



Shill (Suing as the personal representative of the Estate of the Bare Shill Abdi) v Shill & another (Environment & Land Case E006 of 2023) [2024] KEELC 6271 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND CASE E006 OF 2023
JM MUTUNGI, J
SEPTEMBER 26, 2024**

BETWEEN

ADEN BARE SHILL (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE BARE SHILL ABDI) PLAINTIFF

AND

ELIAS BARE SHILL 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

RULING

1. The Applicant vide a Notice of Motion application dated 27th October 2023, prays for the following orders;
 1. Spent
 2. That pending inter parties hearing of the application, an order of injunction do issue restraining the 1st Defendant/Respondent whether by himself, his servants, his agents, advocates, employees, assignees, or otherwise howsoever and any person whatsoever from selling, disposing off, charging, subdividing, processing subtitles or leases, pledging, dealing, constructing, developing, interfering with and/or intermeddling in any manner whatsoever with all that property known as Garissa Township/Block 1/72 (previously known as Plot No. GSA 29 subsequently Plot No. GSA 72).
 3. That pending inter parties hearing of the application an order of injunction do issue restraining the 1st Defendant/Respondent, whether by himself, his servants, his agents, advocates, employees, assignees, or otherwise howsoever and any person whatsoever from harassing, evicting, intimidating, and/or in any manner whatsoever interfering with the use, and/or



possession of the suit property by the Plaintiff and/or any other beneficiary of the estate of Bare Shill Abdi (deceased), their children, employees, servants and/or agents.

4. That pending inter parties hearing of the application this Honourable Court do issue an order staying the proceedings relating to Garissa Rent Restriction Case No. E007 of 2023: Elias Bare Shill v Aden Bare Shill.
 5. That pending inter parties hearing of the application this Honourable court be pleased to order and/or direct the 1st Defendant/Respondent to forthwith or within such other time as this Honourable court may deem fit, deposit in Court all rental income derived and/or collected from any part of the premises located on all that property known as Garissa Township/Block 1/72 (previously known as Plot No. GSA 29 subsequently Plot No. GSA 72).
 6. That the Officer Commanding Garissa Police Station be ordered and/or directed to see that the order of this Court is obeyed.
 7. That this Honourable Court be pleased to issue any other order that it may deem fit for ends of justice to be met.
 8. That the costs of the application be provided for.
2. The application is based on the grounds set out in the body of the application and the sworn affidavit of Aden Bare Shill. Essentially, the Applicant is seeking temporary orders for the preservation of land parcel Garissa Township/Block 1/72 (previously known as Plot No. GSA 29) (the suit property). The Applicant asserts that the suit property was originally registered in the name of the late Bare Shill Abdi, their father, who passed away on 8th September 1973. It is claimed that the suit property comprises 5 rental shops, 5 rental houses, from which the 1st Respondent and their mother receive rent, and 2 houses in which the applicant resides. The Applicant alleges that the 1st Respondent had previously attempted to transfer the suit property into his name when their late father was unwell, but these attempts were resisted as illustrated by the District Commissioner of Garissa in a letter dated 16th August 1973. The family also opposed the 1st Respondent's attempts to deprive them of their inheritance. When the Applicant learnt that the suit property was among the 193 plots recommended for Titles, the Applicant, along with two of his brother, requested to have the title deed of the property registered in the name of Bare Shill Abdi & Sons, a request the County Council granted. The Applicant stated that they only came to learn the 1st Respondent had acquired a title to the suit property during the succession proceedings in the Kadhi's Court succession cause No. 510 of 2022 when the 1st Respondent exhibited title to the said land. The Applicant avers that the Kadhi deferred dealing with the issue of succession in regard to the suit property until the ownership of the same was determined.
3. Strangely the Applicant states even though they have all along been utilising part of the suit premises as their ancestral home, the 1st Respondent following the disposal of the succession matter before the Kadhis Court went ahead and sued the Applicant before the Rent Restriction Tribunal vide RTC No. 207 of 2023 seeking to have him evicted from the premises on account of non payment of rent yet the Applicant was never a rent paying tenant of the 1st Respondent. The Applicant further avers the 1st Respondent has threatened to demolish the structures on the suit premises which would occasion loss to the estate of the deceased. On that account the Applicant prays for an injunction to restrain the 1st Respondent from in any manner interfering with the suit property pending the hearing and determination of the suit.
4. The 1st Defendant/Respondent filed a Replying Affidavit in opposition to the Applicant's application. He affirmed that the suit revolves around the ownership of the suit property. He affirmed that his late



