



**Kazungu (Suing as administrator of the Estate of John Kazungu Tsanje Mukuba-Deceased) v
Kazungu & 3 others (Land Case 6 of 2022) [2023] KEELC 104 (KLR) (17 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 6 OF 2022
MAO ODENY, J
JANUARY 17, 2023**

BETWEEN

**BERNARD KALAMA KAZUNGU (SUING AS ADMINISTRATOR OF THE
ESTATE OF JOHN KAZUNGU TSANJE MUKUBA-DECEASED) PLAINTIFF**

AND

**MARTIN GONA KAZUNGU 1ST DEFENDANT
E-LLY ENTERPRISES LIMITED 2ND DEFENDANT
LAND REGISTRAR-KILIFI COUNTY 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. This ruling is in respect of a notice of motion dated February 1, 2022 by the applicant seeking the following orders; -
 - a. Spent
 - b. That this honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant/respondent by himself, his agents, servants, assigns, representatives or any other person claiming under him from intermeddling with properties of the estate of the said John Kazungu Tsanje Mukumba (deceased) and in particular Land Parcel No Gede/Dabaso/422 situated between Kwa Khadija and Kwa Davis stages at Timboni area in Gede Dabaso location within Kilifi County which parcel of land the 1st defendant/respondent has subdivided into three (3) portions namely sub-division parcel Nos. 1594,1595 and 1596 of which the 1st defendant/respondent and he be further restrained from adversely dealing with the property and from causing any subdivisions or transferring any part of the suit property to



any other interested buyer or investor or any other person pending the hearing of the instant application.

- c. That this honourable court be further pleased to issue an order of temporary injunction restraining the 2nd defendant/respondent by itself, its servants, agents, representatives, workers, employees, assigns or any other person claiming under him from trespassing on the suit property known as Gede/Dabaso/422 and in particular subdivision portion nos. 1595 which has been illegally and fraudulently transferred to him by the 1st defendant and from carrying on any temporary or permanent developments thereon from or from adversely dealing with the property pending inter-partes hearing of the instant application.
- d. This honourable court be pleased to issue a temporary injunction restraining the 3rd defendant/respondent from conducting any registration, transaction or any activity in respect of the suit property herein being Land parcel No Gede/Dabaso/422 situated between Kwa Khadija and Kwa Davis stages at Timboni area in Gede Dabaso location within Kilifi County which parcel of land the 1st defendant/respondent has subdivided into three (3) portions namely subdivision parcel nos 1594, 1595 and 1596 pending the hearing of the instant application.
- e. That upon inter-partes hearing this Honourable court be pleased to issue an order of temporary injunction restraining the 1st defendant/respondent by himself, his agents, servants, assigns, representatives or any other person claiming under him from intermeddling with properties of the estate of the said John Kazungu Tsanje Mukumba (deceased) and in particular Land Parcel No Gede/Dabaso/422 situated between Kwa Khadija and Kwa Davis stages at Timboni area in Gede Dabaso location within Kilifi County which parcel of land the 1st defendant/respondent has subdivided into three (3) portions namely sub-division parcel Nos 1594, 1595 and 1596 to the 2nd defendant/respondent and he be further restrained from adversely dealing with the suit property and from causing any subdivisions or transferring any part of the suit property to any other interested buyer or investor any other person pending the hearing, determination and final disposal of the main suit filed herein.
- f. That upon interpartes hearing this honourable court be further pleased to issue an order of temporary injunction restraining the 2nd defendant by itself, its servants, agents, representatives, workers, employees, assigns or any other person claiming under him from trespassing on the suit property known as Gede/Dabaso/422 and in particular subdivision portion nos 1595 which has been illegally and fraudulently transferred to him by the 1st defendant and from carrying on any temporary or permanent developments thereon or from adversely dealing with the property pending the hearing, determination and disposal of the main suit filed herein.
- g. That upon inter-partes hearing this honourable court be further pleased to issue a temporary injunction restraining the 3rd defendant/respondent from conducting any registration, transaction or any activity in respect of the suit property herein being Land parcel No Gede/Dabaso./422 situated between Kwa Khadija and Kwa Davis stages at Timboni area in Gede Dabaso location within Kilifi county which parcel of land the 1st defendant/respondent has subdivided into three (3) portions namely sub-division parcel nos 1594, 1595 and 1596 pending the hearing, determination and disposal of the main suit filed herein.
- h. That the costs of the application be borne by the defendants/respondents.
- i. That this honourable court be further pleased to make such other interlocutory orders as may appear to the court to be just and expedient.



