



**Owuor v Barasa (Environment & Land Case E009 of 2024)
[2024] KEELC 7533 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E009 OF 2024
AY KOROSS, J
NOVEMBER 14, 2024**

BETWEEN

SAMWEL OTIENO OWUOR PLAINTIFF

AND

ANTONE OTIENO BARASA DEFENDANT

RULING

1. This ruling seeks to determine the notice of motion dated 14/02/2024 that the plaintiff filed. He seeks several reliefs from this court some of which are spent and the residual prayers for determination are: -
 - a. Pending hearing and determination of the suit, a temporary injunction be issued compelling the defendant to surrender into this court the original title deed of land parcel no. North Ugenya/Ndenga 1274.
 - b. Pending hearing and determination of the suit, a temporary injunction be issued against the defendant restraining him, his agents, servants, or any other person acting for him or with his authority from taking possession, encroaching, trespassing onto, or alienating, disposing of or in other way whatsoever with interfering with the plaintiff's ownership and use of land parcel no. North Ugenya/Ndenga/1274.
 - c. The court does grant any other or further orders it may consider just in the circumstances.
 - d. Costs of the motion be provided for.
3. The motion is supported by the grounds set out on the body thereof and the supporting affidavit sworn by the plaintiff Samwel Otiemo Owuor on 15/05/2024.
4. Significantly, in them, he asserts that in 2014, he sold $\frac{1}{4}$ acre of North Ugenya/Ndenga/1274 (suit property) to the defendant for ksh.50,000/-. He stated in 2015, the defendant convinced him to surrender the title deed thereof for purposes of subdivision.



5. Nonetheless, according to him, the defendant fraudulently transferred the suit property in whole to himself. He averred that the defendant is in occupation of the suit property and he (plaintiff) has since lodged a caution over it. He urged this court to grant the reliefs sought.

Defendant's case

6. By the law firm of M/s.Achero Mufuayia & Co. Advocates, the defendant Antone Otieno Barasa filed a replying affidavit deposed on 20/9/2024. He alleges in 2010, he purchased the entire suit property from the plaintiff, paid the purchase price of kshs. 300,000/- and the plaintiff handed over to him the title deed to the suit property together with the transfer instruments.

Parties' submissions

7. As directed by the court, both parties filed written submissions. The plaintiff's law firm on record M/s. Mumbua Munyao Advocates filed written submissions dated 28/09/2024 in which counsel identifies 2 issues for resolution; whether the defendant acquired the title document fraudulently and whether the plaintiff is entitled to the reliefs sought. In arguing the plaintiff's case, his counsel relies on several provisions of law and authorities.
8. In response, the defendant's counsel filed written submissions dated 7/10/2024 in which counsel recognizes the following issues as falling for determination; whether the defendant should surrender the original title deed to court, whether temporary injunctive orders should be granted, and who is entitled to the costs of the suit.
9. Counsel relies on several provisions of law and judicial precedents. For reasons counsels did not tender the legal authorities relied upon, they will not be considered.

Preliminary issues

10. In submitting their arguments, both counsels did not contain themselves to the substance of the matter that is the subject of this ruling. Instead, they wantonly dived into the merits of the case.
11. For the plaintiff's counsel, it was on the issue of fraudulent acquisition of the title deed whereas without laying a basis, the defendant's counsel has urged this court to dismiss or strike out the case.
12. It is worth reckoning that when faced with interlocutory applications such as this one which concerns the preservation of the substratum of the suit, the court's mandate at this stage is restricted to probing and appraising the facts and evidence that are before it and determine if the plaintiff has met the threshold to warrant the grant of the orders sought.
13. Thus, portions of the parties' submissions that delve into the merits of the case will be disregarded.

Issues for determination.

14. I have carefully considered the motion, its grounds, affidavits, and parties' rival submissions. In cognition, the following issues arise for determination: -
 - a. Whether the defendant should surrender the title deed to the suit property to the court.
 - b. Whether the plaintiff has met the threshold to warrant the grant of injunctive orders.
 - c. What orders should be issued?



Analysis and Determination

15. The issues that were earlier identified in this ruling shall be dealt with shortly in a seriatim manner.

a. Whether the defendant should surrender the title deed to the suit property to the court.

