



**Kombe v Simba (Environment & Land Case E014 of 2020)
[2023] KEELC 15756 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15756 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E014 OF 2020
TW MURIGI, J
FEBRUARY 15, 2023**

BETWEEN

CHRISTINE KITHI KOMBE APPLICANT

AND

BENARD NZYUKO SIMBA RESPONDENT

RULING

1. There are two applications before me for determination. The first is a Notice of Motion application dated October 21, 2022 brought pursuant to the provisions of Sections 1A, 1B, 3A & 18 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law the Applicant seeks the following orders:-
 1. That this honourable court be pleased to transfer this matter to a similar court in Mombasa where the Plaintiff resides, for hearing and determination.
 2. That this Honourable Court orders that the parties be heard inter partes before any other orders are given in this matter.
 3. That the costs of the application be provided for.
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. A summary of the grounds and the averments is that the Applicant resides in Mombasa, while the Defendant and the suit property are situated within Makueni. The Applicant averred that, her doctor has advised her against travelling long distances due to her poor health. The Applicant further averred that since the present suit is a claim for compensation on a tort of trespass, it can be instituted in any



other Court of a similar jurisdiction. She argued that the Court is enjoined by the provisions of Section 1A and 1B to dispense justice in an expeditious manner.

4. The second Notice of Motion is dated 21st of October, 2022, brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 and Order 51 Rule 3, 4 and 5 of the Civil Procedure Rules and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. Spent.
 2. That pending the hearing and determination of this suit, the Defendant/Respondent by himself, his servants and agents or otherwise howsoever be prevented/disallowed/stopped/barred/prohibited/restrained by an order of temporary injunction from entering, building and/or having any dealing in the Plaintiff's plot known as Mbooni/Itetani/183 at Makueni.
 3. That an order to issue compelling and requiring the Defendant/Respondent to stop building in the Plaintiff's property No Mbooni/Itetani/183.
 4. That an order compelling the Defendants/Respondent herein to return the building poles, roofing sheets taken by him and or his agents and servants.
 5. That the application be heard inter partes on such date and at such time as this Honourable Court may direct.
 6. That the costs of this application be provided for.
5. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant.

The Applicant's Case

6. The Applicant averred that she is the registered owner of the suit property. She further averred that the Respondent has without any colour of right and her consent trespassed on the suit property by constructing a house thereon. The applicant stated that unless the Respondent is restrained by an order of injunction, he will continue constructing the house on the suit property.

I The respondent's case

7. In opposing the applications, the Respondent vide his replying affidavit sworn on October 27, 2022 averred that the application is frivolous, vexatious and an abuse of the Court process. He averred that the suit property was his late brother Raphael Kavuti Simba share of ancestral land. He further averred that vide a sale agreement dated March 28, 1985, his late brother Raphael Kavuti Simba sold to him 4.25 acres to be excised from the suit property and sold the remaining portion to Pius Jimmy Musyoki his late brother. That after the sale, his late brother Raphael Kavuti sold his share of ancestral land, he migrated and settled in Taita Taveta where he was buried after his demise. He further averred that the suit property is adjacent to land no Mbooni/Itetani/185 which is his share of his inheritance. He maintains that his son is constructing on land parcel no Mbooni/Itetani/185 and not on the suit property. The parties were directed to canvass the applications by way of written submissions.

The plaintiff's submissions

8. The Plaintiff's submissions were filed on December 7, 2022.
9. Counsel submitted on the principles applicable in the grant of an injunction as enunciated in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358.



10. On prima facie, Counsel submitted that the Applicant has established a prima facie case with a probability of success as she is the registered owner of the suit property and was holding the same in trust for other beneficiaries. Counsel contended that the Applicant's rights under Section 24 of the [Land Registration Act](#) cannot be taken away as she is the registered owner of the suit property.
11. Finally, Counsel submitted that the Applicant has met the threshold for the grant of an injunction and urged the Court to grant the orders sought.

The respondent's submissions

12. The Respondent's submissions were filed in Court on November 29, 2022.
13. With regards to the first application, Counsel submitted that the application is devoid of merit as the suit herein cannot be transferred to Mombasa since the Defendant resides in Mbooni and the suit property is situated within Makueni County.
14. Counsel referred the Court to Section 12 and 15 of the [Civil Procedure Act](#) and argued that convenience of the Plaintiff is not a factor to be considered in transfer of a suit. He argued that the suit ought to have been filed in Makueni or Tawa Law Courts.
15. On the second application Counsel reiterated the contents of the replying affidavit sworn by the Respondent.
16. To buttress his submissions counsel placed reliance on the case of [James Muoki Musymi v Julius Wamiua Malai](#) (2021) eKLR.

