



Muiruri & 2 others (Suing in their capacity as the Chairman, Vice Secretary and Treasurer of Neema Sisters Support Group) & another v Longechele & 2 others (Land Case E005 of 2024) [2024] KEELC 6848 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
LAND CASE E005 OF 2024
MC OUNDO, J
OCTOBER 17, 2024**

BETWEEN

**ESTHER WANJIKU MUIRURI, JOYCE WAMBUI KABIRURI, MARY WANJA KAMONJO (SUING IN THEIR CAPACITY AS THE CHAIRMAN, VICE SECRETARY AND TREASURER OF NEEMA SISTERS SUPPORT GROUP) 1ST PLAINTIFF
EVANS MWANIKI OGETO 2ND PLAINTIFF**

AND

**JONES COSMAS LONGECHELE 1ST DEFENDANT
FRENDRINK GITONGA MBUGORI 2ND DEFENDANT
MWIRUKAMA COMPANY LIMITED 3RD DEFENDANT**

RULING

1. Coming up for determination is a Notice of Motion Application dated 12th March, 2024 brought under the provisions of Order 40 Rule 1 and 2, Order 51 rule 15 of the *Civil Procedure Rules*, Sections 1A and 3A of the *Civil Procedure Act*, Article 162 (2) (b) and 165 (6) of the *Constitution* and all other enabling provisions of the law wherein the Plaintiffs/Applicants sought for a temporary injunction order restraining the Defendants by themselves, their agents, servants, employees or anyone authorized by them and acting on their behalf from trespassing on, transferring, intermeddling, advertising for the sale, disposing of, letting, leasing, sub-leasing, charging, mortgaging, subdividing, partitioning, exchanging, building, evicting or otherwise in any other manner interfering with or dealing with all that parcel of land known as Naivasha Ol Jorai Phase II/495 now sub-divided into Naivasha Ol Jorai Phase II/15836, 15837, 15838. They also sought that the costs of the Application be provided for.



2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Joyce Wambui Kabiruri, the 1st Plaintiff's secretary who deponed that the Plaintiffs were the bona fide purchasers for value of 1½ acres of all that parcel of land known as Naivasha Ol Jorai Phase II/495 now sub-divided into Naivasha Ol Jorai Phase II/15836, 15837 and 15838 (suit properties). That together with Esther Wanjuku Muiruri and Mary Wanja Kamonjo, they had purchased a share of 1 acre of Naivasha/ Ol Jorai Phase II/495 from the late Elimah Jemsop Komen on behalf of the 1st Plaintiff, on 19th December, 2014 wherein they had taken immediate possession of the said portion. That the 2nd Plaintiff on the other hand had purchased his portion of ¼ of an acre on 16th August, 2019 wherein he had also taken immediate possession of the same. That their properties were bordering each other.
3. That at the time of purchasing their respective shares in Naivasha/Ol Jorai Phase II/495, the same had been registered in the name of Elimah Jemsop Komen who had died before the same could be sub-divided. That subsequently, to finalize the process of sub-division, they had approached the family together wherein, Elimah's husband, one David Longeshele had taken out the letters of Administration in Nakuru CM Succession Cause No 131 of 2018. That unfortunately, the said David had also died on 10th November, 2021 before procuring a Certificate of Conformation of Grant.
4. The 1st Defendant/Respondent, a son to the deceased Ekimah Jemsop Komen and David Longeshele then obtained a title deed to Naivasha/ Ol Jorai Phase II/495 wherein the 1st Plaintiff moved the court in Nakuru vide CM Succession Cause No 131 of 2018 wherein the title deed had been nullified. That unfortunately, it was after the said nullification order had been obtained that they had become aware that the 1st Defendant/Respondent had already caused the initial parcel of land to be sub-divided into Naivasha Ol Jorai Phase II/15836, 15837 and 15838 wherein he had sold the same to the 2nd and 3rd Defendants/Respondents without the Plaintiffs' involvement and consent which was fraudulent and illegal.
5. That they had followed the proper procedure in purchasing the suit properties hence they prayed that the court intervenes to protect their rights because they were apprehensive that the Defendants/ Respondents may move to the suit properties to evict them, trespass and/or interfere with their quiet and peaceful possessions. That accordingly, there was a need to protect the substratum of the suit and the rights of the Plaintiffs pending the hearing and determination the instant suit.
6. In response and in opposition to the Applicants' Application, the 2nd Respondent through their Replying Affidavit dated 29th April, 2024 sworn by Fredrick Gitonga Mbogori, the 2nd Defendant/ Respondent herein deponed that the instant Application was bad in law and suitable for striking out ex-debito justitiae.
7. That vide a Sale Agreement of 7th February, 2022, he had bought 1 acre piece of land from the 1st Defendant/Respondent herein at a consideration of Kshs 1,000,000/=, to be excised from land parcel No Naivasha /Ol Jorai Phase II/495, the suit property which had been vacant and wherein he had embarked on growing hay grass.
8. That before the purchase, the 1st Defendant had availed to him a copy of his Identity Card, allotment letter for the land parcel No Naivasha/Ol Jorai Phase II/495 which was in the name of his mother Elimah Jemsop Komen, a confirmed grant of letters of administration dated 15th March, 2022 vide Nakuru CM Succession Cause No 131 of 2018 which had bequeathed and devolved the entire parcel that is Naivasha/Ol Jorai Phase II/495 to him.



