Ngecha Mbari ya Thaara Co Ltd & 3 others v Langat & 5 others (Environment & Land Case E003 of 2024) [2024] KEELC 5705 (KLR) (Environment and Land) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5705 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT & LAND CASE E003 OF 2024

MC OUNDO, J

JULY 25, 2024

BETWEEN

NGECHA MBARI YA THAARA CO LTD ..... 1ST PLAINTIFF

DAVID KAHURIA MBUGUA ..... 2ND PLAINTIFF

MARGARET WANJIRU KAHURIA ..... 3RD PLAINTIFF

WILFRED BENSON MBUGUA ..... 4TH PLAINTIFF

AND

ROBERT LANGAT ..... 1ST DEFENDANT

JANE LANGAT ..... 2ND DEFENDANT

WILLIAM KOONYO ..... 3RD DEFENDANT

APOLLO OJODE ..... 4TH DEFENDANT

NICHOLAS AYUGI ..... 5TH DEFENDANT

AGRICULTURAL DEVELOPMENT CORPORATION ..... 6TH DEFENDANT

RULING

1. Coming up for determination is a Notice of Motion dated 19th February, 2024, brought pursuant to the provisions of Order 51 (i), Order 40 Rule 1 (a), Rule 2, Rule 4 of the Civil Procedure Rules 2010, Section 1A, B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law wherein the Applicants have sought that the court restrain the Respondents by way of an injunction by themselves, their assigns, personal representatives, servants and/or agents from entering, trespassing, remaining in, subdividing, evicting, conveying, dealing, advertising, selling, alienating or in any way interfering with

the Applicants' quiet possession of all those parcels of land known as LR Nos. 28068/31, 28068/32, 28068/33 and 28068/34 ADC Ndabibi Farm, pending the hearing and determination of the instant suit.

2. The Applicant also sought that the Officer Commanding Station Kongoni Police Station ensures strict compliance of all parties with the court's orders, and that they be granted the costs of the application.

3. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by David Kahuria Mbugua, the 2nd Plaintiff/Applicant herein who deponed that they were the owners of all that parcels of land known as LR Nos. 28068/31, 28068/32 28068/33 and 28068/34 ADC Ndabibi Farm (suit properties) having purchased the same from the 6th Respondent in the year 1999. That all material times relevant to the instant suit, they were all members of a community and that all the four parcels of land formed one 20 acres parcel that they had jointly used.

4. He explained that upon completing the payment of the purchase price, they had taken possession of the suit properties in the year 1999 and issued with title deeds by the 6th Respondent after which they had proceeded to develop the same.

5. That they had been enjoying quiet possession of the suit properties until 14th February, 2024, when the 1st and 2nd Defendants who allege to be officers in the National Government and therefore well connected, without color or right had invaded the suit lands wherein they had proceed to destroy crops and uproot beacons before erecting new ones while threatening the Applicants' workers to leave the same on the claim that the suit land had been allegedly allocated to them by the 6th Respondent.

6. That the 1st Respondent and his agents had been threatening to harm, by shooting, anyone they found on the suit properties and thereafter move into the same, which matter had been reported at Kongoni Police Station. That the said threats posed an imminent danger which should be stopped by the court.

7. He thus deponed that there was an imminent danger of chaos and loss of lives on the ground were orders to stop the open ploy to grab the suit properties from the Applicants not granted.

8. That they stood to suffer irreparable losses having fully paid the purchase price, taken possession and immensely developed the suit properties and it was only fair that the court protects them their workers, and the suit properties from the Respondents since no prejudice would be occasioned to the said Respondents were the instant orders granted.

9. The 1st and 2nd Respondents opposed the Applicants Application vide their Grounds of Opposition dated 7th March, 2024 to the effect that:

    i. The Applicants hands are soiled and not entitled to any equitable reliefs.

    ii. On the face of the purported copy of title document reveals fraud.

    iii. The process of obtaining the purported Certificate of Title revealed fraud on the part of the Applicants.

    iv. The court should not be asked to sanctify fraudulent and criminal transaction.

    v. The Applicants are guilty of engaging in a process of criminality and in particular making and uttering false documents that were null and void ab initio.

    vi. The Application cannot stand scrutiny of law and is otherwise frivolous, vexatious, bad in law and a clear abuse of the due process of law.

