



REPUBLIC OF KENYA



**Musyoka v National Land Commission & 2 others (Environment & Land  
Case E014 of 2023) [2024] KEELC 4870 (KLR) (17 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4870 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E014 OF 2023**

**FM NJOROGE, J**

**JUNE 17, 2024**

**BETWEEN**

**WILLIAM NYAMBALI MUSYOKA ..... PLAINTIFF**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> DEFENDANT**

**CHRISPUS SINGO ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRY, KILIFI COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application dated 21.02.2023 brought by the Plaintiff under order 40 rule 1 and 2 of the [Civil Procedure Rules](#) and Section 63 of the [Civil Procedure Act](#) seeks the following orders: -
  1. Spent
  2. That the 2<sup>nd</sup> defendant by himself, his agents and or servants be restrained by an order of injunction from trespassing, subdividing, constructing or in anyway dealing with the suit property herein Chembe/ Kibabamshe/ 412 until the suit herein is heard and determined.
  3. That the 3<sup>rd</sup> defendant be restrained by an order of injunction from transferring, making any entry, registering any sub division or in any way dealing with the parcel of land Chembe/ Kibabamshe/412 until the suit herein is heard and determined.
  4. That prayer Number 2 & 3 be granted in the interim.
  5. That the costs of this application be provided for.
2. The application was premised upon the grounds on the face of the application as well as the supporting sworn on 21/02/2023 by William Nyambali Musyoka. He deponed that the parcel of land Chembe/ Kibabamshe/ 412 is part of the estate of his late father Julius Musyoka Nyambali who is the registered



proprietor of the land. He also deponed that sometime in the year 2017 he was summoned for a public hearing by the 1<sup>st</sup> defendant on the issue of ownership which he attended.

3. According to him, to his surprise on July 17, 2017 *vide* Gazette Notice No. 6862 the National Land Commission granted the land to the 2<sup>nd</sup> defendant; that further, there have been reports that the land had been subdivided and the maps changed.
4. In response, the 3<sup>rd</sup> defendant filed grounds of opposition stating that there are no new or novel issues raised in the application to warrant the grant of orders sought and that the court has already spoken its mind in the judgment delivered in ELC No. 92 of 2011 and as such the matter is *res judicata* as the substance has been determined *vide* its judgment dated 18<sup>th</sup> October, 2013.
5. The 2<sup>nd</sup> defendant on the other hand filed grounds of opposition dated the March 20, 2023. The 2<sup>nd</sup> defendant asserted that article 67(2) of the Constitution read together with section 5 (1) of the National Land Commission Act, 2012 allows the 1<sup>st</sup> Defendant on its own motion or by a petition by a party or the government at any level to initiate investigations into any present or historical injustices in respect of allocation of land and that particularly article 67(3) of the Constitution together with section 5 (2) of the NLC Act accords the 1<sup>st</sup> defendant mandate to monitor registration of all rights and interests in land within the Republic. He asserted that the plaintiff's title issued in 1978 was irregular and amounted to a historical injustice.
6. According to him, from the Commission's proceedings which the Plaintiff attended, it emerged that a court of competent jurisdiction had heard and determined the interest to the subject matter in favour of the 2<sup>nd</sup> defendant in 2011; that the 1<sup>st</sup> defendant corrected the irregularity by revoking the irregular title and directed the 3<sup>rd</sup> defendant to regularize in the name of the 2<sup>nd</sup> defendant.

