



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mapesa v Simiyu & another (Land Case E008 of 2023)  
[2024] KEELC 4825 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4825 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
LAND CASE E008 OF 2023  
EC CHERONO, J  
JUNE 6, 2024**

**BETWEEN**

**RONALD SIMIYU MAPESA ..... PLAINTIFF**

**AND**

**JANEPHER NAVALAYO SIMIYU ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, BUNGOMA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated the 14<sup>th</sup> March, 2024 brought under Section 1A & 3B of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules](#) 2010, the Applicant seeks for the following orders:
  - a. That the 1<sup>st</sup> defendant/respondent be restrained by themselves or through their agents, servants, employees and/or assigns or anybody whomsoever claiming through her, from leasing, selling or in any manner whatsoever disposing off, or alienating Land Parcel No. NDIVISI/NDIVISI/656 or any purported derivatise thereof pending the hearing and determination of this suit.
  - b. That the costs of this application be borne by the defendant/respondent.
2. The application is based on grounds on the face of the application and the supporting affidavit of the applicant sworn on 14<sup>th</sup> March, 2024.
3. It is the applicant's case that he filed this suit for the purpose of protecting the property of one Sabuni Muremi-deceased pending distribution to its beneficiaries. He alleges that the 1<sup>st</sup> defendant intends to dispose the land to third parties and has used force and violence in doing so leading to a report being made at Webuye Police Station under O.B No.10/5/2/2024. The applicant argues that the 1<sup>st</sup> respondent needs to be stopped or else he will suffer irreparable losses.



4. In opposition to the application, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 2<sup>nd</sup> April, 2024 where he deposed that the said Land Parcel No. NDIVISI/NDIVISI/656 is non-existent since the same was lawfully sub-divided with the knowledge of all beneficiaries in relation with the estate of the late Sabuni Muremi. He deposed that the plaintiff was aware of the subdivision and he is entitled to land parcel no. Ndivisi/Ndivisi/2306 and he should pursue for the title, the same way other beneficiaries are doing. It is his contention that her entitlement is Land parcel no. Ndivisi/Ndivisi/2313 where she has constructed a house and has been in actual use and possession to the exclusion of the applicant or any other persons.
5. The 1<sup>st</sup> respondent argued that the applicant has repeatedly threatened her and her children and even assaulted Donald Mutoro when she took her children to show them their respective portions of land given as beneficiaries. She stated that the incident was reported at Misikhu Police Station under O.B. No. 06/04/02/2024. The 1<sup>st</sup> respondent contends that it is the applicant who is hell-bent in causing chaos and denying her her rights.
6. The parties took directions and agreed to dispose of the application by way of written submissions. Pursuant to those directions, the applicant filed his submissions dated 27<sup>th</sup> April, 2024. In his submissions, the applicant reiterated his averments as deposed in his supporting affidavit and asked the court to grant the prayers sought.
7. The 1<sup>st</sup> Respondent on the other hand filed her submissions dated 9<sup>th</sup> May, 2024 where she also reiterated her averments contained in her replying affidavit.

