



**Ndwiko (Administrator of the Estate of the Late Peter Ndolo Ndwika) v Kavatha & 5 others
(Environment & Land Case E068 of 2022) [2023] KEELC 400 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E068 OF 2022
A NYUKURI, J
JANUARY 25, 2023**

BETWEEN

**PETER NDOLO NDWIKO (ADMINISTRATOR OF THE ESTATE OF THE
LATE PETER NDOLO NDWIKO) PLAINTIFF**

AND

**SHADRACK MUTISYA KAVATHA 1ST DEFENDANT
DANIEL MASAKU KAVATHA 2ND DEFENDANT
JOSIAH KEEN 3RD DEFENDANT
GRACE MUMBUA 4TH DEFENDANT
IRENE NGIMA MUREITHI 5TH DEFENDANT
LAND REGISTRAR, MACHAKOS 6TH DEFENDANT**

RULING

Introduction

1. Before court is the Notice of Motion dated 11th September 2022, filed by the Plaintiff/Applicant seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. That the OCS, Machakos Police Station do oversee the enforcement of the orders and ensure there is no breach of peace.
 - d. That the Honourable Court be pleased to grant an order of injunction restraining the Defendants whether by themselves or through their agents and/or servants or anyone



acting under them from trespassing, transferring, alienating, disposing, leasing, constructing, interfering in any manner with L.R. No. Mavoko Town Block 3/2840 pending the hearing and determination of the suit.

- e. That the Honourable Court be pleased to issue a mandatory injunction requiring the Defendants and/or their agents to pull down all the temporary structures erected on L.R. No. Mavoko Block 3/2840 and/or in the Alternative the Plaintiff be authorized to pull down the said structures.
 - f. That the costs of the Application be provided for.
2. The Application is anchored on the affidavit in support thereof sworn on 11th September 2022, by Muanza Dwiko, the Plaintiff/Applicant. The Applicant's case is that the estate of his late father, the late Peter Ndolo Ndwiko is the registered proprietor of L.R. No. Mavoko Town Block 3/2840 (Suit property) which land was acquired by the late Peter Ndolo Ndwiko in 1981 through the defunct Lukenya Ranching and Farming Co-operative Society Limited. He further stated that on 6th September 2022, the 1st, 2nd, 3rd, 4th and 5th Defendants by themselves and or their agents trespassed on the suit property, wantonly cut down trees thereon, cleared the bushes, erected semi-permanent structures and interfered with the beacons thereof.
 3. It was the Applicant's assertion that the late Peter Ndolo Ndwiko had entrusted the late Jonathan Kavatha, the father of the 1st and 2nd Defendants with his title documents but that the latter was interfering with the said properties which actions are being repeated by the Defendants herein. He expressed apprehension that unless restrained, the Defendants may create third party rights over the suit property to the detriment of the estate of the late Peter Ndolo Ndwiko. Further that the Applicant filed Machakos JR. Misc. Application No. E003 of 2022 to compel the Land Registrar to transfer the suit property to him.
 4. The Application was opposed. The 1st and 2nd Defendants filed a replying affidavit sworn by Daniel Masaku Kavatha on 26th September 2022 in response to the Application. It is their case that the suit property was gifted to their late father, the late Jonathan Kavatha Ndolo by the late Peter Ndolo Ndwiko, which fact is well known to the Plaintiff/Applicant. They also stated that the 1st and 2nd Defendants were in actual occupation and use of the suit property for several decades. They stated that no will was attached to the application and that the photographs availed by the Plaintiffs were inadmissible in law and contrary to the provisions of Section 106 B of the *Evidence Act*.
 5. In a rejoinder, Muanza Dwiko swore a supplementary affidavit dated 5th October 2022. He stated that the 1st and 2nd Defendants' allegation that the suit property was gifted to their father was preposterous, misleading and a distortion of the facts as a gift of such magnitude would have been formalized in writing.
 6. He also averred that the 1st and 2nd Defendants together with their father misapprehended the will of the late Peter Ndolo Ndwiko which stated that his share of the land in Lukenya Ranching and Farming Cooperative Society Limited was bequeathed to Muanza Dwiko the Plaintiff, but that in the event the latter did not survive the deceased, that's when the same would be left to Jonathan Ndolo. He denied confirming that there was a gift to the 1st and 2nd Defendants' father in respect of the suit property and insisted that he has always sought for documents to show ownership of the suit properties.
 7. The Plaintiff further denied that the 1st and 2nd Defendants were in occupation of the suit property. He maintained that the photographs attached to the Application were the true representation of the status of the suit property as shown in the certificate attached under the *Evidence Act*. It was his position that



