



REPUBLIC OF KENYA



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**Ndolo v Reuben & 72 others (Environment & Land Case E019 of 2022)
[2024] KEELC 13284 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E019 OF 2022
TW MURIGI, J
NOVEMBER 20, 2024**

BETWEEN

ANDREW NDOLA NDOLO PLAINTIFF

AND

REUBEN & 72 OTHERS & 72 OTHERS & 72 OTHERS DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 12th July 2022 brought under Order 5 Rule 17, Order 40 Rules 2(1) and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A and 63(c) of the *Civil Procedure Act* in which the Applicant seeks the following orders:-
 - 1 Spent.
 2. That service of summons be effected by way of substituted service by advertisement in one of the local circulating dailies.
 3. That this Honourable court be pleased to issue a temporary injunction against the Defendants/ Respondents whether by themselves, their servants and/or agents from trespassing upon, dealing with or wasting the Land Reference Parcel No. 1757/19 pending the hearing and determination of this application and/or until further orders of this Honourable court.
 4. That the Officer Commanding Police Division(OCPD) Sultan Hamud to ensure That the orders are fully complied with.
 - 5 That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Andrew Ndola Ndolo sworn on even date.



The Applicant's Case

3. The deponent averred That he instituted this suit on behalf of Elizabeth Kamene Ndolo by virtue of a Power of Attorney donated to him. He further averred That at all material times, his mother Elizabeth Kamene Ndolo was the registered owner of the suit property measuring 1296.0 acres having acquired the same by transmission vide High Court Succession Cause No. 106 of 1985. That by a vesting order dated 30th September 1996, his mother was entitled to 40% share of the original land parcel No. 1756/4/2 which was subsequently registered as L.R. No. 1757/6.
4. That during the intervening period, the Respondents took advantage of the legal battles within the family to encroach and commit acts of waste in the suit property. He further averred That the Respondents have always acknowledged That his mother is the registered proprietor of the suit property.
5. That pursuant to the said recognition, they held several meetings to negotiate their safe exist or sale of the portions occupied by each one of them. He averred That on 16th March, 2006, they held a meeting with the representatives of the Respondents to discuss the survey, subdivision and settlement on the suit property.
6. That as a follow up of the meeting, they received a letter on 21st March 2006, from Geosite System quoting the charges for subdivision of the land. He further averred That the negotiations did not materialise as the Respondents failed to agree on a fair market value for the portions occupied by each one of them.
7. That on 4/3/2010 he discovered That the Respondents had sought legal counsel from Ms Kyalo and Associates on the possibility of acquiring the occupied portions through adverse possession. He went on to state That he issued notices to the Respondents directing them to pull down the erected structures and vacate the suit property.
8. That consequently, some of the Respondents instituted Makueni ELC Nos, 241, 240, 239, 238, 237, 236, 235, 234 and 233 of 2017 claiming adverse possession of the suit property. He stated That after the court found in favour of the 9 Applicants, he filed Civil Appeal No. 394 of 2018 which is pending for hearing and determination.
9. He went on to state That sometime in the year 2018, he resurveyed the original title No. 1757/6 into nine titles and added That the resultant title L.R. No. 1757/19 was partially occupied illegally by the Respondents herein.
10. He asserted That the illegal occupation of the suit property by the Defendants has deprived his mother quiet enjoyment of her property. He urged the court to allow the application as prayed.

The Respondents Case

11. The Respondents opposed the application through the replying affidavit of Raphael Mulwa sworn on his own behalf and on behalf of his co-Respondents.
12. The deponent averred That the instant suit is res judicata on account of Milimani ELC No. 226 of 2014 was determined vide a ruling delivered on 12th February 2015 and added That the subject matter and the parties are similar as to those in the current suit. That being aggrieved, the Applicant appealed against the decision in Civil Appeal No. 394 of 2018 which was dismissed by the Court of Appeal vide the judgment delivered on 18th November 2022. He argued That the Respondents have filed the suits where there is a pending application for consolidation.



13. In conclusion, he contended That the application is an abuse of the court process as the Applicant has failed to establish a prima facie case with a probability of success. He urged the court to dismiss the application with costs.
14. The application was canvassed by way of written submission.