9. That he had paid in instalments for the suit property in full wherein on 22nd June, 2022, the 1st Defendant had availed to him the original title deed for the suit property wherein a consent of the Land Control Board Gilgil had been duly obtained on 16th March, 2023 and the parcel of land measuring 1 acre was duly registered through transmission in his favour on 22nd March, 2023. That he had subsequently engaged a surveyor who sub-divided the suit property into three (3) portions being land parcel numbers Naivasha/Ol Jorai Phase II/15836, 15837 and 15838. That he had thus complied with the due process in purchasing the 1 acre out of land hence the Plaintiffs' allegations were misplaced.
10. He reiterated that the suit land had been vacant and in any event, the 2nd Defendant having been in occupation of the suit land wherein he held title to the same, the Plaintiffs could not seek injunctive orders in respect to the same as they were devoid of ownership documentation. That further an injunctive order whose effect was to evict the 2nd Defendant from the suit land could not be sought.
11. That the orders dated 26th July, 2023 in Nakuru CM Succession Cause No 131 of 2018 cancelling the title in Naivasha/Ol Jorai Phase II/495 had been obtained due to the material non-disclosure of facts by the Plaintiffs since by the time the said orders were being obtained, the title No Naivasha/Ol Jorai Phase II/495 was not in existence the same having been subdivided and new titles issued being title numbers Naivasha/Ol Jorai Phase II/15836, 15837 and 15838. That the allegation of fraud against him by the Plaintiffs were unfounded and the application ought to be dismissed.
12. In a rejoinder, the Plaintiffs vide their further Affidavit deponed that the 2nd Defendant/Respondent's Replying Affidavit was unmerited and deliberately meant to mislead the court. That she was never been made aware of the purported agreement or dealing between the 1st and 2nd Respondent despite the fact that they had been on the ground and in possession of the suit property being Naivasha/Ol Jorai Phase II/495. That they had only become aware of the existence of the 2nd and 3rd Respondents upon embarking on the process of nullifying the title deed that had been issued to the 1st Respondent as per the orders that had been issued by the court in Nakuru CM Succession No 131 of 2018. That had the 2nd Respondent done his due diligence, he would have known that the Plaintiff had been in occupation of the suit property since it was not enough only to follow the rightful and lawful procedure in the purchase of land.
13. That from the documents that the Plaintiffs had adduced in court, they had established that they had a valid claim over the suit property and were only seeking a Mereva injunction to ensure that the suit property was preserved so that the suit filed herein was not rendered moot.
14. That from the foregoing, the instant Application was made in good faith and on merit thus the same should be allowed as prayed since the 2nd Respondent's Replying Affidavit did not, on a balance of proportion warrant the court denying the Applicants the orders sought.
15. The 1st and 3rd Defendants/Respondents did not participate in the instant Application.
16. On 3rd June, 2024 direction had been issued that the Application dated 12th March, 2024 be canvassed by way of written submissions wherein the Plaintiffs/Applicants and the 2nd Defendant/Respondent complied and filed their submissions which I shall proceed to summarize as herein under.
17. The Applicants' Submissions dated 28th June, 2024 in support of their Application dated 12th March 2024 summarized the factual background of the matter before framing one issue for determination to wit; whether they had met the criteria for the grant of an order of temporary injunction pending the hearing and determination of the main suit.



