



Kuduku v Kuduku & 15 others (Environment & Land Case E124 of 2022) [2024] KEELC 7151 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7151 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E124 OF 2022
NA MATHEKA, J
OCTOBER 30, 2024**

BETWEEN

PATRICK ROBERT KUDUKU PLAINTIFF

AND

- SYDNEY ROBERT KUDUKU 1ST DEFENDANT**
- RHODA UCHI KUDUKU AKA RODA UCHI CAKURU 2ND DEFENDANT**
- CHARLOTTE MBONDZE KUDUKU 3RD DEFENDANT**
- DAVID MDICO KUDUKU 4TH DEFENDANT**
- HILDA KADZO KUDUKU 5TH DEFENDANT**
- SIKALILY AHMED MOHAMED 6TH DEFENDANT**
- BIMAL RASIK VARIA 7TH DEFENDANT**
- VARIA MOHINI BIMAL 8TH DEFENDANT**
- DAVID MWANCI KAMAU 9TH DEFENDANT**
- DAMARIS MBITHE NZUVE 10TH DEFENDANT**
- SAMUEL WARUI NJANE 11TH DEFENDANT**
- FLORENCE MWENDE NYAMAI 12TH DEFENDANT**
- MERCY WANJIKU 13TH DEFENDANT**
- JANE WAIRIMU WAWERU 14TH DEFENDANT**
- NCBA BANK KENYA PLC 15TH DEFENDANT**
- COUNTY/DISTRICT LAND REGISTRAR, KILIFI 16TH DEFENDANT**



RULING

1. The application is dated 4th October 2022 and is brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40 Rules 1, 2, 4, and 10, Order 51 Rule I of the Civil Procedure Rules, Sections 68, 69 and 70 of the [Land Registration Act](#), No. 3 of 2012 seeking the following orders;
 1. That this Application be certified as urgent and service of the same be dispensed with at the first instance.
 2. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants by themselves, their agents, assigns and/or employees or anyone claiming in or through him or otherwise howsoever from selling or purporting to sell or offering to sell, disposing off, charging, mortgaging, subdividing, pledging, entering into, remaining in or in any other manner interfering with all that piece and/or parcel of land known as Title Number: Buni/Kisimani/27 and all the subdivisions thereof being Titles Number: Buni/Kisimani/1219, 1220, 1226, 1227, 1228, 1229, 1236, 1237, 1238, 1239, 1240, 1241, 1242, and 1243, together with any other subdivisions thereof pending the hearing of this Application inter partes and further pending the hearing and determination of this suit.
 3. That this Honourable Court be pleased to issue an order of inhibition inhibiting all dealings with regard to Title Number: Buni/Kisimani/27 and all the subdivisions thereof being Titles Number: Buni/Kisimani/1219, 1220, 1226, 1227, 1228, 1229, 1236, 1237, 1238, 1239, 1240, 1241, 1242, and 1243, together with any other subdivisions thereof pending the hearing of this Application inter partes and further pending the hearing and determination of this suit.
 4. That costs of this Application be borne by the Defendants/Respondents and be paid to the Plaintiff/Applicant.
2. It is grounded on the annexed Affidavit of Patrick Robert Kuduku, and on the following grounds that the Plaintiff/Applicant was/is the sole Administrator of the Estate of Robert Charo Kuduku (herein after referred to as the Deceased), who died on the 16th July, 2001, and was issued with the Grant of Letters of Administration Intestate to the Estate of the Deceased, and issued on the 20th June, 2008 by the High Court of Kenya at [Mombasa vide Succession Cause No. 124 of 2007](#). The Deceased was the registered owner of all that piece or parcel of land known as Buni/Kisimani/27 measuring approximately 10.63 Hectares (26.3 Acres). On the 3rd June, 2020, High Court of Kenya at [Mombasa vide Succession Cause No. 124 of 2007](#), issued the Plaintiff/Applicant with the Certificate of Confirmation of Grant, which clearly stated how the property of the Deceased was to be shared out and specifically with regard to the suit property herein. The Plaintiff/Applicant left Kenya for Germany, via Dubai, on the 25th September, 2019 he was in Dubai from 25th September, 2019 till the 16th October, 2019 and then left for Germany where he arrived on the 16th October, 2019, being out of the Country, inter alia, the Plaintiff/Applicant was not able to have the distribution of Estate of the Deceased done.
3. While in Germany, the Plaintiff/Applicant learned that the Deceased's property herein was being subdivided and/or sold out forcing him to quickly travel to Kenya, since the Family Members in Kenya were not giving the requisite information. Having visited the suit land as well as the lands office, Kilifi, the Plaintiff/Applicant confirmed the 1st to the 15th Defendants have jointly and severally been involved in, inter alia, fraudulent, illegal, unlawful and wrongful execution and registration of Form I-RA 42 which was fraudulently executed by the 1st and 2nd Defendants/Respondents and also bore the Plaintiff/Applicant's passport sized photo and a forged signature purporting to be the



