



REPUBLIC OF KENYA



**Kabochi v Garero & 2 others (Land Case E045 of 2023)
[2024] KEELC 5620 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE E045 OF 2023
NA MATHEKA, J
JULY 25, 2024**

BETWEEN

ANDREW GAKAU KABOCHI PLAINTIFF

AND

MOSES MKAMBA GARERO 1ST DEFENDANT

THE COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT

THE LAND REGISTRAR, MOMBASA 3RD DEFENDANT

RULING

1. The application is dated 8th December 2023 and is brought under Order 40 Rules 1, 2 & 3, Order 51 of the *Civil Procedure Rules*, Section 1, 4, 1B, 3, 4, 3 & 63(B) of the *Civil Procedure Act* seeking the following orders:
 1. That this Honourable Court be pleased to certify this Application as extremely urgent and service of the same be dispensed with in the first instance.
 2. That pending the hearing and the determination of this Application interparties, the Defendants by themselves, their servants, employees, agents and or any one acting under their authority or instance be restrained by way of an Order of a temporary injunction from trespassing, constructing, building, selling, disposing, leasing out, charging, mortgaging, sub-dividing, transferring and/or disposing and or otherwise dealing with the Plaintiffs Plot Numbers Mombasa/MN/Block 2/211 and Mombasa/MN/ Block 2/212
 3. That pending the hearing and the determination of the main suit, the Defendants by themselves, their servants, employees, agents and or any one acting under their authority or instance be restrained by way of an Order of a temporary injunction from trespassing, constructing, building, selling, disposing, leasing out, charging, mortgaging, sub-dividing,



transferring and/or disposing and or otherwise dealing with the Plaintiffs Plot Numbers Mombasa/MN/Block 2/211 and Mombasa/MN/ Block 2/212

4. That costs of this Application be provided for.
2. It is supported by the following grounds that by sub leases dated 8th August, 2006 the Plaintiff was granted lease for a term of 99 years by the 2nd Defendant in respect to land known as Mombasa/MN/ Block 2/211 and Mombasa/MN/ Block 2/212 commonly known as Miritini World Bank Project. That pursuant to the grant of the said lease the Plaintiff was granted lease titles in respect to Plot Numbers Mombasa/MN/Block 2/211 and Mombasa/MN/ Block 2/212 registered in his name by the 3rd Defendant on the 30th day of October 2008, 14th day of November, 2008 and 4th day of November, 2008 respectively.
3. That on the 2nd day of July, 2003 the Plaintiff with intention or commencing construction moved to his portions of land and found the 1st Defendant had fenced of the same with an intention of constructing structures thereof and claimed ownership of the Plaintiff's land. That the Plaintiff moved to the 3rd Defendant with an intention of conducting a search of this properties but the files at the land registry were said to be missing and none of the officials was interested in assisting the Plaintiff in obtaining the searches in respect to Plot Numbers Mombasa/MN/Block 2/211 and Mombasa/MN/ Block 2/212 the suit property herein. That the plaintiff sought the services of his advocate and on the 22nd of September, 2023 the searches were released showing that the 1st Defendant is the registered owner of the Plaintiff's portions of land upon which the Plaintiff holds the original titles of the suit land in his name. That the Defendants have colluded to fraudulently alter, change, remove the name of the Plaintiff on the entries related to the suit property without the Plaintiff consent, authority, and or execution of any transfer document or court order in favor of the 1st Defendant. That the Plaintiff is the absolute owner of the suit property and the actions of the Defendants are unlawful, illegal and fraudulent and the process of registration of the 1st Defendant in the entries related to the suit property were vitiated by fraud, misrepresentation and corruption. That the 1st Defendant has unlawfully fenced of the Plaintiff's property and piled up building materials with a view of constructing structures on the Plaintiff's land any time from now. That that unless this Court grants the orders sought the Plaintiff is bound to suffer great loss and damage. That the Plaintiff being the owner of the Land is apprehensive that the Defendants may precede to construct or sale the same to a third party.
4. That 1st Defendant stated that he is the registered and/or bona fide beneficial proprietor of all that land known as Mombasa/MN/Block 2/211 and Mombasa/MN/Block 2/212 and. currently holding an indefeasible Title that cannot be defeated by either mistake or fraud occasioned by a 3rd party. That the proprietor then, Dennis Kyalo Noolonzi gave him copies of the Certificate of Lease for Mombasa/MN/Block 2/211 dated 13th January 2016 and for Mombasa/MN/Block 2/212 dated 26th February 2016 showing the Lessor as the defunct Municipal Council of Mombasa for 99 years with effect from 1st March 1996. (Annexed and marked as "MM-1" & "MM-2" are copies of Certificate of Leases for Block 2/211 and Block 2/212 respectively). That he carried out of an official search for both parcels of land on 15.06.2023 with the 3rd Respondent's office which confirmed Dennis Kyalo Mbolonzi as the registered owner thereat. (Annexed and marked as "Tvrvi-3 & "1vn,'I-4" are search copies for Block 2/211 and Block 2/212 respectively).
5. Having confirmed the same, he entered into a sale agreement with Dennis Kyalo Mbolonzi for both parcels on 16th June 2023 for purchase at Kshs.3 Million per plot. (Annexed and marked as "MM-5 and are copies of Sale Agreement date 16th June 2023 for Block 2/211 and Block 2/212 respectively). On 19th June 2023, he paid for stamp duty to a tune of Kshs.240,000 vide National Bank for both parcels of land (Annexed and marked as MM -7 is a Banking slip from National Bank of Kenya). The