18. They placed reliance on the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules and the decided case of Mwalungu Mwambui Nyiyo & 201 others v Total Oil Products (East Africa) Limited & another [2021] eKLR on the conditions for the grant of temporary injunction.
19. On whether they had established a *prima facie* case, they placed reliance on the decided case of Mrao v First American Bank of Kenya Limited & 2 others (2003) KLR 125 to submit that the suit herein was based on the issues of ownership, disclosure of material facts and fraud all in relation to the suit property. They reiterated the contents of their Supporting Affidavit stating that what they now sought was to have the sub-divided titles cancelled so that the mother title being Naivasha/Ol Jorai Phase II/495 could be subdivided to include the properties and the boundaries they had purchased so that the same could be transferred in their favour. That they had discharged the burden of having a *prima facie* case which raised triable issues necessitating the preservation of the suit property pending the hearing and determination of the suit.
20. That they would suffer irreparable prejudice should the orders sought herein not be granted since the subject matter of the suit was likely to be wasted. They placed reliance in the Halsbury's Laws of England, 3rd Edition Volume 21, Paragraph 739 page 352 and the decided case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR to submit that it was not in contention that they had purchased the suit property before the 2nd and 3rd Defendants/Respondents. That accordingly, they had a preceding interest in the same, which interest they had long sought to register wherein their efforts had remained elusive to them. Their contention was that the turn of events was occasioned by the acts of commission and/or omission by the 1st Defendant/Respondent.
21. They reiterated that the property that they had bought from the deceased persons being Elimah Jemsop Komen and David Longeshele were 1 acre and ¼ acre respectively, to be excised from Naivasha/Ol Jorai Phase II/495. That they had been shown the exact portions of the suit property that they had bought wherein the portion had been demarcated on the ground to indicate their respective boundaries. That the late Elimah Jemsop Komen had sought to have the suit property subdivided so that they could get their share of the suit property wherein upon his demise, the deceased David Longeshele had sought to finish the process and in the process had included the 2nd Plaintiff herein.
22. That they now had a situation in which the 1st Defendant/Respondent had taken over and finished the process wherein he had obtained the certificate of Confirmation of Grant, transferred the suit property to his name, subdivided the same as he deemed fit and proceeded to fraudulently sell the subdivided portions to third parties being the 2nd and 3rd Defendant/Respondents herein without informing them.
23. That subsequently, the 1st Defendant/Respondent had denied, refused, ignored and/or neglected to enter appearance despite being served with the summons and the application herein. That should the 2nd and 3rd Defendants/Respondents not be restrained, the already dire situation would be worsened thus causing them (Applicants) such severe prejudice which damages could not compensate.
24. On the issue on preservation of the subject matter, they placed reliance on a combination of decisions in the case of Chebie Kipkoech v Barnabas Tuitoek Bargoria & another [2019] eKLR and Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others [2016] eKLR to reiterate that whereas the 1st Defendant/Respondent had denied, ignored, refused and/or neglected to enter appearance, the suit property had already been sub-divided and a specific portion being Naivasha/Ol Jorai Phase II/15837 sold and transferred in favour of the 2nd Defendant/Respondent who had obtained a title deed. That accordingly, the 2nd Defendant/Respondent could dispose of the portion forming part of the suit property before the main suit could be determined thereby occasioning them great injustice as they had an interest in the suit property.



25. That subsequently, it was evident that the balance of convenience tilted in their favour since they stood to suffer irreparable harm should the adverse parties herein be allowed to act and do as they wished with regards to the suit property, which would then render the suit nugatory causing them (Applicants) to lose their interest in the suit property entirely before the suit could even be determined. They thus submitted that they had exhaustively discharged the three requirements for the grant of the orders of injunction.
26. Lastly, they placed reliance on the provisions of Order 40 rule 2 and the decided case of Mwalungu Mwambui Nyiyo (*supra*) to submit that the duty of the court was to preserve the subject matter of the suit and thus urged the court to allow their Application dated 12th March, 2024 for the ends of justice.
27. The 2nd Respondents' Submissions dated 18th June, 2024, on the other hand summarized the factual background of the matter deponed in their affidavit as well as in the Applicant's Affidavit before framing his issues for determination as was laid down in the decided case of Giella v Cassman Brown (1973) EA 358 to wit:
- i. Whether the Plaintiffs/Applicants have a *prima facie* case
 - ii. Whether the Plaintiffs/Applicants stood to suffer irreparable loss/damage
 - iii. Whether the balance of convenience is in favour of the 2nd Defendant
28. On the first issue for determination as to whether the Applicants had made out a *prima facie* case, he placed reliance on the definition of *prima facie* case from the decided case of Mrao v First American Bank of Kenya Limited & 2 others (2003) KLR 125 and Nguruman Limited v Jan Bonde Nielsen and 2 others (2014) eKLR to submit that the court needed to determine whether the Plaintiffs/Applicants had a clear and unmistakable right over the suit property and if so whether such a right had been infringed. Further reliance was placed on the provisions of Section 43(2) of the Land Registration Act and the decided case of Jomo Kenyatta University of Agriculture and Technology v Kwanza Estates Limited [2022] eKLR to submit that there was need to register instruments effecting any disposition of a private land and that non-registration of such instruments made such instruments a mere contract between parties.
29. That it was thus imperative for the court to determine whether there existed a legal and valid contract between the Plaintiffs herein and the late Elimah Jemsop Komen. That the only documents that had been annexed by the Plaintiffs in an attempt to prove existence of a contract, were sale agreements which agreements in a land transaction simply indicated existence of two elements of a valid contract that is, an offer and acceptance.
30. That there had been no proof that the consideration had been met as no proof of payment had been annexed such as bank statements, cheque slips or even acknowledgement notes. To this effect, there existed no valid contract between the Plaintiffs herein and the late Elimah Jemsop Komen. He thus submitted that the Plaintiffs had no *prima facie* case thus the instant application should be dismissed.
31. On the second issue for determination as to whether the Plaintiffs/Applicants stood to suffer irreparable loss/damage, he submitted that he had annexed a copy of a Certificate of Title which was a *prima facie* proof of proprietorship pursuant to the provisions of Section 26 of the Land Registration Act. He placed reliance in the decided case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR to submit that the Plaintiffs could not suffer loss in respect of a parcel of land which did not belong to them and which they had no legal claim over.