the 1st and 2nd Defendants had hatched a scheme with the local administration to disinherit him of his late father's property.

8. The 3rd and 4th Defendants filed a replying affidavit sworn on 7th October 2022 by Josiah Keen the 3rd Defendant. Their case was that the Application did not meet the threshold for grant of injunction and that the Applicant had approached the court with unclean hands by concealing the fact that the suit property was gifted to Jonathan Kavatha Ndolo Ndwiko who took possession.
9. The 3rd Defendant stated further that he lawfully bought ten acres of the suit property from the late Jonathan Kavatha Ndolo. His position was that there was no evidence to show that the suit property had been bequeathed to the Plaintiff and that upon gifting the same to the late Jonathan Kavatha Ndolo, the same ceased to be part of the deceased estate. He further stated that he was in possession of the ten acres and that JR. Misc. Application No. E003 of 2022 was merely meant to scandalize the Office of the Land Registrar.
10. Despite service, the 5th and 6th Defendants did not respond to the application. The application was canvassed by way of written submissions. On record are the Applicant's submissions filed on 21st October 2022 and the 1st to 4th Respondents' submissions filed on 19th October 2022.

Applicant's Submissions

11. Counsel for the Applicant submitted that the Applicant had met the conditions for grant of an injunction as set out in *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358, by establishing a prima facie case with a probability of success; that he may suffer irreparable injury that cannot be compensated in damages if the injunction is not granted and that the scale of convenience tilts in favour of granting an injunction. Counsel relied on the case of *Mrao Ltd vs. First American Bank of Kenya & 2 Others* [2003] eKLR, to argue that the Applicant had established a prima facie case by demonstrating that the late Peter Ndolo Ndwiko was the bona fide owner of LR No. Mavoko Town Block 3/2840; that he is the administrator of the deceased's estate; that the Machakos Land Registrar has declined to transfer the suit property by transmission to the Applicant and that the land was invaded by the 1st to 4th Defendants which invasion was allegedly admitted.
12. Counsel argued that a gift inter vivos is untenable in law and cannot override or seek to amend a written will. That the deceased died testate and bequeathed that suit property to the Plaintiff. Reliance was placed on *In Re Estate of the Late Gedion Manthi Nzioka (deceased)* [2015] eKLR, where the court held that for gift inter vivos to be upheld by the court, they may be granted by deed, a written instrument or by delivery, by way of declaration of trust by the donor or by way of resulting trusts or presumption of gifts of land by way of registered transfer. Further, that where the land is not registered, it must be in writing or by a declaration of trust in writing, and that a gift inter vivos must be complete for the same to be valid.
13. It was submitted for the Applicant that the alleged verbal gift was merely fiction and a scheme concocted to grab the suit property as the same has no basis in law. Counsel argued that the purported sale of the suit property to the 3rd and 4th Defendants by the 1st and 2nd Defendants' father amounted to intermeddling with the estate of a deceased person contrary to Section 45 of the Law Succession Act. Counsel took the position that Jonathan Kavatha having not been the administrator of the estate of the late Peter Ndolo Ndwiko had no capacity to sell, transfer or confer rights in respect of the suit property to the 3rd and 4th Defendants hence their agreement was null and void ab initio. Counsel was categorical that the email relied upon by the 1st and 2nd Defendants was inauthentic and suspicious as it does not bear the complete thread or previous communication and that the Plaintiff in his emails categorically demanded for proof of the act of gifting.



