



REPUBLIC OF KENYA



**Sawe v Waithaka & 3 others (Environment & Land Case E051 of 2024)
[2024] KEELC 13347 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E051 OF 2024
EO OBAGA, J
NOVEMBER 21, 2024**

BETWEEN

JOAN JEBICHI SAWE PLAINTIFF

AND

DANCAN KURIA WAITHAKA 1ST DEFENDANT

GEORGE KIBET SAWE 2ND DEFENDANT

JANE C SAWE 3RD DEFENDANT

LAND REGISTRAR, UASIN GISHU COUNTY 4TH DEFENDANT

RULING

1. The Notice of Motion Application dated 19th August, 2024 is brought by the Plaintiff under Certificate of Urgency and it seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. That a temporary injunction do issue against the defendants either by themselves, agents, employees, proxies and/or any person claiming through them from cultivating, trespassing, selling, sub-dividing, transferring, using it as security, leasing out, obtaining consents of land board, cultivating, grazing, fencing off or in any manner whatsoever interfering with Land Parcel Uasin Gishu/Ainabkoi East/163 pending the hearing and determination of this suit.
 - d. Spent.
 - e. That the costs of this Application be provided.



2. The motion is premised on the grounds on the face it and supported by the Plaintiff's affidavit sworn on even date. She deposed that she is a co-administrator of the estate of her husband, the late Alexander Kiptanui Sawe alongside their son, Nicholas Kiptum Sawe, who had by Power of Attorney authorised her to bring the suit on his behalf. It is her case that on 27th July, 1995 her late husband purchased Uasin Gishu/Ainabkoi East/163 (hereinafter "the suit property"). Her late husband was given the title deed and other completion documents but never transferred it to his name because he never attended the land board owing to Hiram Waithaka Kuria, the 1st Defendant's father, and his busy schedule and the nature of his job. She deposed that the said documents were kept in their house in Nairobi.
3. The Plaintiff also deposed that her husband died of injuries related to a fire that broke out in their home on 2nd September, 1998 in which she was also injured. That her husband's family accused her of killing her husband and she was charged with murder, but her conviction was quashed by the court of Appeal. Upon her release however, she discovered that all the properties she and her husband had acquired had been shared by her in-laws without consideration to her and their son. She added that the 2nd and 3rd Defendants, her late husband's siblings, had taken full possession of the suit property taking advantage of the fact that the ownership documents had burnt in the fire and denying that the property belonged to her husband. She averred that the 2nd Defendant has a duplicate copy of the Agreement but refused to release it to her. She carried out a search which initially showed that the land was in the name of Hiram Waithaka Kuria, who on inquiry informed her he had delegated the issue of the land to the 1st Defendant. The 1st Defendant has refused to talk to her, but she has through other means discovered that the 2nd and 3rd Defendants, who had been authorised by her late husband to use the land, had installed a caretaker on the land who was reported by the 1st Defendant.
4. The Plaintiff averred that she was summoned to the Police post, where on attendance she obtained copies of the sale agreement, a bankers cheque and transfer documents through the OCS, Ainabkoi Police Station. She also obtained a copy of the title which shows that the 1st Defendant transferred the suit property to his name last year. She averred that the 1st Defendant had no right to claim ownership of the suit property since her late husband had paid the full purchase price, and neither do the 2nd and 3rd Defendants. For the above reasons, the Plaintiff claimed an equitable constructive trust imposed on the property in her favour. She deposed that the rights of a registered proprietor under Sections 25, 26 and 28 of the *Land Registration Act* though absolute and indefeasible, were subject to rights and encumbrances noted in the register and overriding interests which include constructive trusts.
5. The Application was served on the Defendants as evidenced by an Affidavit of Service sworn by Daniel Kanyiri Watu, licensed Court Process Server. There has been no response filed by any of the Defendants, and the Application thus proceeds unopposed.

Submissions;

6. The Application came up for hearing on 15th October, 2024 where Counsel for the Plaintiff confirmed he had served the Defendants herein with the Notice of Motion as evidenced by the said Affidavit of Service, however, the Defendants were absent. The Court allowed Counsel for the Plaintiff to make oral submissions on the Application. He started by pointing out that the application is unopposed and it should be allowed. He explained that the Plaintiff was seeking injunctive orders in terms of prayer 3 of the motion. He submitted that the Plaintiff had demonstrated that the Respondents were holding the suit property in trust for her, however, that they are intent on selling it. Counsel relied on the cases of *Wainaina vs Mwangi & 3 Others* (2016) eKLR, *Joel Mwangangi Githure vs Priscah Mukorimburi* (2022) eKLR, *Jodan Properties Ltd vs Margaret Njoki Migwi* (2020) eKLR and *Tony Justice Ogare vs Catherine Lorna Abiri* (2021) eKLR.



