



**Kimani v Kimani & 5 others (Environment and Land Appeal
E003 of 2023) [2024] KEELC 3678 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

LN GACHERU, J

MAY 9, 2024

BETWEEN

FRANCIS WAMUCHWE KIMANI APPLICANT

AND

PAUL MUNGAI KIMANI 1ST RESPONDENT

JOHN MACHARIA KIMANI 2ND RESPONDENT

JOSEPHAT KIMEMIA KIMANI 3RD RESPONDENT

**JANE NYAMBURA MWANGI (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF PETER MWANGI KIMANI - DECEASED) 4TH RESPONDENT**

LAND REGISTRAR, MURANG'A 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The matter for determination is the Amended Notice of Motion Application dated 31st October 2023, wherein the Applicant has sought for the following orders against the Respondents;
 - i. that the Court be pleased to issue a temporary injunction to restrain the Respondents by themselves, their agents, servants, employees or any person whomsoever from selling, leasing, charging, transferring, sub dividing or otherwise howsoever interfering with the Applicant quiet, peaceful, actual and exclusive possession, cultivation, use development and enjoyment of the parcel of land known as Land Parcel No. Loc 3/ Mukuria/ 980, pending the hearing and determination of the suit.
 - ii. that costs of the Application be provided for.



2. The said Application is premised on the grounds set out on the face of the Application, and on the supporting Affidavit of the Applicant, Francis Wamuchwe Kimani. These grounds are;
 - i. That the registered owner of the suit property died testate having bequeathed and distributed his properties amongst his beneficiaries being; Patrick Mungai Kimani, John Macharia Kimani, Josephat Kimemia Kimani and the estate of Peter Mwangi Kimani(deceased), land parcel No Loc 3/ Mukuria/ 98;
 - ii. That the Applicant and Respondents are all children of the deceased – Kimani Karanja who was the registered owner of the suit land;
 - iii. That with the full knowledge of the Will, the Respondents sold their individual bequests to the Applicant through a sale agreement dated 13th September 2004, before the confirmation of grant;
 - iv. That since 2004 to date, the Applicant has been in use and occupation of the suit property in exclusion of the Respondents;
 - v. However, after the confirmation of grant and issuance of such certificate on 17th November 2017, vide Kigumo P&A Cause No. 25 of 2013, the Respondents have reneged on their promise to transfer their individual interests in the suit property unto the Applicant;
 - vi. Further that the Respondents having disposed of their proprietary interest in the suit property unto the Applicant are now estopped from raising legal justifications by unjustly enriching themselves out of the process of the suit property despite an uncontested sale;
 - vii. That it is just fair and in the interest of justice, that the orders sought are granted on priority basis to conserve the suit property.
3. In his supporting Affidavit Francis Wamuchwe Kimani, averred that he is a bona fide purchaser of land parcel No. Loc 3/ Mukuria/ 980, which was initially owned by their father, who died testate, having bequeathed the suit land the Respondents.
4. He reiterated the contents of the grounds in support of the Application that the Respondents despite being in full knowledge of the Will, and before confirmation of Grant, they sold the suit land to him.
5. It was his contention that after the grant was confirmed on 17th November 2017, vide Kigumo P&A No 25 of 2013, the Respondents reneged on their promise, and, are now preparing to dispose of the suit land to potential buyers.
6. It was his further contention that the Respondents disposed of their proprietary interest in the suit property and are estopped from raising any legal justification and are prevented from unjust enrichment.
7. He urged the Court to allow his Application.
8. The Application is opposed by the 1st, 2nd, 3rd and 4th Respondents vide their Replying Affidavit sworn on 5th September 2023.
9. It was their averments that the suit herein has no chance of success as the pleadings have not disclosed any prima facie case, and the injunction cannot be issued as the Applicant is not the owner of the suit land as he has no title deed for the said land and he lacks locus standi to bring up the suit.
10. It was their contention that the suit land belongs to them vide the Judgement of the Court in Kigumo SPMCC P& A No 25 OF 2013.