32. On the third issue for determination as to whether the balance of convenience was in his favour, the 2nd Defendant submitted that there will be a much larger risk of injustice in allowing the instant Application. He placed reliance on the decided case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR and *Pius Kipchirchir Kogo (supra)* to submit that since he was the legal bonafide owner of the parcel of land known as Naivasha/Ol Jorai Phase II/15837, his right to property, would be the higher risk of injustice as he had followed all the required procedures in acquiring the title in Naivasha/Ol Jorai Phase II/15837 as evidenced in his annexures. That allowing the instant application would deny him as the legal and bonafide owner of all that parcel of land known as Naivasha/Ol Jorai Phase II/15837 his right to property thus leading to a greater risk of injustice. That accordingly, the balance of convenience was in his favour. That the Plaintiffs' application be dismissed with costs.

Determination.

33. I have considered the Applicants' application, its opposition, the submissions by Applicants and the 2nd Respondent, the law as well as the authorities therein cited.
34. In their application dated 12th March, 2024, the Applicants herein sought for injunctive orders against the Respondents restraining them from interfering or dealing with all that parcel of land known as Naivasha Ol Jorai Phase II/495 now sub-divided into Naivasha/Ol Jorai Phase II/15836, 15837, 15838 (suit property).
35. In response to the said application, the 2nd Respondent in his Replying Affidavit dated 29th April, 2024 deponed that vide a Sale Agreement dated 7th February, 2022, he had bought 1-acre piece of land approximately 0.434 hectares from the 1st Defendant/Respondent herein at a consideration of Kshs 1,000,000/= out of land parcel No Naivasha /Ol Jorai Phase II/495 measuring 2.02 hectares which is approximately 5 acres (suit property) and which parcel had been vacant without human settlement thus he had embarked on growing hay grass on his 1-acre portion of the suit property. That thereafter, upon following due process, he had sub-divided, with approval, the suit land wherein he had subsequently obtained a title deed to his 1-acre parcel of land known as Naivasha/Ol Jorai Phase II/15837.
36. The 1st and 3rd Defendants/Respondents did not participate in the instant Application.
37. The court has thus been moved under certificate of urgency, by the Applicants, to issue temporary a injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought and not to determine the merit of the case.
38. Accordingly, the issue that arises for determination herein is whether an interim order of injunction should issue.
39. The celebrated case of *Giella v Cassman Brown* (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows: -
- i. Is there a serious issue to be tried (*prima facie* case)?
 - ii. Will the Applicant suffer irreparable harm if the injunction is not granted?
 - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").



40. On the first issue as to whether the Applicants in the instant matter have made out a *prima facie* case with a probability of success, I am guided by the case of *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125, where a *prima facie* case was described 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.”

