



**Mibey v Lomson Enterprise & 6 others; Chief Land Registrar (Interested Party)  
(Civil Suit 21 of 2023) [2024] KEELC 3653 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3653 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
CIVIL SUIT 21 OF 2023  
JM ONYANGO, J  
APRIL 30, 2024**

**BETWEEN**

**RHODA MIBEY ..... PLAINTIFF**

**AND**

**LOMSON ENTERPRISE ..... 1<sup>ST</sup> DEFENDANT**

**MOSES KOSKEI ..... 2<sup>ND</sup> DEFENDANT**

**JEREMIAH KOSKEI BOWEN ..... 3<sup>RD</sup> DEFENDANT**

**NAOMI KOSKEI ..... 4<sup>TH</sup> DEFENDANT**

**ANDREW KOSKEI ..... 5<sup>TH</sup> DEFENDANT**

**NATHAN KOSKEI ..... 6<sup>TH</sup> DEFENDANT**

**M ORIENTAL BANK ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**RULING**

1. What is before me for consideration is the Notice of Motion dated 21<sup>st</sup> July 2023 brought under the provisions of Section 63(e) of the Civil Procedure Act, Section 2 & 5 of the Access to Information Act, Order 40 rule 1 and Order 51 rule 1 Civil Procedure Rules seeking the following orders:
  1. Spent
  2. That pending the hearing and determination of this application an injunction do issue restraining the defendants, their agents or servants from further charging or dealing in any



manner whatsoever with the parcel of land known as Kapsaret/Simat/Mokombe Block 3 and parcel 64 which is subject of this suit.

3. That an injunction do issue permanently restraining the defendants, their agents or servants from disposing, further charging or dealing in any manner whatsoever with the parcel of land known as Kapsaret/Simat/Mokombe Block 3 and parcel 64 which is the subject of this suit.
  4. That in the alternative to prayer 2 &3, an order do issue compelling the Lomson Enterprises Limited and Jeremiah Koskei Bowen to deposit Kenya Shillings 11,500,000 to the Plaintiff/Applicant in due performance of the sale and in fulfilment of the agreement entered between the parties.
  5. Cost in the cause”
2. The application is premised on the grounds on the face of it and supported by the affidavit of Rhoda Mibey sworn on 24<sup>th</sup> July 2023. She avers that the 1<sup>st</sup> Defendant/Respondent in collusion with the rest of the Defendants/Respondents in this suit acted fraudulently to unjustly enrich themselves by illegally dispossessing the Applicant of her matrimonial property known as Kapsaret/ Simat Mokombe Block 3 and Parcel 64. She deposes that the 3<sup>rd</sup> Respondent hoodwinked the applicant’s husband and took away the property vide a sale agreement in the year 2012 where the Respondent was to pay thirteen million shillings but the Respondent has only paid one and a half million shillings to date. That they ceased payments in the year 2021. The suit property was transferred by the 1<sup>st</sup> Respondent courtesy of the 3<sup>rd</sup> Respondent in concert with the 2<sup>nd</sup>,4<sup>th</sup> and 5<sup>th</sup> Respondents using the privilege held by the Respondents who hold the title. The suit property is now subject to a charge to the 7<sup>th</sup> Defendant who plans to dispose of the same in an auction for recovery of monies in respect of the purported charge.
  3. In opposing the application, the 7<sup>th</sup> Respondent filed a Replying Affidavit sworn by George Karanja on 10<sup>th</sup> August 2023 where he objects to the strong language used by the Applicant as she is a stranger to the bank and has no contractual relationship with them. He contends that they have no interest and are a stranger to the suit property. He avers that the 7<sup>th</sup> Respondent is not a chargee to the suit property nor has she lent any money secured by a charge over the suit property. He adds that they intend to apply for striking out of their name from this suit as there is no cause of action against them.
  4. In opposing the application, the 6<sup>th</sup> Respondent filed a Replying Affidavit sworn by Nathan Koskei on 13<sup>th</sup> October 2023 where he deposes that he is the son of the 3<sup>rd</sup> Respondent and that the allegations against him are vexatious and misleading because he has never had any interest in the suit property and it was never registered in his name at any point.
  5. In opposing the application, the 5<sup>th</sup> Respondent filed a Replying Affidavit sworn by Andrew Kiplimo Koskei on 13<sup>th</sup> October 2023 where he deposes that he is also a son of the 3<sup>rd</sup> Respondent and terms the application as frivolous and misleading. He avers that he has never been in any agreement with the Applicant and that the suit property is not matrimonial property. He maintains that the suit property was never registered in the 1<sup>st</sup> Respondent’s name as alleged by the Applicant and that no charge exists with the 7<sup>th</sup> Respondent nor is the same intended to be auctioned. He states that he is the current registered owner of the suit property measuring 1.15 Ha and the title deed was issued to him on 26<sup>th</sup> June 2020; He purchased the suit property from one Nicholas Muli Mutunga. He further states that the former parcel of land had been charged to Oriental Commercial Bank by the then owner (the 3<sup>rd</sup> Respondent herein) who defaulted in payment; The bank then exercised their statutory power of sale through a public auction whereby Nicodemus Muli Mutunga purchased the entire parcel 22 and a title deed was issued to him on 9<sup>th</sup> April 2018. He deposes that the suit property was subdivided and created new parcels of land known as KKapsaret/ Simat Block 3 (Mokombe)/40 TO 65. He deposes