The Plaintiff's Submissions

15. The Plaintiff submissions were filed on 24th October 2022.
16. On his behalf, Counsel outlined the following issues for the court's determination:-
 - a. Whether the Applicant should be granted leave to effect substituted service of the application upon the Respondents by advertisement in one of the local circulating dailies;
 - b. Whether the application meets the required threshold for injunctive reliefs and;
 - c. Who should bear the costs.
17. Counsel submitted That it is impossible to effect personal upon the Defendants because they reside in various parts of the land which is 8000 acres in size. In addition, Counsel expressed safety concerns for the process server arising from animosity between him and the Respondents. To buttress this point, Counsel relied on the provision of Order 5 Rule 17 of the Civil Procedure Rules to submit That the court can order for substituted service if it is satisfied That personal service cannot be effected upon the Defendants.
18. With regards to the second issue, Counsel relied on the provisions of Order 40 of the Civil Procedure Rules and on the case of Giella vs Cassman Brown to submit on the guiding principles for the grant of an injunction.
19. On prima facie, Counsel submitted That the Applicant has established a prima facie case with a probability of success. Counsel contended That the Applicant has adduced sufficient evidence for the grant of a temporary injunction.
20. On the second condition, Counsel submitted That the Applicant risks losing the family property if the orders sought are not granted. Counsel further submitted That no award in damages will compensate the Applicant in event That she loses her property.
21. Finally, Counsel submitted That the balance of convenience tilts in favour of the Applicant as she has demonstrated That she will suffer irreparable damage which cannot be compensated by an award in damages.
22. To buttress his submissions, Counsel relied on the list of authorities dated 13th October 2022.

The Defendants Submission

23. The Respondents filed their submissions dated 21st March 2024.
24. On their behalf, Counsel relied on the case of Giella v Cassman Brown & Co Ltd (1973) EA to submit on the conditions necessary for the grant of an interlocutory injunction.
25. On the first condition, Counsel relied on the definition of a prima facie case set out in the case of Mrao Limited v First American Bank of Kenya Limited & 2 others (2003) eKLR to submit That the Applicant has not established a prima facie case with a probability of success. Counsel submitted That the Respondents have been in occupation of the suit property for more than 21 years which



is confirmed by the notices That were issued by the Applicant. Counsel further submitted That the Respondents occupation was affirmed by the decision in the case of Elizabeth Kamene Ndolo vs Muema Kitutu & 84 others (2015) eklr which has not been challenged on Appeal or reviewed.

26. Counsel further submitted That the Applicant entered into a consent dated 6/8/1991 in High Court Civil Case No, 5041 of 1988-Josiah Salvin Kaumbulu vs Elizabeth Kamene Musyimi, in which the Plaintiff was granted orders for specific performance of contract. That following the court order, the Plaintiff(Kaumbulu) sold portions of the suit property to the Respondents herein. Counsel further submitted That the Applicant has failed to disclose to the court the decision in Civil Appeal No. 394 of 2018. Counsel argued That the Applicant has not been in possession of the suit property for over 40 years and hence she will not suffer any damage That may call for the court’s protection.
27. Counsel further submitted That the Applicant has no locus standi to bring this application as he did not seek the court’s approval to file the current application in his name on the strength of the power of attorney. To buttress this point, Counsel relied on the provisions of Order 9 Rule 1 and 2 of the Civil Procedure Rules.
28. Concluding his submissions, Counsel urged the court to dismiss the application with costs. None of the authorities cited by Counsel were availed for the court’s perusal.

Analysis and Determination

29. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination:-
 1. Whether the Plaintiff has locus standi to bring the present application.
 2. Whether the Applicant should be granted leave to effect service by way of substituted service
 3. Whether the Plaintiff has established the legal threshold for the grant of a temporary injunction.

Whether the plaintiff has locus standi to bring the present application

30. The Respondents contended That the Plaintiff has no locus standi as he did not seek the court’s approval to institute the suit herein in accordance with Order 9 Rule 1 and 2 of the Civil Procedure Rules.
31. Locus standi is defined in Black’s Law Dictionary 9th Edition as “the right to bring an action or to be heard in a given forum.”
32. In the case of Alfred Njau and others vs City Council of Nairobi (1982) KAR 229, the Court defined the word Locus Standi as follows;-

“ the term Locus Standi means a right to appear in Court and conversely to say That a person has no Locus Standi means That he has no right to appear or be heard in such and such proceedings.”
33. Further in the case of Law Society of Kenya vs Commissioner of Lands & others, Nakuru High Court Civil Case No. 464 of 2000, the Court held That;

“ Locus Standi signifies a right to be heard. A person must have sufficiency.”