41. The Applicants herein have alleged that they were the bona fide purchasers for value of 1¹/₂ acres of all that parcel of land known as Naivasha/Ol Jorai Phase II/495 now sub-divided into Naivasha Ol Jorai Phase II/15836, 15837 and 15838 (suit properties). That the 1st Plaintiff had purchased a 1-acre parcel of land to be excised from Naivasha Ol Jorai Phase II/495 from the late Elimah Jemsop Komen on 19th December, 2014 wherein they had taken immediate possession of the said portion. That the 2nd Plaintiff on the other hand had purchased his portion of ¹/₄ of an acre on 16th August, 2019 wherein he had also taken immediate possession of the same and that their properties were bordering each other. That unfortunately the said Elimah and her husband one David Longeshele had passed on before a subdivision on the suit property had been carried out to distinguish their respective portions of land.
42. That thereafter, their son, the 1st Respondent herein had obtained the Letters of Administration and procured a title deed to the whole parcel of land being Naivasha/ Ol Jorai Phase II/495. That the Plaintiffs had subsequently and successfully applied for its nullification however, the said cancellation could not be effected on the Register since the order of the court had been made after subdivision of the initial parcel of land into Naivasha Ol Jorai Phase II/15836, 15837 and 15838 wherein the 1st Respondent had already sold the resultant parcels to the 2nd and 3rd Respondents.
43. The 2nd Respondent’s argument on the other hand was that upon receiving a spousal consent from the 1st Respondent’s spouse, he had purchased from the 1st Respondent, 1-acre portion of land which was excised from land parcel No Naivasha/Ol Jorai Phase II/495. That he had engaged a surveyor who had sub-divided the suit land into three (3) portions namely land parcel numbers Naivasha/Ol Jorai Phase II/15836, 15837 and 15838. That subsequently, through transmission, he had been registered as proprietor of land parcel No Naivasha/Ol Jorai Phase II/ 15837 on 22nd March, 2023. That hence the Applicants allegations that they had an adverse claim on the suit property was misplaced. That further, since the Applicants’ claim was for 1¹/₂ acres out of the original land and not the entire parcel of land, they had no stake on his 1-acre piece of land.
44. I have considered the bundles of documents herein annexed and it is not in dispute that a portion of land measuring 0.434 hectares being land parcel No Naivasha/Ol Jorai Phase II/15837 was registered in the name of the 2nd Respondent on 22nd March 2023 thereby constituting the 2nd Respondent as its absolute proprietor as set out under the provisions of Section 25 of the *Land Registration Act*. Further, the provisions of Section 26 (1) of the Act are clear to the effect that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate.
45. The 2nd Respondent having demonstrated that he was currently the registered proprietor of No Naivasha/Ol Jorai Phase II/15837 by virtue of the fact that he had been issued with a certificate of lease, *prima facie* his title is indefeasible and the burden shifts to the Applicants to show or demonstrate that the title is challengeable within the provisions of the law.



46. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 2nd Respondent's title but the mere proof that he holds a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicants have not established a *prima facie* case.
47. That having been said, I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella v Cassman Brown Ltd* case (*supra*) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless it was entertaining a doubt as to whether or not a *prima facie* case had been established. The court of appeal in the case of *Kenya Commercial Finance Co. Ltd v Afraba Education Society* (2001) IEA 86 cited by Gitumbi, J (As she then was) with approval in the case of [*Joseph Wambua Mulusya v David Kitu & another*](#) (2014) eKLR observed as follows:-
- “The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.
48. Secondly, on 5th June, 2024 the court had been informed that 1st Defendant was in occupation of the suit property, thus considering the fact that by issuing the orders as sought by the Applicants would amount to an eviction of the said 1st Defendant from the suit land, which is premature at this stage and coupled with the fact that the 2nd Defendant/Respondent is *prima facie* the registered proprietor of the 1-acre portion of the suit property, I find that there will be no harm in ordering that the parties do maintain the *status quo* pertaining which order will assist in case management until the same is determined.
49. Indeed, the Court of Appeal in the case of [*Mugab v Kunga*](#) [1988] KLR 748, had held that in land matters *status quo* orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No 5178/2014 Practice direction No 28(k) gives the court the leeway and discretion to make an order for *status quo* to be maintained until determination of the case.
50. Accordingly, whilst cautioning myself on the preservation of the *status quo* so as to ensure that no party is prejudiced, I would interfere in a limited manner by clearly defining the *status quo* herein to the effect that:
- i. An order of *status quo* is herein issued to be maintained by all the parties in that it must be understood that the 1st Defendant is still in occupation of land Title No Naivasha Ol Jorai Phase II/495 now sub-divided into Naivasha Ol Jorai Phase II/15836, 15837, 15838 as at the time of filing the instant suit.
 - ii. There shall not be any interference with land Title No Naivasha Ol Jorai Phase II/495 now sub-divided into Naivasha Ol Jorai Phase II/15836, 15837, 15838.
 - iii. Such *status quo* is to be maintained by all parties until the matter is finally heard and determined.
 - iv. Parties shall set down this matter for hearing expeditiously by complying with the provisions of Order 11 of the [*Civil Procedure Rules*](#) within the next 21 days upon delivery of this ruling
 - v. The cost of the application dated the 12th March, 2024 shall be in the cause.



DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 17TH DAY OF OCTOBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

