



**Tuli & another v Mwaruwa & 4 others (Environment & Land Case E37 of 2024) [2024] KEELC 7158 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7158 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E37 OF 2024  
FM NJOROGE, J  
OCTOBER 30, 2024**

**BETWEEN**

**SAMSON NZAI TULI ..... 1<sup>ST</sup> PLAINTIFF**

**MUDZOMBA BARISA MUDZOMBA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MWARUWA CHONGWA MWARUWA ..... 1<sup>ST</sup> DEFENDANT**

**THE DIRECTOR OF LAND ADUDICATION & SETTLEMENT .... 2<sup>ND</sup> DEFENDANT**

**DEPUTY COUONTY COMMISSIONER, RABAI ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, KILIFI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. For determination is the Applicants' Notice of Motion dated 17<sup>th</sup> April 2024 seeking the following orders:
  1. Spent
  2. That pending inter partes hearing of this Application, this honourable court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant/ Respondent either by himself and or his proxies, servants, employees, agents or any other person acting for or claiming under him from entering into, occupying, trespassing, cultivating, tilling, planting, evicting the plaintiff and or in any manner whatsoever dealing or interfering with parcel of land known as Plot No. Miyuni/Mleji/480 measuring around 75 Acres or thereabouts situate at Kawala Village;



3. That pending the hearing and determination of the suit herein, this honourable court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant/ Respondent either by himself and or his proxies, servants, employees, agents or any other person acting for or claiming under him from entering into, occupying, trespassing, cultivating, tilling, planting, evicting the plaintiff and or in any manner whatsoever dealing or interfering with parcel of land known as Plot No. Miyuni/Mleji/480 measuring around 75 Acres or thereabouts situate at Kawala Village.
4. That costs of the application be in the cause.
2. The application is founded on the grounds set out on its face and on the Supporting Affidavit of Samson Nzai Tuli the 1<sup>st</sup> Plaintiff with the authority of the 2<sup>nd</sup> Plaintiff who deponed that he was born and raised in the suit property where he resides with his family and that they have developed the land by way of constructing and cultivating on it. They have buried their deceased relatives thereon. He stated that the suit property has been a subject of court disputes which disputes have been resolved in favour of their predecessors who had a right of staying in the suit property.
3. It was further averred that in 1995, there was a dispute over the suit parcel of land between one Mwangala Kulumba and one Mbaji Bilali vide Reference No. Land 16/7/Vol XIII/434 dated 16/1/1995 where the land was awarded to Mwangala Kilumba.
4. In addition, in the year 2002, the 1<sup>st</sup> Defendant/Respondent disputed the ownership of the suit property in the District Land Dispute Tribunal which ordered that the suit property be divided into 2 equal shares between the 1<sup>st</sup> Respondent and one Mr. Tumbo Mudzomba who was the 1<sup>st</sup> plaintiff/applicant's grandfather; that being aggrieved with the decision, the 1<sup>st</sup> Respondent appealed to the Provincial Land Appeal Committee which set aside the tribunal decision. The applicant complains that the respondent in that Appeals Committee case was not accorded an opportunity to be heard.
5. Again, in 2015, the applicant referred the matter to the Land Adjudication Committee where it was decided that the suit property be divided into two portions and he be issued with a new property number. Mr. Samson Tuli further averred the suit property was surveyed on March 2015 pending the issuance of Title.
6. However, in November 2016 at a hearing conducted by the Kilifi County Arbitration Board over the adjudication of the said Property, the Board chairperson made findings that the land belongs to the applicant by inheritance but proceeded to make a contradictory decision awarding the property to the 1<sup>st</sup> Defendant.
7. Further, in February 2019, another hearing occurred over the adjudication of Miyuni/Mleki 'A' and objections therein in respect to subdivisions of plot no. 480 and new parcel numbers that had been issued and it was ordered that the new parcel numbers shall be erased from the map and the 1<sup>st</sup> Defendant shall have parcel no. 480 which decision the applicant appealed to the Minister of Lands.
8. In 2021, the 1<sup>st</sup> Defendant made an application for vacant possession to the magistrate's court in Kaloleni which was declined and the court adopted the decision by District Land Dispute Tribunal. On 22<sup>nd</sup> February 2022 the applicant was summoned to a hearing of his appeal to the Minister at Mwawesa and after the hearing he was informed he would be served with a date for the decision which he has never been served to date.
9. Despite the history of land ownership, the previous decisions and the court ruling in 2021 which the 1<sup>st</sup> Defendant did not appeal against, the 1<sup>st</sup> defendant fraudulently obtained title to the entire parcel of



land on 15<sup>th</sup> March 2023. Further, the 1<sup>st</sup> Defendant through deceit made the applicant and family sign a document they did not understand which the later on learnt that it was an agreement that meant that they were discharging their proprietary interests in the suit property and that they would vacate within 90 days. It is on the strength of that document that the 1<sup>st</sup> defendant now seeks to evict the plaintiffs.

