



REPUBLIC OF KENYA



KENYA LAW
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**Katu v Masaku & another (Environment & Land Case E13 of 2021)
[2023] KEELC 15735 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E13 OF 2021
TW MURIGI, J
FEBRUARY 15, 2023**

BETWEEN

MULUE MUASYA KATU APPLICANT

AND

KIMENYE MASAKU 1ST RESPONDENT

WAMBUA KIMENYE 2ND RESPONDENT

RULING

1. Before me for determination is a notice of motion dated 3rd of November 2021 brought pursuant to the provisions of sections 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, order 40 rules 2, 6(1), 6(6) and order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, where the Applicant seeks the following orders:-
 1. Spent.
 2. Pending the hearing and determination of the application herein inter partes, the Honourable Court be pleased to issue an order restraining the 2nd Respondent or any other person whomsoever from forcefully and violently entering into and interring/burying the remains of the 1st Respondent(deceased) herein on parcel of land known as Kwa Kavisi Plot No 303 situated in Kavingani Itumbule, Kathonzweni Sub-County which land is the subject matter of a suit pending before the subordinate Court in Makueni MELC No 138 of 2018 Mulue Muasya Katu versus Kimenye Masaku and Another.
 3. Pending the hearing and determination of the Appeal herein, the Honourable Court be pleased to issue an order restraining the 2nd Respondent or any other person whomsoever from forcefully and violently interring/burying the remains of the 1st Respondent (deceased) herein on parcel of land known as Kwakavisi Plot No 303 situated at Kavingani, Itumbule, Kathonzweni Sub-County which land is the subject matter of a pending suit in the subordinate



court in Makueni ELC no 136 of 2018 Mulue Muasya Katu versus Kimenye Masaku and Another.

4. The Officer Commanding (OCS) Kathonzwani Police station does ensure compliance and that peace prevails.
5. That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The Applicant's Case

3. The Applicant averred that he instituted Civil Suit No 138 of 2018 against the Defendants seeking for an order of specific performance for the transfer of ownership of 4 acres of land known as Kwa Kavisi Plot No 303 situated in Kathonzwani, an order of permanent injunction restraining the Defendants from trespassing or interfering with the Plaintiff's ownership and possession of the suit property.
4. He further averred that despite being duly served with summons to enter appearance, the Defendants failed to enter appearance and/or to file defence. That interlocutory judgment was entered against the 2nd Respondent on 4/11/2019. That although service was effected twice upon the 1st Respondent, he was yet to enter appearance or file a defence by the time of his demise.
5. He further averred that the 2nd Respondent is not justified in entering the suit property to bury the remains of the 1st Respondent as he is in possession of the suit property. He argued that if 1st Respondent is buried on the suit property he will be forced to live with the body of the 1st Respondent or to go through the tedious and expensive proceedings to exhume the body. Finally, the Applicant contended that his appeal has high chances of success.

2nd Respondent's Case

6. The application was opposed by the 2nd Respondent. In his replying affidavit, he averred that he is the son of the 1st Respondent and that the suit property belongs to his parents. He argued that he should not be denied the opportunity to bury his father on the suit property as it is evident from the Applicant's affidavit that he only purchased 4 acres and not the entire suit property.

The Response

7. In response, the Applicant averred he purchased the entire suit property from the 1st Respondent and immediately took possession thereof. He further averred that the 1st Respondent relocated to Machakos after he sold to him the suit property. He argued that the 2nd Respondent has not given any explanation why he cannot bury the 1st Respondent in his land in Machakos.
8. The application was canvassed by way of written submissions.