Analysis and determination

17. Having considered the application, the affidavits and the rival submission, I find that the issue that arises for determination is whether the applicant has satisfied the criteria to transfer the suit from Makueni ELC to Mombasa ELC.
18. Order 47 Rule 6(2) of the [Civil Procedure Rules](#) provides that a court on its own motion or on application of any party to a suit and for good cause shown can order the case to be tried in a particular place to be appointed by the court.
19. The Plaintiff has called upon the court to transfer this suit to Mombasa as she has left knee arthritis and uncontrolled diabetes. She averred that she has been advised by the Medical Superintendent Mariakani Sub-County Hospital to avoid long distance travelling since it aggravates her health condition.
20. The Respondent on the other hand opposed the application on the grounds that the suit property is within Makueni and that he resides in Makueni.
21. There is no doubt that under Sections 3 and 26 of the [ELC Act](#) this court has powers to transfer a suit pending before it to another ELC if it can be conveniently and expeditiously determined in that other ELC Court. In the case of [Hangzhou Agrochemicals Industries Ltd VIA Panda Flowers Ltd](#) (2012) eKLR the Court addressed conditions to be considered in determining whether or not to grant an order transferring a suit, thus;

“..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting



and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.”

22. Section 12 of the *Civil Procedure Act* restricts the filing of suits for recovery, partition, foreclosure, sale, compensation or determination of any rights or interest in immovable property to the Court within the local limits of whose jurisdiction the property is situate. The suit property herein Land Parcel No. Mbooni/Itetani/183 is within the territorial jurisdiction of this court.
23. From the material placed before me, it is clear that the Plaintiff is having challenges with her health and would like to have the matter heard in Mombasa ELC. In the present suit, it is clear that the Plaintiff wishes to have her case heard immediately owing to her health conditions. The governing law in relation to such evidence that is so critical that it requires the immediate examination of witnesses is to be found under Order 18 Rule 9 (1) of the *Civil Procedure Rules, 2010*. The law provides thus: -
 - (1) Where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may, upon the application of any party or of the witness, at any time after institution of the suit, take the evidence of such witness in the manner hereinbefore provided.
24. In *Center for Rights Education and Awareness & Another v John Harun Mwau & 6 Others* [2012] eKLR, KH Rawal JA (as she then was) adopted the following definition for de bene esse evidence: -

“I may quote a general definition and purport of the term De bene esse as under -

“De bene esse is a Latin term that means “of well being”. In a legal context, it refers to things done conditionally; allowed to stand for the time being; done in anticipation of future need. For example, an appearance de bene esse is a special appearance allowing a person to fulfill their obligation to appear without submitting to the court’s jurisdiction unless there is a final determination that the right to object to jurisdiction has been waived.” (emphasis mine).”
25. The Applicant did not invoke the provisions of Order 18 Rule 9 (1) of the *Civil Procedure Rules*. It is the finding of this Court that the application by the Plaintiff cannot be granted on account of Section 12 of the *Civil Procedure Act*. In light of the forgoing, the application dated October 21, 2022 is devoid of merit and the same is dismissed with no orders as to costs.
26. In the second application, the Applicant is seeking for injunctive reliefs.
27. Having considered the pleadings, the application, affidavits and the rival submissions, I find that the only that only issue that arises for determination is whether the Applicant has met the threshold for the grant of an order of injunction.
28. The principles applicable in an application for an injunction are well settled. In the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 the Court set out the conditions as follows: -First the 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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.



29. I will first determine whether the Applicant has established a prima facie case with probability of success.
30. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR the Court of Appeal defined a prima facie case as follows;

“ a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case 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.”
31. The Applicant averred that she is the registered owner of the suit property. In this regard the applicant annexed a copy of the Title deed to the suit property (annexure CKK-2). The Applicant averred that the Respondent was constructing on the suit property. In this regard, she annexed photographs (annexure CKK3) to her supporting affidavit. The Respondent on the other hand averred that his son was constructing on land parcel No 185 which is adjacent to the suit property.
32. It is not in dispute that the Applicant is the registered owner of the suit property and holds the same in trust for her co-beneficiaries. The Plaintiff has not demonstrated from the photographs (annexure CKK3”) that the Respondent is constructing on the suit property.
33. I therefore find that the Applicant has not established a *prima facie* case . Having failed to establish a prima facie case with a probability of success, I find no good reason to delve into the other limbs that are to be considered in an application for the grant of temporary orders.
34. The upshot of the foregoing is that the application dated October 21, 2022 is dismissed with no orders as to costs.

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

Hayanga for the Plaintiff/Applicant.

Mr. Sila for the Respondent/Defendant.