10. The applicants allege collusion between the 1<sup>st</sup> defendant and the rest of the defendants.
11. The 1<sup>st</sup> Defendant filed a replying affidavit dated 13/5/24 stating that he is the duly registered owner of the suit property which is his ancestral land; that sometime in the late 1970's the Plaintiffs' father invaded the suit land and started cutting down trees and tilling the same without his family's consent which matter was reported to the area Chief who summoned the Plaintiff's father and cautioned him but which warnings he ignored.
12. He stated he filed a complaint before the Kaloleni Land Dispute Tribunal in 2002 where the tribunal made a decision directing that the land be shared between himself and the plaintiff's father; that dissatisfied with the decision the 1<sup>st</sup> respondent appealed to the Provincial Land Appeals Committee-Coast in Appeal Case No. 202 of 2002 where he was awarded the entire land on 29<sup>th</sup> October 2008. The decision of the Committee was adopted as an order of the court in Kaloleni Senior Resident Magistrate's Court Case No 15 Of 2007 On 28<sup>th</sup> January 2010. He then obtained a Decree and Warrants of Eviction against the Plaintiff's father in Kaloleni Senior Resident Magistrate's Court Case No 15 Of 2007 and successfully evicted the plaintiff's father. The 1<sup>st</sup> respondent avers that the plaintiffs are now claiming the land in the name of their father. It was further averred that on 17<sup>th</sup> May 2010, the plaintiffs signed an undertaking to quit and vacate from the suit land in compliance with the court ruling that awarded the 1<sup>st</sup> defendant the land; that in 2014 the suit land was demarcated during adjudication where the land was to be registered in his name but the 1<sup>st</sup> Plaintiff filed an objection against decision by the Committee, which Committee directed that the land be shared in two portions. Dissatisfied with the decision, the 1<sup>st</sup> Plaintiff filed an objection to the Arbitration Committee which committee directed that the land be given to the 1<sup>st</sup> Defendant; this decision was appealed by the 1<sup>st</sup> plaintiff to the Minister where the Deputy County Commissioner Rabai Sub-County dismissed the Appeal and ordered the suit land be registered in the 1<sup>st</sup> Defendant's name; on 15<sup>th</sup> March 2013, the 1<sup>st</sup> defendant was issued with a title deed in his name.
13. It was also stated that the Plaintiffs on 13<sup>th</sup> July 2023 filed ELC Pet No. E024 of 2023 seeking to have the title cancelled and revoked which petition was dismissed with costs to the 1<sup>st</sup> Defendant which costs the plaintiffs have not paid thus the instant application is an abuse of the court process.

### **Disposition.**

14. The application was disposed of by way of written submissions. I have considered the submissions by the parties as well as the authorities relied upon. The issue for determination is whether the Plaintiffs have met the threshold for granting of the interlocutory orders sought. The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

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.

15. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [Supra] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction, and they are as follows: -

Firstly, 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."

16. The Court of Appeal in the case of *Nguruman Limited –v- Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... 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 are 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."

17. The Court of Appeal in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, defined a prima facie case as follows;

A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

18. From the above definition, it is clear that a prima facie case means an arguable case in which the on the basis of the available pleadings and affidavit evidence, show an infringement of a right and which may require an answer from the opposing side. Have the Plaintiffs therefore demonstrated this?

19. The plaintiffs' case is that they were born and raised on the suit property where they have made developments and even buried their relatives. It is not disputed from both the Plaintiffs' case and the 1<sup>st</sup> Defendant's case that the suit property has been a subject of disputes before tribunals and the courts. It is alleged by the plaintiffs that they were coerced to sign a document they did not understand which ostensibly implied that they had consented to vacate the suit land. Conscious that evidence has to be tested at the hearing, I have perused the consent dated 24.03.23 which is in Kiswahili language and which is witnessed by the area Assistant Chief. Further, I have also considered the fact that the Plaintiffs instituted ELC Petition No. E24 of 2023 which petition was dismissed. I have also considered the fact that orders were issued in Kaloleni Senior Resident Magistrate's Court Case No 15 Of 2007 ordering that the suit land be handed over to the 1<sup>st</sup> defendant. That suit was between the 1<sup>st</sup> defendant and the



plaintiffs' grandfather and the plaintiffs never featured therein. The plaintiffs do not deny that Tumbo Mdzomba is their grandfather. They expressly admit it through the 1<sup>st</sup> plaintiff's affidavit in support of the motion.

20. However, it is the curious narrative of possession of the suit land since times of yore, and the assertion that there is a tribunal decision and a court decision which supposedly grant the applicants half of the suit land which they aver have never been challenged, that have gripped the attention of this court. Also, the claim by the applicants herein has not been brought in the name of or on behalf of their predecessor's estate. Rather they aver that they were born on the land, the same having been acquired by their great grandfathers, and that they had been in occupation thereof since time immemorial. In this court's view the litany of purported decisions both for and against parties in this suit as the case may be, warrant a deeper examination of the matter.
21. In light of the available information, I am of the view that the Plaintiffs have set out a prima facie case for granting of the interlocutory orders sought. I also find that in the circumstances of this case, there is risk that the applicants may suffer irreparable loss and damage if the orders sought are not granted, or if at least the status quo of the land is not preserved perchance it out that the final determination in the present suit will be in their favour. In the circumstances this court must be cautious in determining the application and consider the balance of convenience. It is this court's view that the balance of convenience lies in preserving the present status of the suit land and title pending the hearing and determination of the suit.
22. Consequently, in disposing of the application dated 17/4/2024, I hereby order that all the parties herein shall maintain or preserve the present status quo of the physical land on the ground and as reflected in the land titles register held by the 4<sup>th</sup> and 5<sup>th</sup> respondents pending the hearing and determination of the present suit.
23. The parties shall file their trial bundles, duly indexed and paginated, the plaintiff within 30 days from the date of this ruling and the defendants within 30 days of the expiry of the period granted to the plaintiff. The suit shall be mentioned on 16/1/2025 for issuance of a hearing date.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