11. They averred that the Applicant is mischievous and he is trying to open a concluded matter, thus prolonging litigation, which is not acceptable in law and equity, and therefore, he cannot get equitable relief.
12. It was their contention that the sale agreement alluded to is fake and unenforceable in law, and in any event, the said agreement or contract has been caught by limitation of actions.
13. The deponents denied having disposed of their proprietary interests in the suit land, and that the two Courts have found in favour of the Respondents, and the land belongs to them and they do not require consents of the Applicant to sell it.
14. They contended that litigation should come to an end, and they urged the Court to dismiss the instant Application for being scandalous and vexatious in nature.
15. The Applicant filed a Further Affidavit on 28th September 2023, and averred that in Kigumo SPMCC Succ Cause No 25 of 2013, and Muranga HCCP&A Appeal No1 of 2018, the Courts were invited to transmit the estate of the deceased, amongst his lawful beneficiaries through the [Law of Succession Act](#).
16. However, in the instant suit, the Court has been invited to determine the issues of use and occupation of the suit land, issue of title to land and existence of constructive trust, plus overriding interest of the land.
17. It was their contention that this is a fresh suit, with a fresh cause of action, that is deserving of the Court's hearing and determination, and thus the Court is fully clothed with jurisdiction to hear and determine the issues herein.
18. The Applicant contended that the suit herein is not Res judicata nor Subjudice, and it raises triable issues, which should be allowed to go on trial.
19. The Application was canvassed by way of written submissions. The Applicant filed his written submissions on 4th March 2024, through the Law Firm of Muiruri Cheserek & Co Advocates, and urged the Court to allow the Application entirely. The Respondents filed their written submissions on 26th September 2023, and urged the Court to dismiss the instant application with costs.
20. The Court has carefully read and considered the rival written submissions and finds as follows; - In his written submissions, the Applicant raised one issue for determination which is; whether the Applicant is deserving of the orders sought.
21. In supporting his prayers, the Applicant relied on various provisions of law and authorities. The Applicant relied on Order 40 Rule 1 of the [Civil Procedure Rules](#), on instances that the Court may issue temporary order of injunction. He also relied on section 28(b) of the Land Registration Act on the overriding interests which include customary trust and section 107 of the [Evidence Act](#), on the burden of proof.
22. Reliance was placed on the case *Giella v Cassman Brown CO Ltd* (1973) EA 358, on the principles to be considered in an application for temporary injunction.
23. On the doctrine of Lis Pendence, reliance was placed in the case of [Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another](#) (2015) eKLR, as quoted in the case of [Mawji v US International University & Another](#) (1976) KLR 185, where Madan JA stated as follows;

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common



law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..”

24. On whether the Applicant deserves the orders sought, it was submitted that he has demonstrated that he is a bona fide purchaser for value of the suit property, having purchased the same from the Respondents, thereby giving rise to a trust in favour of the Applicant herein. Reliance was placed in the case of *Tony Justus Ongale v Catherine Lorna Mariati* (2021) eKLR, which was quoted with approval by the Court of Appeal in the case of *Twalib Hatayan Twalib Hatayan & Another v Said Saggar Ahmed Al-Heidy & Others* (2015) eKLR, where the Court defined and expounded on the application of trusts.
25. It was further submitted that the Respondents herein have received the full purchase price, thus creating an implied or constructive trust in favour of the Applicant, who paid the full purchase price.
26. The Applicant further submitted that he has been in possession of the suit land from 13th September 2004, when he was placed in occupation on the strength of the sale agreement that was attached.
27. Further, it was submitted that the Applicant possession of the suit land was a result of constructive trust, which is an overriding interest on the land as provided by section 28(b) of the *Land Registration Act*. The Court was urged to consider whether the rights of the Applicant who was in possession could be defeated by the rights of the Respondents, who were the vendors, and who did put the Applicant in possession through the sale agreement, as a bona fide purchaser.
28. Reliance was placed in the case of *Baron Mathenge Munyoki v Dedan Mbangula Kithusi* (2022) eKLR, which quoted with approval the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR. Where the Court held;

“would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void? The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases..... constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”
29. Further reliance was placed in the case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR, which upheld the doctrine of constructive trust in favour of a purchaser, in circumstances similar to this case.
30. Consequently, the Applicant submitted that he has demonstrated all the principles for grant of temporary injunction, which are; prima facie case with probability of success; irreparable loss and balance of convenience would shift in his favour. He urged the Court to allow his application.
31. In their submissions, the Respondents submitted that the dispute herein is in respect of land parcel No Loc 3/ Mukuria/ 980, wherein a Judgement was entered by the Kigumo SPM Court in Succession Cause No 25 of 2013, and later by the Murang’a High Court in HCCP&A Appeal No.1 of 2028.
32. Therefore, it was their submissions that the Applicant is a vexatious litigant and the Court should stop him in his track by dismissing this Application, which is scandalous.
33. Further, it was submitted that litigations should come to an end as the horse has already bolted and the issues that he is raising have been canvassed and concluded in another forum. That the flurry of



cases filed by the Applicant offends the provisions of section 7 of the Civil Procedure Act, as the suit herein is Res Judicata.

