



**Muthoki v Munyao & 12 others (Environment & Land Case
E006 of 2023) [2024] KEELC 5914 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E006 OF 2023
TW MURIGI, J
SEPTEMBER 18, 2024**

BETWEEN

REGINA MUTHOKI PLAINTIFF

AND

BENJAMIN NZIOKA MUNYAO & 12 OTHERS & 12 OTHERS DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 6th October 2023 brought under Order 53(1) of the Civil Procedure Rules, Sections 8 & 9 of the Law Reform Act Cap 26 Laws of Kenya in which the Applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this suit, an order of injunction do issue restraining the Defendants/Respondents whether by themselves, their agents, surveyors, servants and/or any other person claiming under them from in any way at all engaging in any acts of dispossessing, subdivision, interference of boundaries and/or curtailing use by the Plaintiff/Applicant all those parcels of land known as Makueni/Unoa/2871 and Makueni/Unoa/1443.
 4. That pending the hearing and determination of this suit, this Honourable court be pleased to issue an order compelling the 12th Defendant/Respondent to register a Restriction on land parcel number Makueni/Unoa/2871 and Makueni/Unoa/1443 and the subsequent subdivisions.
 5. That the costs of and incidental to this application be borne by the Defendants/Respondents.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Regina Muthoki sworn on even date.

The Applicant's Case

3. The Applicant averred that she is the daughter of the late Timothy Kingóku, the legal proprietor of the suit properties herein. She added averred that the subdivision of the suit properties was fraudulent as they were effected after the death of her father. She further that she is apprehensive that the Respondents will transfer the suit properties to third parties if the orders sought are not granted.

The 1st-11th Respondents Case

4. The Respondents opposed the application through the affidavit of Benjamin Nzioka Kyalo sworn on his own behalf and on behalf of his co-Respondents.
5. The deponent averred that the application is misconceived and full of falsehoods meant to mislead the court. He admitted that the suit properties initially belonged to their late father who in the nineties gave them the portions that they now occupy.
6. He further averred that they have been living on the suit properties since they were young where they have constructed their permanent homes and various commercial enterprises.
7. He went on to state that the suit properties were subdivided in the manner unanimously agreed upon by the family in a meeting held on 9/5/2009. He further averred that the transfer forms were lodged at the Makueni Lands Office long before their father passed away.
8. He asserted that the Applicant is driven by pure greed and malice in bringing this application as the process of subdivision and survey was finalized before the death of their father. He urged the court to dismiss the application with costs.
9. Though duly served, the 12th Defendant did not file any response to the application.
10. The parties were directed to canvass the application by way of written submissions.

The Plaintiff's Submissions

11. The Applicant's submissions were filed on 8th February 2024.
12. On her behalf, Counsel outlined the following issues for the court's determination:-
 - i. Whether a prima facie case has been proved.
 - ii. Whether the balance of convenience tilts in favour of the Applicant.
 - iii. Whether the Applicant shall suffer irreparable damages.
13. Counsel submitted that the principles that govern the grant of an injunction were set out in the case of *Giella vs Cassman Brown* (1973) EA 358.
14. Counsel submitted that the Applicant has established a prima facie case with a probability of success as she has demonstrated that the transfers effected by the Respondents were marred with fraud and irregularities.
15. Counsel further submitted that the Plaintiff established from the land registry that land parcel No. Makueni/Unoa/221 was subdivided to create land parcel No. Makueni/Unoa/2871 and Makueni/Unoa/2872. Counsel further submitted that in the year 2016, land parcel No. Makueni/Unoa/2871



was further subdivided to create land parcel No. Makueni/Unoa/3375 and Makueni/Unoa/3376. Counsel contended that the green cards show that the late Timothy Kingóku was as at 26/1/2016 the registered owner of the suit property.

