



REPUBLIC OF KENYA



**KENYA LAW**  
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**Safari v Kenya Commercial Bank Limited & another (Environment & Land Case 28 of 2022) [2023] KEELC 15669 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15669 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 28 OF 2022**

**NA MATHEKA, J  
FEBRUARY 21, 2023**

**BETWEEN**

**MARY MUKABADEGE SAFARI ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SERAH KALUME KITSAUMBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application is dated March 14, 2022 and is brought under Sections 1A, 1B, 34, 63 (e) of the [Civil Procedure Act](#), cap 21 Laws of Kenya; Order 40 Rule 1 of the [Civil Procedure Rules, 2010](#) seeking the following orders;
  1. That this Application be certified as urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
  2. That a temporary injunction be issued restraining the Respondents, whether acting by themselves, servants, agents or any person acting on their account, from trespassing, demolishing and or interfering in any way with the Applicant's property known as Subdivision Number 6938/111/MN, Title Number CR 60145 and the orders be enforced by the Officer Commanding station (OCS) and Officer Commanding Police Division (OCPD) Mtwapa Police Station Pending hearing and determination of the Application.
  3. That an order of inhibition be issued to the Chief Land Registrar, Mombasa, to prevent further transfer or any dealing with the suit property Subdivision Number 6938/111/MN, Title Number CR 60145 pending hearing and determination of the main suit
  4. That a permanent order of injunction be issued restraining the Respondents, whether acting by themselves, servants, agents or any person acting on their account, from trespassing,



demolishing and of interfering in any way with the Applicant's property known as Subdivision Number 6938/111/MN, Title Number CR 60145 and the orders be enforced by the Officer Commanding station (OCS) and Officer Commanding Police Division (OCPD) Mtwapa Police Station.

5. That honorable court be pleased to an order to the Chief Land Registrar, Mombasa, to register the Applicant as the proprietor of land Plot Number 6938/111/MN, Title Number CR 60145 in place of the current registered owner and in place of any other person succeeding the Respondent.
  6. The costs of this suit be in the cause.
2. It is based on the grounds that the Applicant is the beneficial and legal owner of property Subdivision Number 6938/111/MN, Title Number CR 60145 and has been in occupation of the suit property for over 35 years and has done extensive developments. That pursuant to the honourable court's judgement delivered on December 18, 2020, the 2<sup>nd</sup> Respondent was found to have extinguished her title over the suit property by operation of the law and the Applicant's occupation and possession of the suit property was found to be exclusive continuous and interrupted. That the Applicant has discovered that at the pendency of the suit, the 2<sup>nd</sup> Respondent transferred the suit property to the 1<sup>st</sup> Respondent in disregard to the Applicant rights and the ongoing suit. That the Applicant now faces challenges in enforcing the court orders at the land registry since property has changed hands and there are no orders directed to the register of lands to transfer the property. That the Applicant has woken up to wanton demolition of her houses on the suit property by the agents and/or servants of the Respondents in an attempt to unlawfully evict her and take possession of the suit property. That the Applicant filed a Complaint at Mtwapa Police Station under OB Number 30/7/12/2021, however, the Police cannot give protection unless this Honourable Court gives orders to that effect. That the Respondents' actions is wasting and rendering the suit property useless, as a result the Applicant stands to suffer loss and damage. That there is eminent danger that the Applicant will be permanently dispossessed of her Property if the Honourable court does not grant the orders prayed for in the Application herein. The 1<sup>st</sup> Respondent /Defendant stated that the Plaintiffs suit and application under reply are bad in law, incompetent, fatally flawed and amount to an abuse of the process of court. The same ought to be dismissed or struck out withcosts. That the 2<sup>nd</sup> Defendant was the registered owner of all that parcel of land known as Plot No 3861 (Original No 3889(22) Section [II Mainland North measuring approximately 0.1162 Hectares situate in North of Mtwapa Creek in Kilifi District. Marked "KCB-I" a copy of the Certificate of Title for the said property. That the 2<sup>nd</sup> Defendant subdivided the abovementioned parcel of land into two subdivisions, to wit, Subdivision No 6937 (Original No 3861/1) Section III Mainland North and Subdivision No 6938 (Original No 3861/2) Section III Mainland North. Marked "KCB-2" a copy of the Deed Plan No 323970 dated April 14, 2011 delineating Subdivision Number 6938 Section III Mainland North and evidencing the subdivision of Plot No 3861 (Original No 3889(22) Section III Mainland North. That upon the said subdivision of the property, the Certificate of Title for the said property was mutated, and new Certificates of Title were issued for the resultant subdivisions; that is Subdivision No 6937 (Original No 3861/1) Section III Mainland North and Subdivision No 6938 (Original No 3861/2) Section III Mainland North. That the 2<sup>nd</sup> Defendant sold and transferred Subdivision No 6937 (Original No 3861/1) Section III Mainland North measuring approximately 0.0607 Hectares to Shella Properties Limited vide a transfer registered as CR No 5227 on May 31, 2011. This entry is reflected on the face of the certificate of title for the property known as Plot No 3861 (Original No 3889/22) Section III Mainland North.
3. That in 2012, the Bank approached the 2<sup>nd</sup> Defendant with the intentions of acquiring the parcel of land known as Subdivision No 6938 (Original No 3861/2) Section III Mainland North measuring



