



**Gatabaki & 2 others v Sanyi Jituan Sensen Investment Limited & 2 others (Environment & Land Case E075 of 2023) [2024] KEELC 779 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 779 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E075 OF 2023  
JA MOGENI, J  
FEBRUARY 20, 2024**

**BETWEEN**

**NANCY WANJA GATABAKI ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPHINE B. GATHONI GATABAKI ..... 2<sup>ND</sup> PLAINTIFF  
ESTHER SUSAN WANGARI GATABAKI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**SANYI JITUAN SENSEN INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT  
PETER KIARIE MURAYA ..... 2<sup>ND</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. I am writing this ruling in respect of the application dated 29/08/2023 filed by the 1<sup>st</sup> plaintiff seeking the following orders:
  1. Spent.
  2. That the Honorable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents, jointly and severally, either through their servants and/or agents from trespassing on; wasting, erecting, damaging, alienating, developing and/or adversely interfering with the portion of suit properties known as LR No5980 and LR No. 4508/1 allegedly described as LR No. 28223/33/C3, C4,C5,C6,C7 and C8 respectively situated in the Nairobi area pending the hearing and determination of this application.
  3. That the Honorable Court be pleased to issue an order of temporary injunction restraining the Defendant/Respondents, jointly and severally, either through their servants and/or agents from trespassing on, wasting, erecting, damaging, alienating, developing and/or adversely



interfering with the portion of the suit properties known as LR No. 5980 and LR No. 4508/1 allegedly described as LR No. 28223/33/C3, C4,C5,C6,C7 and C8 respectively situated in the Nairobi areas pending the hearing and determination of the substantive suit.

2. The application is supported by the applicant's affidavit and is premised on the 15 grounds on the face of the application which I do not see the need of reproducing here. The gist of the grounds being that the plaintiff claims to be the registered owner of the suit property with her late husband by virtue of an indenture that was executed on 22<sup>nd</sup> April 1971. That the plaintiffs have discovered that the respondents effected illegal survey of the suit properties and fraudulently and illegally sub-divided the same and sold portions to third parties.
3. The respondents have opposed the application through the replying affidavits of the 1<sup>st</sup> defendant which is undated but is deponed by Ye Yongqing the Managing Director of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant through Peter Kiarie Muraya the Director of Muga Developers Limited and Suraya Properties Group Limited deponed a replying affidavit dated 25/10/2023.
4. The 3<sup>rd</sup> defendant, the Chief Land Registrar despite being served did not file and replying affidavit nor attend court when the parties appeared in court on 17/10/2023.
5. The 1<sup>st</sup> defendant has deposed that he purchased the suit property from Equity Bank wherein Muga David who were owners of the suit property. He attached a copy of the sale agreement dated 24/12/2019 as testament to the purchase of the suit property. He denied all allegations of fraud stating that the 1<sup>st</sup> defendant is an innocent purchaser for value. He attached copies of the lease agreement marked "SJS2".
6. The 1<sup>st</sup> defendant pleaded that the suit is res judicata for the reason that the matter before court had been already determined in a commercial court. He however did not attach any documents to support this allegation nor did he elaborate the issue that was determined in the commercial court the instant suit being one about ownership of the suit property.
7. The 2<sup>nd</sup> defendant also opposed the application and deponed that the 1<sup>st</sup> plaintiff and her late husband Dr Gatabaki undertook the sub-division of LR 5980 and created 4 parcels LR No. 5980/1, 2, 3, and 4 thus LR 5980 ceased to exist.
8. That on 23/05/2007 Muraya Property Company Limited entered into a joint venture with the 1<sup>st</sup> defendant and her late husband and to support this allegation he attached a copy of the joint venture marked as "PKM-1".
9. He further averred that shareholding percentage between the 1<sup>st</sup> plaintiff and her husband and Muga Developers Limited and Muraya Property Company was agreed at thirty three and one third (33 and 1/3) for the 1<sup>st</sup> plaintiff and her late husband and for Muga Developers and Muraya Property Company respectively who were all directors in the joint venture.
10. The 2<sup>nd</sup> defendant deponed that Muga Developers Limited was registered on 25/07/2007 as a special purpose vehicle for the joint venture. 9. That in the interest of justice the orders sought should not be granted. That it is clearly the plaintiff/applicant is misusing the powers of this court and therefore the application ought to be dismissed with costs as it lacks merit.
11. On 17/10/2023 when the parties appeared in court they agreed to canvass the application by way of written submissions. The 1<sup>st</sup> Plaintiff/Applicant submitted that her claim is one which raises a prima facie case with chances of success. It is not in dispute the plaintiff applicant is in occupation of the suit and, therefore, the fact of being in occupation is in itself a *prima facie* case. In addition her claim pertains customary rights over suit land after which declaratory orders will issue. That it is not



mandatory to register a customary trust. She relied in the case of *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another* [2019] eKLR, Section 28 of the *Land Registration Act* and *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR.