2. Counsel agreed to canvas the application *vide* written submissions which were duly filed.

Applicant's Submissions

3. The applicant relied on his sworn affidavit and deponed that he is the administrator of the estate of John Kazungu Tsanje Mukuba (deceased) having duly obtained letters of administration ad litem. He further stated that the estate belongs to his late father who died on January 28, 2011 and that the 1st defendant/respondent is his brother. Further that the deceased was survived by 3 widows and 18 children.
4. It was his statement that since his late father died, no letters of administration of the estate have been taken out.
5. The applicant deponed that sometime in 2017 the title deed in respect of the suit property got lost and efforts by family members to trace it were futile and consequently a report was made to Watamu police station on February 26, 2017 whereby a police abstract was issued to that effect.
6. It was the applicant's case that they later learnt that the 1st defendant had subdivided the suit land and advertised the same for sale which led to the plaintiff and other family members institute a suit at the chief magistrate's court Malindi which suit was dismissed as the plaintiffs lacked locus standi.
7. That upon conducting a search of the suit property, the applicant found out that there are three subdivisions; Gede/Dabaso/1594 registered in the name of Kakala Kazungu the 1st widow of the deceased and the other two subdivisions Gede/Dabaso/1595 and 1596 had been sold and transferred to the 2nd defendant yet the 1st defendant/respondent had no capacity to intermeddle with the estate of the deceased thus he ought to be stopped from interfering with the estate of the deceased as the Applicant and other family members stand to suffer irreparable loss.
8. Counsel relied on order 40 rule 1 of the [Civil Procedure Rules](#) and the cases of [Bel Salim & others v Okong'o & others](#) [1976] KLR and [Giella v Cassman Brown & Co Ltd](#) and submitted that the applicant has met the threshold for grant of temporary injunction.

Respondent's Submissions

9. The 1st defendant filed a replying affidavit dated March 29, 2022 stating that the application is misconceived and has been overtaken by events in that the parcel of land known as title No Gede/Dabaso/422 does not exist for having been closed upon subdivision on April 28, 2021. Further that he has not intermeddled in any way with the estate of the deceased as alleged by the plaintiff as the suit land had devolved to the deceased widows as per the grant of letters of administration and confirmation of grant.
10. The respondent stated that the parcels were transmitted to the widows on August 3, 2020 whereby the registered owners subdivided the land into three portions namely Gede/Dabaso/1594 registered in the name of Kakala Kazungu Tsanje, Gede/Dabaso/1595 registered in the name of Dama Kazungu Tsanje and Gede/Dabaso/1596 registered in the name of Sidi Kazungu Tsanje. He further deponed that the registered owners of titles No Gede/Dabaso/1595 and 1596 sold and transferred their interest to the 2nd defendant.
11. Counsel submitted that the plaintiff has not met the conditions for grant of interlocutory injunctions as set out in [Giella v Cassman Brown & Co Ltd](#) and [Mrao Limited v First American Bank of Kenya Limited & 2 others](#) as he has failed to show by material evidence rights which are infringed or about to be infringed by the 1st defendant.



12. It was counsel's further submission that the Plaintiff did not demonstrate the existence of any rights over titles No Gede/Dabaso/422, 1594, 1595 and 1596. Further, that the evidence shows that the 1st defendant has never been the registered owner in respect of the suit properties.
13. Consequently, counsel submitted that from the forgoing facts the 2nd defendant and the third party will suffer the greater harm than the plaintiff if the order of injunction is made against them and urged the court to dismiss the application with costs to the respondents.

Analysis and Determination

14. The issue for determination is whether the applicant has met the threshold for grant of temporary injunction.
15. The principles to be satisfied in grant of temporary injunctions pending the hearing and determination of this suit are as was enunciated in the case of *Giella v. Cassman Brown & Co Ltd* (1973) EA 358 as follows:

“First, an applicant must show a prima facie case 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 the balance of convenience.”
16. The applicant avers that the defendants have intermeddled with the estate of the deceased. It is on record that the estate was administered vide a confirmation of grant dated July 6, 2020 whereby the widows and the children got their shares which were later transmitted to the rightful beneficiaries who had power to deal with the suit lands however they wished.
17. Further the suit parcel of land was subdivided and resultant numbers given to third parties who are not parties to this suit therefore issuing injunctive orders against them would cause prejudice and hence they will be condemned unheard.
18. The applicant has not placed any evidence on record to show a prima facie case with a probability of success taking into account that there was a confirmed grant of letters of administration which the applicant did not disclose to the court.
19. If the applicant was aggrieved with the grant, then he should have filed an application for revocation in the High Court and not seeking for orders to stop intermeddling.
20. I find that the applicant has not met the threshold for grant of a temporary injunction and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF JANUARY, 2023.

M.A. ODENY JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

