



**Al-Maddy v Ali & 4 others (Environment & Land Case  
104 of 2022) [2023] KEELC 195 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 195 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 104 OF 2022  
NA MATHEKA, J  
JANUARY 26, 2023**

**BETWEEN**

**MOHAMED SHEIKH ABDULRAHIM AL-MADDY ..... APPLICANT**

**AND**

**MOHAMED ALI ..... 1<sup>ST</sup> RESPONDENT**

**ABDALLA ALI ..... 2<sup>ND</sup> RESPONDENT**

**FAIZ ALI TAIB ..... 3<sup>RD</sup> RESPONDENT**

**NABHAN SWALEH SALIM ..... 4<sup>TH</sup> RESPONDENT**

**LAND REGISTRAR, MOMBASA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The application is dated September 28, 2022 and is brought under Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 1A,1B, 3A of the [Civil Procedure Act](#), Section 13 of the [Environment and Land Court Act](#), No 19 of 2011, Article 162 (2)(b) of the [Constitution of Kenya](#), 2010 seeking the following orders;
  1. That service of this application be dispensed with in the first instance and the same be certified urgent and heard ex-parte in the first instance due to the urgent nature of the reliefs sought herein.
  2. That pending the interpartes hearing and determination of this Application, this Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, their agents, servants, personal representatives and/or whomsoever acting under their instructions from trespassing, disposing, selling, offering for sale, sub-dividing, consolidating, charging, transferring, constructing on and/or undertaking any works on or in any way interfering with Title No Mombasa/Block XI/129 and all the resultant plots sub-



divided out of it being the series of parcel known as Mombasa/ Block XI/985 to Mombasa/ Block XI/1038 (both plots inclusive) together with all that property being Mombasa/Block XV 1118 being a property derived from the consolidation of six plots being Title Numbers Mombasa/Block XI/1026, 1027, 1028, 1031, 1032 and 1037 within the subdivision of Mombasa Block XI/129 (hereinafter jointly referred to as 'the suit properties').

3. That pending interpartes hearing and determination of this Application, this Honourable court be pleased to issue an interim order restraining the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, their agents, servants, personal representative and/ or whomsoever acting under their instructions from lodging for registration and/or presenting documents to the 5<sup>th</sup> Respondent with the effect of removing the Applicant as a trustee of the Masjid Huda & Madrasatul Huda (Spaki) Trust or in any way altering the proprietorship of and/or placing any encumbrance over the suit properties.
4. That pending interpartes hearing and determination of this Application, this
5. Honourable Court be pleased to issue an interim order directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, their agents, servants and /or personal representative and/ or whomsoever acting under their instructions as the custodians of all the original Titles of the suit properties, to surrender the original documents of Title to the 5<sup>th</sup> Respondent to hold the same in safe custody and to the order of the Court.
6. That pending interpartes hearing and determination of this Application, this Honourable Court be pleased to issue interim orders directing the 5<sup>th</sup> Respondent either by themselves, their agents, employees, servants and/or whomsoever acting under their instructions as the Chief Land Registrar to place all the cards of record contained in the Kalamazoo and/or any other records over the suit properties held at the Lands Registry under lock and key for safekeeping.
7. That pending interpartes hearing and determination of this Application the 5th Respondent be estopped from registering, making any entries and/or authorizing any dealings over the suit properties.
8. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, their agents, servants, personal representatives and/ or whomsoever acting under their instructions from trespassing, disposing, selling, offering for sale, subdividing, consolidating, charging, transferring, constructing on and/or undertaking any works on or in any way interfering with Title No Mombasa Block XI/129 and all the resultant plots sub-divided out of it being the series of parcel known as Mombasa/Block to Mombasa/ Block XV1038 (both plots inclusive) together with all that property being Mombasa/Block XV/1118 being a property derived from the consolidation of six plots being Title Numbers Mombasa/Block XV1026, 1027, 1028, 1031, 1032 and 1037 within the subdivision of Mombasa Block XI/129.
9. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an interim order restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, their agents, servants, personal representative and/or whomsoever acting under their instructions from lodging for registration and/or presenting documents to the 5th Respondent with the effect of removing the Applicant as a trustee of the Masjid Huda & Madrasatul Huda (Spaki)



Trust or in any way altering the proprietorship of and/ or placing any encumbrance over the suit properties.

10. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an interim order directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, their agents, servants and/or personal representative and/or whomsoever acting under their instructions as the custodians of all the original Titles of the suit properties, to surrender the original documents of Title to the 5<sup>th</sup> Respondent to hold the same in safe custody and to the order of the Court.
  11. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue interim orders directing the 5<sup>th</sup> Respondent either by themselves, their agents, employees, servants and/or whomsoever acting under their instructions as the Chief Land Registrar to place all the cards of record contained in the Kalamazoo and/or any other records over the suit properties held at the Lands Registry under lock and key for safekeeping.
  12. That pending the hearing and determination of this suit the 5<sup>th</sup> Respondent be estopped from registering, making any entries and/or authorizing any dealings over the suit properties
  13. That the County Police Commander, Mombasa and/or Officer Commanding Station, Makupa Police, Mombasa be directed to ensure enforcement of the orders prayed for herein above
  14. That this Honourable Court do grant any other Orders it may deem just and fit to grant in the circumstance.
  15. That the costs of this Application be in the cause.
2. It is based on the following grounds that the Applicant is the registered owner of Mombasa/Block XI/129. That the Applicant is the rightful trustee of Masjid Huda & Madrasatul Huda (Spaki), situated on a section of Mombasa/Block XI/129. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have illegally imposed themselves as trustees of Masjid Huda & Madrasatul Huda (Spaki), situated on Mombasa/Block XI/129. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, despite being imposter trustees, are now purporting to remove the Applicant as a trustee of Masjid Huda & Madrasatul Huda (Spaki), situated on Mombasa/Block XV/129 and replace him with the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. That the 5<sup>th</sup> Respondent has registered and/or is the process of registration of the illegal removal of the Applicant's trusteeship and fraudulent appointment of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as trustees in his place. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have irregularly subdivided Mombasa/Block XI/129 and further consolidated some of the resultant sub-titles within the property with no consent from the Applicant and further proceeded to encumber the resultant Titles by way of charging the same to financial institutions and disposing to 3<sup>rd</sup> parties. That the 1<sup>st</sup> - 4<sup>th</sup> Respondents have now commenced construction work on the suit property and if the same is not stopped forthwith, the Applicant is apprehensive that the 1<sup>st</sup> - 4<sup>th</sup> Respondents will indeed dispossess and/or interfere with the Applicant's proprietorship and trusteeship. That it is therefore in the interests of justice that this Application be heard expeditiously and without delay and orders sought therein granted.
3. The 2<sup>nd</sup> Respondent stated that the applicant did not commence the construction of the mosque known as Masjid Huda, Spaki situate on plot number Mombasa/Block XI/129 as alleged. The Mosque was being built by Sheikh Ali Taib (deceased) one of the founders by pooling resources from different well-wishers. The Applicant was only acting for and on behalf of Sheikh Ali Taib (deceased) who is his father. That indeed Messrs Kasmani Advocate wrote the letter dated 5th February 1983 addressed to Masjid Huda Spaki. The letter has been annexed in the Applicants Application and



Marked as MSA-I. It is notable that the letter was not addressed to the Applicant in his individual capacity but to the mosque (trustees) because the mosque did not belong to him. That any and all discussions/ negotiations by the Applicant with the then Nasserpuria Memon Jamat were done by the Applicant in his capacity as representative of Masjid Huda and not as the owner of the mosque.

4. That because the trust deed dated December 23, 1987 did not provide for ownership of properties, in order to circumvent this restriction and expand the role of the trust the trustees reformed the trust to be known as The Masjid Huda and Madrassatul Huda (Spaki) Mosque Trust. The said Trust is dated May 1, 1988 and was registered on November 17, 1988. The initial Trust deed dated December 23, 1987 was superseded by the Trust Deed dated May 1, 1988; That Applicant is a party and signatory to the Trust Deed dated May 1, 1988 and therefore was aware that the number of trustees for the trust had been changed to five (5) and not three as was in the initial trust.
5. This court has considered the application and submissions therein. The power of court in an application for interlocutory injunction is discretionary, the discretion is judicial and is exercised on the basis of law and evidence. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. *Giella vs Cassman Brown & Co Ltd (1973) EA 358*, set out the three requirements that has to be satisfied in an interlocutory injunction application. The applicant has to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and where the court has any doubts, it will be decided on a balance of convenience.
6. The court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125* defined a prima facie case is. It held

'So what is a prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter.' The court went further to hold that 'A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant case upon trial. That is clearly a standard which is higher than an arguable case.'

7. That Applicant avers that he is the registered owner of Mombasa/Block XI/129. That the Applicant is the rightful trustee of Masjid Huda & Madrasstul Huda (Spaki), situated on a section of Mombasa/Block XI/129. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have illegally imposed themselves as trustees of Masjid Huda & Madrasstul Huda (Spaki), situated on Mombasa/Block XI/129. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, despite being imposter trustees, are now purporting to remove the Applicant as a trustee of Masjid Huda & Madrasstul Huda (Spaki), situated on Mombasa/Block XV/129 and replace him with the 3<sup>d</sup> and 4<sup>th</sup> Respondents. That the 5<sup>th</sup> Respondent has registered and/or is the process of registration of the illegal removal of the Applicant's trusteeship and fraudulent appointment of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as trustees in his place. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have irregularly subdivided Mombasa/Block XI/129 and further consolidated some of the resultant sub-titles within the property with no consent from the Applicant and further proceeded to encumber the resultant Titles by way of charging the same to financial institutions and disposing to 3<sup>rd</sup> parties.
8. The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014) eKLR* the court held that,

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 facie, 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.'

9. The Respondent states that the Applicant is aware of all the changes and that he is a party and signatory to the Trust Deed dated May 1, 1988 and therefore was aware that the number of trustees for the trust had been changed to five (5) and not three as was in the initial trust. I find this is a matter of evidence and will only be determined during the full trial. The Applicant/Plaintiff has proved that he would suffer irreparable damage and the balance of convenience is in his favour as he has produced a trust deed dated December 23, 1987 and a sale agreement of the suit property. The court in *Nguruman Limited* (supra), found that the three conditions and stages have to be applied as separate, distinct and logically. It was held that;

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 is 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. The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between.'

10. Be that as it may, I find that the Plaintiff/Applicant has established a prima facie case and order that the status quo be maintained pending the hearing and determination of this suit. Costs to be in the cause.
11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> JANUARY, 2023.**

**N.A. MATHEKA**

**JUDGE**

