



**Hamisi v Mwangi (Environment & Land Case E054 of 2022)  
[2024] KEELC 5012 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 5012 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E054 OF 2022**

**AE DENA, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**MOHAMED KOPA HAMISI ..... PLAINTIFF**

**AND**

**DAVE MUNYA MWANGI ..... DEFENDANT**

**RULING**

1. The Defendant filed the application dated 12/07/23 seeking the following orders;
  - a. Spent
  - b. That a temporary injunction do issue restraining the Plaintiff/Respondent whether by himself, his agents, employees, servants and or anyone acting on his instructions from further trespassing, dwelling upon, alienating, carrying any unlawful construction or dealing or dealing with the suit land in any manner whatsoever pending full hearing and determination of this suit.
  - c. That orders subject to prayer 2 above be served upon the Court Bailiff, Kwale Law Courts and the OCS Shimoni Police Station for purposes of ensuring execution of this order.
  - d. That Costs of this Application be provided for.
2. The application is premised upon grounds set out thereon and the supporting affidavit of Dave Munya Mwangi the Defendant herein sworn on 12/07/23. The Defendant depones that he is the registered owner of title No. Kwale/Shimoni/SS/686 (suit property). The Defendant narrates the history of the suit property as a subdivision of title Kwale/Shimoni/335. It is deponed that he has enjoyed exclusive ownership, quiet possession and derivative use of the suit property until the year 2017 when the Plaintiff and his accomplices started trespassing thereon. However following demand notice from the Defendants lawyers, the trespassers vacated. That in the year 2022 the Plaintiff and one Mchasa



Kopa Mchambi returned to the suit property and erected permanent structures and did not heed the Applicants demand notice to vacate claiming they were the lawful owners thereof. That the Plaintiff and his agents have continued to unlawfully construct permanent structures in the suit property denying him quiet possession thus the present application.

3. In opposition to the application the Plaintiff filed a replying affidavit sworn on 25/07/23. It is deponed that the documents attached in the Defendant's affidavit are being challenged under these proceedings and cannot confer ownership. That the demand notice 'DMM5' is addressed to the Plaintiff but his deceased father. That there are no construction being carried out in the suit property either by the Plaintiff or his agents. It is further stated that the Defendant is not in possession of the suit property. He is a resident of Nairobi and who is not a local hence was given land in Shimoni which he cannot identify. The Defendant avers that he has together with his family since time immemorial lived in the suit property continuously, open and without interruption. Further that the property is well secured and is not being wasted.
4. The application was canvassed by way of written submissions and which both parties filed and exchanged. The court has considered the same in making a determination of this application.

### **Determination**

5. The main issue for determination is whether the application has met the test for the grant of an injunction.
6. The application is filed under Articles 40 Rule (1) and (3) of the Constitution of Kenya 2010, Sections 1,1A,1B, 3,3A, 63(e) of the Civil Procedure Act and Order 40 Rules 1,2 and 4 of the Civil Procedure.
7. The law governing the grant of injunctions is Order 40 Rule 1(a) which provides: -  
Where in any suit it is proved by affidavit or otherwise—
  - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - b. the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
8. The above provision of law was well summarised in the celebrated case of *Giella v Cassman Brown & Co. Ltd* where the criteria for grant or refusal of injunctive orders was laid down. The said criteria has been reaffirmed in a number of authorities and which include *Kibutiri v Kenya Shell, Nairobi High Court*, Civil Case No.3398 of 1980 [1981] eKLR, where the Court held that: - “The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also *E. A Industries v Trufoods* [1972] EA 420.”
9. The Defendant has attached to the application a copy of an official search dated 17/5/23 which shows as at 7/9/2010 Dave Munya Mwangi was the registered owner of title No. Kwale/Shimoni/SS/686. Title deed was re-issued on 15/8/2018. Also attached is a copy of the said title deed in the name of Dave Munya Mwangi. I have also seen a copy of the title issued 7/09/2010 and the alleged mother title Kwale/Shimoni/355 and the relevant mutation forms.