16. In seeking this prayer, the plaintiff relies on Sections 1A, 1B, 3A, and 63 (e) of the *Civil Procedure Act* (CPA), Section 157 of the *Land Act*, and Order 40 Rules 1,2, 3 & 4 of the Civil Procedure Rules (CPR).
17. The provisions of the CPA counsel relies upon are omnibus provisions of law that concern themselves with the objectives of the Act, the court's duty, its inherent powers, and generally, on interlocutory applications.
18. Further, the provision of the *Land Act* that counsel relies upon has no relevance to the issue at hand as it deals with criminal offenses over land matters. Significantly, this court lacks jurisdiction over criminal matters.
19. The plaintiff has not laid a legal basis as to why this relief should be granted and this may explain the heavy silence in the submissions over this particular issue.
20. Consequently, I must agree with the defendant's counsel that the defendant's title is sacrosanct and can only be impeached on legal grounds. By Sections 24, 25, and 26 of the *Land Registration Act*, courts consider title documents as prima facie evidence of ownership of land.
21. This proprietorship allows the registered owner to enjoy rights of possession, occupation, and quiet use of her land. Still, the registered owner's proprietorship can only be challenged on grounds set out in Section 26 which are fraud, misrepresentation, illegality, acquisition by unprocedural means, or corrupt schemes.
22. Some of these grounds have been pleaded in the plaint and will have to await the outcome of the main case. In the circumstances, I find this relief is not merited.

b. Whether the plaintiff has met the threshold to warrant the grant of injunctive orders

23. Order 40 Rule 1 of the CPR confers this court with jurisdiction to grant an injunctive relief by stating as follows: -

“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.”

24. Although this court exercises discretion in considering applications for injunctive relief, it exercises judicious discretion based on the law and evidence. An applicant has to meet the threshold of the 3 tests



which are inter alia, establish a prima facie case; demonstrate irreparable injury, and that the balance of convenience tilts in his favour.

25. These principles were well settled in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 which were similarly restated in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR in the following manner: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

26. When determining an interlocutory application such as the one before this court, the court has to be careful and not prejudice a party by making conclusive findings of fact or law on substantive issues that are the preserve of trial as was stated by Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002*.

27. The 1st test to establish is whether the plaintiff has a prima facie case and the definition of the term was defined by the Court of Appeal decision of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR which stated: -

“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.”

28. The affidavits filed by both parties did not avail documents signifying the existence of the suit property but in documents filed on 27/09/2024 by the plaintiff, an official search certificate has been tendered which shows the defendant is the registered owner of the suit property.

29. Among these documents, the plaintiff also brought to this court an alleged agreement for sale dated 5/12/2009 in which he allegedly sold the entire suit property to the defendant, and the purchase price was ostensibly settled.

30. Additionally, both parties are in consensus the defendant is in occupation of the suit property, and as held in the case of *Stanley Kirui v. Westlands Pride Limited* (2013) eKLR which this court concurs with, a court cannot injunct what has already happened.

31. Further, although the plaintiff has sought for “temporary injunction”, a close reading reveals that for all intents and purposes, in some of the reliefs, he is seeking a mandatory injunction for the eviction of the defendant from the suit property which is not tenable in the circumstances of this complex case.



32. In arriving at this position, this court adopts the Court of Appeal decision of *Lucy Wangui Gachara v Minudi Okemba Lore (Civil Appeal 4 of 2015)* [2015] KECA 277 (KLR) (30 October 2015) (Judgment) which had this to say: -

“It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage.”

33. On the premises, I find the plaintiff has not met the 1st test. In the circumstances and having not met the 1st hurdle, it is the considered view of this court that it would be superfluous to consider the other 2 tests.

34. For the findings and reasons herein stated above and in addressing issue (c), I ultimately find the notice of motion dated 15/05/2024 unmerited and it is hereby dismissed with costs being in the cause. Matter to be mentioned before the Deputy Registrar for pretrial directions on 25/02/2025.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

14/11/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Miss. Mumbua for the plaintiff

Mr. Achero for the defendant

Court assistant: Ishmael Orwa