34. Further, they submitted that the Applicant has not met the threshold for grant of injunctive orders as laid down in the case of *Giella v Cassman Brown* (supra). The Respondents urged the Court to dismiss the instant Application dated 21st August 2023, with costs to the Respondents.
35. The 5th and 6th Respondents did not file any response to the instant Notice of Motion Application and/or file any written submissions. The Court will thus determine this Application without their input.
36. The Court has carefully considered the pleadings herein and the annexures thereto, and has read the rival written submissions together with the quoted authorities and finds as follows;
37. The Applicant has sought for temporary injunction, which is an equitable relief granted at the discretion of the Court. However, such discretion should be exercised judiciously. See the case of *David Kamau Gakuru v National Industrial Credit Bank Ltd*, Civil Appeal No. 84 of 2001, where the Court of Appeal held;

“it is trite law that the granting of an interim injunction is an exercise of judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”
38. Further, in an Application for injunction, the Court is not required to determine the issues in dispute with a finality. All that the Court is required to do is to consider whether the Application for injunction is merited, based on the usual criteria; see the case of *Edwin Kamau Muniu v Barclays Bank of Kenya Ltd* Nairobi HCCC No. 1118 of 2002, wherein the Court held;

“in an application for injunction the Court is not required to determine the very issues, which will be canvassed at the trial with finality; all that the Court is entitled to at that stage is whether the Applicant is entitled to an injunction sought based on the usual criteria.....”
See also the case of *Airland tours and Travels ltd v National Industrial Credit Bank*, Nairobi HCCC No. 1234 of 2002).
39. The Application herein is anchored under Order 40 Rule 1 of the Civil Procedure Rules which provides that Court can issue temporary injunction if the property in dispute is in danger of being wasted, damaged or alienated by any of the party to the suit before the suit is heard and determined.
40. Consequently, the Applicant needed to prove that the property in dispute is in danger of being wasted, damaged, alienated disposed of or sold, for this Court to determine whether to grant the orders sought or not.
41. The conditions for grant of an interlocutory injunction are now well settled in Kenya. See the case of *Giella v Cassman Brown* (Supra). These criteria are;
 - a) Applicant must show a prima facie case with probability of success;
 - b) Applicant will suffer irreparable injury which will not be adequately compensated by an award of damages;
 - c) if the Court is in doubt, it will decide on the balance of convenience. See the case of *East African industries v Trufoods*(1972) EA 420.



42. For the Applicant to succeed in the instant Application, he has to demonstrate the above conditions. What is not in dispute is that the parties herein are related and are the children of the late Kimani Karanja, who died testate, having distributed his properties to his beneficiaries as per his last Will.
43. The Applicant herein Francis Wamuchwe Kimani, is the administrator of the estate of their late father and he was bequeathed Land Parcel No. Loc 18/ Marumi/511, as a sole proprietor. Further land parcel No. LOC 3 /Mukuria/ 980, the suit land was bequeathed to the Respondents herein in equal shares.
44. The Applicant alleged that even with the knowledge that the suit property was bequeathed to them, and the Grant had not been confirmed, the Respondents sold the suit land to the Applicant in 2004. However, after the grant was confirmed after a protracted Court case, the Respondents reneged on the said sale and have now threatened to sale the suit property, which the Applicant has acquired through constructive trust.
45. Indeed the Applicant filed an Originating Summons dated 21st August 2023, wherein he has sought for a declaration that a constructive trust exists in respect of the suit land Loc 3/Mukuria/ 980, by operation of the law, and thus the Applicant is entitled to that suit land.
46. It is on the basis of the prayers sought in the above Originating Summons, that the Applicant has brought this Notice of Motion Application for orders of temporary injunction, pending the hearing of the main Originating Summons.
47. In the instant Application, the Applicant is seeking to restrain the Respondents from dealing in the suit property in whatsoever manner, pending the hearing and determination of the main suit.
48. In the grounds in support of the Application, the Applicant has dwelt so much on how he purchased the suit property, and how the Respondents have reneged on the promise to transfer the suit property to him after the grant was confirmed.
49. The Applicant has not averred that the Respondents have put the suit land in the danger of being wasted, damaged or alienated, as these are the conditions that forms the basis of grant of injunctive orders as provided by Order 40 Rule 1 of the *Civil Procedure Rules*.
50. It is settled that temporary orders of injunctions are granted when there is evidence of immediate danger to the property by either sale or any other disposition. See the case of *Noormohammed Janmohammed v Kassam Ali Virji Madhani* (1953) 20 LRK; where the Court held;

