



**Mudachi & 3 others v Mwakulu & 5 others (Civil Suit  
11 of 2015) [2023] KEELC 7 (KLR) (12 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 7 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL SUIT 11 OF 2015  
MAO ODENY, J  
JANUARY 12, 2023**

**BETWEEN**

**ANTONY MUDACHI ..... 1<sup>ST</sup> PLAINTIFF  
BENJAMIN K KATETEI ..... 2<sup>ND</sup> PLAINTIFF  
SAMUEL SIKUKU KATETEI ..... 3<sup>RD</sup> PLAINTIFF  
ELIJAH NGOLANYE KIMANTHI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**ATHMAN MBOSIO MWAKULU ..... 1<sup>ST</sup> DEFENDANT  
ELIJAH KIMANZI MWAKULU ..... 2<sup>ND</sup> DEFENDANT  
ABSAL & SONS ENTERPRISES ..... 3<sup>RD</sup> DEFENDANT  
LANDS COMMITTEE TRIBUNAL OF KAWALA B LANDS ADJUDICATION  
SECTION ..... 4<sup>TH</sup> DEFENDANT  
LOYCE KASYULA JEREMIAH MASHA ..... 5<sup>TH</sup> DEFENDANT  
6. DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER,  
KILIFI ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a notice of motion dated July 21, 2021 by the 2<sup>nd</sup> defendant seeking the following orders; -
  - a. Spent
  - b. That this honourable court be pleased to issue an order of temporary injunction restraining the respondents by themselves, their agents, assignees and anybody working under their



instructions be restrained from selling, transferring and or having any dealings with plot no Kawala B/ 10 pending hearing of this application.

- c. That the honourable court be pleased to grant order that ¼ of the plot no kawala b/10 be subdivided and land adjudication and settlement officer to prepare new adjudication records for the resultant new numbers, title and have one registered in the applicant's name.
  - d. That costs of this application be in the cause.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

### **Applicant's Submissions**

3. The application is anchored on the sworn affidavit of Elijah Kimanzi Mwakulu the applicant who stated that the respondents filed land appeal no173 of 2016 in respect of the suit property which was heard and determined and ordered that the suit property be subdivided into two portions and registered in the name of the 1<sup>st</sup> plaintiff, further that the ministry of lands instructed sub-county surveyor to effect and enforce the decision.
4. It was the applicant's case that the respondents fraudulently obtained title number Kawala B/10 without having it subdivided as per the orders in the appeal and they are in the process of selling the whole of the suit property to a third party without the applicant's consent and it is in the interest of justice that the orders sought be granted as he stands to suffer irreparable loss and damages.
5. The applicant urged the court to grant the orders as prayed to preserve the suit property pending the hearing and determination of the suit.

### **Plaintiff/respondent's Submissions**

6. The 1<sup>st</sup> plaintiff anthony mudachi filed a replying affidavit dated November 22, 2021 denying the allegations of the applicant and stated that the orders of the appeal had been complied with and a title deed in respect of the property marked as "b" on the mutation form has since been released to the 1<sup>st</sup> and 2<sup>nd</sup> defendants which title was collected by the 2<sup>nd</sup> defendant in his presence sometime in August 2020.
7. Counsel submitted that an order for injunction presupposes that the applicant has filed a suit against the respondent which is pending before the trial court, which in the instant case the 2<sup>nd</sup> defendant/ applicant has not filed a counterclaim against the plaintiffs.
8. Counsel therefore submitted that the tests to be applied in determining whether or not to issue injunctive orders as more particularly set out in the case of *Giella v Cassman Brown & co Ltd* (1975) EA 358 may not find the relevance of application. The application therefore lacks the primary foundation upon which a quest for injunctive orders can be raised.
9. It was counsel's further submission that the order sought by the 2<sup>nd</sup> defendant in prayer 3 of the application is for a mandatory injunction which seeks a positive order compelling the settlement officer kilifi to prepare a new adjudication records for the resultant new numbers, title and have one registered in the applicant's name.
10. Counsel submitted that the applicant has not met the set out the criteria for grant of mandatory injunction in the cases of *Kenya Airports Authority v Paul Njogu Mungai & 2 others* (1997) eKLR and *Kenya Breweries Ltd and another v Washington O Okeyo* (2002) eKLR.
11. Counsel also submitted that the applicant is guilty of material non-disclosure as the ruling in the land appeal no 173 of 2016 in respect of parcel no Kawala 'B'/10 in Kawala 'B' adjudication section has



