



REPUBLIC OF KENYA



**Waita (Suing as the legal representative of the Estate of Jimmy Waita
- Deceased) v Musembi (Environment & Land Case E002 of 2022)
[2023] KEELC 15757 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E002 OF 2022**

TW MURIGI, J

FEBRUARY 15, 2023

BETWEEN

**REGINA MONIKA WAITA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JIMMY WAITA - DECEASED) PLAINTIFF**

AND

JOSEPH NDAVI MUSEMBI DEFENDANT

RULING

1. By a Notice of Motion dated 4th of February 2022 brought pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40 Rule 1 & 2 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#) and all other enabling provisions of the law the Applicant seeks the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to order the *status quo* prevailing as at 18th of April, 2021 before the judgment of the Court by Hon Justice Mbogo dated 19th of April, 2021 in ELC Suit No 74 of 2018 and/or the filing of the said suit regarding possession, user and occupation of the parcel of land known as title No Kiteta/Ngiluni/1802 by the Plaintiff/Applicant pending the hearing and determination of this application inter partes.
 3. That this Honourable Court be pleased to order the *status quo* prevailing as at 18th of April, 2021 before the judgment of the Court by Hon Justice Mbogo dated 18th of April, 2021 in ELC suit No 74 of 2018 and/or the filing of the suit regarding possession, user and occupation of the parcel of land known as title No Kiteta/Ngiluni/1802 by the Plaintiff/Applicant pending the hearing and determination of this suit.
 4. That in the alternative, this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendant/Respondent whether by himself, his servants, agents or



any person whomsoever from doing any of the following acts that is to say, selling, leasing, charging, farming/working on the land or otherwise howsoever dealing with the parcel of land known as title number Kiteta/Ngiluni/1802 pending the hearing and determination of this application inter partes.

5. That the Honourable Court be pleased to issue a temporary order of injunction restraining the Defendant/Respondent whether by himself, his servants, agents or any person whomsoever from doing any of the following acts that is to say, selling, leasing, charging, farming/working on the land or otherwise howsoever dealing with land parcel of land known as title number Kiteta/Ngiluni/1802 pending the hearing and determination of this suit.
 6. That the Honourable Court do make any further order it deems fit in the interest of justice.
 7. That the costs for this 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. The Applicant averred that she is the widow of Jimmy Waita Lole. The Applicant further averred that on 25th of May, 1985, her late husband entered into an agreement for sale in respect to the suit property which by then was un-surveyed with the Respondent herein. She further averred that her late husband made several payments towards the purchase of the suit property and completed payment on 13th of October, 1997. She further averred that since 1985, the deceased and his family were farming and depending on the suit property as their source of livelihood.
4. The Applicant further averred that in 2013, the Respondent illegally and unlawfully acquired the title deed to the suit property. That he informed her that he had not sold the property to her late husband but had leased the same for a period of 4 years starting from 1985 and ending in 1989. She went on to state that vide the judgment delivered on 19th of April, 2021, in ELC N0. 74 of 2018 the Plaintiff (the Respondent herein) was granted an order of permanent injunction and proceeded to evict the Applicant and her family from the suit property.
5. It is the Applicant's case that in Makueni ELC Case No 74 of 2018, the Court held that the suit was defended by a person who did not have privity of contract. The Applicant argued that although she was not a party in ELC Case No 74 of 2017, she now has the *locus standi* to mount a claim over the suit property. She averred that the case was determined on the basis of privity of contract and/or *locus standi* and not on merits. She maintains that the Respondent registered the suit property in his name so as to disinherit her.
6. She further averred that vide a letter dated 17th of September, 2021 the Chief Ngiluni location confirmed that the Respondent had sold the suit property to her late husband, who had made payment in full. The Applicant argued that unless the orders sought are granted, the Respondent may sell, charge or lease the suit property which will prejudice her family's interest in the suit property.

The Respondent's Case

7. In response to the application, the Respondent vide his replying affidavit sworn on 28th of February, 2022 averred that on diverse dates in 1985, he leased the suit property to the Respondent's late husband for a term of four years to enable him to get funds to battle a dispute with a third party at the Lands Dispute Tribunal. In addition, he stated that by then, the land was unregistered.