father had six wives and at the time of his death, only the fifth wife (the mother of the Applicant, Ebla Ali Daar) and the 6th wife (his mother) were legally married to him. He asserted that before his father's demise, he shared his properties among his last 3 wives and 9 children, and the suit property was distributed to himself to hold in trust for his mother and siblings. He further stated that the District Commissioner indeed raised concerns about the transfer of the suit property, but he averred that the application to transfer the suit property was made by his father in person and that at the time, his father was not bedridden and ill, as alleged by the Applicant. He stated that he had been paying land rates for the suit property based on the understanding that it had been transferred to him. Regarding the changes made to the plot owner's name, he explained that the suit property was initially in the name of Elias Bare Shill and was later changed to Elias Bare Shill Abdi & Sons in an irregular manner, as noted in a letter dated 15th June 1983. He clarified that despite the name being changed to Elias Bare Shill & sons, the Plot Allocation Committee (PAC) issued an allotment letter for the suit property in the name of Bare Shill Abdi & Sons. He objected to the exclusion of his name and applied for the rectification of the discrepancy, which was eventually corrected on 11th June 1989, and he was issued with a certificate of lease dated 29th June 1989. He averred that since the issuance of the certificate of lease, the Applicant has never challenged it and further explained that he had obtained funds on the security of the property which he has used to develop the same. He emphasized that he followed the due legal process to acquire ownership of the suit land and urged the Court to dismiss the Applicant's application with costs.

5. The Applicant, in the further Affidavit, reiterated that the 1st Defendant/Respondent acquired the title of the suit property fraudulently through misrepresentation and/or corrupt scheme. He disputed the fact that his father's estate was distributed whilst his father was still alive and stated that he objected to every move by the 1st Respondent initiated to transfer the land to his name, he also claimed that he came to know of the fraudulent transfer of the suit property when he filed Succession Cause No. 51 of 2022 at the Kadhi's Court. The Applicant denied the 1st Respondent was the one who developed the property as he had claimed.
6. The application was canvassed by way of written submissions. The Applicant filed his submissions on 26th April 2024, while the 1st Defendant filed his submissions on 11th June 2024.
7. The Applicant's application is premised on Article 159 (2) (b) and (d), Sections 1A, 1B, and 3A of the *Civil Procedure Act* that basically speak to the administration of substantive Justice in an expedient and cost-effective manner. The application further invokes the provisions of Order 51 and Order 40 Rule 1 of the Civil Procedure Rules, 2020 that deals with grant of temporary injunction. Both the Applicant and the 1st Respondent in their submissions have extensively set out the background and the facts giving rise to the dispute and hence reiterated the contents of the Affidavit sworn in support and in opposition of the application. Additionally, the parties have referred to various Judicial authorities to buttress their arguments.
8. I have reviewed the pleadings, the submissions and I have considered the authorities cited by the parties. The issue for determination at this stage is whether on the facts and circumstances of the matter, the Plaintiff/Applicant has satisfied the conditions for grant of a temporary injunction to warrant the Court to grant the same in his favour.
9. The principles applicable in applications for the grant of temporary injunction were articulated in the Case of Giella Versus Cassman Brown (1973) EA 358 where the Court held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.”

10. The conditions for granting a temporary order of injunction, as outlined in the *Giella v. Cassman Brown* case (supra), are as follows: First, the Applicant must demonstrate a prima facie case with a probability of success. Second, the Applicant must show that without the injunction, they will suffer irreparable injury or loss that cannot be adequately compensated by a damages award. Third, if the Court is uncertain or in doubt, it will determine the application by considering the balance of convenience, taking into account the interests of both the parties.
11. These conditions are examined sequentially. If no prima facie case is demonstrated, the application will not succeed. If a prima facie case is demonstrated but damages would suffice as a remedy, then an injunction would also not be granted.
12. A prima facie case was defined by the Court of Appeal in the Case of *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR 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.”
13. In order to establish whether a prima facie case, has been demonstrated, the Court needs to evaluate whether the Applicant has presented sufficient evidence to demonstrate that the opposing party may have violated some right and/or there was a threatened violation of such right. In the instant suit it is not disputed that the suit property was originally registered in the name of both the Applicant’s and 1st Defendant’s father, Bare Shill Abdi (deceased). As per to the Applicant’s case, the 1st Respondent fraudulently acquired land parcel Garissa/Township/Block 1/72, previously known as Plot No. GSA 72. The correspondence from the District Commissioner and the Clerk/Treasurer of the defunct Garissa County Council reveal disagreements over the legality of the suit property transfer, with one letter halting the transfer and another stating no proper transfer had occurred in favor of the 1st Respondent. Further communications show that the Applicant and his brother, Mohammed Bare Shill, successfully requested the Plot Allocation Committee to issue the title deed of the disputed property to Bare Shill & Sons. The allotment letter was issued on 12th August 1984. There’s proof to show that the dispute between the brothers persisted, evidenced by actions such as the Applicant hiring lawyers to prevent the 1st Respondent and his mother from collecting rent from the suit property, pending the deceased estate administration. Additionally, a letter from the District Officer to the Lands Commissioner dated 24th July 1989 also sought to halt dealings with the property until the siblings’ dispute was resolved. Also attached is a caution document lodged against the property by Mohamed Bare Shill, claiming to be the rightful heir of the suit property.
14. The 1st Defendant/Respondent, on his part, claims to have received the suit property from his deceased father. He has provided a copy of an application for transfer dated 25th April 1973, of an unidentified plot to himself, which was supposedly executed by his late father. He acknowledges being aware of letters from the District Commissioner and the Clerk of Garissa County Council disputing his land ownership and the ongoing dispute with his sibling over the property. In paragraph 14, of the Replying Affidavit, the 1st Respondent acknowledges knowing the property was registered under the name of Bare Shill & Sons. The 1st Respondent explained that the plot Allocation Committee had irregularly caused the plot to be registered under the name of Bare Shill & Sons and that following his objection,



the name was rectified to his name, Elias Bare Shill before he was issued with the certificate of lease in his name.

15. There is no dispute that the property in question belonged to the deceased father of the parties. The Applicant has raised concerns that the 1st Respondent obtained this property through fraudulent means and has adduced evidence that indicates the ownership of the suit property has been in dispute as from the time their father died. The 1st Respondent indeed acknowledges there have been issues concerning the ownership.

16. Section 26(1) of the [Land Registration Act](#) provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... and the title of that proprietor shall not be subject to challenge, except--

On the ground of fraud or misrepresentation to which the person is proved to be a party; or

Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.”

17. It is well-established that any allegation of fraud must be pleaded and strictly proved in cases where fraud is alleged. At this interim stage of the case, it is sufficient that the Applicant has included the specifics of fraud in paragraph 34 of the Plaint and has provided what he considers could be supporting evidence as outlined above. The Court finds this to be adequate to establish the existence of a prima facie case with some probability of success noting that a prima facie case need not be one that must succeed at the trial.

18. In regard to the issue of whether the Applicant stood to suffer irreparable harm that could not be adequately compensated by an award of damages if the injunction was not granted, the Applicant has to prove that he stands to suffer such harm or damage that could not be compensated by an award of damages.

19. The Court of Appeal in the Case of Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR held that: -

“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury, that is, injury that is actual, substantial, and demonstrable, injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount, will never be adequate remedy.

20. In the present suit, even though the 1st Respondent asserts ownership of the suit property, the Applicant has averred that he has been in occupation and possession of the two rooms from before the death of his father to date as it was his father’s property and his ancestral home from his childhood. This assertion of the Applicant has not been rebutted and infact the 1st Respondent’s case before the Rent Tribunal seeking to have the Applicant deliver vacant possession and to pay rent supports the Applicant’s position that he has been in possession of part of the suit property. The Applicant has



averred that the 1st Respondent has threatened to demolish the suit property (though no evidence has been provided and there has been no denial). If that was to happen, the Applicant and his family could be rendered homeless. In the event the Plaintiff is successful in the suit, the suit property would devolve to the estate of the deceased and liable to be distributed to the beneficiaries who would include the 1st Respondent. In the premises having regard to all the attendant circumstances, I am persuaded that unless the suit property is preserved to await the final determination of the Court in regard to ownership of the suit property, damages would not be an adequate remedy should the Plaintiffs be successful in the suit.

21. The Court notes the Applicant and the 1st Defendant/Respondent have since the death of their father way back in 1973 been living harmoniously, and that apparently issues arose only when the succession cause No. 51 of 2022 was filed by the Applicant before the Kadhis Court. Up till that time, there is no indication the parties had any problems. I see no reason why the parties should not be required to observe the prevailing status quo where the suit property remains as it is until the question of the ownership of the same is finally determined by the Court.
22. The Applicant in the application has sought for an order that the 1st Respondent be directed to deposit the rent that he has been collecting from tenants in the suit premises in Court pending the hearing and determination of the suit. The Applicant has not furnished any evidence that there are any rent paying tenants and/or any particulars of the rent that is paid. The Applicant himself and his family have been occupying part of the premises without paying any rent and that apparently has been the position since the death of their father. The Applicant in my view has not established a basis for the Court to make a direction for the rental income to be deposited into Court. The Court therefore declines to issue such an order/direction.
23. As regards whether or not the Garissa Rent Restriction Case No. E007 of 2023 (Elias Bare Shill –vs Aden Bare Shill) should be stayed pending the hearing and determination of the instant suit, I think so. As is evident from the pleadings, this suit concerns the ownership of land parcel Number Garissa Township/Block 1/72 (previously known as Plot No. GSA/29 and GSA/72). Does the property solely belong to the 1st Defendant and/or it belongs to the estate of the late Bare Shill Abdi (deceased). The Plaintiff claims he occupies the same as a beneficiary of his late father's estate while the Defendant, claims absolute proprietorship of the property as the registered owner. Whether or not the Plaintiff is a rent paying tenant of the Defendant is Dependent on the issue of ownership of the property being determined. The proceedings before the Rent Restriction Tribunal on the face of the present proceedings are untenable. One gets the impression that the Defendant wanted to pull a fast one against the Plaintiff by getting him evicted from the premises: How come from 1973 when their father died the Defendant had not sought to recover rent from the Plaintiff but all of a sudden following the collapse of the succession cause before the Kadhi's Court, the Defendant rushed to the Rent Restriction Tribunal Court to seek recovery of rent and eviction of the Plaintiff? It does appear that the Rent Restriction Tribunal case was not instituted in good faith and the 1st Respondent may have wanted to steal a match against the Plaintiff? It does appear that the Rent Restriction Tribunal case was not instituted in good faith and the 1st Respondent may have wanted to steal a match against the Plaintiff.
24. The Kadhi's Court had advised the parties the issue of ownership of the property ought to be litigated before a competent Court. The determination of the present case would have a bearing and would impact the case pending before the Rent Restriction Tribunal Court. In the premises I would order that the proceedings before the Rent Restriction Tribunal Court be stayed pending the hearing and determination of the present suit.



25. The upshot is that although the Plaintiff/Applicant satisfied the first two conditions for grant of a temporary injunction, having regard to all the attendant circumstances in this matter and considering there are disputed facts, it is my view that the grant of an order of injunction would not be justiciable in the circumstances. The order that commends itself to the Court and which I hereby grant is that the parties shall be required to observe and maintain the prevailing status quo as appertains to the suit property pending the hearing and determination of the suit. For avoidance of any doubt and for clarity there will be no disposal of the suit property by way of sale or transfer and there will be no further charging of the property without an order of the Court in that regard.
26. As indicated earlier in this Ruling the matter pending before the Rent Restriction Tribunal Court being Garissa RRTC No. E007 of 2023 is ordered stayed pending the determination of the instant suit.
27. The costs of the application will be in the cause.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 26TH DAY OF SEPTEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