12. The 1<sup>st</sup> plaintiff submitted that she stands to suffer irreparable loss which could not be compensated by an award of damages. That she has been in occupation of the suit land since she was born and has extensively developed it by planting various citrus trees and crops. She also has her house there and she has no other place to call home. That in the event she is evicted and the suit succeeds she would have lost her sentimental attachment, value of property and no amount of money can compensate her.
13. The plaintiff/applicant submitted that she will be highly inconvenienced if the injunction is not granted. That the inconvenienced caused to her if eventually the suit is decided in her favour will be greater than that which will be caused to the defendant/respondent if an injunction is granted than when the suit is dismissed. She therefore prayed that the application be allowed as prayed.
14. On its part, the 1<sup>st</sup> defendant submitted that the plaintiff/ applicant has not proved *prima facie* case with a probability of success. That an order restraining the defendant/respondent in his own land would be prejudicial to him and a violation of his ownership rights under Article 40(1) and (2) of the *Constitution* of Kenya 2010. That the plaintiff/applicant has not produced any evidence that she reported to any local authority the destruction of her fruits. Further the plaintiff/applicant has not challenged the manner in which the defendant/respondent acquired his title to the suit parcel of land. He cited the case of *Kipkoech Langat T/A Kaptarakwa Enterprises & 23 Others V William Bayas & 3 Others* [2013] eKLR.
15. The defendant/respondent submitted that the plaintiff /applicant has not proved that she will suffer irreparable loss and harm if the injunction is not granted. That the defendant/respondent has not at any given time attempted or acted in a way to evict the plaintiff/applicant and no evidence of the same has been provided. Therefore, what is before court is just mere allegations and things that the plaintiff/ applicant can foresee.
16. The 2<sup>nd</sup> defendant submitted that the plaintiff/applicant has not proved her case on a balance of convenience. That by virtue of the defendant respondent being the registered owner of the suit land, the balance of convenience tilts in his favour. The status quo of the applicant has not been interfered with as she is still in the suit land.
17. In conclusion the defendant/respondent submitted that the applicant has not demonstrated a case that merits an injunction to issue against the defendant/respondent. He prayed for the application to be dismissed with costs to the defendant/respondent.
18. I have considered the application, pleadings, affidavits filed and the submissions, the main issue for determination is whether the applicant has made out a case for the granting of orders of temporary injunction.
19. The plaintiff having sought for injunctive orders is only entitled to either grant or denial of the same at this stage. It is not in doubt that there has been contradictory and contentious issues that have been raised by the parties that require proper interrogation during the main trial, by calling of evidence, testing the same through cross examination and arrival of determination of the same. However, the suit is still at an interlocutory stage and the Court cannot deal with the merit of the case at this stage.



20. In considering whether to grant injunctive orders the court in *Airland Tours and Travel Ltd...vs... National Industrial Credit Bank*, Milimani HCCC No.1234 of 2003, held that: -
- “In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”
21. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides that: -
- “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. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.”
22. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -
- “Firstly, 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.”
23. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely: -
- i. There must be a serious/fair issue to be tried,
  - ii. Damages are not an adequate remedy,
  - iii. The balance of convenience lies in favour of granting or refusing the application.
24. The important consideration before granting a temporary injunction under Order 40 Rule 1 of the *Civil Procedure Rules* is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to 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 a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, it is not clear whether the suit property LR No5980 and LR No. 4508/1 allegedly described as LR No. 28223/33/C3, C4,C5,C6,C7 and C8; is in danger of being alienated as the defendants have denied that the 1<sup>st</sup> plaintiff



owns the suit property. On her part, the plaintiff has not been very useful because she has provided scanty evidence in respect of this subject.