8. That on 25th of May, 1985, the deceased paid the first instalment of Kshs 200/= and later on paid him in bits a sum of Kshs 17,100/= leaving an outstanding balance of Kshs 1,900/= which is unpaid to date.
9. That after he won the case at the Land Disputes Tribunal, he acquired the title to the suit property from the Makueni Lands Office. He argued that he had no reason to consult the Applicant since he did not sell the suit property to her late husband.
10. He went on to state that he instituted ELC Suit No 74 of 2014 against Mbyuta Nzioka seeking for a permanent injunction restraining him from trespassing on which upon hearing was on 19th of April, 2021 determined in his favour.
11. He contended that the Applicant's claim over suit property is an afterthought since she was a key witness of Mbyuta Nzoka and did not apply to be enjoined in the suit to ventilate her alleged claim of ownership.
12. He further averred that it is clear from Applicant's statement and testimony in Court that she has never been in occupation of the suit property since it was Mbyuka who was using the land having purchased the same from his deceased brother. He maintains that Mbyuta in compliance with the decree vacated the suit property.
13. The application was canvassed by way of written submissions.

The Plaintiff's Submissions

14. The Plaintiff's submissions were filed in Court on 7th of July, 2022.
15. Counsel for the Applicant submitted that the only issue that arises for determination is whether the Applicant has met the threshold for the grant of an injunction. Counsel submitted that the law governing the grant of an injunction is founded on Order 40 Rule 1 of the Civil Procedure Rules while the conditions to be met were enunciated in the case of *Giela v Cassman Brown Co Ltd* 1973 EA358.
16. Counsel submitted that the Applicant's late husband purchased the suit property in 1985 from the Respondent as confirmed by the sale agreement, records of the payments, proceedings before the Assistant Chief and the Chief, and the letter by the Chief Ngiluni Location. Counsel argued that the Respondent fraudulently and through misrepresentation obtained registration of the suit property which is a basis of impeaching the title.
17. On irreparable loss, Counsel submitted that the Applicant having been in occupation of the suit property will suffer irreparable loss if the property is sold to third parties as damages will not be an adequate remedy.
18. On balance of convenience, Counsel submitted that the Respondent caused the Applicant to be evicted from the suit property where she had been residing for the last 36 years. Counsel argued that the balance of convenience lies in favour of the Applicant as Respondent has only been in occupation of the suit property for 1 year 2 months.

The Respondent's Submissions

19. The Respondent's submissions were filed in Court on 1st of December, 2022.
20. Counsel for the Respondent identified the following issues for the Court's determination:-
 - i. Whether the Court can issue an order of injunction absolute against the owner of LR Kiteta/ Ngiluni/1802 from using and dealing with his land.



- ii. Whether the Plaintiff has made out a *prima facie* case with chances of success.
 - iii. In whose favour does the balance of convenience lie.
21. Counsel submitted that the Applicant has not established a *prima facie* case with a probability of success as the Respondent is the registered owner of the suit property. He argued that an injunction cannot be issued against the Respondent as it would offend the provisions of Section 26 of the [Land Registration Act](#).
 22. Counsel further submitted that the Applicant will not suffer any loss since she has never been in possession of the suit property.
 23. In conclusion, Counsel submitted that the balance of convenience tilts in favour of the Respondent as he is the absolute owner and occupier of the suit property.

Analysis And Determination

24. Having considered the pleadings, the application, affidavits and the rival submissions, I find that the only issue that arises for determination is whether the Applicant has met the threshold for the grant of an order of injunction.
25. 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.
26. I will first determine whether the Applicant has established a *prima facie* case with probability of success.
27. 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.”
28. The Applicant averred that on 25th of May, 1985, her late husband entered into an agreement for sale of the suit property with the Respondent. The Applicant contended that at the time of the sale, the suit property was un-surveyed. That the deceased made several payments towards the purchase up to 13th October, 1997. In this regard, she annexed a sale agreement dated 25th of May, 1985 between Joseph Musembi Ndavi Ngota and Jimmy Waita Lole and acknowledgement of payment made between 28/11/1985 to 13th of October, 1997. She also annexed a letter dated 9th of August 1995 by the Chief, Ngiluni Location which confirmed that indeed the Respondent sold the suit property to her late husband. The Applicant contended that the Respondent illegally and unlawfully acquired the title deed for the suit property in a bid to dispossess her.
29. On the other hand, the 1st Respondent denied having sold the suit property to the Applicant’s deceased husband. He averred that he leased the suit property to the deceased for a period of 4 years so that he could get funds to battle a case at the Land Dispute Tribunal. That after he won the case, he obtained



the title for the suit property on 13th of October, 2013 procedurally and had no reason to consult the Applicant since he had not sold his land. The Applicant argued that the Respondent unlawfully and illegally registered the suit property in his names so as to disinherit her and her family.

