



Mrisa & 3 others v Dzivo & 4 others (Environment & Land Case E014 of 2023) [2024] KEELC 4569 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4569 (KLR)

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

**AE DENA, J
JUNE 11, 2024**

BETWEEN

**CHIGODI MRISA 1ST PLAINTIFF
JACKSON TSUMA 2ND PLAINTIFF
MGALA MBOVU 3RD PLAINTIFF
MBOVU MAMBO 4TH PLAINTIFF**

AND

**DZIVO MDOE DZIVO 1ST DEFENDANT
TSUMA CHIGUMBA 2ND DEFENDANT
BENJAMIN M MKUBA 3RD DEFENDANT
SAID NZUGA 4TH DEFENDANT
LAND REGISTRAR KWALE 5TH DEFENDANT**

RULING

Application

1. The application dated 1/3/2024 by the Plaintiffs/Applicants is for the following prayers; -
 1. Spent
 2. Spent
 3. That this Honourable court be pleased to grant a temporary injunction restraining the Defendants either by themselves or through their agents/servants and/or employees from selling, charging, subdividing, taking possession or otherwise dealing in any manner interfering



with the Plaintiffs quiet occupation, use, enjoyment and ownership of the suit property pending hearing and determination of this suit.

4. That costs of this application be provided for.
5. That this Honourable court be pleased to make such further or other orders, as it may deem just and expedient in the circumstances of this case.
2. The grounds supporting the application are listed on its face and the same is accompanied by an affidavit sworn by Chigodi Mrisa Tsuma the 1st Plaintiff/Applicant. The deponent avers that he belongs to the Duruma tribe clan of Mwadzine Wa Buta and who are the beneficiaries of parcel No. Kwale/South Samburu/130 by virtue of being members of the South Samburu Group Ranch according to the judgement delivered by the Senior Chief Samburu Location on 14/10/2019 and that of 11/2/2022 by the Munyuni Village Elders. That the mother title is in the names of the South Samburu Group Ranch who hold the same in trust for the community. That sometime in November 2022, the deponent was informed by his son that the Defendants had trespassed into the suit property and sold a portion of the same to third parties. Apparently the sold portion forms part of the deponent's land. That he was later informed by a surveyor at the survey department that there was an intended sub division on the suit property.
3. The 1st Plaintiff states that he visited the Chiefs Office in Samburu where it was confirmed that a portion of the land had been sold necessitating this suit and application. The Applicants pray that the orders sought be allow as prayed.

Response

4. The 2nd Defendant Tsuma Chigumba filed a replying affidavit on 7/6/2023 in response to the application. He avers that he is an official of the South Samburu ranch elected as treasurer while the 3rd Defendant is the secretary to the group. He states that the officials of the group were mandated to hold property of the community land located in Samburu. That the initial mother title comprised 63,646 Hectares occupied by 14 clans. That some of the clans sold their portions and the Plaintiffs were left with title No 130. That the title currently held by the group is Kwale/South Samburu/127. That the Applicants are misguided in their allegations. He confirmed that the clans had sold land to the 3rd Defendant and his brother and the duty of the officials was to only sign and approve the necessary documents for transfer.
5. In opposing the application, the 4th Defendant Said Nzuga averred that he was a stranger in most of the averments raised in the application as he was not an official in the South Samburu Group Ranch. In reference to CMT4 the deponent stated that the receipt was among the documents to a land he purchased together with his brother from different clans who own land in Kwale South Samburu Ranch and which was part of Plot No Kwale/South Samburu/130. In reference to the documents, it is further averred that after purchase, the 4th Defendant started the process of obtaining tile and it is his suspicion that the Plaintiffs have the documents from the process. That prior to the purchase ownership of the parcel was confirmed and as such the allegations raised by the Plaintiffs are baseless. That it is apparent the Plaintiffs are not aware of the exact location of their land.

Submissions

6. The application was disposed of by written submissions. The Plaintiffs submissions are dated 19/4/24 and filed on 22/4/2024. The 2nd, 3rd and 4th Defendants submissions are dated 30/4/24. The court has perused and taken note of the contents thereof.



Discourse

7. I have carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions. In my considered view, the sole issue that arises for determination is whether the Applicants have met the threshold for grant of temporary injunction pending hearing and determination of the suit herein
8. The court in the case of *Giella v Cassman Brown* [1973] EA 358, stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”
9. A prima facie case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 Others* [2003] eKLR as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
10. The Plaintiffs have produced before court a copy of the title deed to the suit property in evidence of its ownership. As alleged, the property is indeed registered in the names of the South Samburu Group Ranch whom as stated hold the same on behalf of the community. The court has been led to believe that the suit property belongs to several people who will get the opportunity of individually owning the land after demarcation and titling which is yet to take place. As such, every person is aware of the portion they hold physically on the ground but are awaiting titles as the demarcation is yet to take place. However, the Defendants and who have produced evidence to this effect, managed to purchase portions of the suit property and were in the process of demarcation and titling of the purchased portion. The Plaintiffs state that this purchase was without their knowledge and consent. I am convinced that a prima facie case has been established.
11. As to whether the Applicants are bound to suffer irreparable damage and loss in the event that the orders sought are not granted, I reiterate the dictum of the court in *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR where the court in deciding on an injunction application stated;

“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...”
12. The Applicants are apprehensive that in the event that the Defendant’s actions are not stopped, they are probably going to lose their properties. I have seen the land sale agreement that has been relied upon



by both parties. The land has been sold by individuals despite the fact that the same is registered under the group ranch. I have not come across any authority or consent from members allowing the property or part of it to be sold on their behalf. I believe that the second threshold for grant of the orders sought has been met. It is imperative of the court to protect the Applicants from loss and to further preserve the suit property pending the hearing and determination of the suit.

13. From the foregoing, the balance of convenience automatically tilts towards the applicants. The case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff, is that if an injunction is not granted and the Suit is ultimately decided in favour 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 and 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”.

14. I am guided further by the holding in the case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the learned judge offered further elaboration on what is meant by balance of convenience and stated

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

15. Consequently, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them pending the hearing and determination of the suit on merit.

16. The upshot is that the application dated 1/3/2023 is hereby allowed as follows; -

1. A temporary injunction is hereby granted restraining the Defendants either by themselves or through their agents/servants and/or employees from selling, charging, subdividing, taking possession or otherwise dealing in any manner or interfering with the Plaintiffs quiet occupation, use, enjoyment and ownership of the suit property pending hearing and determination of this suit.
2. The Applicants will have the costs of this application.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 11TH DAY OF JUNE 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

No appearance for the Plaintiff/Applicants



No appearance for 2nd, 3rd and 4th Defendant

Ms. Kagoi holding brief for Mr. Penda for the 5th Defendant

Mr. Daniel Disii - Court Assistant