### **Analysis And Decision**

8. I have considered the application dated 14<sup>th</sup> March, 2024, the replying affidavit and the annexures thereto as well as the submissions by the Applicant and the 1<sup>st</sup> Respondent herein.
9. The applicant in this case brings this suit purportedly as a beneficiary of the estate of one Sabuni Muremi-deceased. It is his contention that the 1<sup>st</sup> respondent is disposing of Land Parcel No. NDIVISI/NDIVISI/656 to third parties and her actions, if allowed, will cause him irreparable injury. The 1<sup>st</sup> respondent on the other hand contends that she is entitled to land parcel no. NDIVISI/NDIVISI/2313 which is a sub-division of Land Parcel No. NDIVISI/NDIVISI/656 while the applicant is entitled to Land Parcel No. NDIVISI/NDIVISI/2306. It is her contention that she has been in use of her share of land to the exclusion of the applicant and that the applicant now intends to dispossess her of her land after her husband one Jeremiah Waswa Simiyu (deceased) passed on.
10. The applicant did not attach any document in support of the application although I note that various documents were attached to the plaint dated 30<sup>th</sup> October, 2023. The 1<sup>st</sup> respondent on the other hand attached a copy of a mutation form for Land Parcel No. NDIVISI/NDIVISI/656 as 'JN 1' as well as copies of certificate of official search for Land Parcel No. NDIVISI/NDIVISI/2312 and 2307 as 'JN2' and 'JN 3'.
11. The applicant in this case avers that he has filed this suit in the interest and for the benefit of the estate of one Sabuni Muremi-deceased and for future sub-division of his estate having obtained letters of administration ad litem vide Webuye MCSUCCMISC/ E031 of 2023. He contends that Land Parcel No. NDIVISI/NDIVISI/656 belongs to the deceased and that the 1<sup>st</sup> defendant intends to dispose the same to third parties. The 1<sup>st</sup> respondent in rebuttal attached a mutation form dated 28<sup>th</sup> December, 2006 which shows that Land Parcel No. NDIVISI/NDIVISI/656 was sub-divided and shared amongst 15 beneficiaries. The 1<sup>st</sup> respondent argued that they have been in occupation of a portion of the land in issue i.e plot no.2313 for over 5 decades to the exclusion of the applicant.



12. The plaintiff seeks a restraining order pending the hearing and determination of this suit. In essence, the applicant seeks an interlocutory order of injunction. It is trite that before granting an application for an interlocutory injunction, the applicant must satisfy the conditions set out in *Giella –vs- Cassman Brown & Co. Ltd* [1973] E.A 358. First, the law demands that the applicant must establish a prima facie case with a probability of success. Even after establishing a prima facie case, an injunction would not issue if damages would be an adequate remedy. Finally, if the court is in doubt as to the two conditions, it would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, all the three conditions be established as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially such that if one of the conditions is not established, then it will not matter if the applicant has established the other two conditions. All the three conditions must be established sequentially.
13. That being the case, the first issue for consideration by this Court is whether the applicant has made out a prima facie case with a probability of success. The Court of Appeal in the case of; *Mrao Limited -vs- First American Bank of Kenya Limited & 2 others* (2003) KLR 125: held 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.”
14. From the summary of the affidavit evidence as relied by parties herein above, it is clear that the current application for interlocutory injunction is highly contested. Both parties submitted extensively and placed materials before this court with a view to demonstrate that they have beneficial interest over the land in question. The issues as to ownership and legitimate possession of the suit property, can only be determined during the main hearing. In the case of *Rebecca Jerono Jogom V William Ngeny & Another*, Kitale Hccc No.31 OF 2001, the Hon Karanja J. held, *inter alia*, as follows;
- “In the light of their annextures, their claim cannot be dismissed before they are heard. Granting the injunction against them will mean removing them from the land where they have been leaving for the last 6 or so years. All the parties herein should be given an opportunity to establish their claims in court by calling evidence. At this point in time, I cannot say that one party has a stronger case than the other...Where a party is in actual occupation of the suit property then the balance of convenience always tilts in his/her favour.”
15. In my considered view, the applicant has not established a *prima facie* case with a probability of success and neither does the balance of convenience tilt in his favour. The applicant has not also demonstrated that he will suffer irreparable injury which cannot be compensated by damages. Deciding the application on a balance of convenience, I find that the balance of convenience does not also tilt in favour of the applicant. Consequently, the Notice of Motion dated 14th March, 2024 is devoid of merit and the same is hereby dismissed with Costs to the 1<sup>st</sup> Respondent.
16. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06<sup>TH</sup> DAY OF JUNE, 2024.**

.....  
**HON.E.C CHERONO**  
**ELC JUDGE**



In the presence of;

Applicant/Advocate-absent

Respondent/Advocate-absent

Bett C/A

