



REPUBLIC OF KENYA



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**Makindu Motors Limited v Subati Group Limited (Environment and Land  
Case E032 of 2022) [2024] KEELC 1673 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1673 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND CASE E032 OF 2022**

**TW MURIGI, J**

**MARCH 13, 2024**

**BETWEEN**

**MAKINDU MOTORS LIMITED ..... PLAINTIFF**

**AND**

**SUBATI GROUP LIMITED ..... DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 12<sup>th</sup> October, 2022 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 40 Rules 1,2,3,4 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 in which the Plaintiff/Applicant seeks the following orders: -
  - i. Spent.
  - ii. Spent.
  - iii. Spent.
  - iv. That this Honourable Court be pleased to grant a temporary injunction against the Defendant/Respondent, its agents, servants, employees or whoever claiming through it from selling, transferring, alienating, subdividing, entering, trespassing, demolishing, cutting or clearing any vegetation, digging trenches and/or carrying out any further developments or interfering with the Applicant's quiet possession, use and enjoyment of Plot No. Makueni/kitengei 159 "B" Squatters Settlement Scheme pending hearing and determination of the main suit.
  - v. That the OCS Mtito Andei Police Station do ensure compliance with these orders.
  - vi. That costs of this application be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Stephen Musyoka Ngei sworn on even date.

### **The Applicant's Case**

3. The Applicant, the Director of the Plaintiff company averred that the Plaintiff is registered owner of the suit property having acquired the same vide the letter of offer dated 15/01/2013. That after the Plaintiff fulfilled the conditions in the letter of offer, it was issued with a discharge of charge awaiting the issuance of a title deed.
4. He further averred that the Defendant started trespassing on the suit property on 3/10/2022 while claiming interest thereof by using heavy commercial machinery to clear vegetation and crops in addition to installing machines to drill boreholes while connecting irrigation systems from the nearby Athi river. He stated that he reported the matter at Mtitio Andei Police Station under OB No. 32/03/10/2022.
5. He further averred that the Sub County Land Adjudication and Settlement Officer, Kibwezi officially confirmed that the Plaintiff is the owner of the suit property.
6. The Applicant asserted that the Plaintiff will suffer irreparable harm if the orders sought are not granted as the suit property will be wasted away. He argued that the Defendant will not suffer any prejudice if the orders sought are granted.

### **The Respondent's Case**

7. The Defendant opposed the application through the replying affidavit of Ravi Ramesh Kumar Patel, the Director of the Defendant's company sworn on 21/10/2022. He averred that the Defendant is the bona fide registered proprietor of the suit property having purchased the same from Reliance Ventures for Kshs. 25,340,000/=
8. He further averred that the Defendant has enjoyed exclusive and quiet possession of the suit property since its registration thereof and is currently preparing the same for erection of a greenhouse for subsequent export farming in addition to having procured fencing of the suit property at a cost of Kshs. 1,500,000/=. He further averred that Plaintiff has not been in possession or occupation of the suit property for the entire duration of the Defendant's proprietorship.
9. He argued that the Plaintiff has not tendered a competing certificate of title or any evidence to show that the Defendant's title is tainted by fraud, misrepresentation or procedural impropriety.
10. According to him, the Defendant is the absolute and indefeasible owner of the suit property.
11. The Respondent contended that the Plaintiff cannot claim ownership over the suit property on the basis of an unregistered transfer form.
12. The Respondent argued that the Defendant's developments in the suit property is enough evidence of its intention of a long-term investment and hence it is not in danger of sale, alienation or subdivision. The Respondent contended that the Plaintiff has not established a prima facie case to warrant the grant of the orders sought. He urged the Court to dismiss the application with costs to the Defendant.

### **The Response**

13. In a supplementary affidavit dated 31/01/2023, the Applicant averred that the suit property forms part of land under settlement programs and hence one cannot acquire a title deed without obtaining



the prior necessary documents. He further averred that the Plaintiff's allocation rights have never been cancelled or extinguished by the Ministry of lands.

14. He averred that Reliance Ventures Limited never occupied, used or developed the suit property. He stated that the Defendant occupied the suit property as recent as the cause of action herein after forcefully evicting the Plaintiff's employees by demolishing structures that were previously on the suit property before hiring private security to restrict access by the Plaintiff.
15. According to the Applicant, the Defendant has not demonstrated how Reliance Ventures Limited acquired and subsequently transferred the suit property to the Defendant herein. He added that the documents giving ownership rights to the Applicant have not been cancelled and that the failure to complete registration was occasioned by the discovery of a title deed which was irregularly issued to other parties.
16. The Applicant insisted that there is a danger that the suit property may be disposed of as the parties herein have competing equitable rights. He urged the court to grant the orders sought.
17. The application was canvassed by way of written submissions.

### **The Plaintiff's Submissions**

18. The Plaintiff's submissions were filed on 3<sup>rd</sup> February, 2023. On its behalf, Counsel submitted that the only issue for determination is whether the Plaintiff has met the threshold for the grant of injunction pending the hearing and determination of this suit.
19. Counsel submitted that the principles that govern the grant of an injunction were enunciated in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358.
20. On the first condition, Counsel submitted that the Plaintiff has established a prima facie case with a probability of success as it has demonstrated that it is the registered proprietor of the suit property.
21. On the second condition, Counsel submitted that the Defendant acts of clearing vegetation, demolishing structures and excavating soil amounts to irreparable harm which cannot be adequately compensated by an award in damages.
22. On balance of convenience, Counsel submitted that the inconvenience that the Plaintiff is suffering is greater compared to the Defendant as demonstrated by the Defendant's actions on the suit property. Counsel submitted that the court has not had the opportunity to interrogate all the documents that might be relevant in providing the history of the events leading to the Defendant's registration on the suit property.
23. Concluding his submissions, Counsel urged the court to grant the orders sought, None of the authorities cited were availed for the court's perusal.