Analysis and Determination;

7. I have considered the Plaintiff's Application, the Affidavit sworn in support, as well as the submissions by Counsel and the case law cited. This is mainly an application for injunction, and the issue herein is whether the Plaintiff has satisfied the conditions for grant of an interlocutory injunction. The test for grant of a temporary injunction was laid out in the renowned case of *Giella vs Cassman Brown Company Limited* (1973) E.A. 358, where the court held that:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, 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 (*E.A. Industries vs Trufoods*, (1972) E.A. 420).”

8. Before a temporary injunction is granted, the Plaintiff must establish the existence of a prima facie case with a probability of success. A prima facie case does not mean a case that must of necessity succeed, but a case which can be said to be established if the evidence presented in support of the case were believed at first sight. In *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, the Court of Appeal defined the term “prima facie case” in the following words:

“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.”

9. I am further guided by the case of *Nguruman Limited vs Jan Bonde Nielsen 2 Others* (2014) eKLR, where the Court of Appeal adopted the definition in the *Mrao Case* (Supra), but went on to explain the concept of a prima facie case in the following words:-

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”



10. The Plaintiff has annexed a General Power of Attorney donated to her by Nicholas Kiptum Sawe and a Marriage Certificate evidencing the marriage between the late Alexander Kiptanui Sawe and herself. In the copy of the sale agreement dated 27th July, 1996 the Vendor is indicated as Hiram Waithaka Kuria and the Purchaser is Alexander Kiptanui Sawe. The Property that was subject of the said agreement is described as Uasin Gishu/ainabkoi East/163 measuring 4.05Ha which translates to approximately 10 Acres. The agreed purchase price was Kshs. 60,000/- per Acre thus the entire parcel was sold for a total of KShs. 600,000/-. Alongside the Agreement for Sale, the Plaintiff annexed a copy of a Bankers Cheque dated 16th July, 1996 drawn in favour of Hiram Waithaka Kuria for the amount of KShs. 600,000/-. The court has seen a copy of a title deed over the suit property herein in the name of the said Hiram Waithaka Kuria dated 30th July, 1991. There is also an undated Transfer of Land form between Hiram Waithaka Kuria and Alexander Kiptanui Sawe, duly executed by the Vendor as was practice those days and his signature was properly attested to.
11. These annexures corroborate facts as laid out by the Plaintiff. Indeed her late husband purchased the suit property and paid the full purchase price vide the bankers cheque presented before this court. This court finds that although the Plaintiff is not the registered proprietor of the suit property, as the widow to the deceased, she has holds sufficient claim on the land to which can be held to be an unregistered interest in the property. She has therefore established a prima facie case.
12. The existence of a prima facie case is not itself sufficient, the Plaintiff is required to establish that she will suffer irreparable injury if the injunction is not granted. Irreparable injury means such injury that cannot be adequately compensated for in damages. As to what constitutes irreparable injury, in *Nguruman Limited vs Jan Bonde Case (Supra)*, the Court of Appeal explained it as follows:-

“On the second factor, that 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 face, 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 standard 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.”
13. The Plaintiff laid out the entire background story as to how she came to lose her stake in the land. If she is to be believed, she has lost a vast majority of her matrimonial properties that she acquired with her deceased husband. One of those properties is the suit property herein, which she avers has been transferred to the 1st Defendant’s name and there is every likelihood that he is in the process of selling it. That same property is in the hands and use of the 2nd and 3rd Defendants locking the Plaintiff out completely. It appears in the circumstances of this case that there is no other remedy by which the Plaintiff can protect her interests on the suit land pending hearing and determination of this suit, and also to preserve the subject matter of the suit save by the temporary injunction sought.
14. Finally, if the court is in doubt, it should only issue an injunction where the balance of convenience tilts in favour of granting it. What is meant by the term “balance of convenience” is that if an injunction is not granted and the suit is ultimately decided in favour of the party seeking the injunction, the inconvenience caused to them would be greater than that which would be caused to the losing party if an injunction is granted but the suit is ultimately dismissed. Flowing from the above, the Plaintiff



herein has demonstrated that the harm which she is likely to suffer if the injunctive orders are not granted is greater as compared to any mischief the Defendants may be exposed to if the order is granted and her case does not succeed. The balance of convenience thus tilts in favour of issuing the injunction as sought by the Plaintiff. For the above stated reasons, I find that the applicant herein has satisfied the Court that this is a case that deserve granting of temporary injunction sought.

15. Consequently, I find merit in the Notice of Motion dated 19th August, 2024 and I allow it in the following terms:-
- a. A temporary injunction be and is hereby issued against the Defendants either by themselves, agents, employees, proxies and/or any person claiming through them form cultivating, trespassing, selling, sub-dividing, transferring, using it as security, leasing out, obtaining consents of land board, cultivating, grazing, fencing off or in any manner whatsoever interfering with Land Parcel Uasin Gishu/Ainabkoi East/163 pending the hearing and determination of this suit.
 - b. The costs of this Application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF NOVEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Chepkwony for Mr. Nyamweya for 1st Defendant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

21st November, 2024