- that parcel 64 came into existence after subdivision from KKapsaret/ Simat Block 3 (Mokombe)/22 which measured approximately 9.6 acres and the same formerly belonged to the 3<sup>rd</sup> respondent herein who is the father to the 5<sup>th</sup> Respondent. He avers that the letter from the bank does not relate to his parcel of land; That the true position is that the letter is addressed to the Applicant's husband in regards to KKapsaret/ Simat Block 3 (Mokombe)/21 and not parcel 64 which belongs to the 5<sup>th</sup> Respondent. He further states that he is a bonafide purchaser for value like the rest of the purchasers and that he charged his parcel to ABSA Bank and thus the Supporting Affidavit by the Applicant is misleading.
6. The 4<sup>th</sup> Respondent swore a Replying Affidavit by Naomi Koskei on 13<sup>th</sup> October 2023 in opposition to the application. She deposes that she is a daughter of the 3<sup>rd</sup> Respondent and that the application herein is misleading. She avers that she has never had any interest in the parcel of land KKapsaret/ Simat Block 3 (Mokombe) 64 and that it has never been registered in her name.
  7. The 3<sup>rd</sup> Respondent in opposition to the application swore a Replying Affidavit dated 13<sup>th</sup> October 2023 by Jeremiah Koskei Bowen who stated that the Supporting Affidavit to the application was misleading, frivolous misrepresented and vexatious due to the following reasons; That the suit property is not matrimonial property as alleged by the applicant; The property was never at any point registered in the name of the 1<sup>st</sup> Respondent as alleged. He adds that the suit property is not charged to the 7<sup>th</sup> Respondent nor is there any intention to auction it. That all times the 3<sup>rd</sup> Respondent has never been the registered proprietor of the parcel KKapsaret/ Simat Block 3 (Mokombe) 21 and the parcel in question KKapsaret/ Simat Block 3 (Mokombe) 64 never arose from KKapsaret/ Simat Block 3 (Mokombe) 21. He avers that in 2006 the applicant's husband Noah Kipchumba sold a parcel of land measuring approximately 10 acres exercised from KKapsaret/ Simat Block 3 (Mokombe) 9 to the 3<sup>rd</sup> Respondent for a consideration of Kshs. 3,500,000/-. This portion was reduced by the 3<sup>rd</sup> Respondent's consent after the seller's request over the years as other purchasers were identified .....that 9.6 acres was excised from parcel 9 which was vast as it measured 47.26 acres and was registered under the name of Noah Kipchumba. The registered owner decided to subdivide land parcel KKapsaret/ Simat Block 3 (Mokombe) 9 from which new blocks were created being parcels 19-25. He further states that the husband of the Applicant took parcel 21 which was 19 acres while the 3<sup>rd</sup> Respondent was issued block 22 measuring 9.6 acres with Noah Kipchumba being the transferor as he had title to block 21. It was not until the 21<sup>st</sup> January 2013 that the 3<sup>rd</sup> Respondent obtained title for block 22 which he later charged to Oriental Bank Limited for Kshs. 6,000,000/-. He then defaulted in repayment of the loan and the whole parcel sold to one Nicodemus Muli Mutunga by Public Auction and title deed issued to him. The said Nicodemus Mutunga later subdivided the land into blocks 40-65. The 5<sup>th</sup> Respondent herein owns block 64 which is the suit property in question which was duly transferred to him by Nicodemus Muli Mutunga. He adds that Block 21 which is registered in the name of Noah Kipchumba was never registered in the 1<sup>st</sup> Respondent's at any given time. He avers that KKapsaret/ Simat Block 3 (Mokombe)/64 is currently registered in the name of the 5<sup>th</sup> Respondent. The said parcel is a subdivision from parcel 22. He deposes that Noah Kipchumba guaranteed him a loan of Kshs.10,000,000/- from Oriental Bank Limited by giving his title deed to block 21. That he has been progressively hiving and selling out portions of block 21 after the 3<sup>rd</sup> Respondent defaulted in repayment of the loan. He avers that the 3<sup>rd</sup> Respondent was in agreement with Noah Kipchumba and has so far paid him Kshs.1,500,000/-. He adds that it is not untrue that the land is about to be auctioned. He deposes that it would have been prudent to have the Applicant's husband joined to the proceedings. He further deposes that the claim before the court is for money owed and not a suit for matrimonial property or failure to honour a sale agreement. He emphasizes that suit property is not part and parcel of Kapsaret/ Simat Block 3 (Mokombe)/21. He prays that the application be dismissed.



