states that as per the loan offer, two titles Nos. Inoi/Thuita/1763 registered in the name of the 4th defendant and the suit land Kathwana/845 registered in the 3rd defendant's name were to guarantee the said loan, but the 1st and 4th defendants colluded and charged the suit land solely. It is his contention that the 4th defendant is the principal debtor and his presence in this suit as a party is important to explain why proper consents were never obtained while charging the suit land. The 3rd defendant avers that he was neither a business partner of the 4th defendant nor a borrower. He also raised the issue that the applicant's affidavit in support of the application is not dated as required under the oaths and statutory declaration Act. He has annexed the letter of offer and the applicant's affidavit and urged the court to dismiss the application.
10. The application was canvassed by way of written submissions which were duly filed by the advocates for the parties and which I have read and considered and I need not reproduce in this ruling.
11. I have considered the application, the responses and the rival submissions. The only issue for determination is whether the name of the applicant should be struck out from the suit for misjoinder.
12. This court has perused the pleadings in this case. It is evident from the applicant's affidavit in support of the application that the applicant entered into a mutual arrangement with the 3rd defendant to obtain a credit facility from the 1st defendant and offered the suit land Kathwana/845 as security. The 3rd defendant is the registered owner of the suit property, while the Applicant was the principal debtor for the loan secured using the title to the said land as security in favour of the 1st defendant. In my considered view, the Applicant is a necessary party in this suit. The presence of the applicant is necessary for the determination of the matter in dispute and to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. It is also clear under order 1 rule 9 of the [Civil Procedure Rules](#) that a suit cannot be defeated by misjoinder or non-joinder of parties. It is my opinion that the applicant played a crucial role in the transactions that resulted in the suit before court and therefore he cannot escape from being a party in the suit. Under order 1 rule 1 and 2 of the [Civil Procedure](#), a proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant. The court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions in the suit.
13. In the result, I find that the application dated 26th June, 2023 is devoid of merit and is dismissed.

Notice of Motion Dated 26th July 2023

14. The application dated 26th July, 2023 is brought by the plaintiffs seeking orders of temporary injunction against the 1st and 2nd defendants restraining them from advertising or selling the suit land Title No. Kathwana/845 pending the hearing and determination of the suit herein. The application is premised on the grounds thereon and supported by the affidavit of Giddiel Mucee Mageu, the 1st plaintiff on 26th July, 2023.
15. The gist of the application is that the 3rd defendant guaranteed the 4th defendant's loan amounting to Kshs.2,656,665.17 with interest in favour of the 1st defendant and offered the suit land, Title No. Kathwana/845 as security. The plaintiffs claim customary trust/rights over the said title and contend that no consent was obtained from them before the said title was charged.
16. The application is opposed by the respondents. The 1st respondent filed a replying affidavit dated 2nd August 2023 sworn by Ruth Njuguna wherein it is averred that the application is an afterthought and brought in bad faith. That the sole intention is to scuttle the 1st defendant's right of statutory power of



sale. The deponent has explained in detail how the 3rd and 4th defendants approached the 1st defendant requesting for a loan which was granted after due diligence was undertaken and the suit land Title No. Kathwana/845 offered as security. That the 3rd and 4th Defendants have breached the terms of the loan agreement by defaulting in payment, and the 1st defendant instructed the 2nd defendant to issue the relevant statutory notices, including a notification of sale in accordance with the law. It is the 1st defendant's contention that the plaintiffs are proxies of the 3rd and 4th defendants who are out to frustrate the actualization of the 1st defendant's right to statutory power of sale. That the plaintiffs' interest in the suit property if any, cannot override the right of the 1st defendant as a chargee. It is the 1st defendant's contention that there is no substantive suit before court challenging the exercise of statutory power of sale by the 1st defendant and that the application herein is made in a vacuum and therefore incompetent and should be dismissed with costs.

