



REPUBLIC OF KENYA



**Kakai v Makau & 2 others (Land Case E069 of 2024)
[2024] KEELC 5572 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E069 OF 2024**

**JA MOGENI, J
JULY 18, 2024**

BETWEEN

ELIZABETH N. KAKAI PLAINTIFF

AND

MAGDALENE MAKAU 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 3RD DEFENDANT

RULING

1. By a Notice of motion dated 20/02/2024 commenced pursuant to Article 40 of *the Constitution* of Kenya, 2010 Section 1A and 1B of the *Civil Procedure Act* Cap 21 Laws of Kenya, Orders 40 and 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of law seeking the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of the Application herein, this Honorable Court be pleased to issue an order declaring the plaintiff/Applicant is the rightful owner of that parcel of land at Embakasi Ranching Company Ltd known as Parcel No. Nairobi/Block 136/3283
 - iii. That pending the inter partes hearing and determination of the Application herein this honorable court be pleased to issue orders restraining the Defendant/Respondents either by themselves, their agents and/or representatives from trespassing or in any way whatsoever interfering with the Applicant's property known as Nairobi/Block 136/3283 or Embakasi Ranching Company Plot Number A-168B (hereinafter referred referred to as the "suit property")



- iv. That pending the hearing and determination of the main suit herein this honorable court be pleased to issue orders restraining the Defendant/Respondents either themselves, their agents and/or representatives from trespassing or in any way whatsoever interfering with
 - v. That the OCS Ruai Police Station be directed to ensure compliance of this court orders.
 - vi. That Costs of this Application be in the main suit.
2. The gravamen of the application is an 18- paragraphed supporting affidavit sworn on even date by the applicant and documents marked as “ENK-1” to “ENK- 11” which include; a copy of the sale agreement and copies of payment receipts for the suit property and beacon certificate including copies of utility bills. The application is also beacons on grounds (1) to (11) stated on its face which include; that the applicant is the legal registered owner of all that parcel of land known as Nairobi/Block 136/3283 or Embakasi Ranching Company Plot number A-168B. That she now wants the respondent enjoined from the suit property which legally belongs to the applicant.
 3. In summary, the lamentations of applicant are that she bought the suit from one Richard Kinyanjui Wainaina vide a sale agreement dated 6/10/1994 and that a corresponding power of Attorney of even dated was executed between herself and Kinyanjui who was a beneficial owner of the suit property Plot Number P133- B allocated to him by the 2nd defendant.
 4. That when he made the requisite payments, the suit property was allocated to the Plaintiff under plot A-168B from P 133- B which led to Richard’s allocation share being cancelled. On or around 21/08/1993 that the applicant was allocated plot Number A-168 B by virtue of her share with the 2nd Defendant/Respondent.
 5. That the plaintiff’s plot was regularized through payment of extra amounts to the 2nd defendant in this case being Kshs 128,000 to enable her to be allocated one of the adjacent plots and the other two to be allocated to other persons.
 6. The applicant immediately took possession and fenced it off and paid all the utility bills and started a small scale farming. She was issued with a Non-Member Certificate of Plot Ownership number 168B by 2nd defendant on 5/08/1999 and a certificate to affirm the beacons on 9/10/2012.
 7. In a 25- paragraphed replying affidavit sworn on 22/04/2024, the respondent through M/s Simiyu Kasimu and Company Advocates, opposed the application. She deposed, from the suit property Nairobi/Block 136/3283 which was measuring one acre, she was allotted a quarter acre and then Richard Kinyanjui Wainaina was allotted one quarter and the remaining two acres were allotted to other persons. The allotments were bonus plots which bonus allocations were as per the shares one had in the 2nd defendant company.
 8. That she did seasonal farming on the suit property between 1994 to 1997 and then occasionally checked on the suit property through her neighbours after ceasing the farming activity. She learnt in 2012 that her parcel had been fenced by the applicant. She reported this trespass through 2nd respondent as envisaged via the annexed letter marked as MM-3.
 9. It is the 1st respondent’s contention that she hired a surveyor to bring clarity on the allocation since the issue of topping up by the plaintiff in order to be allocated a plot is illegal since the plaintiff was not a member of the 2nd respondent. Further the alleged allocated land was already owned by the 1st respondent and thus no proper title could pass.
 10. That the plaintiff has been trespassing since 2012 and cannot benefit from the innocent purchaser defence since she has been altering the suit property without consent and or permission.