very same day i.e. vide an instrument of transfers he transferred the suit parcels of land in his favour (Annexed and marked as "MM-8" and "MM-9" are transfer documents for Block 2/211 and Block 2/212 respectively). That immediately upon transfer, he took possession of the suit properties and fenced off the same.

6. That the Applicant is guilty of the doctrine of laches. The Applicant states that it was granted a Sub-lease by the defunct Municipal Council of Mombasa on 1st March 1996 and further a Certificate of lease by the by Defendant on 8th August 2006 and since then to 2nd July, 2023 (seventeen (17) years later) when it discovered the said parcels being fenced off only shows an Applicant who went to "slumber" and got to "wake-up" from such slumber too late in the day. That 'whoever comes to equity must come with clean hands'. The applicant's hands are soiled and undeserving of the orders sought.
7. The 2nd defendant submitted that the applicant's leases contained special conditions which must be fulfilled for him to claim interest. That he does not disclose any reasonable cause of action against the 2nd defendant and he has not fulfilled the grounds for granting an injunction.
8. This court has considered the application and the submissions therein. The first issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit. 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 decisions from Kenyan courts 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 injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

9. Consequently, the Plaintiff ought to, first, establish a prima facie case. In the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR the Court of Appeal gave a determination on a prima facie case. The court stated that;

... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. In support of their application, the Plaintiff has attached copies of documents of title to the suit property, Plot Numbers Mombasa/MN/Block 2/211 and Mombasa/MN/ Block 2/212 registered in his name by the 3rd Defendant on the 30th day of October 2008, 14th day of November, 2008 and 4th day of November, 2008 respectively. I find that the applicant has established a prima facie case.



11. 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.

12. The Plaintiff has deponed on the 2nd day of July, 2023 the Plaintiff with intention or commencing construction moved to his portions of land and found the 1st Defendant had fenced of the same with an intention of constructing structures thereof and claimed ownership of the Plaintiff's land. That the 1st Defendant/ Respondent has without any color of right trespassed on the suit property and commenced the construction of illegal structures thereon. He has attached photos of the said property. In my view, therefore, the inability to access and use the suit property is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

13. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in his favour. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR which 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 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 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”.

14. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

15. The 1st Defendant contends that the balance of convenience tilts in his favour because he is the owner of the suit property who has an indefeasible title. The Respondent in his replying affidavit states that



he is the registered owner of plot No Mombasa/MN/Block 2/211 and Mombasa/MN/Block 2/212. That he acquired the suit property from Dennis Kyalo Mbolonzi after conducting due diligence in 2023. They attached the sale agreement, transfer of land documents and copy of the search certificates.

16. In the decision of *Amir Suleiman v Amboseli Resort Limited* (2004) eKLR the learned judge offered further elaboration on what is meant by “balance of convenience” and stated that;

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

17. I find that, there is a lower risk in granting orders of temporary injunction than not granting them, at this stage. Both litigants are in possession of the titles and both claim ownership. This is especially so because I have not had opportunity to consider the matter on its merit. In view of the foregoing, I find that the Plaintiff/ Applicant has established a prima facie case and I order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

