



Thiongo & 2 others v Kariuki & 2 others (Land Case E348 of 2024 & Miscellaneous Application E151 of 2014 (Consolidated)) [2025] KEELC 995 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E348 OF 2024 & MISCELLANEOUS
APPLICATION E151 OF 2014 (CONSOLIDATED)
TW MURIGI, J
FEBRUARY 27, 2025**

BETWEEN

LUCY NJOKI THIONGO PLAINTIFF

AND

PETER NDUNGU KARIUKI 1ST DEFENDANT

RACHAEL WANJERI NDUNGU 2ND DEFENDANT

AS CONSOLIDATED WITH

MISCELLANEOUS APPLICATION E151 OF 2014

BETWEEN

PETER NDUNGU KARIUKI 1ST APPLICANT

RACHAEL WANJERI NDUNGU 2ND APPLICANT

AND

LUCY NJOKI THIONGO RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 21st August 2024 brought under Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Article 40 of the *Constitution*, Sections 152A, 152B, 152E & 152F of the *Land Act* in which the Applicant seeks the following orders:-
 - a. Spent.
 - b. Spent.



- c. Spent.
 - d. Spent.
 - e. That pending the hearing and determination of this suit an order be issued by this Honourable Court restraining the Defendants, their servants and any other person acting under their authority or direction from trespassing onto the property, invading, transferring any interest, occupying, damaging, alienating or utilizing parcel of land known as Tassia-II-97/1168/Q100 which order to be enforced by the Officer Commanding Station.
 - f. That any rent collected from the illegal structures erected by the Defendants/Respondents on the suit property be forthwith deposited in this Honourable court or in the alternative an independent bank account as directed by this court pending full hearing and determination of the suit.
 - g. That an order directing the Defendants/ Respondents to account and an independent audit be conducted with this court's supervision for every amount the Defendants have received from their illegal occupation and trespass into the Plaintiff's/Applicant's suit property.
 - h. An order be granted that the Defendants and its tenants illegally occupying the property to vacate the commercial house/premises until the matter is heard conclusively.
 - i. That this court be pleased to grant the Plaintiff/Applicant herein costs of this application
 - j. That this Honourable Court do issue any other order and further orders as may be necessary to protect the rights of the Applicant/Plaintiff.
2. The application is premised on grounds appearing on its face together with the supporting affidavit of Lucy Njoki Thiongo sworn on 19th August 2024.

The Applicant's Case

- 3. The Applicant averred that she is registered as a person living with disability. She averred that she is the registered owner of land parcel No. Tasia L.R No.97/1168/Q100 (the suit property herein) having purchased the same in the year 2009 from National Social Securities Fund.
- 4. She contended that the Defendants have taken advantage of her disability to trespass on the suit property.
- 5. She further contended that the Defendants have constructed illegal structures on the suit property without her consent and approval and that efforts to have them vacate, including making several reports of land grabbing to Tasia Police station and to the Director of Criminal Investigations have been ignored by the Defendants who might even dispose the suit property. In conclusion, the Applicant urged the court to allow the application as prayed.

The Defendants' Case

- 6. The Defendants filed a Notice of Preliminary Objection dated 3rd September 2024 and a replying affidavit in opposition to the application. In their Notice of Preliminary Objection the Defendants contended that the Plaintiff's application and suit offends the provisions of Section 6 of the *Civil Procedure Act* and Section 7 of the *Limitation of Actions Act*.



7. In his replying affidavit, the deponent reiterated that the Plaintiff's application and suit offends the provisions of Section 6 of the *Civil Procedure Act* since the subject matter in the application and suit herein is directly and substantially similar to ELC MISC 151/2024 which is active before this court.
8. He further averred that the application is time barred as it was filed 14 years after the alleged cause of action arose. He contended that together with his wife the 2nd Defendant, they enjoyed quiet, peaceful and un-interrupted possession of the suit property for over 14 years and have put up massive developments worth over Kshs.50,000,000/=. He further averred that they acquired the suit property through the NSSF Client purchase scheme 14 years ago. He argued that the application is fatally defective and urged the court to dismiss the same with costs.
9. In response thereto, the Plaintiff filed grounds of objection dated 25th November 2024. She contended that the Defendants preliminary objection does not meet the legal threshold set out in the case of Derick Masini Onami v Josam Ibwana [2021] eKLR. She further contended that the Defendants' claim to the suit property by way of adverse possession pleaded in Misc. App ELC No. E 151 of 2024 would require adjudication on the facts presented. According to the Applicant, the preliminary objection is overtaken by events as this suit was consolidated with Misc. App Elc No. E 151 of 2024. She argued that the preliminary objection is made in bad faith with the intention of having this matter determined prematurely.
10. The application and the preliminary objection were canvassed together by way of written submissions.