34. Order 9 Rule 1 of the Civil Procedure Rules provides That:-

“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force be made or done by the party in person or by his recognized agent or by an advocate duly appointed to act on his behalf

Provided That-

Any such appearance shall if the court so directs be made by the party in person.”

35. In the matter at hand, the Plaintiff has a power of attorney to act for his mother in this suit. He has clearly indicated in his Complaint and application That he is acting on behalf of his mother. From the reading of the power of Attorney, the court finds That the same does not deprive him of the capacity to sue. The Respondents have not demonstrated to the court what prejudice they have suffered by failure of the Applicant to seek approval of the court.

36. In the case of Edmund Mwangi Waweru vs Gabriel Wanjohi Waweru & another (2017) eKLR the court held That:-

“whilst the legal position is categorical on the need of person holding a power of attorney to seek approval of the court before he can be deemed to be a recognised agent of another for the purposes of doing the acts specified in order 9 rule 1 of the civil procedure rules, I agree with Meoli J That failure to seek approval of the court to do the acts specified in That section of the law does not necessarily render the act or appearance fatally defective.”

37. I therefore find That the Plaintiff has locus standi to institute the suit together with the application herein.

Whether the applicant should be granted leave to effect service of summons by way of substituted service

38. The Applicant has sought leave to effect service of summons on the Defendants by way of substituted service. The law That governs the grant of leave to effect substituted service is set out in Order 5 Rule 17(1) of the Civil Procedure Rules of 2010. According to the provisions of That Order, substituted service may be ordered by the court in the following circumstances:-

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- (1) Where the court is satisfied That for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.
- (2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.
- (3) Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may be.



- (4) Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No 5 of the Appendix with such variations as the circumstances require.

39. It is clear from the above provisions That the court must be satisfied That for some reasons, the summons cannot be served personally. The Applicant stated on oath That it is impossible to effect personal service on the Defendants due to the vast area where they occupy and security concerns of the process server. I am satisfied That personal service may not be possible in the circumstances raised in the affidavit.

Whether the applicant has met the threshold for the grant of an interlocutory injunction

40. The court is also called upon to determine whether the Applicant has met the threshold for the grant of an interlocutory injunction. 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.

41. Both parties made reference to the case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 which sets out the principles applicable in an application for 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.

42. 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 order of an injunction.

43. 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.”

44. The Applicant’s claim over the suit property is anchored on the title for the suit property while the Respondents claim is based on adverse possession.



45. The Applicant produced a certificate of title to demonstrate That it is the registered owner of the suit property. The Respondents on the other hand contended That they have been in occupation of the suit property for more than 21 years. The court is aware That at the interlocutory stage, it is not required to make any definitive conclusion on the matters That are in controversy.
46. In the case of Mbuthia Vs Jimba credit Corporation Ltd 988 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
47. 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.”
48. The issues of ownership can only be determined in a full trial where the parties will have the opportunity call evidence and have the same challenged by way of cross examination.
49. Based on the evidence placed before me I find That the Plaintiff has not established a prima facie case with a probability of success.
50. In an interlocutory injunction application, the Applicant has to satisfy the three conditions before an injunction is granted. In so finding I am persuaded by the holding in the case of Nguruman Limited Vs Jan Bonde Nielsen & 2 Others [2014] eKLR where the Court of Appeal stated as follows: -
- “...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.
51. Having found That the Applicant has failed to establish a prima facie case with a probability of success, this courts finds That it will be immaterial to delve into the other limbs That are to be considered on grant of a temporary injunction. In so finding, I am persuaded by the holding in the case of Commercial Finance Co. Ltd vs Afraha Education Society & Others C A Civil Appeal No. 142 of 1999 where the court held That:-
- “.....the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated That it has a prima facie case with a probability of success no interlocutory injunction would be available.”



52. In the end, I find That the application partially succeeds in the following terms:-

1. An order is hereby issued for service of summons to be effected by way of substituted service through advertisement in one of the local circulating dailies.
2. Each party to bear its own costs.

.....

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF NOVEMBER, 2024.

In the presence Of:

Jematia holding brief for Ndalila for the Plaintiff Applicant.

Court Assistant-Alfred.