Plaintiff/Applicant's. Further, Form LIRA 39, though indicating, at page 1, was to be executed by the Plaintiff/Applicant, had been executed by the 1st and 2nd Defendants/Respondents, yet they are not the Administrators of the Estate of the Deceased. Further, the suit property had been subdivided severally and Transfers registered with regard to the purported subdivisions in favour of the 6th up to 14th Defendants/Respondents and which transfers bore forged signatures of some of the Beneficiaires, specifically Constance Mishi Kuduku, Kashi Ali Hamisi, Irine Robert Kuduku's, and probably Nickson Richard Kuduku, Edith Bahati Kuduku and Irene Mishi Kuduku, who are his Nieces, being Daughters of his Deceased Brothers, he believes they were not involved nor did they execute the purported transfers herein. All the transactions herein are not only fraudulent, illegally, unlawful, wrongful but further against and in contempt of the Orders of the Family Court in Succession Cause No. 124 of 2007, and thus void ab initio. The subdivisions and transfers done by the 1st to the 13th Defendants/Respondents were fraudulent, illegal, unlawful, wrongful and void ab initio in that the said Defendants were all in collusion in the fraudulent, illegal, unlawful, wrongful and void transactions herein during which they all had one common Advocates and before whom they purportedly executed the Transfers wherein they purported that some of the Beneficiaries of the Estate of the Deceased appeared before the common Advocates together with the alleged purchasers/transferees, yet the latter knew that not all the transferors executed the Transfer.

4. That the 14th Defendant/Respondent, being a financial institution, was also part of the fraudulent, illegal, unlawful, wrongful and void actions herein, purporting to advance Kshs. 5,000,000.00 on a property which had been sold at Kshs. 450,000.00 and duly certified by the government valuer and being worth Kshs. 450,000.00, yet the alleged charge of Kshs. 5,000,000.00 was registered on the same date with the Transfer to the 5th Defendant of Kshs. 450,000.00.
5. Having fraudulently, illegally, unlawfully and wrongfully purchased portions of the Deceased's suit property, the 6th to the 14th Defendants have began fencing off, constructing, building and/or interfering with the said portions which actions are and continue to deteriorate the suit land. The process of dealing with the Deceased's property herein were done in a fraudulent, illegal, unconstitutional, unlawful and wrongful manner, the Defendants/Respondents might proceed and sell, dispose off, charge, develop the suit properties in which event the Estate of the Deceased, the Plaintiff/Applicant and the disinherited Beneficiaries of the Deceased's Estate irreparable loss and damage which cannot be compensated with an award of damages.
6. The 6th defendant swore a replying affidavit on 4th February 2024 and challenged the jurisdiction of this court as it could not entertain a dispute on the manner of distribution of an estate of a deceased person and that the plaintiff could not obtain an injunction against beneficiaries to the estate of the late Robert Charo Kuduku. Furthermore, he averred that in the afore mentioned grant, the deceased had three parcels of lands and among them was Buni/Kisimani/27 which was subdivided into several parcels which the court hereafter refers to as the suit properties.
7. That stated that although the plaintiff was the sole administrator, he was merely a trustee of title on behalf of the beneficiaries and had an obligation under section 83 of the Law of Succession Act to transfer the property to the beneficiaries within six months of the confirmed grant. He stated that even though the plaintiff claimed that the transfer was done without his consent, there is no evidence to prove that the beneficiaries transferred parcels that the said grant did not allocate. Further that even though the plaintiff was out of the country, he still had the capability to distribute the original parcel no. 27. He was quick to dismiss the statement by the plaintiff that the plaintiff's mother; Irine Robert Kuduku did not execute the transfer and stated that her signature was not mandatory. He also alluded to the fact that the others he had mentioned whose signatures were forged did not make statements or produce any evidence.