17. The 3rd defendant filed his replying affidavit dated 31st October 2023 wherein he avers that the land Title No. Kathwana/845 initially belonged to his father, Peter Mageu Mwindu before it was later registered in his name as the 1st born. He states that his brothers live on the land.
18. The 3rd defendant also admitted that he offered the title to the suit land to secure a loan from the 1st defendant, although he contends that the loan was to be guaranteed by two titles, the suit land and Inoi/Thaita/1763 belonging to the 3rd defendant. That on 8th July 2020, he received a letter from the 1st defendant demanding the repayment of the said loan which the 4th defendant had defaulted in paying. That the 1st defendant threatened to sell the suit land leaving out the other title. That upon conducting a search, he was surprised title No. Inoi/Thaita/1763 was never charged. He accuses the 1st defendant of charging the title of the suit land only contrary to the loan offer, and for treating him as the principal debtor. He states that he is a victim of misrepresentation and fraud by the 1st and 4th defendants. That he has sued the 1st and 4th defendants in Chuka High Court E001/23.
19. The application was also canvassed by way of written submissions which were duly filed by the advocates for the parties and which I have read and considered and I need not reproduce in this ruling.
20. I have considered the application, the responses and the submissions filed. The only issue for determination is whether the order of temporary injunction should be granted as sought by the plaintiffs.
21. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the case of *Giella -vs- Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited -vs- 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) demonstrate irreparable injury if a temporary injunction is not granted and (c) ally any doubts as to (b) 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.”

22. Consequently, the applicants ought to, first, establish a prima facie case. The applicants stated that they are beneficiaries of the suit land and they fear to be homeless and destitute because once the hammer falls the public auction takes place at any time thereafter, then the suit property shall be forever out of



their reach and the suit may be rendered nugatory. That they know not of any land other than their father's land where they now live and make a living from.

23. In the case of *Mrao Ltd. -vs- First American Bank of Kenya Ltd.* (2003) eKLR, the Court of Appeal gave a determination on a prima facie case. The court stated that:

“...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.”

24. Secondly, the Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

25. The plaintiffs state that their residences are on the suit land which also forms their matrimonial homes where their children and grandchildren have known as home. That they stand to suffer irreparable loss and damage if the suit property is sold through public auction. That there is no order in place stopping the sale or preserving the land as at now. The applicants have attached photographs of their residential houses, graves belonging to their mother and mud houses which belongs to their parents.

26. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai* (2018) eKLR, the concept of balance of convenience was defined as:

“The meaning of balance of convenience will favour of the Plaintiff's is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”

27. In the case of *Paul Gitonga Wanjau -vs- Gathuthis Tea Factory Company Ltd & 2 Others* (2016) EKLR, the court dealing with the issue of balance of convenience expressed itself thus: -

“Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn



out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

28. In the case of *Amir Suleiman –vs- Amboseli Resort Limited* (2004) eKLR, the learned judge offered further elaboration on what is meant by “balance of convenience” and stated:

“The court in responding to prayers of interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

29. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them. I am also persuaded that the plaintiffs have made out a prima facie case with chances of success. They may also suffer irreparable harm if the suit land is sold.

30. In *Robert Mugo Wa Karanja –vs- Eco bank (Kenya) Limited & Another* [2019] eKLR, the court in deciding on an injunction application stated:

“Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

31. I am persuaded that if orders of temporary injunction are not granted in this suit, the property in dispute would be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiffs/Applicants. That may also render the suit nugatory.

32. In view of the foregoing, I find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.

33. In the result, I make the following orders:

- a. The Notice of Motion dated 26th June, 2023 is dismissed with costs.
- b. The Notice of Motion dated 26th July, 2023 is allowed in terms of prayer 3 thereof. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH FEBRUARY, 2024

In the presence of:

Court Assistant – Martha

Ms. Wangeci for Plaintiffs

Kirimi for 1st Defendant

3rd Defendant present in person

No appearance for Ms. Kijaru for 4th Defendant

No appearance for 2nd Defendant

C.K YANO,



JUDGE