10. In their Replying Affidavit dated 15th May, 2024, sworn by the 1st Respondent Robert Langat on behalf of the 1st and 2nd Respondents, he had deponed that he was the bonafide owner of the suit properties known as LR Nos. 28068/31, 28068/32 28068/33 Ndabibi Farm (ADC) having been allotted the same after which he had fulfilled all the prerequisite conditions and made payment towards the same. That the Applicants herein were strangers to the suit properties there having been no proof of their acquisition.

11. The transfer of title document availed by the Plaintiffs as their proof had been altered by a pen to insert the transferor as the 6th Respondent previously demoted as M/s Lands Limited, that there was no execution page by the transferor, nor any documents attached as proof of payment to occasion the transfer of the suit properties to them by the 6th Respondent.

12. That whilst he had been in possession of the suit properties since he bought the same, there had been occasional menace of squatters who had been taking advantage of the time that he had been out of the jurisdiction wherein he had recently erected perimeter wall to control entry and destruction of the suit property that had been orchestrated by the Applicants.

13. That the applicants had not met the threshold for obtaining an injunction as prayed for they had neither demonstrated a prima facie case of ownership of the parcels of land, nor that they would suffer irreparable damage were the injunction not granted and finally that the balance of convenience tilted in their favour.

14. That in the interest of justice, the status quo order that had been granted by the court on 22nd April, 2024 suffices to preserve the subject matter with each party in their current respective positions pending the hearing of the main suit, in which case they were already in occupation of the suit properties.

15. On the other hand in response and opposition to the Applicant's Application, the 4th, 5th and 6th Defendants filed their Replying Affidavit dated 14th March, 2024, which was sworn by Lilian Kosgei, the 6th Respondent's senior legal officer who deponed that the 4th and 5th Respondents were employees of the 6th Respondent hence they joined issues for purposes of the instant suit.

16. That the mother land measured approximately 20 acres prior to its subdivision into the suit properties LR Nos. 28068/30, 28068/32, 28068/33 and 28068/34 which measured 5-acres each herein claimed by the Applicants who had neither been allotted the same by the 6th Respondent nor purchased it whatsoever.

17. That indeed the Applicants had been in occupation of the suit properties as squatters whereas the legitimate proprietor of the suit properties was the 1st Respondent who had been allocated the same by the 6th Respondent and who had met all the prerequisite terms of the letter of offer.

18. That none of the documents annexed to the Application by the Applicants with regards to the sale of suit properties LR Nos. 28068/30, 28068/32, 28068/33 and 28068/34 existed in their records. The 6th Respondent never received any payment from the Applicants during the alleged period of sale, all the alleged transfer documents annexed in the Applicants' Supporting Affidavit were never executed by the 6th Respondent nor its agents, the purported sale of the suit properties had been done by non-allottees for which transaction did not bind the 6th Respondent and there had been no allocations of land in the year 2002 hence there was no way the Applicants could have been allocated the suit properties then. That the forgeries herein should therefore not be entertained by the court.

19. She deponed that the Applicants had no valid interest over the suit and their assertion that owned the suit properties was untrue, misleading and calculated to deprive the 1st Respondent ownership of the

suit properties. That subsequently, it was only just and fair that the instant Application be dismissed with costs as it had no factual and legal basis, was scandalous, frivolous, and vexatious and a waste of court's time. That the 4th and 5th Respondents herein being the employees of the 6th Respondents, should be struck out of the instant proceedings.

