Ndiema & 2 others v Matayo & 2 others (Suing as Legal Representative of Matayo Otola Munyani) (Environment and Land Appeal 21 of 2023) [2024] KEELC 3930 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3930 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 21 OF 2023

EC CHERONO, J

MAY 16, 2024

BETWEEN

LABAN NDIEMA .... 1ST APPELLANT

MAKANI NDIEMA .... 2ND APPELLANT

BACHI NDIEMA .... 3RD APPELLANT

AND

NELSON JUMA MATAYO .... 1ST RESPONDENT

PIUS KEYA ODULLA .... 2ND RESPONDENT

PATRICK OKIRU MATAYO .... 3RD RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF MATAYO OTOLA MUNYANI

(Being an appeal arising from the ruling of Hon.G.Adhiambo (PM) delivered on 5th June, 2023 in Kimilili ELC Case no. 13 of 2023)

JUDGMENT

1. This appeal arises from the judgment of the Principal Magistrate Hon. Hon. G.Adhiambo delivered on 5th June, 2023 in Kimilili MC ELC Case No.13 OF 2023.

2. The brief background of this case is that the respondents filed a Notice of Motion dated 29th March,2023 under certificate of urgency with an accompanying plaint dated 29th March, 2023.

3. In the application whose ruling is the subject of this appeal, the respondents sought for the following orders;

   a. The application be certified as urgent and service be dispensed with in the 1st instance.

b. The defendant/respondents either by themselves and/or through their servants, agents be and are hereby restrained from entering, utilizing, taking possession of, erecting any structure and/or in any other manner dealing with land parcel no. Elgon/Kapsokwony/3xx pending the hearing and determination of this application inter-partes.

c. The defendant/respondents either by themselves and/or through their servants, agents be and are hereby restrained from entering, utilizing, taking possession of, erecting any structure and/or in any other manner dealing with land parcel no. Elgon/Kapsokwony/3xx pending the hearing and determination of this suit.

d. The OCS Kapsokwony police station or the nearest police station to ensure compliance with this order.

e. The costs of this application be provided for.

4. When the matter was placed before the duty Magistrate, interim orders were granted in terms of prayer No. 1 & 2 and a date for directions issued.

5. In the said application, the respondents contend that that they were the legal representatives of the estate of Matayo Otula Munyani who died on 6th June, 1986 leaving 9 children and have been issued with letters of administration on 17th July, 2022. They further averred that the deceased was the absolute registered owner of L.R. No. Elgon/Kapsokwony/3xx('the suit land') but the appellants herein being the neighbours encroached into the deceased's estate illegally sometime in January, 2023 and they seek to have them restrained from further entering, taking possession, developing or otherwise dealing with the suit land.

6. Upon being served with the application, the appellants filed a replying affidavit sworn by Laban Roland Tendet Ndiema, the 1st Appellant/Applicant herein on 5th April, 2023. In the supporting affidavit, the applicant confirmed that the suit land which measures 8.0 acres is registered in the name of the deceased. However, he contends that on 30th December, 1987 the family of the deceased shared out 1 acre of the suit land to each child in the presence of the area assistant chief, Kibiku Sub-location. It is his further averment that vide an agreement dated on 4th April, 1989 the respondents sold each of their share i.e. 3 acres plus the developments thereon to him which amount was paid by the 1st appellant's agent and brother one Charles Kaibei. It was his averment that after the sale, the respondents relocated to Cherangany and that he has been utilizing the said 3 acres since then to date planting sugarcane.

7. In a further affidavit sworn on 27th April, 2023 the respondents denied the alleged sale stating that they had initially reported the appellants to the Chief Kibiku area and the OCS Kapsokwony over the issue and the appellants were released on paying a fine of Kshs. 10,000/=.

8. Directions were taken by consent to have the application canvassed by way of written submissions and a ruling date was reserved for 29th June, 2023. The court in its ruling delivered on the said date allowed the applicants application and granted orders of temporary injunction against the appellant from entering, utilizing, taking possession and/or in any way dealing with the suit land and directed the OCS Kapsokwony to ensure compliance with the said orders. The court also granted the respondent costs of the application.

9. Being aggrieved by the impugned decision, the Appellants herein preferred an appeal to this Honourable court vide a memorandum of appeal dated 30th March, 2023 on the following grounds;

a. The learned trial magistrate erred in law and in fact in finding that the appellants occupation of land parcel no. Elgon/Kapsokwony/3xx was unlawful, illegal and trespass.

b. The learned trial magistrate erred in law and in fact for issuing injunctive orders at interlocutory stage thus rendering the main suit irrelevant nugatory and an exercise in futility.

c. The learned trial magistrate erred in law and in fact by failure to appreciate that the appellants are in occupation of the portion in question and the same has the appellants sugarcane which when not attended to, will go to waste and the appellant will suffer irreparable loss.

d. The learned trial magistrate erred in law and in fact in disregarding the appellants replying affidavit and the annexures thereto.

e. The learned trial magistrate erred in law and in fact for failure to appreciate that the respondent's application was brought in bad faith and an afterthought.

f. The learned trial magistrate erred in law and in fact for failure to appreciate that occupation and utilization of the portion in question was with the knowledge, express authority and permission of the respondents.

g. The learned trial magistrate erred in law and in fact to appreciate that allowing the application at interlocutory stage, the respondents will destruct/destroy the already growing sugarcane which will be prejudicial to the appellants.