16. Counsel further submitted that the green card for Makueni/Unoa/3375 shows that the late Timothy King'oku was the registered owner as at 26/1/2016 and that the land was transferred to the 1st Respondent on the same day.
17. Counsel further submitted that the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages if the orders sought are not granted as she will be disinherited.
18. Finally, Counsel submitted that the balance of convenience tilts in favour of the Applicant. Counsel urged the court to maintain the obtaining status quo pending the hearing and determination of this suit.
19. None of the authorities cited by Counsel were availed for the court's perusal.

The 1st -11th Defendants Submissions

20. The Defendants filed their submissions dated 15th March 2024.
21. On their behalf, Counsel identified the following issues for the court's determination:-
 - i. Whether the Applicant has met the criteria for the grant of an injunction pending the hearing and determination of this suit.
 - ii. Whether the court should issue an order compelling the 12th Respondent to register a restriction on land parcels numbers Makueni/Unoa/2871 and 1443.
 - iii. Who shall bear the costs of the suit.
22. As regards the first issue, Counsel submitted on the principles for the grant of an injunction set out in the case of *Giella vs Cassman Brown* (1973) EA 358 and further restated by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR as follows:- "In an interlocutory injunction application, the Applicant has to satisfy the triple requirements:-
 - a) Establish his case only at a prima facie level.
 - b) Demonstrate irreparable injury if a temporary injunction is not granted.
 - c) Allay any doubt as to (b) by showing that the balance of convenience is in his favour".
23. Counsel submitted that the main issue for determination is whether the subdivision of the suit properties was done fraudulently after the death of Timothy Kingóku.
24. On the first condition, Counsel relied on the case of *Mrao Limited v First American Bank of Kenya Ltd* (2003) eKLR where the Court of Appeal defined a prima facie case of as follows:-

"...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...A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case."



25. Counsel submitted that the Plaintiff has not established a prima face case with a probability of success as the subdivision and subsequent transfer of the suit properties was done before the death of Timothy King'oku.
26. Counsel further submitted that the Respondents were residing on the suit property prior to the death of their father. Counsel submitted that the Plaintiff did not demonstrate that the Defendants posed a danger to the suit properties requiring the court's intervention.
27. On the second condition, Counsel submitted that the Plaintiff has not demonstrated that she will suffer irreparable harm or that the properties are in danger of being wasted since she does not reside on the suit properties. To buttress this point, Counsel relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) Eklr where the court defined irreparable injury as follows:- "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and 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".
28. On the contrary, Counsel argued that the Respondents will be prejudiced if the orders sought are granted since they have constructed their permanent homes and business enterprises on the suit properties.
29. On balance of convenience, Counsel submitted that the Plaintiff has not demonstrated that she will be inconvenienced as she does not reside on the suit property.
30. With regards to the second issue, Counsel submitted that that the Plaintiff had not exhausted the available dispute resolution mechanisms before approaching this court. It was submitted that Section 76 of the Land Registration Act permits a party to register a restriction through the Land Registrar without necessarily approaching the court.
31. On costs, Counsel submitted that the application is devoid of merit and urged the court to dismiss the same with costs.

Analysis And Determination

33. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination:-
 1. Whether the Plaintiff has established the legal threshold for the grant of a temporary injunction.
 2. Whether an order of restriction should issue.
34. The application before me has been brought under the wrong provisions of the law. However, the invocation of the wrong provisions of the law was not made in bad faith. This is a procedural technicality that does not go to the substance of the application.

Whether the plaintiff has met the threshold for the grant of an injunction

35. The law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides as follows: -
 1. Where in any suit it is proved by affidavit or otherwise-



- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

36. Both parties relied on the case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 which set out the principles that govern the grant of an injunction as follows: -First the 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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
37. The first issue for determination is whether the Applicant has made out a prima facie case with a probability of success to warrant the grant of an injunction.
38. A prima facie case was defined by the Court of Appeal in *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.”
39. It is the Applicant’s case that her late father, Timothy Kingóku is the legal proprietor of land parcels Nos. Makueni/Unoa/2871 and Makueni/Unoa/1443. According to the Applicant, the subdivisions and subsequent transfer of the suit properties were fraudulent as they were done by the 1st – 11th Respondents after the death of their father.
40. The Respondents on the other hand contended that the subdivision and subsequent transfer of the suit properties were finalized before the death of their father.
41. The Applicant annexed to her affidavit in support of the application, green cards (Annexure RM3) for the suit properties. The green card for land parcel No. Makueni/Unoa/1443 shows that it is a subdivision of land parcel No. Makueni/Unoa/212. The registered proprietor is indicated as Timothy Munyao Kingo’ku. It also shows that on 26/01/2016 the title was closed on subdivision giving rise to Nos 3377-3381.
42. As regards land parcel No. Makueni/Unoa/2871, the green card shows that it is a subdivision of land parcel No. Makueni/Unoa/221. The land was registered in the name of Timothy Munyao Kingo’ku on 27/03/2013. On 26/01/2016, the title was closed on subdivision giving rise to Nos. 3375-3376.
43. The main issue for determination is whether the subdivisions and subsequent transfer of the suit properties were effected fraudulently. These are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the court is not required to determine the issues which will be canvassed at the trial.



44. In the case of *Mbuthia Vs Jimba credit Corporation Ltd (1988) KLR* the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
45. Similarly, in the case of *Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd NBI HCCC NO 1118 of 2002*, the court held that;
- “In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”
46. At the interlocutory stage, the court is not required to make any definitive conclusion on the matters that are in controversy. The issue of fraud can only be determined in a full trial where the parties will have the opportunity to call evidence and have the same challenged by way of cross examination.
47. Looking at the documents annexed to the respective affidavits, it is evident that the Plaintiff’s claim is not baseless.
48. On the basis of the material that is on record, I find that the Plaintiff/Applicant has established a prima facie case with a probability of success.
49. 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.
50. The Court of Appeal in *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 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.”
51. The Applicant averred that she is apprehensive that the Respondents may transfer the suit properties to third parties. She contended that she will suffer irreparable loss which cannot be compensated adequately by an award of damages since she would be disinherited.
52. The Respondents on the other hand contended that they will suffer prejudice if the orders sought are granted as they will be restrained from accessing their homes and business enterprises which they have constructed on the suit properties. In this regard, the Respondents annexed to the replying affidavit photographs showing their homes constructed on the suit properties.
53. Indeed, if the Respondents decide to transfer the suit properties to third parties the process of recovery will be difficult. 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.



54. 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.
55. 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 Vs 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.”
56. 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.

Whether an order of restriction should issue

57. The Plaintiff is seeking an order to compel the 12th Defendant to register a restriction on the suit properties and the subsequent subdivisions thereof.
58. Restrictions are governed by Section 76(1) of the Land Registration Act which provides as follows:-
- “For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge”.
59. From the foregoing, it is clear that the purpose of a restriction is to preserve the status quo of the register and other records in respect of the suit property pending an event.
60. In the matter at hand, the Respondents alleged that the Plaintiff ought to have moved the Land Registrar to register the restriction without necessarily moving the court. In order to preserve the suit property, I find that the Plaintiff is entitled to the order sought.
61. In light of the foregoing, I find that the Applicant has met the threshold for the grant of a temporary injunction. Consequently, the application dated 6th October 2023 is allowed in the following terms:-
1. An order of temporary injunction be and is hereby issued restraining the Defendants/ Respondents whether by themselves, their agents, surveyors, servants and/or any other person claiming under them from in any way at all engaging in any acts of dispossessing, subdivision, interference of all those parcels of land known as Makueni/Unoa/2871 and Makueni/Unoa/1443 pending the hearing and determination of this suit.
 2. An order of restriction be and is hereby issued compelling the 12th Defendant/Respondent to register a Restriction on land parcel number Makueni/Unoa/2871 and Makueni/Unoa/1443 and the subsequent subdivisions pending the hearing and determination of this suit.
 3. Cost of the application to be borne by the Defendants.

.....

HON. T. MURIGI



JUDGE

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

IN THE PRESENCE OF:

Kithuka for the Applicant

Ms Munyao for the 1st -11th Respondents

Court assistant Stephen