## Submissions

8. The application was canvassed by way of written submissions.
9. The Applicants filed their submissions on 18<sup>th</sup> October 2023 and the 3<sup>rd</sup> to 6<sup>th</sup> Respondents filed theirs on 20<sup>th</sup> December 2023.

## Applicant's submissions.

10. The Applicant submitted that she is jointly registered as an absolute proprietor of the suit property being Kapsaret/ Simat/Mokombe/BLOCK 3 with the husband. The said property is their matrimonial home which was charged to the bank by the borrower.
11. The Applicant identified two issues for determination namely:
  - i. Whether the court should issue an order of temporary injunction against the 2<sup>nd</sup>-6<sup>th</sup> Defendants.
  - ii. Whether the suit is statute barred.”
12. On the first issue the Applicant submits that they have met the threshold for granting an injunction. To buttress their case, they relied on the cases of *Giella v Cassman Brown & Company Limited* (1973) E.A; *Moses Mubia Njoroge & 2 others v Jane Lesaloi & 5 others* (2014) eKLR; *Robert Mugo Wa Karanja v Eco bank Limited* (2019) and *Shiva Carriers Limited v Imperial Bank Limited & another* (2018) eKLR. It is their submission that the application is not vexatious based on the documents produced. It is their contention that they have established prima facie case with probability of success.
13. On whether the Applicant shall suffer irreparable harm that cannot be compensated by an award of damages the Applicant argues that the registered owner of the suit parcel is John Mibey. This is borne out by the annexures and pleadings. It is their submission that if an injunction is not granted against the Defendants, they are likely to transfer, alienate and carry out developments on the suit property.
14. In discussing what constitutes irreparable harm the Applicant cited the case of *Banis Africa Ventures Limited v. National Land Commission* (2021) eKLR. They submitted that Applicant stands to suffer harm that cannot be compensated by damages if the injunction is not granted.
15. Regarding the balance of convenience, the Applicant submits that they stand to suffer more compared to the Respondents and as such the balance of convenience lies in her favour. The applicant relied on the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company & 2 others* (2016) eKLR to buttress this point.
16. They further submitted that the suit is not statute barred in accordance with the provisions of section 7 of the *Limitations Act*. It is their contention that time starts running when the Applicant discovers fraud. To buttress this point, they relied on the case of *Edward Moonge Lengusuranga v James Lanaivara & Another* (2019) eKLR.
17. The 3<sup>rd</sup> to 6<sup>th</sup> Respondents filed joint submissions in opposition to the application. They identified the issues for determination as follows:
  - a. Whether the Defendant/Applicant has established a prima facie case with a probability of success;
  - b. Whether the Defendant/Applicant will suffer irreparable damage in the event the injunction is not granted;