The Plaintiff's Submissions

11. The Plaintiff filed her submissions dated 19th November 2024. On her behalf, Counsel submitted that the only issue for determination is whether the Defendants Preliminary Objection is merited.
12. Counsel submitted that the issue as to whether this suit is time barred cannot be determined through a Preliminary Objection as it requires examination of evidence and proper adjudication by this Court. Counsel further submitted that the Preliminary Objection has been overtaken by events since this suit was consolidated with ELC Misc E151 of 2024 on 28th October 2024. To buttress this point, Counsel relied on the case of Josephat Njuguna Karugu v Margaret Nduta Ngugi & 2 others [2021] eKLR and the case of Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696.
13. Counsel relied on the case of Njoroge v Githinji & 2 Others (Environment and Land Appeal E002 of 2023) [2023] KEELC 20799 (KLR)(19 October 2023)(Judgement) as well as the case of Nadeem A Kana v Lucy Wambui Mwangi[2021] eKLR to submit that the preliminary Objection has been overtaken by events since this suit is consolidated with Misc. Application No.E151 of 2024 (OS).

Analysis and Determination

14. Having considered the Preliminary Objection, the application, the grounds of opposition, the respective affidavits and the submissions by the Applicant, the following issues fall for determination: -
 - a. Whether the Defendants preliminary objection is merited.
 - b. Whether the Applicant has met the threshold for the grant of the orders sought.
15. The Defendants are challenging the jurisdiction of this court on the grounds that the Plaintiff's application and suit offends the provisions of Section 6 of the *Civil Procedure Act* and Section 7 of the *Limitation of Actions Act*.



16. Section 6 of the *Civil Procedure Act* provides that;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

17. In the case of Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR, the Supreme court stated as follows

“... A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

18. It is clear from the above provision that the sub judice rule applies where another suit or proceeding is pending in another court involving the same parties and over the same subject matter. It is not in dispute that this suit and Misc. Application No. E151 of 2024 (OS), involves the same parties and over the same subject matter. The record shows that both suits were consolidated on 8th October 2024 for hearing and determination. On the basis of the consolidation, I find that this suit is not sub judice to Misc Application No E151 of 2024 (OS).

19. On the 2nd limb of the Preliminary Objection, Section 7 of the *Limitation of Actions Act* provides that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

20. The question as to whether the Plaintiff’s suit is statute barred is a factual issue which can only be determined at the hearing of the 2 consolidated matters.

21. With regards to the 2nd issue, the law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides that: -

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.

22. The principles applicable in an application for injunction were set out in the case of Giella Vs Cassman Brown & Co Ltd 1973 EA 358 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.

23. The first issue for determination is whether the Applicant has made out a prima facie case with a probability of success to warrant the grant of an order of an injunction.

A prima facie case was defined by the Court of Appeal in *Mrao Ltd Vs 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.”

24. On the first condition, the Applicant averred that she is the owner of the suit property having purchased the same from NSSF in the year 2009. In this regard, the Applicant annexed to her supporting affidavit a letter dated 16th May 2024 in which NSSF confirms that she is the owner of the suit property. The Defendants claim is anchored on the doctrine of adverse possession. The Defendants alleged that they acquired the suit property pursuant to a sale agreement between them and one Yasin Adan.

25. The dispute between the parties herein revolves around the ownership of the suit property.

26. In the case of *Mbuthia vs Jimba Credit Corporation Ltd* 988 KLR 1, 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.”

27. Similarly, in the case of *Edwin Kamau Muniu vs 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.”

28. 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.

The issue of ownership can only be determined in a full trial where the parties will have the opportunity to call evidence and have the same challenged by way of cross examination.

29. Looking at the documents annexed to the affidavit in support of the application, it is evident that the Plaintiff's claim is not baseless. On the basis of the material that is on record, I find that the Plaintiff/ Applicant has established a prima facie case with a probability of success.

30. On the second condition, the Applicant must establish that she will suffer irreparable injury which cannot be adequately compensated by an award of damages.



31. In *Nguruman Limited vs Bonde Nielsen & 2 Others* (2014) eKLR the Court of Appeal held that: -

“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

32. The Applicant is apprehensive that the Defendants may sell the suit property if an order of injunction is not granted. The court is convinced that the Applicant stands to suffer irreparable harm that cannot be compensated by way of damages if the suit property is disposed of to third parties.

33. On the balance of convenience, it is not in doubt that an order of injunction is meant to preserve the suit property. In the case of *Virginia Edith Wambui Vs Joash Ochieng Ougo* (1987) eKLR, where 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.”

34. In the matter at hand, the balance of convenience tilts in favour of preserving the suit property.

35. The Plaintiff also sought for a permanent injunction in the form of an eviction order against the Defendants and their alleged tenants. In *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, the court held that:

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered.”

36. In my view, an order for eviction cannot be granted at the interlocutory stage as it will amount to the granting the final orders.

37. Similarly, an order to deposit the rent in court or an independent account cannot be granted at the interlocutory stage.

In the end, I find that the Preliminary Objection dated 3rd September 2024 is devoid of merit and the same is hereby dismissed with costs to the Plaintiff. The application dated 21st August 2024 partially succeeds in the following terms:-

1. An order of status quo is hereby issued pending the hearing and determination of this suit in the following terms:- The Defendants are restrained from selling, or alienating the suit property pending the hearing and determination of this suit.
2. The Plaintiff is awarded the costs of the application.



RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY, 2025.

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T. MURIGI

JUDGE

IN THE PRESENCE OF:-

Hilda Simiyu holding brief for Mwangi Mwendia fo the Plaintiff.

Ahmed – Court Assistant

