



**Maina v Chome & another (Environment & Land Case E076 of 2024)
[2024] KEELC 14164 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 14164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E076 OF 2024
FM NJOROGE, J
NOVEMBER 14, 2024**

BETWEEN

MICHAEL NDEIH MAINA PLAINTIFF

AND

MURISA KAFASI CHOME 1ST DEFENDANT

KOMBO CHIVATSI CHOME 2ND DEFENDANT

RULING

1. In his application dated 19/7/2024, filed alongside a plaint evenly dated, the Plaintiff sought the following orders: -
 1.Spent;
 2.Spent;
 3. Pending the hearing and determination of the main suit, the honourable court be pleased to issue a temporary injunction restraining the Defendants/respondents, their agents, servants, employees, assigns or anyone acting under their direction or authority from entering, remaining on, constructing on, or in any manner interfering with the Plaintiff/Applicant’s quiet possession and ownership of all that parcel of land known as Gede/Mijomboni/578 registered in the name of Michael Ndeih Maina;
 4. The Officer Commanding Waramu Police Station do ensure compliance with the orders issued by this Honourable Court;
 5. The costs of this application be borne by the Defendants/respondents.
2. The grounds in support of the application were listed at the foot thereof and it was supported by the affidavit sworn by the Plaintiff on 16/7/2024.



3. The Plaintiff's case is that he is the registered proprietor of the land parcel Gede/Mijomboni/578 ("the suit property"). He annexed copies of the certificate of title, green card and recent search as exhibit MNM-1. He narrated that the suit property was originally owned by one Katana Charo who allowed the Defendants' father into the suit property as a caretaker; that sometime later, the said Katana Charo and the defendant's family differed and following his attempts to evict the Defendants from the suit property, he was arrested, which prompted him to sell the suit land to one Dedan Kinyua Irungu. That transfer was finalized on 9/12/1977. It is averred that Dedan Kinyua allowed the Defendants to continue staying on the suit property until he transferred it to the Plaintiff. Similarly, the Plaintiff allowed the Defendants to continue occupying the suit property as a recognition of their service thereon.
4. The Plaintiff averred that years later when he decided to occupy the suit property, he engaged the Defendants in negotiations and offered to them a portion of the suit property in order to secure a peaceful co-existence; that the Defendants rejected that offer and claimed the entire suit property. The Plaintiff asserts that further mediation attempts still bore no fruit thus causing him to issue demand and eviction notices; that despite those notices, the Defendants have continued to trespass and unlawfully occupy the suit property causing him financial and emotional loss and distress.
5. The Defendants opposed the application. They filed a Replying Affidavit sworn by the 1st Defendants on 30/9/2024, wherein he swore that the Defendants have been in occupation of the suit property prior to the year 1985 when the adjudication of Gede/Mijomboni Settlement Scheme took place. He deposed that there was no permission or licence granted to them to occupy the suit property and that they have even interred some of their relatives thereon. He added that the Defendants filed a claim for adverse possession against the Plaintiff and was in the process of trying to serve the Plaintiff when he was served with the summons in this suit. The 1st Defendant deposed that the Plaintiff is not entitled to the orders sought at an interlocutory stage since the Defendants have permanent structures on the suit property.
6. On 1/10/2024, this court directed parties to file written submissions on the application. However, as at the time of this ruling, neither party had complied.
7. The conditions for granting an order for interlocutory injunction are now settled. Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless an applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (See *Giella vs Cassman Brown & Company Limited* (1973) E A 358).
8. The first hurdle for an applicant is to establish that he has a prima facie case before an order of injunction can be issued. In the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the court expounded and stated that: -

In *HABIB BANK AG ZURICH V. EUGENE MARION YAKUB*, CA NO. 43 OF 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."



9. The same caution was repeated in NATIONAL BANK OF KENYA V. DUNCAN OWOUR SHAKALI & ANOTHER, CA NO. 9 of 1997 when Omolo JA stated:

“The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

10. et again in AGIP (K) LTD V. VORA [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:

“With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit.”

11. The Plaintiff gave an elaborate background of his case. The Defendants admit that the Plaintiff is registered as the owner of the suit property. I find that the Plaintiff has established a prima facie case.

12. The Plaintiff must also establish that he will suffer irreparable loss if an order of injunction is not issued. The decision of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR provides an explanation for what is meant by irreparable loss and it states;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

13. The Plaintiff deposed that due to his advanced age, he continues to incur substantial medical expenses hence his need to dispose the suit property to cater for his financial needs; that he needs gift some of the land to his offspring; that he is unable to do so with the Defendants on the suit property. In my view, this is not sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

14. Finally, the Plaintiff has to demonstrate that the balance of convenience tilts in his favour. In the case of Paul Gitonga Wanjau v Gathuthi Tea Factor Company Ltd & 2 others [2016] eKLR, my brother Justice Mativo, while dealing with the issue of balance of convenience expressed himself thus: -

Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits



or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

15. It is trite that an order for interlocutory injunction is to preserve the substratum of a suit. Order 40 rule 1 of the Civil Procedure Rules stipulates that the court may by order grant a temporary injunction to restrain any action, 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.
16. In this case, it must be borne in mind that the Defendants have been in occupation of the suit property for years and can not be condemned unheard. It matters not at this stage that they are lawfully or unlawfully in occupation. This will be determined at the hearing of the suit. I am thus convinced that the balance of convenience tilts in favour of granting a preservative order.
17. Guided by the above, this court orders that the status quo of the suit property shall be maintained by all parties pending the hearing and determination of this suit. The costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 14TH DAY OF NOVEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