approximately 0.0555 Hectares. That on March 7, 2012, the Bank entered into an Agreement for Sale dated March 7, 2012 with the 2<sup>nd</sup> Defendant for the sale of the suit property. The 2<sup>nd</sup> Defendant subsequently transferred the suit property to the Bank *vide* a transfer registered as CR 60145 on June 12, 2013 with a Certificate of Title being duly issued to the Bank on the same date, and marked KCB 3" a copy of the Agreement for Sale dated March 7, 2012, the Instruments of Transfer dated May 20, 2013, and the Bank's Certificate of Title for the suit property. That in the course of the transaction, the Bank carried out due diligence of the suit property by conducting a search at the Mombasa Land Registry to ascertain the status of the suit property, including its registered owners. The Mombasa Land Registry issued a certificate of postal search confirming, inter alia, that the 2<sup>nd</sup> Defendant was the registered owner of the suit property, marked "KCB-4" a copy of the Certificate of Official Search conducted dated November 19, 2012.

4. That from previous litigation relating to the suit property that the 2<sup>nd</sup> Defendant filed a suit against the Plaintiff by way of a Plaint dated January 24, 2013 being Mombasa Chief Magistrate's Case Number 136 of 2013 Serah Kalume Kitsaumbi versus Kahindi Dickson Jefwa and Mary Mukabadege Safari. The 2<sup>nd</sup> Defendant sought numerous reliefs in the said suit, including an order for vacant possession of the suit property. marked "KCB-5" a copy of the Plaint dated January 24, 2013 and the supporting documents therein. That on December 3, 2013, the Plaintiff filed a Statement of Defence and Counter-claim dated October 3, 2013 in CMCC Case No 136 of 2013. In the Defence and Counter-claim, the Plaintiff raised a defence of adverse possession and a claim for damages from the 2<sup>nd</sup> Defendant herein. The suit in CMCC Case No 136 of 2013 was heard in full and judgment delivered by the Court on December 18, 2020, marked "KCB-6" a copy of the Statement of Defence and Counter-claim dated October 3, 2013 and the judgment delivered in CMCC Case No 136 of 2013 on December 18, 2020.
5. That after the proceedings in CMCC Case No 136 of 2013 were concluded, the Plaintiff herein attempted to reopen litigation before the Court by filing an application dated February 15, 2021 seeking an order for the Registrar of Titles Mombasa to register the Plaintiff as the owner of the suit property pursuant to the judgment in CMCC Case No 136 of 2013. The Court declined to grant the orders sought by the Plaintiff and by way of a ruling dated September 10, 2021, the Honourable Court dismissed the Plaintiffs application seeking to enforce the judgment in CMCC Case No 136 of 2013 annexed hereto and mark "KCB-T" a copy of a Ruling delivered by the Court on September 10, 2021, dismissing the Plaintiff's application seeking orders to for the Registrar of Titles Mombasa to register the Plaintiff as the owner of the suit property.
6. That the Plaintiff has filed the present suit against the Bank seeking to enforce the judgment issued in CMCC Case No 136 of 2013. The Bank was not a party to the said CMCC No 136 of 2013 and there were no orders issued against the Bank in that suit. The Plaintiff cannot enforce any Orders issued in the said suit against the Bank. Further, the law does not allow the Plaintiff to engage in piecemeal litigation and the suit and application filed herein is an abuse of the process of court. That the Plaintiffs suit is based on a claim of adverse possession against the Defendants. The Bank obtained ownership and title to the suit property on June 12, 2013, Only 8 years have lapsed since the Bank became the registered owner of the Suit property. The Plaintiff cannot prove that she has had open and peaceful possession of the suit property without permission or action from the Bank for a continuous and uninterrupted period of 12 years. That in any event, the suit property only came into existence when the Deed Plan for the subdivision of Plot No 3861 (Original No 3889/22) Section III Mainland North, was approved by the Director of Surveys on April 14, 2011. That the act of subdividing the Plot No 3861 Section III Mainland North into two subdivisions and the sale of the two portions by the 2<sup>nd</sup> Defendant was a firm assertion of ownership of the said property by the 2<sup>nd</sup> Defendant and a definite interruption of any claim for adverse possession, which stopped the running of time. Consequently, any claim of



adverse possession in respect of Subdivision No 6938/111/MN can only be reckoned from the date of the said subdivision.