11. The 1st respondent avers that an order of status quo would be a more appropriate order to issue.
12. The application was argued by way of written submissions pursuant to the orders and directions of this court given on 20/05/2024 see Orders 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Directions number 33 of the Environment and Land Court (ELC herein) Practice directions, 2014.
13. Accordingly, learned counsel for the applicant filed submissions of five (5) pages dated 14/05/2024 giving brief facts of the matter and framed three issues for determination which are a summary of the principles that are key in granting of an interlocutory injunction. The issues raised include whether the application raises a prima facie case, on whose favor is the balance of convenience and whether the applicant will suffer irreparable loss.
14. The applicant made reference to the cases of Giella-vs- Cassman Brown Company Ltd (1973) EA 358 and Mrao Ltd-vs-1st American Bank of Kenya Ltd and 2 others (2003) eKLR 125, among other authorities. Counsel urged the court to allow the application.
15. The 1st respondent's counsel filed six (6) paged submissions dated 6/06/2024. Counsel cited Giella case (supra), Nguruman Limited vs JaN Bonde Nielsen & 2 Others [2014] eKLR, among others framed one issue for determination being whether the applicant has met the criteria for the grant of a temporary injunction. Counsel urged the court not to grant an injunction since the suit property Nairobi/Block 136/3283 is a one-acre piece of land which he submitted is occupied by several people and issuance of a blanket order would prejudice their right to ownership.
16. Further that whereas the plaintiff provided an elaborate process of allocation of the initial plot sold to the plaintiff by Richard Kinyanjui Wainaina referred to Plot No. P.133B which is Plot No. 1 in the map the 1st respondent produced. The other parcel known as N41 B which is plot number 2 does not bear the same elaborate process. The 1st respondent supports the status quo order in existence until the suit is heard and determined.
17. I have duly considered the application, the replying affidavit and rival submissions including all the authorities relied upon therein. So, has the application attained the threshold for the grant of orders sought therein?
18. The conditions including likely injury to applicant, duration and costs under Order 40 Rule 2 of the Civil Procedure Rules, 2010, are meant to curb abuse of temporary injunctions; see DPP -vs- Justus Mwendwa Kathenge (2016) eKLR.
19. The temporary injunction sought in the application is an equitable remedy. It is within the flexibility and discretion of the court to grant the interlocutory injunction remedy; see Central Bank of Kenya and another -vs- Uhuru Highway Development Ltd and 4 others (1998) eKLR.
20. As such, the applicant has to demonstrate, inter alia, a prima facie case against the respondent; see Mrao Ltd-vs-First American Bank of Kenya Ltd and 2 others (supra). It is established law that the jurisdiction to issue injunctive relief vests in the probability of irreparable injury, inadequacy of damages and prevention of the multiplicity of suits as stated in Nguruman Ltd-vs-Jan Bonde Nielsen (supra).
21. I do subscribe to the decision in Ogada-vs-Mollin (2009) KLR 620 as regards lis pendens doctrine (status quo orders) to preserve the suit property until the suit is determined or terminated.
22. In the present application, both the applicant and the 1st respondent are laying claim to the suit property. Both the plaintiff and the 1st respondent do not have title of the suit property but allotment letters and for the plaintiff even utility bills indeed showing that they are the ones utilizing the suit property. Thus the applicant has established a prima facie case with triable issues as noted in Paul



Gitonga Wanjau vs Githuthi Tea Factory Company and others (2016) eKLR. That he is likely to suffer irreparable damage as held in Tritex Industries Ltd and 3 others –vs- National Housing Corporation and another (2014) eKLR.

23. This court has the mandate under Section 13 (7) (a) ELC Act to grant preservation orders. The same does not exclude a status quo order sought in the application. This court had issued a temporary status quo order which was to subsist until this application was heard and determined.
24. To that end, I find the application meritorious. I am of the considered view that the merited order in lieu of interlocutory injunction, is the maintenance of the obtaining status quo over the suit land until this suit is heard and determined. This position was held in the cases of Musa Angira Angira-vs-Industrial and Commercial Development Corporation (2015) eKLR and Meresa Akello (suing as administrator of the estate of Tingo Nyamatiko-Deceased-vs- John Itembe Mucheria (2021) eKLR.
25. Accordingly, the application dated 20/02/2-024 be and is hereby determined in terms of an order of status quo over the suit land. In particular, pending the hearing and determination of the suit in the following manner: _
 - a. The respondents shall not evict the applicant from the suit land,
 - b. The respondents shall not sell, charge, lease, dispose of or part with any portion of the suit land,
 - c. The parties shall not erect permanent structures on the suit land,
 - d. Costs of the application be in the cause.
 - e. Parties to go for Pre-Trial Conference on 3/09/2024

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JULY 2024

MOGENI J

JUDGE

In the presence of:

Ms. Kasimu for the 1st Defendant/Respondent

No appearance for Plaintiff, 2nd and 3rd Defendant

Caroline Sagina - Court Assistant