20. In a rejoinder, the Applicants via their Further Affidavit dated 20th March, 2024, sworn by David Kahuria Mbugua, the 2nd Applicant herein deponed that the 4th, 5th and 6th Respondents' allegation of fraud was without any evidence and that they had not attached any document to confirm ownership. He thus urged the court to take judicial notice that the incidences of land grabbing had increased rapidly in Moi Ndabibi since the beginning of the year 2024. That if indeed the suit properties had been 20 acres allocated to one of the Respondents, the 4th, 5th and 6th Respondents had not explained why the same had been divided into 4 different parcels. That they were thus simply trying to re-allocate the land that had been allocated prior pursuant to the communication between the 6th Defendant's Advocate and the Applicants' advocate in that regard.

21. That the 6th Respondent had not produced any documents of ownership, a full Deed Plan to show when the same had been issued but had only attached a screenshot of some sub-division. That the Supreme Court had ruled that a title deed was the ultimate ownership document but not an allocation. He thus prayed that their Application dated 19th February, 2024 be allowed.

22. In retort, the 4th, 5th and 6th Respondents filed a Supplementary Affidavit dated 29th April, 2024 sworn by Lilian Kosgey, the 6th Respondent's Senior Legal Officer who reiterated what she had deponed in her Replying Affidavit dated 14th March, 2024. She agreed with the Applicants that land grabbing was currently rampant and gave an example of the instant suit in which the Applicants through lawless and rogue agents were attempting to forcefully enter the suit properties.

23. That the only documents that the Applicants had provided before the court relating to the suit properties were correspondences between their Advocates and a third party who was a stranger in the instant suit. No single correspondence had been from the 6th Respondent. That being apprehensive that the Applicants would dispose the suit properties herein, the court should reject to grant the relief sought by them and set the matter down for hearing.

24. The 3rd Defendant did not participate in the instant Application.

25. The application was canvassed by way of written submissions wherein the Applicants vide their submissions dated 11th March, 2024 framed their issues for determination as hereinunder:

    i. Whether an injunction should be issued against the Respondents pending the hearing and determination of the suit.

    ii. Whether the Applicants can be condemned unheard.

26. On the first issue for determination, reliance was placed on the provisions of Order 40 Rule 1 of the Civil Procedure Rules and the guiding principles for the grant of interlocutory injunction as was settled in a combination of decisions in the case of East African Industries v Truefoods [1972] EA 420, Giella Vs. Cassman Brown (1973) EA 358 and Nguruman Limited Vs. Jan Bonde Nielsen and 2 Others (2014) eKLR to submit that the Applicants had established a prima facie case. That there was no dispute that they had purchased in full, taken possession of and developed the suit properties thus allowing the Respondents to evict them would interfere with their enjoyment of the same. They placed reliance in the decided case of Mrao Limited Vs. First American Bank of Kenya (2003) KLR 125.

27. That they would suffer irreparable harm if the injunction was not granted since their eviction from the suit properties would cause irreparable harm to their peaceful enjoyment of the suit properties having paid the full purchase, stamp duty, taken possession thereof, and immensely developed the suit properties for years. Reliance was placed in the decided case of Pius Kipchirchir Koggo v Frank Kimeli Tenai [2018] eKLR.

28. That the balance of convenience was in their favour having been peacefully enjoying the suit properties from the time they took possession for evicting them would cause greater inconvenience than that which may be caused to the Respondents who did not have any ownership documents. Reliance was placed in the decided case of Paul Gitonga Wanjau v Gathuthia Tea Factory Company Ltd & 2 others [2016] eKLR. That further, the rules of natural justice were well settled that a party could not be condemned unheard hence it was only fair that the suit properties be preserved and they be given a chance to be fairly heard on merit.

29. 1st and 2nd Respondents' Submissions dated 15th May, 2024 was to the effect that the legal right that they had apparently infringed had not been clearly established. That the documents provided by the Applicants in evidence were marred with irregularities and bordered on criminality. That subsequently, the prima facie case had not been established. Reliance was placed on the decision in the case of Florence Khayanga Musanga v Transnational Bank Ltd & another [2020] eKLR and Mrao Limited's case (supra).