14. On whether the Plaintiff may suffer irreparable injury, counsel submitted that if the orders sought are not granted, the estate of the late Peter Ndolo Ndwiko stands to suffer irreparable injury that may not be compensated in damages. Reliance was placed on the case of *Paul Itotia David vs. Muthio Nzioki* [2022] eKLR, for the proposition that where there is threat of sale to third parties, there is proof of irreparable injury.
15. In addition, counsel argued that the balance of convenience titled in favour of the Plaintiff as the title deed was registered in his late father's name.
16. On whether the Applicant had met the threshold for grant of mandatory injunction, counsel argued that although mandatory injunction is sparingly granted, the same may be granted in aiming at preventing or mitigating damages occasioned by an illegal action. Counsel maintained that the Plaintiff had shown that the Defendants had invaded the suit property with wanton destruction of vegetation. Their position being that the Defendants were trespassers with no equitable interest in the land. The court was referred to the cases of *Robert Ng'ang'a Marabu & Another vs Julius Mboya Munyora & 3 Others* [2015] eKLR and *Ahmed Ibrahim Suleiman vs Noor Khamis Surur* [2015] eKLR, for the proposition that where the Plaintiff's case is clear and that hearing the case may not serve any purpose, the court may grant a mandatory injunction.

1st to 4th Respondents' Submissions

17. Counsel for the 1st to 4th Respondents relied on the cases of *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs Cassman Brown & Co. Ltd* (Supra) to argue that the Applicant had not met the threshold for grant of temporary injunction. Counsel argued that the will relied upon by the Applicant does not show that the suit property was bequeathed to him and therefore that the Applicant came to court with unclean hands.
18. It was maintained for the 1st to 4th Respondents that the suit property was gifted to the late Jonathan Kavatha Ndolo and that the late Peter Ndolo Ndwiko died before effecting transfer. Reliance was placed on the email of 8th September 2020. Counsel submitted that the Plaintiff had not established a prima facie case as he had concealed material facts by failing to disclose that the suit property was gifted to the late Jonathan Kavatha.
19. Counsel contended that the Plaintiff permanently resides in the state of Nevada in the United States of America and therefore what he stated in his affidavit was merely hearsay and that the suit property was gifted to Jonathan Kavatha who sold part of it to the 3rd and 4th Defendants. Counsel relied on the case of *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002, to contend that in an interlocutory application, the court should not make any conclusive findings.

Analysis and Determination

20. I have carefully considered the application, the response thereto and the submissions. The issues that arise for determination are;
 - a. Whether the Plaintiff has met the threshold for grant of temporary injunction.
 - b. Whether the Plaintiff has met the threshold for grant of mandatory injunction.
21. Principles of grant of temporary injunction are well settled. The Applicant must demonstrate the following;
 - a. Demonstrate a prima facie case with a probability of success.