10. The appellant sought for the following orders;

a. The findings by the Trial Magistrate set aside.

b. The court do issues orders to allow the appellants to maintain the already growing sugarcane to its maturity and harvest the same.

c. The court do direct that the Kimilili MC ELC 13 of 2023 case be heard to final conclusion before another trial magistrate.

d. The costs of the appeal.

11. In support of this appeal, the appellant filed submissions dated 12th April 2024. The appellants' submissions raise three issues. The first issue is that the trial magistrate issued final orders which rendered the appellants main suit nugatory and an exercise in futility. They relied on the case of *James Thendu Gitau & another v John Nginga Magecha* (2020) eKLR. On the second issue, the appellants argued that they have been in occupation of 3 acres of the suit land having cultivated thereon and urged the court to allow them to cultivate and tend to the sugarcane which takes 18 months to mature. Reliance was placed in the case of *James Thendu Gitau & another v John Nginga Magecha*(*Supra*). Lastly, the appellants submitted that the trial magistrate in her ruling failed to appreciate that she was making a ruling on an interlocutory application therefore denying the appellants a fair hearing and breaching the principles of natural justice. They urged the court to have the suit transferred to another judicial officer for final determination.

12. The respondents on the other hand filed submissions dated 11th April, 2024 and urged the court to reject the appeal. They emphasized that it is undisputed that letters of administration for the estate of the deceased had not been obtained at the time of the alleged sale to the appellant. Therefore, they argued that the appellant was essentially a trespasser, lacking proper legal authorization or ownership rights to the land. It was argued that the appellants alleged occupation and utilization of the suit land, if any, was in contravention of Section 45(1) of the *Law of Succession Act*, Cap 160.They urged the court to dismiss the appeal and maintain the trial court's ruling.

13. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by both parties and the court record generally and identify the following as the issues that emerge for determination:

    a. Whether the appellant is entitled to the orders sought.

    b. Who bears the costs.

14. The respondents in the supporting affidavit sworn on 29th March, 2023 attached a grant of letters of administration for the estate of Matayo Atola Munyani-deceased issued in favour of Nelson Juma Matayo, the 1st Resondent herein on 17th July,2020. From the said letter of administration, it emerges that's the deceased died on 6th June, 1986.

15. The respondents in their further affidavit sworn on 27th April,2023 denied selling the suit land to the 1st appellant and stated that they have been utilizing the land by leasing it out to various individuals over time. In support, they produced copies of various lease agreements. It was their assertion that if at all any sale did occur, the same is null and void since letters of administration for the estate of the deceased had not been taken out.

16. The appellants in their Replying affidavit before the lower court sworn by the 1st appellant on 5th April, 2023 opposed the respondents' application as well as the contents of the supporting affidavit and denied that the 2nd and 3rd appellants ever purchased or utilized land parcel No. Elgon/Kasokwony/3xx. He also referred to an agreement dated 30th December, 1987 where land parcel No. Elgon/Kapsokwony/321 was subdivided and shared amongst the children of the deceased in the presence of the local administration and elders. He also referred to an agreement dated 4th April, 1989 between the respondents as the sellers and one Charles Kielei as the buyer for 3 acres to be curved out of L.R. No. Elgon/Kapsokwony/3xx. The deponent further referred to a sale agreements between the respondents as buyers and others for the purchase of various plots, an invoice from West Kenya Sugar Company Limited for services rendered to the 1st appellant and the purported photos of the suit land and denied the same ever happened.

17. The respondent in their application whose ruling is subject of this appeal sought mainly for injunctive orders.

18. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

    > "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
    >
    > (a) establish his case only at a *prima facie* level,
    >
    > (b) demonstrate 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 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. Afraha 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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

19. Odunga J in the case of *JM v SMK & 4 others* [2022] eKLR while reiterating the above position quoted Ringera J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank* Nairobi (Milimani) HCCC No. 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.

20. According to the Court of Appeal in *Esso Kenya Limited. v Mark Makwata Okiya* Civil Appeal No. 69 of 1991:

> " The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

21. The first element to consider is whether the respondents established a *prima facie* case with chances of success at the main trial. What then constitutes a *prima facie* case? In the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the Court of Appeal held as follows:

> "It may not be easy to define what is meant by "*prima facie* case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "*prima facie*" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "*prima facie*" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case... In civil cases a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

22. In this case, the respondents asserted that their father, one Matayo Otolo Muyani was the registered owner of L.R No. Elgon/Kapsokwony/3xx and although they did not attach a copy of title or a certificate of official search to the application, I note that there is a copy of a certificate of official search attached to the plaint dated 20th March, 2023 showing that the deceased was indeed registered as the proprietor on 1st August, 1966. This position was affirmed by the appellants in paragraph 7 of their response to the application.