30. That an injunctive order being an equitable remedy, the aforementioned documents could not be relied upon to establish a case since the Plaintiffs hands were soiled contrary to the adage that whoever comes to equity must come with clean hands. That whereas our jurisprudence envisages that interim reliefs could only be granted wherein the Applicant stood to suffer irreparable loss, in the instant case, the Applicants had not even shown how they stood to suffer loss that could not be compensated in damages. That in the absence of cogent explanation as to the nature of irreparable loss that the Applicants stood to suffer, the Application ought to fail.

31. The 4th, 5th and 6th Respondents via their submissions dated 15th May, 2024 submitted that the Applicants had not demonstrated that they had a prima facie case to warrant an injunctive order being sought, the documents they sought to rely on having been obtained fraudulently.

32. They also placed reliance on a combination of decisions in the case of Wreck Motor Enterprises v the Commissioner of Lands and Others [1997] eKLR and Dr. *Joseph N.K Ng'ok v Justice Moijo Ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997* (unreported) to reiterate that without any allotment letter or Sale Agreement, the transfer instruments had been fraudulently drawn as a basis of the instant Application hence the court should not grant the injunction sought but set the instant matter down for hearing on merit.

33. That since a title was an end product of the process and the process of obtaining the same having not been complied with in the present suit, that for an Applicant to enjoy the injunction orders being sought, they ought to demonstrate through evidence the process of acquisition from inception and go beyond the title. That the Applicants had not demonstrated what loss if any, they stood to suffer if the orders were not granted and which loss could not be compensated with an award of damages. That further, the court should take judicial notice that the Applicants had not been in possession of the suit land. That the Applicants had not satisfied the criteria set in the Giella's case (supra) thus the court should dismiss their Application with costs.

Determination.

34. I have considered the Applicants' application, its opposition, the submissions by parties, the law as well as the authorities therein cited. Via their application dated 19th February 2024, the Applicants herein sought for injunctive orders against the Respondents restraining them from interfering with their quiet possession of all those parcels of land known as LR Nos. 28068/31, 28068/32, 28068/33 and 28068/34 ADC Ndabibi Farm and for the Officer Commanding Station Kongoni Police Station to ensure strict compliance of all parties with the court's orders.

35. In response to the said application, the 1st and 2nd Respondents in their Grounds of Opposition dated 7th March 2024 and Replying Affidavit dated 15th May, 2024 had deponed that the 1st Respondent was the bonafide owner of the suit properties known as LR Nos. 28068/31, 28068/32 28068/33 Ndabibi Farm (ADC) having been allotted the same and having fulfilled all the prerequisite conditions and making payments thereto.

36. That the Applicants were strangers to the suit properties since the registered owner, the 6th Defendant herein, was unaware of their alleged purchase or alleged ownership of the said properties. That the Applicants' claim had been based on a Transfer of Title Document that had been altered by a pen to insert the 6th Respondent previously denoted as M/s Lands Limited as the transferor wherein there had been no execution page.

37. The 4th, 5th and 6th Respondents on the other hand in their Replying Affidavit dated 14th March, 2024 and Supplementary Affidavit dated 29th April, 2024 had deponed that the Applicants had only been in occupation of the suit properties as squatters. That the suit land had been allocated to the 1st Respondent as its legitimate proprietor, by the 6th Respondent. That the purported allotments to the Applicants had been forged and/or fraudulently obtained.

38. The celebrated case of Giella vs Cassman Brown (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows:-

    i. Is there a serious issue to be tried(prima facie case)

    ii. Will the Applicant suffer irreparable harm if the injunction is not granted;

    iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

39. The Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunctive orders against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the orders sought. The Court is not required to determine the merit of whether the Applicants herein have demonstrated that they have a genuine and arguable case or not.

40. The issues that arises for determination herein is whether an interim order of injunction should issue.

41. On the first limb as to whether the Applicants in this matter have made out a prima facie case with a probability of success, I am guided by the case of Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125, where 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."