30. The Applicant's proprietary claim is anchored on the sale agreement dated 25th of May, 1985 between her late husband and the Respondent, while the Respondent proprietary claim is based on the certificate of title.
31. Both parties are claiming ownership over the suit property. It is not in dispute that the Respondent is the registered owner of the suit property.
32. As a registered proprietor, the Respondent is by dint of Section 26(1) of the [Land Registration Act](#), deemed to be an absolute and indefeasible owner of the said suit property. The above Section states as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge.”

33. However, the exceptions in (1) (a)&(b) provide that the said Certificate of title can be challenged if the same was acquired through fraud, misrepresentation, illegally, unprocedurally or through corrupt scheme. Section 26(1) (a)&(b) of the [Land Registration Act](#) provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

34. The Applicant alleged that the registration of the suit property in favour of the Respondent was done through illegal and/or unlawful means.
35. On whether the Defendant obtained registration of the suit through illegal or unlawful means is not a matter to be determined at this juncture. The said determination will have to await the calling of evidence at the main trial. The issues of ownership and whether registration was obtained through illegal means are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination.
36. The Court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy. At the interlocutory stage, the Court is not required to make final findings on the contested matters.



37. In the case of *Mbutbia v Jimba Credit Finance Corporation & another* [1988] eKLR the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
38. Similarly, in the case of *Edwin Kamau Muniu v Barclays Bank of Kenya Ltd* NBI HCCC No 1118 of 2002, the court held that;
- “In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”
39. In the case of *Joash Ochieng Ougo & another v Virginia Edith Wambui Otieno* [1987] eKLR, the Court of Appeal held that;
- “The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the *status quo* until the dispute has been decided on a trial.”
40. From the pleadings and the documents availed to the Court, it is crystal clear that there is an agreement for sale of Plot No 1802 between the Applicant’s late husband and the Respondent herein. The Respondent denied having executed an agreement for sale with the Applicant’s deceased husband.
41. Looking at the documents annexed to the Applicants supporting affidavits, it is evident that the Applicants claim is not baseless. I find that the Applicant has established a *prima facie* case with a probability of success.
42. On whether the Applicant will suffer irreparable loss which cannot be adequately compensated by award of damages if the orders sought are not granted, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.
43. The Court of Appeal in *Nguruman Limited v Bonde Nielsen & 2 others* (2014) eKLR held that: -
- “On the second factor, 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 facie*, 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 stand 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.”
44. The Applicant argued that having been in occupation of the suit property, she is apprehensive that the Respondent may dispose of the suit property to 3rd parties. The Respondent on the other hand stated that as per the proceedings in ELC Case No 74 of 2018, it was evident that the Applicant has never been in possession of the suit property. He argued that it was her brother in law Mbyuta who was in possession and had in compliance with the orders of the Court vacated the suit premises.



45. The Applicant conceded that pursuant to the judgment delivered in ELC Case No 74 of 2017, the Respondent evicted her from the suit property. Although it is evident that the Plaintiff has not been in occupation of the suit property.
46. This Court is convinced that the Applicant stands to suffer irreparable harm that cannot be compensated by way of damages if the suit property is transferred to a third party pending the hearing and determination of this suit.
47. On the issue of balance of convenience, the Court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction, against the hardship to be borne by the Respondent by granting the injunction.
48. Looking at the evidence presented by the parties herein, I find that the balance of convenience tilts in favour of maintaining the status quo on the suit property. The status quo herein is that the Defendant is the registered owner of the suit property and he should remain so. However, the Defendant is restrained from selling, leasing or charging the suit property to any third party/ies or any other person whatsoever pending the hearing and determination of the main suit.
49. In light of the foregoing, I hereby issue an orders of *status quo* in the following terms:-
 1. The Defendant is the registered owner of the suit property but he is restrained from selling, leasing or charging the suit property to any third party/ies or any other person whatsoever pending the hearing and determination of the main suit.
 2. Parties to set down the main suit for hearing expeditiously.
 3. Costs shall be in the cause.

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

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HON. T. MURIGI
JUDGE

In the presence of: -

Court Assistant - Mr. Kwemboi

Ms Nduku holding brief for Munyasya for the Plaintiff/Applicant.

Mr. Moriasi for the Respondent.