been effected where the disputed parcel was subdivided and  $\frac{3}{4}$  registered in the name of the appellant therein, Anthony Mudachi (the plaintiff herein) in trust of the family members as indicated in the proceedings and that  $\frac{1}{4}$  of the property registered in the names of the two Respondents therein.

12. Counsel also stated that the plaintiffs have annexed a letter from the chief land registrar dated July 31, 2019 addressed to the district land registrar kilifi in which the proceedings and the ruling in respect of the appeal were forwarded to the district land registrar.
13. Further that the letter enclosed the RI M's showing the subdivision, a copy of duplicate adjudication record in accordance with section 29(3)(b) of the *Land Adjudication Act* cap 284 and the area list for further action by the district land registrar.
14. Counsel submitted that the Plaintiff annexed a mutation form which indicated that new parcel numbers as 10 and 1448 measuring 4.37 and 1.47 Ha. respectively and the sketch plan of the respective portions. That subsequently the parties have received their title deeds and further that the 2<sup>nd</sup> defendant also collected the title deed in respect of the second portion, parcel no 1448 sometimes in August 2020 in the presence of the 1<sup>st</sup> plaintiff.
15. Counsel urged the court to dismiss the application with costs

### **Analysis and Determination**

16. The issue for determination is whether the applicant has met the threshold for grant of temporary and mandatory injunctions as per the Giella Casman Brown case. Has the applicant established a prima facie case with a probability of success, will the applicant suffer irreparable loss not capable of being compensated by way of damages and if the court is in doubt of the above conditions the court will decide on a balance of convenience.
17. It is not disputed that this case emanated from a land appeal no 173 of 2016 in respect of parcel no Kawala 'B'/10 in Kawala 'B' adjudication section which was heard and determined and the outcome of the appeal enforced as per the ruling where the disputed parcel was subdivided and  $\frac{3}{4}$  registered in the name of the appellant therein, Anthony Mudachi in trust of the family members as indicated in the proceedings and that  $\frac{1}{4}$  of the property registered in the names of the two respondents therein.
18. It is further not disputed that the titles to the respective parcels were issued but what the applicant is complaining about is that the subdivision was fraudulent because mutation form no 04333026 shows that the mother title no is Kawala "B"/10 subdivided into two plots being Kawala "B"/1448 measuring 1.47 and another one plot no Kawala "B"/10.
19. The applicant seeks for a mandatory injunction to compel the settlement officer kilifi to prepare a new adjudication record for the resultant new number titles and be registered in the applicant's name.
20. In the case of *Kenya Breweries Ltd & another -v Washington O Okeyo* (2002) eKLR the Court of Appeal said: -

“The test whether to grant a mandatory injunction or not is correctly stated in Vol 24 Halsbury's Laws of England 4th Edition Paragraph 948 which read: -

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant



attempted to steal a match on the plaintiffs....a mandatory injunction will be granted on an interlocutory application. ”

21. The Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd- vs- Agro export and others* (1986) I ALL ER 901 where it was stated: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”

22. From the pleadings, application and the submissions, it is clear that there are no special circumstances to warrant the court to issue a mandatory injunction in favour of the Applicant. These are the same issues that will be determined after hearing the evidence of the parties during the full hearing.
23. The applicant must demonstrate the existence of exceptional and special circumstances as interlocutory mandatory injunctions require a different standard higher than the prohibitory injunctions.
24. I find that the application lacks merit and is therefore dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 12<sup>TH</sup> 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.