“ to justify temporary injunctions, there must be evidence of immediate danger to property by sale or other dispositions”
51. In the pleadings and submissions, the Applicant has dwelt on how he is entitled to the suit property by way of constructive trust, and that the Respondents actions of reneging in the promise to transfer amounts to unjust enrichment and is against the principle of equality.
52. The above averments have been denied by the Respondents in both in their Replying Affidavits in opposition to the Originating Summons and the instant Application.
53. However, the Applicant has come to Court seeking to restrain the Respondents from selling, leasing, charging transferring, sub dividing the suit land or interfering with the Applicant’s quiet and peaceful possession of the suit land.
54. For this Court to issue such restraining orders, the Applicant needed to prove existence of such danger of selling, leasing charging or alienation of the suit land. There was no such evidence and the Court



cannot issue orders out of suspicion without evidence of occurrence or imminent danger of occurrence of instances of immediate danger. The Applicant needed to avail evidence of such imminent dangers but not mere suspicion. See the case of *Robert Mugo Wa Karanja v Eco Bank(k) ltd & Another* (2019) eKLR, the Court held as follows;

“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.....”

55. The Court will now turn to the guiding principles in an application for temporary injunction. First the Applicant needed to establish that he has a prima facie case with probability of success at the trial. In the case of *Habib Bank A.G Zurich v Eugene Marion Yakub*, Civil Application No. 43 of 1982(Nairobi), the Court held;

“probability of success means the Court is not only to gauge the strength of the Plaintiffs case and not to adjudge the main suit at that stage, since proof is only required at the hearing stage”

56. The Applicant has alleged that the Respondents, who are his brothers sold their inheritance to him. The Respondents denied the allegations. The suit property is not in the name of the Respondents nor the Applicant at the moment. At this juncture, this Court cannot hold with certainty that indeed the Respondents sold the suit property to the Applicant. This determination can only be made after calling of evidence at the main trial. At this stage, the Court will be cautious not to make definitive findings of facts based only on affidavits evidence. See the case of *Airland Tours & travel ltd v NIC Bank* HCCC No. 1234 of 2000, where the court held;

“that in an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence, or disputed proposition of law”.

57. Given that the suit land is what was bequeathed to the Respondents by their deceased father, and the fact that the Applicant was also given his share, this Court cannot hold and find that indeed the Applicant purchased the suit land from the Respondents, and thus he has a legal and equitable right, worthy being protected at the moment through injunctive orders.

58. Secondly, the Applicant needed to prove that he will suffer irreparable loss which cannot be adequately compensated by an award of damages. Irreparable injury was defined in the case of *Pius Kipchirchir kogo v Frank Kimeli Tenai* (2018) eKLR, the as follows;

“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.”

59. Further, it is evident that even if the Applicant can prove injury, if the same can be adequately compensated by an award of damages, then injunctive orders will not usually be granted. See the case



of Wairimu Mureithi..v...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, where the Court held that:-

“ However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

60. In the instant case, the Applicant has only stated that he is entitled to the suit land through the doctrine of constructive trust. This is an issue to be determined in the main suit, and not at this juncture. The Applicant did not demonstrate the actions done by the Respondents to occasion imminent danger to the suit property. Injunctive orders are not issued to prevent suspected future events. Without evidence of the Respondents intention to sell, charge, alienate and/ or deal with the property in a manner that is detrimental to the Applicant, then this Court finds that the Applicant has not demonstrated that he will suffer irreparable injury which cannot be compensated by an award of damages in the event the Applicant turns out to be the successful litigant after the trial.

61. On the third principle of if the Court is in doubt to decide on a balance of convenience, this Court finds that it is not in doubt, and will therefore not decide on the balance of convenience. However, considering that the parties are related and the suit property was an inheritance for the Respondents, this Court finds and holds that the lower risk herein is to decline to issue any injunctive orders as sought by the Applicant. See the case of Amir Suleiman v Amboseli Resort ltd (2004) eKLR, where the Court held;

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

62. In view of the foregoing and having considered the available evidence, this Court finds and holds that the Applicant had failed to establish the criteria for grant of injunctive orders. Consequently, the Court dismisses the Applicant Amended Notice of Motion Application dated 31st October 2023, entirely with costs to the Respondents herein.

63. Let the matter proceed for hearing and all the disputed issues be dealt with at the main trial.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MURANG’A THIS 9TH DAY OF MAY, 2024

L.GACHERU

JUDGE.

Delivered online in the presence of;

Mr Muiruri for the Applicant

1st Respondent

Mr T M Njoroge for the 2nd Respondent

3rd Respondent

4th Respondent

Absent 5th Respondent



6th Respondent

Joel Njonjo - Court Assistant

L.GACHERU

JUDGE.

9/5/2024