The Applicant's Submissions

9. The Applicant's submissions were filed in Court on 18th of May 2022.
10. Counsel for the Applicant submitted that the only issue that arises for determination is whether an order of injunction can be granted pending appeal.
11. Counsel referred the Court to the case of Patricia Njeri & 3 Others Vs National Museum of Kenya (2004) eKLR which set out the conditions for the grant of an injunction pending appeal. Counsel



submitted that the appeal against the ruling of Hon J.N. Mwaniki(Chief Magistrate) delivered on 03/11/2021 is not frivolous as it raises serious arguable issues on the learned Magistrate’s discretion in refusing to grant the interlocutory injunction. Counsel argued that the grant of an injunction will preserve the suit property to await the determination of the appeal herein. Counsel contended that if the deceased is buried on the suit property, the Applicant and his family will be forced to live with the remains of a stranger on the suit property for eternity. In addition, Counsel submitted that a refusal to grant the injunction as prayed will render the appeal nugatory.

12. Finally, Counsel submitted that the Applicant has demonstrated the principles enunciated in the case of *Giella Vs Cassman Brown & Co Ltd* (1973) EA 358 for the grant of a temporary injunction.
13. Learned Counsel for the Applicant relied on the list and bundle of authorities filed in Court on 18th of May 2022 in support of his submissions.

The 2nd Respondent’s Submissions

14. The 2nd Respondent’s submissions were filed in Court on 13th of October 2022.
15. Counsel for the 2nd Respondent submitted that the Applicant has failed to establish the threshold for the grant of an injunction as set out in the case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358.
16. On the first limb, Counsel submitted that the Applicant has failed to demonstrate that he purchased the entire suit property from the 1st Respondent. It was submitted that the Applicant stated in his pleadings that he purchased 4 acres from land parcel number Kwa Kavisi Plot No 303. It was further submitted that as per the certificate of official search the suit property measures 4 hectares and is registered in the names of Kimenye Musau and Susan Nzula Kimenye.
17. Counsel contended that the Applicant has not annexed a map to show the parcel of land or the subdivision thereof. Counsel argued that the case before the lower Court relates to the issue on whether the Applicant owns 4 acres of land and not on a burial dispute.
18. On whether the Applicant stands to suffer irreparable loss, Counsel submitted that the Applicant has not attached any documents of ownership of any part or the entire suit property in order to claim proprietary right over the same. He maintains that the Applicant has not demonstrated that he will suffer irreparable loss if the order sought is not granted.
19. On balance of convenience, Counsel submitted that it lies in favour of the Respondents since the Applicant has not demonstrated that he is in occupation of the suit property nor the specific portion of the property that he owns.
20. Learned Counsel relied on the following authorities to buttress his submissions:-
 1. [*Nguruman Limited Vs Jan Bonde Nielsen & 2 Others*](#) (2014) eKLR.
 2. [*Pius Kipchirchir Kogo Vs Frank Kimeli Tenai*](#) (2018) eKLR.

Analysis and Determination

21. Having considered the application, affidavits and the rival submissions, I find that the issue that arises for determination is whether the Applicant has met the threshold for grant of a temporary injunction pending the hearing and determination of the appeal herein.



22. Order 42 rule 6(6) provides as follows;

“Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

23. The principles for the grant of a temporary injunction pending appeal are well settled. In the case of *Patricia Njeri & 3 Others Vs National Museum of Kenya* [2004] eKLR, the Court gave the following principles as governing grant of temporary injunction pending appeal;

- a. “An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
- b. The discretion should be refused where it would inflict great hardship than it would avoid.
- c. The applicant must show that to refuse the injunction would render the appeal nugatory.
- d. The court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358.”

24. The principles for granting an injunction are well established in the case of *Giella Vs Cassman Brown & CO. Ltd* (1973) EA 358 where the Court stated as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”

25. I will first determine whether the Applicant has established that he has a prima facie case with probability of success.

26. A prima facie case was defined in the case of *Mrao Limited Vs First American Bank of Kenya & 2 Others* [2003] eKLR as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

27. The Applicant averred that he instituted Makueni ELC Case No. 138 of 2018 seeking for an order of specific performance for the Defendants to transfer the ownership of 4 acres of the suit property, a permanent injunction restraining the Defendants from interfering with the property.