#### **Submissions.**

7. The application was canvassed by way of written submissions with the Plaintiff/ Applicant filing their submissions on the 14<sup>th</sup> June, 2023. Counsel submitted that the issue that arises is whether the Plaintiff/ Applicant has met the threshold for grant of an injunction as in the case of *Giella v Cassman Brown* (1973) E.A. 358. Counsel referred the court to section 24 and 25 of the Land Registration Act and submitted that the plaintiff has established a *prima facie* case with probabilities of success and that the Plaintiff has also demonstrated that he will suffer irreparable loss if the 2<sup>nd</sup> defendant is not restrained by an order of injunction since the 2<sup>nd</sup> defendant has subdivided the land with a view to dispose off to unsuspecting third parties.
8. The 2<sup>nd</sup> Defendant on the other hand filed submissions on the 8<sup>th</sup> day of November, 2023. Counsel identified three issues for determination, whether a *prima facie* case has been established, whether there is a chance the applicant will suffer irreparable loss and whether the balance of convenience tilts in their favour. On the 1<sup>st</sup> issue for determination, counsel submitted that the correct and unrebutted position is that the letters of allotment were meant to correct an irregularity and historical injustices and that such an irregularity was to enable lawful owners take up new leasehold titles and that the applicant did not do what was expected of him. He also submitted that the suit before court will fail as the test of ownership of the property as against the 2<sup>nd</sup> defendant has been subjected to a judicial intervention. On this issue, he further submitted that by the mandate of the 1<sup>st</sup> defendant under section 14 of the Act and article 68 of the Constitution, the 1<sup>st</sup> defendant reviewed the said title by way of Notice to the plaintiff which he admits, and he was given an opportunity to be heard and a determination was made.
9. On whether there will be irreparable loss counsel submitted that based on the remedies being sought by the plaintiff, there is proof that any loss that may arise in the absence of an injunction is reparable and



indemnifiable. On the balance of convenience, counsel submitted that the Plaintiff does not have a title and that the title deed he claims to have in the certificate of land issued in 1978 does very little justice to his case. Counsel further submitted that if the balance of convenience were to tilt in his favour, then it would water down the maxim of equity that equity aids the vigilant not the indolent.

### **Disposition.**

10. This court has considered the application and, in its view, the main issue that arises for determination is whether the applicant has met the threshold for grant of temporary injunction pending hearing and determination of the suit herein.
11. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous local decisions and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that in an interlocutory application the Applicant has to satisfy the triple requirements which are: to establish his case only at a prima facie level, to demonstrate irreparable injury if a temporary injunction is not granted, and if any doubts as to irreparable injury are raised, by showing that the balance of convenience is in his favour. The court continued to state that those are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent and that all the conditions are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.
12. The applicant has sworn an affidavit stating that the parcel of land herein Chembe/ Kibabamshe/ 412 is part of the estate of his late father who is the registered proprietor of the land and he annexed a copy of the title deed and grant of letters of Administration thereto. He also contends in his affidavit that sometime in the year 2017 he was summoned for a public hearing by the 1<sup>st</sup> defendant on the issue of ownership which he attended. Further, that on the July 17, 2017 *vide* Gazette Notice No. 6862 allocated the land to the 2<sup>nd</sup> defendant who is in the process of subdividing the land.
13. The Respondent on the other hand asserts that the Plaintiff's purported title issued in 1978 was irregular and amounted to a historical injustice; that *vide* the mandate of the 1<sup>st</sup> defendant under Section 14 of the Act and Article 68 of the Constitution, the 1<sup>st</sup> Defendant reviewed the said title by way of notice to the Plaintiff which he admits, that he was given an opportunity to be heard and a determination was made. Further, that the 1<sup>st</sup> defendant corrected the irregularity by revoking the irregular title and directed the 3<sup>rd</sup> defendant to regularize in the name of the 2<sup>nd</sup> defendant.
14. Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125, a *prima facie* case was described 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.”
15. Secondly, the Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:

“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.”

16. The 2<sup>nd</sup> defendant submits that the plaintiff does not have a title and that the papers he has presented are as old as he is and that the title deed in his possession issued in 1978 does very little to his case. The plaintiff/applicant on the other hand submitted that he has demonstrated that if the 2<sup>nd</sup> defendant is not restrained by an order of injunction, he will suffer irreparable loss since the 2<sup>nd</sup> defendant has subdivided the land with a view to dispose off to unsuspecting third parties.
17. I have considered the competing interests of both parties in this matter and guided by the above case law, I am also privy to the fact that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties’ cases. The principle was considered and Lord Diplock made the following observation in *American Cyanamid Co. v Ethicon Limited* (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510.

“It is no part of the Court’s function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”
18. In the end, I am satisfied that the applicant has met the threshold for grant of an order of injunction as sought in the application dated 21<sup>st</sup> February, 2023 and the same is hereby be allowed in terms of prayer no 2 and 3 thereof. The costs of the application shall be in the cause. The parties shall comply with the rules by filing and serving each other their respective trial bundles duly paginated and indexed, the plaintiff within the first 30 days from the date hereof and the defendant within 30 days of the expiry of the period granted to the plaintiff and this suit shall be mentioned on 31/10/2024 for issuance of a hearing date.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 17<sup>TH</sup> DAY OF JUNE, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

