



**Kariuki v Ngonyo & 17 others (Environment & Land Case  
E019 of 2023) [2024] KEELC 4996 (KLR) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4996 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E019 OF 2023**

**AE DENA, J**

**MARCH 18, 2024**

**BETWEEN**

**PAUL GATHURU KARIUKI ..... PLAINTIFF**

**AND**

**NASSORO JUMA NGONYO & 17 OTHERS ..... DEFENDANT**

**RULING**

- 1 The Plaintiff's application dated 16/10/2023 and which is subject of this ruling seeks for the following prayers;
1. Spent
  2. That the honourable court be pleased to issue a temporary order of injunction restraining the Defendants/Respondents by themselves, agents, servants, employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from subdividing, selling, developing, transferring or in any way howsoever from dealing and interfering with the Plaintiffs ownership use and quiet possession of all that original parcel of land known as Kwale/Diani/167 and resultant subtitles arising from subdivision of parcel number Kwale/Diani/167 being interalia Plot Number Kwale/Diani/SS 3748, Kwale/Diani/SS 3749, Kwale/Diani/SS 4931, Kwale/Diani/SS 5665, Kwale/Diani/SS 5666, Kwale/Diani/SS 4932, Kwale/Diani/SS 4933, Kwale/Diani/SS 4934, Kwale/Diani/SS 4935 and Kwale/Diani/SS 4936 pending the hearing and determination of this matter.
  3. That the honourable court be pleased to issue a temporary order of injunction restraining the Defendants/Respondents by themselves, agents, servants, employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from subdividing, selling, developing, transferring or in any way howsoever from dealing and interfering with the Plaintiffs ownership use and quiet possession of all that original parcel of land known as Kwale/



Diani/167 and resultant subtitles arising from subdivision of parcel number Kwale/Diani/167 being interalia plot number Kwale/Diani/SS 3748, Kwale/Diani/SS 3749, Kwale/Diani/SS 4931, Kwale/Diani/SS 5665, Kwale/Diani/SS 5666, Kwale/Diani/SS 4932, Kwale/Diani/SS 4933, Kwale/Diani/SS 4934, Kwale/Diani/SS 4935 and Kwale/Diani/SS 4936 pending the hearing and determination of this suit.

4. That the Officer Commanding Station [OCS] Diani Police Station do ensure compliance and adherence of the orders sought.
5. That the Defendants/Respondents do bear the costs of this application.
2. The application is premised upon grounds on its face and which summarily stated that the Plaintiff is the registered proprietor of land parcel no Kwale/Diani/167 measuring approximately 1.9 Hectares. That the Defendants have created fraudulent and parallel title deeds over the Plaintiff's suit property and the said actions are ongoing hence bound to cause the Plaintiff to suffer great prejudice. The same has necessitated this suit.
3. In the affidavit in support of the application as sworn by the Plaintiff Paul Gathuru Kariuki, the Plaintiff annexes a copy of the title deed to Kwale/Diani/167 and avers that he purchased the suit property from one Raphael Mungai who was the original allottee of the same. The Plaintiff states that he was issued with a certificate of outright purchase dated 14/3/1986 by the Settlement Fund Trustees (SFT). A copy of the same was annexed. That he had made the discovery that the 15<sup>th</sup> Defendant had fraudulently and through a corrupt scheme issued the 1<sup>st</sup> Defendant with a title deed over the suit property on 15/11/2011 and the 1<sup>st</sup> Defendant had subsequently subdivided the suit property into two equal subdivisions on 7/12/2016 and registered the same in his name as captured under paragraph 7 of the affidavit.
4. That one of the two subdivisions listed under paragraph 7 was further subdivided into two further subdivisions as stated under paragraph 8 with an annexed copy of the green card. It is averred at paragraph 9 that on 18/5/2020 the 1<sup>st</sup> Defendant sold the subdivision of Kwale/Diani SS/3748 to four other individuals being the 2<sup>nd</sup> to 5<sup>th</sup> Defendants and title deeds were issued. The Plaintiff lists the sub divisions of the mother parcel from which he lays claim of ownership and the same result to approximately 11 parcels owned differently by the Defendants herein. He avers that the 1<sup>st</sup> Defendant did not acquire a legitimate title to the suit property to legitimize the subdivisions and resultant disposal of the subdivided parcels and as such the application is merited. It is his case that his right to ownership of property has been violated and the injunctive orders sought should be granted pending the hearing and determination of this suit.
5. On 5/12/2023, the Plaintiff through his advocate sought leave to serve the instant application vide substituted service as personal service of the motion had proved futile. The said application was allowed as prayed. An affidavit of service sworn by Kithome John Makuu Advocate confirming service vide an advertisement in the Daily Nation of 22/1/2024 at page 15 was filed. An extract of the same was attached.
6. The Defendants did not respond. The application is unopposed.
7. The court record bears no submissions by either parties. I will nevertheless proceed to render this ruling as follows;
8. The first issue for determination is whether the Plaintiff has met the criteria for the grant of the temporary orders of injunction pending the hearing and determination of this suit. The principles for the grant of orders of temporary injunction are well settled and outlined in the case of *Giella Versus*



*Cassman Brown* (1973) EA 358. The same has been reiterated in myriad decisions one being the case of *Nguruman Limited versus 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, ally 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”.