28. In this regard the Applicant annexed a copy of the Plaintiff dated 28/11/2018 in ELC No 138 of 2018 to his supporting affidavit. He further averred that he purchased the suit property from the 1st Respondent and immediately took possession thereof. That the 2nd Respondent intends to bury the remains of the 1st Respondent on the suit property which will torment him as he will be forced to live with the remains of the 1st Respondent on the suit property. The Applicant stated that he has established a prima facie case as his appeal raises arguable grounds with probability of success.



29. On the other the hand, the 2nd Respondent stated that the Applicant has not established a prima facie case as his parents are the registered owners of the suit property. In this regard, he annexed a certificate of official search to his replying affidavit.
30. According to the certificate of official search dated 10th of February, 2022 (annexure WK) land parcel No Kathonzweni/Kwa Kavisi/303 measures 4.0 hectares and is registered in the names of Kimenye Masaku and Susan Nzula Kimenye in common each ½ undivided share. The 2nd Respondent contended that the Applicant deposed that he purchased 4 acres from the suit property and not the entire suit property.
31. In his Complaint in MCELC Case No. 138 of 2018, the Applicant is seeking for the following reliefs against the Defendants jointly and severally:-
- a. An order of specific performance directing the 1st Defendant to transfer to the Plaintiff the ownership piece of land the subject matter 4 acres situated in Kavingoni area of Itumbule Kathonzweni otherwise known as plot No. 303-Kwakavisi.
 - b. A declaration that the 2nd Defendant has unlawfully trespassed into the suit property and should therefore vacate.
 - c. An order of permanent injunction prohibiting the Defendants jointly or severally and whether acting in person, through family members, agents, proxies, servants or any other person whomsoever from trespassing or in any way interfering with the Plaintiff's ownership and possession of the suit property being the 4 acres of land situated in Kavingoni area of Itumbule Kathonzweni otherwise known as plot no 303 Kwakavisi.
32. The Applicant in paragraph 4 of his Complaint, stated in part as follows;
- “...sometime in the year 1994 he entered into an agreement for sale under which he purchased from the 1st Defendant a piece of land measuring 4 acres situated in Kavingoni, Itumbule otherwise known as Kwa Kavisi Plot No. 303 for an agreed purchase price of KShs 90,000/-.”
33. According to the certificate of official search, the suit property measures 4.0 hectares and not 4 acres as alleged by the Applicant. From the materials placed before me, it is clear that the Applicant's claim against the 1st Defendant is for the transfer of ownership of 4 acres and not the entire suit property. Although the Applicant averred that an interlocutory judgment has been entered against the 2nd Respondent, the trial Court will be called upon to determine whether the Applicant purchased 4 acres comprised in the suit property and whether the Respondents should transfer ownership of the 4 acres. That will be a matter for determination at the trial by evidence.
34. Until that is done, the rights of a registered proprietor as can be shown in a certificate of title shall be taken by all Courts as prima facie evidence that the person so named is the absolute and indefeasible owner under section 26 of the *Land Registration Act*, No.3 of 2012. On that ground, I find that the Applicant has not established a prima facie case with a probability of success.
35. The conditions set out in the Giella case (supra) are to be considered sequentially. Having found that the Applicant has failed to establish a prima facie case the Court finds no reason to delve into the other limbs that are to be considered on grant of a temporary injunction. In so finding I am persuaded by



the holding in the case of *Kenya Commercial Finance Co. Ltd Vs Afraba Education Society & Others* C.A Civil Appeal No. 142 of 1999 where the Court held that:-

“.....the judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated that it has a prima facie case with probability of success, no interlocutory injunction would be available.”

36. The upshot of the foregoing is that the application dated 21st of November, 2021 is devoid of merit and the same is dismissed with costs to the 2nd Respondent. For avoidance of doubt, the order issued on 8th of November, 2021 is hereby discharged.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF FEBRUARY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms. Kellen holding brief for Muumbi for the Applicant.

Ms Munyao for the 2nd Respondent.