### **The Defendant's Submissions**

24. The Defendant's submissions were filed on 16<sup>th</sup> November, 2022.
25. On its behalf, Counsel submitted that the only issue for determination is whether the Plaintiff had made out a case for the grant of an injunction.
26. Counsel submitted that the principles that govern the grant of an injunction were set out in the case *Giella v Cassman Brown & Co Ltd* [1973] EA 358.



27. On the first condition, Counsel submitted that the Defendant is the registered proprietor of the suit property as evidenced by a copy of the certificate of title (exhibit RRP1) and the certificate of official search (Exhibit RRP9). Counsel further submitted that the Defendant has provided evidence of its root of title that was ascertainable.
28. Counsel submitted that the certificate of title is prima facie evidence that the Defendant is the absolute and indefeasible owner of the suit property and cannot be challenged except under the provisions of Section 26 of the [Land Registration Act](#).
29. On the second condition, Counsel submitted that the Plaintiff will not suffer irreparable harm if the orders sought are not granted since it has not adduced any evidence to show that it is in occupation of the suit property or that it has put up any improvements thereon. Counsel argued that in the absence of a prima facie case, the court need not interrogate the remaining conditions for the grant of an injunction.
30. Counsel submitted that the balance of convenience tilts in favour of the Defendant as it is in possession of the suit property. Concluding his submissions, Counsel urged the Court to dismiss the application with costs.
31. To buttress his submissions, Counsel relied on the list of authorities dated 14<sup>th</sup> November, 2022.

### **Analysis and Determination**

32. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Plaintiff has established the legal threshold for the grant of an injunction.
33. The law that governs applications for injunction is premised under Order 40 Rule 1 of the [Civil Procedure Rules](#) 2010 which provides as follows: -
  1. 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 orders.
34. Both parties placed reliance on the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 which sets out the principles applicable in an application for injunction as follows: -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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.



35. The first issue for determination is whether the Applicant has established a prima facie case with a probability of success. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows:-
- “a prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
36. The Applicant’s claim over the suit property is anchored on the letter of offer dated 15<sup>th</sup> January 2013 (Exhibit SMN1) and the letter of acceptance (SMN2a), payment receipts and the transfer form in respect of the suit property. It is the Applicant’s case that it was allocated the suit property by the Government on 15<sup>th</sup> January 2013. The Applicant averred that after the Plaintiff complied with the conditions in the letter of offer, it was issued with a discharge of charge awaiting the issuance of the title. According to the Applicant, the transfer form in respect of the suit property was not signed because it was discovered that a title was issued to other parties.
37. On the other hand, the Defendant’s claim over the suit property is based on the certificate of title and the certificate of official search.
38. The Respondent gave an elaborate account on how the Defendant acquired the suit property. The Respondent averred that the Defendant purchased the suit property from Reliance Ventures vide the sale agreement dated 26/07/2021. In this regard the Defendant produced a copy of the certificate of title (RRP1), a copy of the sale agreement (RRP3) and a copy of the certificate of official search (RRP9).
39. The Plaintiff is challenging the Defendant’s title in respect of the suit property on the grounds that it was irregularly issued. Section 26 of the *Land Registration Act*, 2012 provides as follows: -
26. (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.
40. The Plaintiff and the Defendant are claiming ownership of the suit property. The issue of ownership can only be determined in a full trial where the parties will have the opportunity call evidence and have the same challenged by way of cross examination.
41. At this stage the court is not required to determine the issues which will be canvassed at the trial.
42. The court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy.



43. In so finding, I am persuaded by the holding in the case of *Mbuthia v Jimba credit Corporation Ltd* (1988) eKLR where the court held that:-

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”

44. Similarly, in the case of *Edwin Kamau Muniu v Barclays Bank of Kenya Ltd* NBI HCCC No 1118 of 2002, the court held that:-

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”

45. Based on the evidence placed before me I find that the Applicant has not established a prima facie case with a probability of success.

46. The conditions set out in the *Giella v Cassman Brown Case (Supra)* are to be considered sequentially.

47. In so finding I am persuaded by the holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court of Appeal stated as follows: -

“...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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”.

48. Having found that the Applicant has not established a prima facie case with a probability of success, it will be immaterial to delve into the other limbs that are to be considered for a grant of a temporary injunction.

49. In the case of *Commercial Finance Co. Ltd v Afraba Education Society & Others* C A Civil Appeal No. 142 of 1999 the court held that:-

“.....the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated that it has a prima facie case with a probability of success no interlocutory injunction would be available.”

50. The upshot of the foregoing is that the application dated 12<sup>th</sup> October, 2022 is devoid of merit and the same is hereby dismissed with costs to the Respondent.

.....  
**HON. T. MURIGI**



**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 13<sup>TH</sup> DAY OF MARCH, 2024.**

In the presence of:-

Court assistant Kwemboi.

Ms Kimani holding brief for

Mwangi for the Respondent.