7. That the required statutory period for an adverse possession claim by the Plaintiff over the suit property could not start running against the title of the suit property that was non-existent before the said subdivision was approved in the year 2011. That the Plaintiff does not have possession of the suit property and there are no structures on the suit property. The Plaintiff does not live on the suit property and it is absolutely dishonest for the Plaintiff to allege that the Bank has engaged in wanton demolition of her houses on the suit property. The photographs annexed to the supporting affidavit of the Plaintiff as annexure MMS-7 are a total misrepresentation and they have not been properly produced as evidence and they ought to be expunged from the record. That the Plaintiff has filed various suits against the Bank claiming ownership of the suit property and seeking to enforce the judgment in CMCC Case No 136 of 2013.
7. That the Plaintiff filed suit in Mombasa Chief Magistrate's ELC Case Number 139 of 2021 (O.S); Ma Mukabadeae Safari v Kenya Commercial Bank Ltd and Serah Kalume Kitsaumbi. In the said suit, the Bank filed an application dated November 22, 2021 seeking to strike out the Originating Summons on inter alia grounds of res judicata and jurisdiction. The said application is scheduled for hearing on April 28, 2022, marked "KCB-8" a copy of the said Originating Summons and the Bank's application dated November 26, 2021.
8. That while CMC ELC case No 139 of 2021 (O.S) was still pending before the court, the Plaintiff filed Mombasa Chief Magistrate's ELC Case Number E 160 of 2021; Mary Mukabadege Safari versus Kenya Commercial Bank Ltd and Serah Kalume Kitsaumbi. Further, the Plaintiff filed a Motion Application dated December 10, 2021 under urgency seeking orders of injunction and orders to enforce the judgment in CMCC Case No 136 of 2013, marked "KCB-9" a copy of the Plaintiff's Application dated December 10, 2021. That in response to the suit filed by the Plaintiff in CMC ELC Case No E160 of 2021, the Bank filed a Replying Affidavit sworn by Dr Joshua Bosire on March 3, 2022 and an application dated March 3, 2022 seeking to strike out the Plaintiff's Motion Application dated December 10, 2021, marked "KCB-10" a copy of the Bank's Replying Affidavit dated March 3, 2022 and the Bank's Application dated March 3, 2022. That the Plaintiff withdrew CMC ELC Case No E160 of 2021 when it came up for hearing. Therefore, the Plaintiff's suit and application herein represents continued abuse of the process of court by the Plaintiff and the same ought to be dismissed with costs.
9. This court has considered the application and submissions therein. The power of the 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 v 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.
10. The court of Appeal in [\*Mrao Ltd v 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.”

11. The Respondent submitted that Applicant/Plaintiff herein attempted to reopen litigation before the Court by filing an application dated February 15, 2021 seeking an order for the Registrar of Titles Mombasa to register the Plaintiff as the owner of the suit property pursuant to the judgment in CMCC Case No 136 of 2013. The Court declined to grant the orders sought by the Plaintiff and by way of a ruling dated September 10, 2021, the Honourable Court dismissed the Plaintiffs application seeking to enforce the judgment in CMCC Case No 136 of 2013 annexed hereto and mark "KCB-T" a copy of a Ruling delivered by the Court on September 10, 2021, dismissing the Plaintiff's application seeking orders to for the Registrar of Titles Mombasa to register the Plaintiff as the owner of the suit property. It is clear that the Applicant has filed a multiplicity of suits on the said subject matter in an effort to obtain similar orders;

12. The Court of Appeal in *Nguruman Limited v 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 face, 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.”

13. 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.”

14. Be that as it may, I find that the Plaintiff/Applicant has failed to establish a prima facie case and what irreparable loss they would suffer as she states her property has already been demolished. I find this application has no merit and is dismissed with costs. Parties are advised to comply with order 11 and set down this matter for hearing.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

**N A MATHEKA**

**JUDGE**