- c. In whose favour does the balance of convenience tilt?
- d. Who shall bear the costs of the application?
18. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submitted that for an order for injunction to be granted it must fulfil the triple requirements to wit;- the Applicant must demonstrate that they have established a prima facie case;- secondly, they must demonstrate that there will be irreparable injury if the temporary injunction is not granted and lastly, where there is doubt the Applicant must show that the balance of convenience tilts in his favour. They relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR.
19. On whether a prima facie case has been established, the Respondents submit that the application does not raise any arguable issues as the Applicant has not attached any documents to prove her allegations. They submit that parcel No. KKapsaret/ Simat Block 3 (Mokombe)/21 has never been registered in any of the 3<sup>rd</sup>-6<sup>th</sup> Respondents. It is their contention that the property was registered in the name of Noah Kipchumba who is the husband to the Applicant and who is not a party to the proceedings.
20. Additionally, they submit that parcel 64 is currently registered in the 5<sup>th</sup> Respondent's name. They have explained that the subdivision arose from KKapsaret/ Simat Block 3 (Mokombe)/9 and not parcel 21 as alleged by the Applicant and thus the allegations by the Applicant are misleading. It is their submission that the Applicant has failed to demonstrate that the property in question was registered in the 1<sup>st</sup> Respondent's name. Furthermore, the Applicant has failed to furnish document proof of her allegations.
21. On the question of irreparable harm, the Respondents submitted that the Applicant is not in possession of the land in question nor is it her matrimonial home, they submit that her husband's property is distinct from the one she is claiming. It is their submission that the Applicant does not reside on the suit property. They are of the view that should the suit succeed, the damage can be quantified in monetary terms hence the Applicant will not suffer any prejudice. They add that the Applicant has not demonstrated that she is able to compensate the 3<sup>rd</sup> to 6<sup>th</sup> Respondents should the application be successful. In that view this places the Respondents at a greater risk. They relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR to illustrate their point that the Applicant does not deserve the injunctive relief sought.
22. On the third issue the Respondents submitted that the balance of favour tilts in favour the Respondents as there is a lower risk in not granting an injunctive order, than granting it. To buttress their point the Respondents relied on the case of *Amir Suleiman v Amboseli Resort Limited* (2004) eKLR.
23. It is their conclusion that the application does not meet the requirements for grant of an injunction as it has failed the three part test as laid out in the Giella case (supra). They urge this court to dismiss the application.

### **Analysis and Determination**

24. Having considered the issues raised in the application and the rival submissions, the main issue for determination is whether the application is merited.
25. The law on temporary injunction is provided under Order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 as follows:

“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."

26. The conditions for the grant of applications for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court expressed itself in the following terms:

"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."

27. In order to determine whether the application meets the required threshold the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court held that: -

"These are the three pillars on which rests 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. See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86. 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 is 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. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

#### **a. Whether the Applicant has established a prima facie case**

28. The court shall examine whether the Applicant has fulfilled this first limb to determine whether the court shall put into consideration the rest of the requirements. The case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 defined a prima facie case as follows;

"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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."