10. Section 26(1) of the *Land Registration Act* provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”

11. Arising from the above provisions the titles produced by the Defendant are prima facie evidence that the Applicant is indefeasible owner of the suit property. I have noted the Plaintiff response that the same are being disputed in the present proceedings. It is now established a prima facie case need not be a case that must succeed provided that the Applicant has demonstrated existence of a right that has been allegedly infringed upon and calls for an explanation from the other party. The Plaintiff admits that they are in the suit property as of right. Further at this stage the court is not called to look into the merits of the case. The validity of the titles or otherwise can only be investigated in a full trial. It is therefore my finding that the Applicant has established a prima facie case with probability of success.
12. The second requirement is for the Applicant to demonstrate they will suffer irreparable loss incapable of compensation by way of damages if the injunction is not granted. The Applicant’s case is that the suit property is in danger of being wasted. The Plaintiffs response to this is that the Applicant has failed to furnish any proof that the suit property was in danger of wastage, damage, alienation or wrongful sale. It is contended that the Applicant is not in possession having given a residential and postal address in Nairobi. On the other had the Plaintiff states that the property is well secure and is not being wasted.
13. My review of the photographs herein shows constructions being undertaken though the photographs are being impugned for lacking a certificate. On the other hand, the Plaintiff through the firm of M/s Asige Advocates has responded to the demand notice from the Defendants stating that they are in lawful occupation and use of the portion of land they live on but has not attached any proof thereof of their occupation.
14. Having considered the foregoing clearly a doubt arises and I must look at the balance of convenience. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor 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.”



15. As stated above, I would not wish to delve into issues of ownership of the suit property. However, the Plaintiff despite claiming ownership of the suit property has not given any documentary evidence in proof of his alleged ownership of the same, the Defendant on the other hand has attached a title deed in ownership of the suit property. The court at this juncture cannot really express itself on the genuineness of the title, but, given the circumstances of the case and the prayers sought in the application, it is imperative that a decision has to be made over the prayers sought.
16. The Plaintiff has attached to his list of documents a letter dated 6/11/15 from the Chairman National Land Commission addressed to the Area Chief Pongwe Kidimu advising on suspension of any kind of development on plots that have disputes in the Shimoni Settlement Area. The suit property forms part of the said settlement scheme. It is ironic that the Plaintiff would desire to use the said letter in support of his case and at the same time object to orders that will preserve the suit property.
17. The court has the jurisdiction under the provisions of Order 40 Rule 1 (b) to make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders. It is the courts view that it is proper to preserve the suit property while ensuring that none of the parties is adversely affected by any orders emanating from the court before the matter is heard and both parties allowed to present their respective cases. Orders of status quo therefore make much sense in the instance circumstances. *Black's Law Dictionary, Butter Worths* 9<sup>th</sup> Edition, defines Status Quo as a Latin word which means "the situation as it exists". The purpose of an order of status quo was stated in *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR, by Odunga J. thus; -

"When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."

18. The purpose of status quo orders is to preserve the status of the property for that time. In the case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR the court referred to Lord Diplock's dictum in the *American Cyanid Co v Ethicon* [1975] 1 All ER 504 where the court stated that where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.
19. In the interest of justice, it is proper for things to remain as they are pending hearing and determination. Accordingly, the Court issues an order for status quo to be preserved and which for the avoidance of doubt shall entail the following:
  1. That there shall be no further constructions or development at the disputed parcels being Kwale/Shimoni/SS/686. Any constructions which are ongoing to forthwith cease.
  2. The said status quo to remain in force pending the hearing and determination of this suit.
  3. Each party to bear its own cost.

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2024.**

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**A.E DENA**

**JUDGE.**

**Mr. Asige for the Plaintiff/Respondent.**

**Mr. Chibanda holding brief for Ms. Oketch for the Defendant/Applicant**

**Mr. Daniel Disii – Court Assistant**