42. That Applicants herein have alleged that they were the owners of the suit properties known as LR Nos. 28068/31, 28068/32 28068/33 and 28068/34 ADC Ndabibi Farm having purchased the same from the 6th Defendant/Respondent in the year 1999 wherein they were issued with the title deeds after which they had proceeded to develop the same and had been enjoying quiet possession of the suit properties until 14th February, 2014 when the 1st Defendant had invaded the same.

43. The Respondents argument on the other hand was that the suit properties belonged to the 1st Respondent having been allotted the same by the 6th Respondent after fulfilling all the prerequisite conditions and making payment towards the same. At paragraph 5 (d) of their Replying Affidavit, the 4th, 5th and 6th Defendants acknowledged that the Applicants had been on the suit properties as squatters. At paragraph 9 of their Replying Affidavit, the 1st and 2nd Respondent had also alluded to occasional squatter menace on the suit property.

44. I have taken into consideration these arguments and also considered the Applicants' ownership title documents herein annexed as annexure "DK 3" to the suit lands herein.

45. Section 26 (1) of the Act provides as follows:-

> " The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except
>
> a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
>
> b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme".

46. Ostensibly, it is not possible to make a final determination at this interlocutory stage on the validity of the Applicants titles but the mere proof that they hold a duly registered certificates of titles which on the face of it was properly acquired, is sufficient to lead the court to hold that the Applicants have established a prima facie case.

47. In Nguruman Limited Vs. Jan Bonde Nielsen and 2 Others (2014) eKLR the court of Appeal observed as follows on irreparable injury:

> "..... An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.
>
> .....the court must further be satisfied that the injury the Respondent will suffer in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying no interlocutory order of injunction should normally be granted however strong the Applicant's claim may appear at that stage."

48. I am also persuaded by the decision in the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR where the court in explaining the meaning of irreparable injury held 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.

49. In the instant case, it has not been disputed that the Applicants are in occupation of the suit lands. The Applicants have further deponed that they have immensely developed the suit properties and therefore should an injunction not issue, I find they stood to suffer irreparably.

50. In the Pius Kipchirchir Kogo's case (supra), the court defined balance of convenience as follows:

'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".

51. In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court observed as follows on the issue of balance of convenience:

> " 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."

52. There having been no contestation that the Applicants have been in occupation of the suit properties, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, pending the hearing of the suit on its merits. This is especially so in view of the allegations of fraud by the Respondents herein, the court needs to have an opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Applicants as well as hearing the Respondents' evidence on the allegations of fraud.

53. Subsequently, I am convinced that if orders of temporary injunction are not granted in the instant suit, the suit properties might be in danger of being dealt in the manner set out in the application and apprehended by the Applicants, the 1st and 2nd Respondents having actually invaded the same wherein they had started erecting a fence during the pendency of the instant suit.

54. I find that since the Applicants who are in occupation of the suit land seek an injunction against the Respondents from interfering with the land in the ways herein above enumerated, or taking possession of the same, so as to preserve the suit land pending the determination of the case, I see no harm in ordering that the parties do maintain the status quo pertaining which order will assist in case management until determination of the case.

55. The Court of Appeal in the case of Mugah –v- Kunga [1988] KLR 748, held that in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.

56. With this in mind, and whilst cautioning myself on the preservation of the status quo so as to ensure that no party is prejudiced, I would therefore interfere in a limited manner by clearly defining the status quo herein to the effect that:

    i. An order of status quo is herein issued to be maintained by all the parties in that it must be understood that the Applicants are in occupation of land in parcel LR Nos. 28068/31, 28068/32, 28068/33 and 28068/34 ADC Ndabibi Farm as at the time of filing suit.

    ii. The Applicants shall also not deal with the said parcels of land adversely

    iii. There shall not be any interfering with parcel registration LR Nos. 28068/31, 28068/32, 28068/33 and 28068/34 ADC Ndabibi Farm by the Respondents.

    iv. That the Officer Commanding Station Kongoni Police Station ensures strict compliance of all parties with the court's orders

    v. Such status quo is to be maintained by all parties until the matter is finally heard and determined.

    vi. The cost of the application dated the 19th February, 2024 shall be in the cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 25TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE