



REPUBLIC OF KENYA



KENYA LAW
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**Waita v David & another (Environment and Land Appeal 10 of 2022)
[2024] KEELC 6070 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 10 OF 2022
TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

MATHA MWELU WAITA APPELLANT

AND

SAMMY KINAI DAVID 1ST RESPONDENT

DAVID MUTHIANI WAITA 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 30th June 2022, brought under Order 40 Rules 1 and 3 of the Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Code, the Applicant seeks the following orders:-
 - i. Spent.
 - ii. That a temporary injunction do issue against the Respondents either by themselves and/or agents, servants and/or any person claiming through and/or under their title from entering, leasing, fencing, selling, disposing or in any other way from interfering with the parcel of land known as Plot No. 1324 at Kiu Settlement Scheme No. 7 pending the hearing and determination of this application inter parties.
 - iii. That a temporary injunction do issue against the Respondents either by themselves and/or agents, servants and/or that status quo be maintained by both parties.
 - iv. That the Respondents have settled far away at Ngaamba whereby they have their permanent homes there another person claiming through and/or under their title from entering, leasing, fencing, selling, disposing or in any other way from interfering with the parcel of land known as Plot No. 1324 at Kiu Settlement Scheme No. 7 as allocated pending the hearing and determination of the main suit.



- v. That the 1st Respondent has disturbed the Applicant very much now and then therefore in the meantime she prays for status quo to be maintained until the matter is heard and determined.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Matha Mwelu Waita sworn on even date.

The Applicant's Case

3. The Applicant averred that she is the beneficial owner of Plot No. 1324 Kiu Settlement Scheme No.7, the suit property herein. She further averred that the Respondents trespassed into the suit property and destroyed her property therein. She further averred that the Respondents have subdivided the suit property and were offering it for sale to third parties thereby denying her access to her land. She stated that she is apprehensive that the Respondents will sell the suit property to third parties if the orders sought are not granted.

The Respondents Case

4. The Respondents opposed the application through the replying affidavit of Sammy Kinai David sworn on his behalf and on behalf of the 2nd Respondent.
5. He deposed that his father was allocated Plot No. 7 in the year 1970 which was later shared between him and his sister by the family committee chaired by the Deputy County Commissioner.
6. He further averred that after the subdivision of the plot by the County Government Surveyor, he occupied his portion of land while the Applicant occupied her portion measuring 2.5 ha. He asserted that the Plaintiff suit is bad in law as she did not produce any document to prove ownership thereof.
7. The Respondents contended that the application is devoid of merit and ought to be dismissed with costs.
8. Parties were directed to canvass the application by way of written submissions. As at the time of writing this ruling, the Applicant had not filed her submissions. The Respondents filed their submissions dated 25th April 2024 which I have duly considered.

Analysis And Determination

9. Having considered the application, the respective affidavits and the submissions filed the Respondents, the only issue that arises for determination is whether the Applicant has met the threshold for grant of a temporary injunction pending the hearing and determination of the appeal herein.
10. Order 42 Rule 6(6) of the Civil Procedure Rules provides as follows;

“Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
11. The principles for the grant of a temporary injunction pending appeal are well settled. In the case of Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR, the Court set out the principles for the grant of a temporary injunction pending appeal as follows;
 - a. “An order of injunction pending appeal is a discretionary order which will be exercised against an applicant whose appeal is frivolous.



- b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”
12. The principles for the grant of an injunction were set out in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”
13. The first issue for determination is whether the Applicant has established a prima facie case with a probability of success.
14. A prima facie case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 Others* [2003] eKLR as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
15. In the trial before the lower court, the Appellant had sought for a permanent injunction restraining the Defendants jointly and severally from interfering with her occupation of her part of the suit property. Her suit was dismissed vide the judgment delivered on 24th May 2022.
16. The record shows that the Appellant filed her Appeal on 15/06/2022. In ground No. 2 of the Appeal, the Appellant faulted the Trial Magistrate for failing to appreciate that there was a dispute over the ownership of the suit property. The Applicant asserted that the suit property belongs to the family and that no title has been issued thereof. She contended that she has been in occupation of the suit property for the last 33 years.
17. From the evidence placed before me, it is my considered view that the Appellant has established that she has a prima facie arguable case.
18. As to whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.
19. The Applicant contended that she is apprehensive that Respondents will dispose of the suit property to third parties as they have subdivided the same.
20. From the evidence presented before me, it is not in dispute that both parties are in occupation of the suit property. It is also not in dispute that no title has been issued for the suit property.



21. The court is therefore convinced that the Applicant stands to suffer irreparable harm that cannot be compensated by an award of damages if the suit property is transferred to third parties.
22. On of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction, against the hardship to be borne by the Respondent's by granting the injunction.
23. The purpose of an injunction is to preserve the suit properties pending the hearing and determination of the suit. In the case of *Virginia Edith Wambui v Joash Ochieng Ougo Civil Appeal No. 3 of 1987*, the Court of Appeal held that;

 "The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial."
24. Looking at the evidence presented by the parties, I find that the balance of convenience tilts in favour of maintaining the status quo on the suit property.
25. In light of the foregoing, I find that the application dated 30th June 2022 is merited and is hereby allowed in the following terms:-
 - a. That a temporary injunction be and is hereby issued against the Respondents either by themselves and/or agents, servants and/or any person claiming through them from selling disposing or in any way interfering Plot No. 1324 Kiu Settlement Scheme No. 7 and/or that the status quo be maintained pending the hearing and determination of the appeal herein.
 - b. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2024.

In The Presence Of:

Mukula for the Respondents

Court assistant Stephen