23. The respondents presented an agreement dated 4th April, 1989, purporting to have purchased 3 acres from the suit land. It is noteworthy that there is a significant dispute in the facts as presented by both parties. Whereas the appellants assert that they purchased 3 acres from the suit land, the respondents deny having sold any portion as the suit land is registered in the name of their deceased father and no letters of administration have been obtained. It is in the basis of this conflicting issues that at the interlocutory stage, the trial ought to have acted with restrain from making definitive or make final findings on the contested matters. The issue whether the sale of land registered in the name of a deceased person before letters of administration are obtained are contested matters which can only be determined in a full trial where the parties will have the opportunity to call evidence and have the same tested by way of cross-examination.

24. In the case of *Virginia Edith Wambui v Joash Ochieng Ougo* Civil Appeal No. 3 of 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."

25. In the present case, it is not in dispute that Matayo Otola Munyani-deceased as represented by the respondents is the registered owner of the suit land. It is evident that the appellants' proprietary claim over the suit property is anchored on the sale agreements. Having carefully looked at the sale agreements and all the materials relied by both sides,I find that they relate to the sale of land No.Elgon/ Kapsokwony/3xx which is the suit land. What is in dispute is whether the appellants lawfully purchased from the respondents 3 acres out of the suit land and has been in possession occupation since 1989.

Although the appellants are not the registered owners of the suit land, it is clear from the pleadings and annexures that they are claiming a stake over 3 acres out the of the suit land.

26. On the basis of the material that is on record, I find that though the respondents have shown that the suit land is registered in the name of their deceased father Matayo Otolo Muyani, the applicants allege that they have been in possession and occupation of the same since 1989. As to whether the respondents had capacity to sell the 3 acres of the suit property to the appellant is a triable issue that ought to have been escalated to the hearing of the suit. As such, I find that the respondent had not established a *prima facie* case to warrant the issuance of the injunctive orders. I note that granting the temporary injunction orders was tantamount to determining the matter at the interlocutory stage. I also note that the respondents at paragraph 12 of their replying affidavit sworn on 19/6/2023 confirmed that the appellants planted sugarcane in on the suit land as shown in the photographs marked LRNT-1. It follows therefore that by granting the impugned injunctive orders, the trial court stopped the appellants from entering the suit land and harvesting their sugarcane which in my view is tantamount to the grant of a mandatory injunction removing the appellants from the suit property before the case is heard and determined.

27. The second condition was the applicant to demonstrate that he would suffer irreparable injury if the injunction is not granted. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR the court stated; "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."

28. The respondents claim that if the orders sought were not granted, they would suffer irreparable injury that cannot be compensated by damages and therefore sought to have the appellants restrained permanently from trespassing on the suit land. From the materials before me, I find that the respondents did not demonstrate that they would suffer irreparable injury since they were not in possession and occupation of the suit property. To the contrary, the appellants were the ones in possession and occupation of the suit land and had even planted sugarcane which were due for ploughing/weeding. In that regard, I find that the trial court erred in fact and law in finding that the respondents had demonstrated that respondents would suffer irreparable injury.

29. Since the Respondents did not establish the first two conditions, the application would have been decided on the issue of balance of convenience. The meaning of balance of convenience was discussed in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where the court held as follows:

> "The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

30. In light of my analysis hereinabove, I am not persuaded that the respondents satisfied the conditions necessary for the grant of the injunction orders as sought in the Notice of Motion dated 29/3/2023. In

my view, the appellants who claim to have been in occupation and have even planted sugarcane ready for ploughing/weeding was sufficient reason that there was an arguable ground to escalate the matter to full hearing.

31. In the case of *Simon Kimemia Muthondu v Moses Mugo Maringa* [2017] eKLR, Justice Olao held as follows:

> 'As indicated above, the defendant's occupation of the suit land is not really in doubt. If an order for temporary injunction is granted, it will have the effect of evicting the defendant from the suit land where he has lived and developed since 1973. It is not the policy of the Court to issue such orders at an interlocutory stage. Guided by the principle laid down in the *Films Rover International case* (*supra*), it is my finding that the lower risk of injustice demands that I decline to issue the order of temporary injunction. After all, though he is the registered proprietor of the suit land, the plaintiff, un-like the defendant, has not been in occupation of the land. It would therefore be in the interest of justice that the status quo now obtaining on the suit land remains until this case is heard and final orders issued. The prayer for a temporary injunction is therefore not appropriate in the circumstances of this case and must be rejected.'

32. In light of the foregoing I am satisfied that this appeal is merited.In light of the matters aforesaid, I allow this appeal and proceed to set aside the orders issued by the trial Court on 5th June, 2023 and issue the following consequential orders;

    a. The status quo obtaining as of today to be maintained pending the hearing and determination of the main suit.

    b. The matter is remitted back to Kimilili Law Court court for mention for directions and taking a hearing date.

    c. The costs of this appeal shall be borne by the respondents.

    d. Mention before the Senior Principal Magistrate, Kimilili on 30/05/2024

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 16TH DAY OF MAY, 2024.

....

HON.E.C CHERONO

JUDGE

In the presence of;

1. Mr. Wafula H/B Wattangah for the appellants

2.Respondents in person-present

3. Bett C/A