



Muturo v Muturo alias Geoffrey Nasong’o Muturo (Environment and Land Miscellaneous Application E017 of 2024) [2024] KEELC 13939 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E017 OF 2024
EC CHERONO, J
DECEMBER 5, 2024**

BETWEEN

FRIDA NABUTUTU MUTORO APPLICANT

AND

**GEOFFREY JUMA MUTORO ALIAS GEOFFREY NASONG’O
MUTORO RESPONDENT**

RULING

1. The Applicant, vide a Notice of Motion application under certificate of urgency dated 17th September, 2024 seeks the following orders;
 - a. (SPENT)
 - b. That a temporary stay of eviction, demolition and survey of land parcel NO. BUNGOMA/TONGAREN/2304 in KIMILILI ELC NO. E028 of 2021 be granted pending inter-parties hearing of this application.
 - c. That it pleases this Honourable court to enlarge time for the Applicant to file appeal out of time.
 - d. That Costs be in cause.
2. The application is said to be urgent on grounds that the lower court has ordered the transfer of the entire land belonging to the Applicant to her son, the Respondent herein who has sold off large portions of the suit land and now wants to evict the Applicant.
3. It is also averred that the Applicant, being an old woman of over 80 years has nowhere to go or settle in the event of eviction from her ancestral land and home where her husband left her.



4. The Applicant also contends that the portion of land in question which is measuring 3 acres was a share of the Applicant in the Succession Cause which ordered that it be shared between her two sons. She averred that the Respondent has moved to sell off the entire portion and disinherit his brother with her as the surviving mother after judgment at the Kimilili court.
5. The application is supported by the affidavit of the Applicant sworn the same date.
6. In her supporting affidavit, the Applicant reiterated the averments contained on the grounds on the face of the application and stated that after her husband died, she filed a Succession cause NO. 4 of 1998 where she shared part of the properties among the children of majority age and was registered proprietor of the remainder 3 acres for herself, the Respondent and his younger brother. She annexed a copy of the Grant and title marked 'FNM-1 & 2' respectively.
7. The Applicant stated that out of the three acres, the Respondent was to get 1/2 an acre and his brother was to get 1/2 an acre while she was to remain with a portion for her live interest and after she dies, the land to be inherited by the girls.
8. She stated that the Respondent then filed a suit at Kimilili SPM-ELC NO. E028 of 2021 where he was awarded the entire land and immediately sold off a large portion to the church and other developers without adherence to her advice.
9. The Applicant deposed that the Respondent is now moving to evict her and his brother which will render them both landless and homeless.
10. Despite service of the said application, the Respondent did not file any response.
11. I have considered the application, the supporting affidavit and the annexures thereto as well as the relevant law.
12. It is trite that before granting an application for injunction which is an equitable relief, an Applicant must establish that he has a prima facie case, that he will suffer irreparable injury that cannot be compensated by an award of damages and where the court is in doubt, the application may be decided on a balance of convenience.
13. At paragraph 6 & 7 of the supporting affidavit, the Applicant deposed that the Respondent filed a suit being KIMILILI SPM-ELC NO. E028 of 2021 where he was awarded the entire land and immediately sold off a large portion to the Church and other developers without adherence to her advice.
14. She also deposed that the Respondent is now moving to evict her and his brother which will render them landless and homeless. The Applicant is also seeking leave to appeal against the said judgment by the trial court out of time.
15. However, the Applicant has not annexed a copy of the impugned judgment or proceedings from the trial court for this court to determine whether the application has been brought without undue delay whether the Applicant has an arguable appeal. It has not even been stated when the alleged judgment was delivered. He has not also demonstrated what substantial loss he stands to suffer unless the application is allowed.
16. Generally, the law guides the court to either grant an injunction or not is set out under Order 40 Rule 1 of the Civil Procedure Rules which states as follows;

“Where in any suit it is proved by affidavit or damaged, or alienated by 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 circumstance 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.”
17. Specifically, this court’s power to grant an injunction pending Appeal is provided under order 42 Rule 6(6) of the civil procedure Rules. The same also provides as follows;

“Notwithstanding anything contained in subrule 1 of this rule the High court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the subordinate court or tribunal has been complied with.”
18. The conditions for consideration on whether or not to grant an application for injunction was laid down in the locus classicus case of *Giella v cassman Brown & Company Limited* (1973) E.A 358, where the court expressed itself as follows;

“Firstly, an applicant must show a prima facie 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 a balance of convenience.”
19. The issue that now emerges for determination in this application is whether the Applicant has established the three conditions for the grant of the injunction orders sought.
20. On the first issue whether the Applicant has established a prima facie case, the court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 123 held as follows;

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the court or 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 later.
21. Upon perusing the supporting affidavit, the Applicant deposed that the Respondent filed a suit in KIMILILI vide KIMILILI SPM-ELC NO. EO28 where he was awarded the entire land. A copy of title was annexed and marked FNM2. As stated elsewhere in this Ruling, the Applicant did not annex a copy of the impugned judgment/decree or copies of proceedings thereof. On whether to grant or not to grant the injunction order will depend on whether the Applicant has an arguable appeal. A copy of the certificate of Grant and title were produced before the trial court and marked as FNM-1 &2. The two items in my view cannot determine whether or not the Applicant has an arguable appeal. It is also important to know whether or not the trial Magistrate took into consideration the two items in its decision. The Applicant has not also annexed a draft memorandum of appeal. In the circumstances, I find that the Applicant has failed to establish a prima facie case.
22. The others issues are whether the Applicant shall suffer irreparable loss and whether the balance of convenience tilts in favour of the Applicant. Having found that no prima facie case has been established, it is no longer necessary for me to consider the second and the third limbs of the rule as was held in *Giella v Cassman Brown Co. Ltd* case. To buttress my reasoning, I refer to the case of



Nguruman Limited v Jane Bonde Nielsen & 2 Others, NRK CA Civil Appeal NO. 77 of 2012 (2014) eKLR where it was stated as follows;

“ These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (see Kenya commercial Finance Co.Ltd v Afaha Education Society (2001) vol. 1 E.A 86).

.....If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

23. For the above reasons, I find that the Applicant has not satisfied the principles guiding the grant of interlocutory injunctions. The application therefore fails.

Final Orders

24. In the premises, the application dated 17th September, 2024 lack merit and the same is hereby dismissed and since the parties are close relatives, I order each party to bear their own costs.
25. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 05TH DAY OF DECEMBER, 2024

.....

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Applicant-present
2. Respondent-present
3. Bett C/A