25. I must therefore consider the question of whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a *prima facie* case as: -

“ 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

26. Has the 1<sup>st</sup> plaintiff herein established a *prima facie* case? It is not in doubt that the 1<sup>st</sup> plaintiff is the registered owner of parcel no. LR No. 5980 and and LR No. 4508/1. The 2<sup>nd</sup> defendant on the other hand claims to be co-owners of the four plots which resulted from the subdivision of LR 5980 leading to having LR 5890/1, 2, 3, 4 which they co-owned with the 1<sup>st</sup> plaintiff and her late husband.
27. On the other hand, the 1<sup>st</sup> defendant claims to have bought part of the subdivided land from Equity bank who are not a party to this suit and that it has a registered lease. Every part seems to stake a claim to the suit property. It is clear that the contention pertaining to the ownership of the suit property cannot be settled at this juncture. The 1<sup>st</sup> plaintiff claims that the defendants have trespassed onto the suit property purporting to install new beacons having fraudulently influenced the sub-division illegally since there is no consent of the Land Control Board.
28. The contentious and contradictory statements of facts cannot be determined at this stage. This Court will have to determine the same at the main hearing. However, as a registered owner, the 1<sup>st</sup> plaintiff is deemed to be an absolute and indefeasible proprietor whose proprietorship can only be challenged as provided by the law. See Section 26(1) (a) & (b) of the *Land Registration Act*.
29. The instant application relates to suit properties known as LR No 5980 and LR No. 4508/1. As earlier on stated, it is not in doubt that the said parcel is registered in the name of the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff claims that the defendants have trespassed on the suit property and demolished the permanent structures and a perimeter wall on the suit property. Further that the defendant have created subdivisions of the suit property and allegedly charged them to Equity Bank which sub-division she claims was superimposed on the suit properties with a view to dispossessing the plaintiffs of the suit property.
30. Prima facie, being both in possession and occupation of the suit land, the plaintiff has therefore established that she has an interest over the suit property. The plaintiff has further alleged that the defendants have trespassed on the onto portions of the suit properties and destroyed the plaintiff's permanent developments erected including a perimeter wall-fence claiming that the 1<sup>st</sup> defendant was the registered owner.
31. The act of trespass and destruction of structures has interfered with the plaintiff's occupation without a lawful cause. It is, therefore, not in doubt that her rights over the suit property (being the right of being in quiet possession) have allegedly been infringed upon by the defendant. Consequently, the court finds and holds that the plaintiff has established a *prima facie* case with probability of success as her rights can only be curtailed in accordance with the law.
32. The other issue to deal with is the one of irreparable injury. The court in the case of *Paul Gitonga Wanjau...vs...Gathuthi Tea Factory Co. Ltd & 2 Others*, Nyeri HCC No.28 of 2015 described “Irreparable loss” as simply injury or harm which would not adequately be compensated by damages



and would be continuous. From my reading of the plaint and the supporting affidavit, It is not in doubt that the plaintiff is in occupation of the suit property. It is trite that by virtue of her occupation her crystalized right if violated cannot be equated to compensation by damages. This was the court's position in the case of *Niaz Mohamm Janmohammed vs Commissioner for Lands & 4 Others* (1996) eKLR, where it was held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”

33. Equally in this case, the Court finds that if the plaintiff's rights are infringed, and no amount of money can compensate such infringement. For the above reasons, the Court finds that the plaintiff has established that she is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

34. The last limb is about the balance of convenience where if the Court is in doubt, then it will determine the matter on the balance of convenience, the Court finds that the balance of convenience tilts in favour of maintaining the status quo. It is not in doubt that this matter raises serious conflicts of facts. Further it is not in doubt that a temporary injunction is meant to preserve and protect the suit property. The court in *Exclusive Estates Ltd...vs.... Kenya Posts & Telecommunications Corporation & Another*, Civil Appeal No.62 of 2004 had this to say:-

“A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter”

35. Additionally, in the case of *Virginia Edith Wambui...Vs....Joash Ochieng Ougo*, Civil Appeal No.3 of 1987 (1987) eKLR, the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

36. It is my view that in the instant matter, the Court holds the position that the status quo ought to be maintained and the status quo herein is that which existed before the wrongful act. The wrongful act herein is the alleged interference of the suit property by the Defendant/Respondent.

37. In conclusion and considering the information before the court, I find that the Notice of Motion Application dated 29/08/2023, as brought by the 1<sup>st</sup> Plaintiff on behalf of the other plaintiffs is merited and an order of status quo is hereby issued pending hearing and determination of this suit. Costs to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 20<sup>TH</sup> DAY OF FEBRUARY 2024**

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**MOGENI J**

**JUDGE**

In the Virtual Presence of:



Mr. Owang for the Plaintiff / Applicant for the 1<sup>st</sup> Plaintiff

Mr. Ken Murgor holding brief for Mr. Ouma for the 2<sup>nd</sup> Plaintiff

Ms. Odhiambo for the 1<sup>st</sup> Defendant/ Respondent

None appearance for the 3<sup>rd</sup> Defendant / Respondent

Ms. Caroline Sagina: Court Assistant.

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**MOGENI J**

**JUDGE**