29. A close perusal of the affidavit in support of the application and the Applicant's submissions reveal that the affidavit is bereft of materials and has no supporting evidence to support the claim made. The Respondents on the other hand have annexed documents to oppose the application. For example, the Replying Affidavit by the 5<sup>th</sup> Respondent have annexures that strongly indicate that parcel 64 which is the suit property belongs to Andrew Koskei. That parcel 64 is a subdivision of Plot no. 22 and not 21 as alleged by the Applicant. The documents further reveal that parcel 22 was closed for subdivision creating new parcels Nos 40 to 65. This was after the parcel 22 was purchased in a public auction before the subdivision done by one Nicodemus Muli Mutunga.
30. According to the evidence placed before the court Noah Kipchumba guaranteed the 3<sup>rd</sup> Respondent charging parcel 9 to the bank for a loan advanced to the latter. The Replying Affidavit by the 3<sup>rd</sup> Respondent annexed documents which strongly indicate that Noah is the proprietor of Parcel 9 who guaranteed a loan for one Jeremiah Bowen the 3<sup>rd</sup> Respondent herein. One of the annexures which is a green card shows that parcel 22 was registered in the names of the 3<sup>rd</sup> Respondent after Parcel 9 was closed for subdivision creating parcels 19-25. The third Respondent was auctioned after a loan default. Parcel 21 which was a subdivision of Parcel 9 belonged to Noah Kipchumba which was used to settle the loan by the 3<sup>rd</sup> Respondent in a separate agreement that is not before the court. The 3<sup>rd</sup> Respondent maintains that the claim is for money owed by himself to Noah Kipchumba and that it is not a claim for matrimonial property. Additionally the claim does not involve the suit property in as the owner of the parcel 64 has been established to be the 5<sup>th</sup> Respondent.
31. The Applicant has not made any effort to disprove the evidence presented by the Respondents by filing a Further Affidavit with documents to support her claim. The Respondents on the other hand have opposed the application by attaching necessary documents to disprove the Applicant's claims. The court observes from the documents placed before it that the suit property the Applicant lays a claim over being parcel 64 is registered in the name of Andrew Koskei while Parcel 21 which was a subdivision of Parcel 9 is registered in the name of Noah Kipchumba. The Applicant has not disproved any of these facts as presented by the Respondents.
32. Section 107 of the [Evidence Act](#) provides that: -
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

This court observes that the Applicant has not discharged this burden as she has not proffered any evidence to support her application.

33. This is not a court of assumptions it is guided by evidence. There is no agreement annexed by the Applicant to verify her monetary claims. From the affidavits it is evident there existed an agreement between Noah Kipchumba and Jeremiah Koskei Bowen the 3<sup>rd</sup> Respondent herein but the court cannot ascertain the terms of the agreement as it is not before the court. Noah Kipchumba could have been the suitable party to sue for recovery of any money owed to the 3<sup>rd</sup> Respondent. Other parties cannot interfere with the contract as they are strangers to the same. Only parties to a contract are bound by it. It is a settled principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite contracts. See the case of [National Bank](#)



of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR, the Court of Appeal stated as follows:

“ A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

34. Having found that no prima facie case has been established, it is no longer necessary for me to consider the second and third requirements. Nonetheless I shall shed light on the issue of the alleged matrimonial property in question as the Applicant presents an argument to suggest that such property is immune to recovery where there is a charge over the same. In the case of Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation), HCCC No. 82 of 2006, Warsame J (as he then was) observed as follows:

“..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”. Similarly, in the case of Al-Jalal Enterprises Limited v Gulf African Bank Limited [2014], Para 19 held:

“the Plaintiff has alleged that the suit property is of unique character and allocation and irreplaceable loss if sold by the Defendant. In my view, this allegation is of no consequence. Once a property is given to a bank as security, the same becomes a commodity that can be sold. This is because it is usually charged for a specific sum of money and as the value is ascertainable, any loss is remediable by an award of damages.”

35. The court cannot grant a temporary injunction where there is insufficient material. The claim by the Applicant is over land which is registered in the name of the 5<sup>th</sup> Respondent. Additionally, the other parcel of land is still under the Applicant’s husband name going by the Respondents’ affidavits. If the Applicant wishes to raise the claim of due performance of the agreement between Noah Kipchumba and the 3<sup>rd</sup> Respondent, she can do so in another forum.

36. In view of the foregoing, the court finds that the application dated 21<sup>st</sup> July 2023 lacks in merit and is hereby dismissed with costs to the Respondents.

37. Orders accordingly.

**DATED, DELIVERED AND SIGNED TODAY THE 30<sup>TH</sup> DAY OF APRIL, 2024**

.....  
**J. M. ONYANGO**  
**JUDGE**

In the presence of;

H.K Lagat for the Plaintiff

Mr. Kemei for the 3<sup>rd</sup> – 6<sup>th</sup> Respondents

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Court Assistant: Mr. Brian K.