- b. Show that if an injunction is not granted an award of damages shall not be sufficient compensation.
- c. If in doubt the court should consider in whose favour the balance of convenience tilts.
22. The above principles were set out in the case of *Giella vs Cassman Brown* [1973] EA 38. A prima facie case is one which on the evidence presented to court, demonstrates that there exists a right which has apparently been infringed by the opposite party, calling for rebuttal or explanation from that party (See *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR).
23. In this case, the Applicant has shown by way of certificate of official search that the suit property is registered in the name of Peter Ndwiko Ndolo, which registration was done on 10th June 2008. He has also shown that he is the administrator of his late father's estate. The 1st and 2nd Defendants' claim over the suit property is based on an alleged gift by the late Peter Ndwiko Ndolo to their father the late Jonathan Kavatha.
24. While at this stage, this court is acutely aware that its findings are only preliminary and not conclusive as the evidence presented to court is yet to be tested by way of cross examination, this court takes the view that the Defendants have not shown or stated when the suit property was gifted to their late father. There is also no evidence that the same was ever given as a gift as alleged or at all. The Plaintiff has shown that his late father wrote a will on 10th December 1984 bequeathing the land at Lukenya Ranching and Farming Cooperative Society to him but that in the event the Plaintiff did not survive him, the land would be bequeathed to Jonathan Ndolo. That will was lodged for safe keeping at the San Bernardino Superior Court Probate Department, and was sealed by the High Court of Kenya sitting at Nairobi in Probate and Administration Cause No. 25 of 2012. The Plaintiff was appointed as administrator of the will of his late father on 1st April 2004 as shown from the letters of administration with will annexed from the Superior Court of California, County of San Bernardino.
25. As the Plaintiff has shown that the suit property is registered in the name of Peter Ndolo Ndwiko, whose will he was appointed to administer by the Superior Court of California, County of San Bernardino on 1st April 2004 and the same will sealed in the High Court in Kenya at Nairobi, and there being no evidence that the suit property was gifted to the late Jonathan Kavatha, it is my preliminary finding that the Plaintiff/Applicant has made out a prima facie case with probability of success. The fact that the structures on the property were put up on 6th September 2022, a few days before the suit was filed has not been denied.
26. On whether the Applicant stands to suffer irreparable injury, the Applicant has stated that the Defendants intend to create third party rights on the suit property which may defeat the Plaintiff's property rights under Article 40 of *the Constitution*. Indeed, the record shows that the 3rd and 4th Defendants claim on the suit property is based on an allegation of purchase from the late Jonathan Kavatha. I agree with the Plaintiff that there is a risk that the suit property may be dealt with by the Defendants to create third party rights. In the event that that happens and the Plaintiff is successful in his claim, he may suffer injury that may not be adequately compensated in damages as the suit property will be in the hands of third parties. I therefore find that if the injunction is not granted, the Plaintiff stands to suffer irreparable injury that may not be adequately be compensated in damages.
27. On the question as to where the balance of convenience tilts, I note that the land is registered in the name of the Plaintiff's late father and there is no evidence or claim challenging that title. The suit property was registered under the Registered *Land Act* (repealed). Under Section 27 of that Act, registration of a person as proprietor of land vested in the person absolute ownership of such land giving the person all rights and privileges attendant to the registration. That position was



maintained under Section 26 of the [Land Registration Act](#) No. 3 of 2012. Even though the Defendants allege occupation of the suit property, no iota of evidence was presented to show such possession or occupation. In the premises, therefore, the balance of convenience tilts in favour of granting the temporary injunction in favour of the Plaintiff who has title to the suit property.

28. The Plaintiff has sought for a mandatory injunction to remove structures allegedly put up by the Defendants. It is settled that a mandatory injunction can only issue in the clearest of cases where it would be unnecessary to grant the Respondent a hearing. Under [the Constitution](#) 2010, the right to be heard is sacrosanct and no one should be condemned unheard. The Plaintiff has sought in the Plaint for an order of eviction against the Defendants. Therefore, granting mandatory injunction in the terms sought by the Plaintiff will amount to allowing the prayers in the Plaint without granting the Defendants an opportunity to be heard. In the interests of substantive justice which must not only be done but must be seen to be done, I decline to grant the prayer for a mandatory injunction.
29. In the end, I make the following orders;
- a. That the Honourable Court be and is hereby pleased to grant an order of temporary injunction restraining the Defendants by themselves or through their agents and or servants or any one acting under them from trespassing, transferring, alienating, disposing, leasing, constructing and interfering in any manner with L.R. No. Mavoko Town Block3/2840 pending the hearing and determination of this suit.
 - b. That the OCS, Machakos Police Station do oversee the enforcement of the orders above and ensure there is no breach of peace.
 - c. The costs of the application shall be in the cause.
30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ngolya for 1st, 2nd, 3rd and 4th Defendants

Mr. Maingi for Plaintiff

Josephine – Court Assistant