8. The 6th defendant stated that he entered into a sale agreement dated 26th November 2020 before the original parcel 27 had been subdivided and that later he conducted a proper search and executed the transfer documents upon paying the balance of the purchase price and was issued with a title deed on 3rd February 2021 for L.R Buni/Kisimani/1220. He emphasized that he bought the property to build a home and dismissed the instant application because there is no irreparable injury that will be occasioned to the plaintiff.
9. The 15th defendant in its replying affidavit sworn by Stephen Atenya, its principal legal counsel stated that the bank has a charge on subdivision Buni/Kisimani/1220 and stated that the 6th defendant has exhaustively explained how he acquired title over the above-mentioned parcel. He stated that the bank advanced Kshs. 5,000,000 since the construction of a house was also put into consideration and he narrated all the precautions it used before advancing the loan and registering the charge. Mr. Atenya stated that the bank had no reason to doubt the 6th defendant's title and even if there was doubt, the bank is an innocent proprietor for value without any notice of defect. He also mentioned that the 6th defendant is its employee.
10. This court has considered the application and the submissions therein. The Supreme Court in *In the Matter of Interim Independent Electoral Commission (2011) eKLR, Constitutional Application No. 2 of 2011* held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows;

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.
11. In *Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR, Application No. 2 of 2011*, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (*supra*) at paragraph 68 of its ruling, the Supreme Court held as follows;

“A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”
12. Although the 6th defendant contested jurisdiction of this court, the facts are straight forward in the pleadings. The plaintiff disputes the validity of the transmissions under form LRA 39 and 42, the subsequent subdivision of Buni/ Kisimani/27 into Buni/Kisimani/1219, 1220, 126, 1227, 1228, 1229, 1236, 1237, 1238, 1239, 1240, 1241, 1242 and 1243 and the transfers to the various defendants listed. Counsel for the 6th and 15th defendant argues that the predominant issue is whether the beneficiaries lawfully transferred the suit properties which is true but this is a preserve of the ELC Court only as it touches on validity of transfers of land property. The jurisdiction of the probate court ends at determining who gets a share and the division of all property. However, it does not deal with determining validity of transfers as this court was specially created by article 162 (2) (b) Constitution to deal with occupation and title to land. The validity of titles of resultant subdivisions have also been challenged and consequently the plaintiff has asked this court to cancel the said titles to the suit properties. I therefore find that this court has jurisdiction.



13. Temporary injunctions have been provided under Order 40 of the Civil Procedure Rules and also in *Nguruman Limited vs Jan Bonde Nielsen, Herman Philipus Steyn Also Known as Hermannus Phillipus Steyn & Hedda Steyn* (2014) KECA 606 (KLR) where the court of appeal stated:

“In *Giella* case (supra) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.”

14. In the above case the Court of Appeal cited with approval *Kenya Commercial Finance Co. Ltd vs Afraha Education Society* (2001) Vol. 1 EA 86 where they stated;

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, 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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

15. Prima facie case is described in *Mrao Ltd. vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 where the court stated;

“In civil cases, a prima facie case is a case in 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 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.”

16. The plaintiff has produced a certificate of confirmation of grant PRK 4 which has listed ten beneficiaries to the original parcel 27. He also produced PRK 10, a certified copy of the green card for original parcel 27 which shows that title was transferred to eleven beneficiaries. The plaintiff has discharged his burden of proof that he was not in the country at the time of signing form LRA 42 and therefore the burden of proving that the signature on the said form fell on the defendants and not the plaintiff. I find that the plaintiff has established a prima facie case.



17. The balance of convenience which was discussed in Pius Kipchirchir Kogo case (Supra) where the court held;

“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.”

The plaintiff has no consequent claim on the suit properties as he was a trustee of the original parcel 27. His concern is that some of the beneficiaries did not get their share of the original parcel 27 and thus the inconvenience falls on the defendants as there is substantial development and even a charge by the bank on one of the suit properties. Consequently, in the interests of justice that I order an inhibition restricting any further dealing so as to save the above-mentioned beneficiaries who may not have gotten their share as alleged. I find that the application is merited and I make the following orders;

1. That an order is issued of inhibition inhibiting all dealings with regard to Title Number: Buni/Kisimani/27 and all the subdivisions thereof being Titles Number: Buni/Kisimani/1219, 1220, 1226, 1227, 1228, 1229, 1236, 1237, 1238, 1239, 1240, 1241, 1242, and 1243, together with any other subdivisions thereof and status quo to be maintained pending the hearing and determination of this suit.
2. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF OCTOBER 2024.

N.A. MATHEKA

JUDGE