9 From the above, it is trite that the Plaintiff ought to, first, establish a prima facie case. The Plaintiff/ Applicant has attached a copy of the title deed to the mother parcel being Kwale/Diani/167. Section 26 of the *Land Registration Act*, 2012 provides;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

10 The above provisions of law stipulate that a title deed is considered as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. Now, has this evidence amounted to the threshold of being a *prima facie* case? In *Mrao Ltd Versus 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.”

11 It is my view that by attaching ownership documents after giving details of the history of such ownership which has not been rebutted. The Plaintiff has established a *prima facie* case.

12 The second limb to be demonstrated by the Plaintiff is that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The court in *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”.



13 The Plaintiff has deponed of how the suit property was allegedly fraudulently acquired and registered in the names of the 1<sup>st</sup> Defendant with the aid of the 15<sup>th</sup> Defendant. Copies of the attached green cards evidence the subsequent subdivisions and the official searches attached evidence of the alleged sale and acquisition of the sub divided portions. It is this court’s finding that the evidence attached by the Plaintiff is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

14 On the balance of convenience, the said concept was defined by the court in [Pius Kipchirchir Kogo Vs Frank Kimeli Tenai](#) (2018) eKLR as:

“The meaning of balance of convenience will favour of the Plaintiff’ 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”.

15 Further in [Amir Suleiman Vs Amboseli Resort Limited](#) [2004] eKLR the learned judge stated

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

16 From the above, it behooves the court to interrogate where the lower risk lies. I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, pending the hearing and determination of this suit. In the event that the court makes a finding that the suit property is lawfully the Plaintiffs property and the subsequent subdivisions are fraudulent, the said subdivisions and resultant titles will have to be cancelled and the land reverted to the initial mother parcel. Having this in mind, it is important to protect the suit property from further subdivision and occupation. I am guided by the holding in [Robert Mugo Wa Karanja Vs Eco bank \(Kenya\) Limited & Another](#) [2019] eKLR where 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...”

17 In view of the foregoing, I find that the Plaintiffs/ Applicant has met the criteria for grant of orders of temporary injunction. I will order for registration of prohibitions on the said titles to evade further subdivision and sale. This order is issued *suo moto* in the interest of justice and preservation of the property. Consequently, I hereby issue the following orders;

1. A temporary order of injunction be and is hereby issued restraining the Defendants/ Respondents by themselves, agents, servants, employees and/or persons acting under



their instructions or any other person whomsoever and whatsoever from subdividing, selling, developing, transferring all that original parcel of land known as Kwale/Diani/167 and resultant subtitles arising from subdivision of parcel number Kwale/Diani/167 being interalia plot number Kwale/Diani/SS 3748, Kwale/Diani/SS 3749, Kwale/Diani/SS 4931, Kwale/Diani/SS 5665, Kwale/Diani/SS 5666, Kwale/Diani/SS 4932, Kwale/Diani/SS 4933, Kwale/Diani/SS 4934, Kwale/Diani/SS 4935 and Kwale/Diani/SS 4936 pending the hearing and determination of this suit.

2. The 15<sup>th</sup> Defendant is ordered to register a prohibition on the said parcels being plot number Kwale/Diani/SS 3748, Kwale/Diani/SS 3749, Kwale/Diani/SS 4931, Kwale/Diani/SS 5665, Kwale/Diani/SS 5666, Kwale/Diani/SS 4932, Kwale/Diani/SS 4933, Kwale/Diani/SS 4934, Kwale/Diani/SS 4935 and Kwale/Diani/SS 4936 pending the hearing and determination of this suit.
3. For the avoidance of doubt these orders shall not result into eviction of any party.
4. Costs of the application be in the cause.

**RULING DATED SIGNED AND DELIVERED THIS 18<sup>TH</sup> DAY OF MARCH 2024.**

**A.E DENA**

**JUDGE**

Ruling delivered virtually through Microsoft Teams video conferencing platform in the presence of: -

Mr. Kithome for the Plaintiff/Applicant

No appearance for Ms. Kagoi for the 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> Defendants/Respondents

No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> Defendants/Respondents

Mr. Daniel Disii – Court Assistant

