



REPUBLIC OF KENYA



**Lubano & 2 others v Machuka & 4 others (Land Case 34 of 2022)  
[2023] KEELC 806 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 806 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 34 OF 2022  
MAO ODENY, J  
FEBRUARY 14, 2023**

**BETWEEN**

**GODFRED MASINDE LUBANO ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH WAKOLI WEKESA ..... 2<sup>ND</sup> PLAINTIFF  
KIZITO MABISI LUBANO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JUDY WANJIRU MACHUKA ..... 1<sup>ST</sup> DEFENDANT  
DAUDI MACHUKA ..... 2<sup>ND</sup> DEFENDANT  
REHEMA MACHUKA ..... 3<sup>RD</sup> DEFENDANT  
MARGARET NGINA MUIRU ..... 4<sup>TH</sup> DEFENDANT  
LEONARD MACHUKA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated June 6, 2022 by the plaintiff/applicant seeking the following orders; -
  - a. Spent
  - b. Pending the hearing and determination of this application an order of injunction be issued restraining the defendants either by themselves, their servants or agents from selling, transferring harassing, evicting, intimidating the plaintiffs or their farmworkers, agents, servants or in other way interfering with plaintiffs' quiet enjoyment, working and stay on LR NO. 1705/233/6 and LR. Kilifi/Mtondia/499,500 and 501.



- c. Pending the hearing and determination of this suit an order of injunction be issued restraining the defendants either by themselves their servants or agents from selling, transferring, harassing, evicting, intimidating the plaintiffs' quiet enjoyment, working and stay on LR NO. 1705/233/6 and LR. Kilifi/Mtondia/499,500 and 501.
  - d. Costs be in the cause.
2. The application is anchored on the supporting affidavit of Kizito Mabisi Lubano the 3<sup>rd</sup> plaintiff with the authority of his co-plaintiffs stating that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs bought LR Kilifi/1705/233/6 while he bought LR Kilifi/Mtondia/499/500/501 from Jesse Simiyu Machuka whom on completion of full purchase price handed over possession in 2010 and the plaintiff's put it to good use. He stated that the said Jesse Simiyu Machuka passed away before completion of the respective suit properties to the plaintiffs.
  3. The applicant further deponed that the 1<sup>st</sup> defendant who is a widow to the deceased has been avoiding the plaintiffs and has instead taken to intimidating the plaintiffs' workers on the suit parcels of land including making false reports of trespass to the DCI.
  4. In response to the application the defendants filed a replying affidavit dated June 20, 2022 sworn by Judy Wanjiru Machuka the 1<sup>st</sup> defendant whereby she deponed that she was the wife to the deceased and that the deceased did not inform her of any sale or any receipt of monies from the plaintiffs.
  5. She further deponed that it is the 3<sup>rd</sup> plaintiff who in 2014 after the demise of her husband informed her of the alleged transactions and requested her to transfer the land to the plaintiffs.
  6. It was her averment that out of her suspicions of the transactions that she involved the DCI to put restrictions to the suit properties to safeguard her rights and interests.

### **Plaintiff/applicant's Submissions**

7. Counsel submitted that the applicants had paid to Jesse Machuka (deceased) full purchase price in respect of the suit properties of which some of the agreements were done in the presence of the 1<sup>st</sup> defendant. and took possession of the suit properties and maintained communication with the late Jesse Machuka.
8. Counsel submitted on the principles of issuance of temporary injunction and relied on the cases of *Giella v Cassman Brown* [1973] EA 35, *Moses C Mubia Njoroge & 2 others v Jane W. Lasalo & 3 others* [2004] eKLR, *Serab Njeri Mwobi v John Kimani* [2013] eKLR, and *Registered Trustees Anglican Church of Kenya Mbeere Diocese v David Waweru Njoroge* [2007] eKLR, and urged the court to find that the applicants have met the threshold for grant of an injunction.
9. Mr. Wati submitted that the four properties Kilifi 1705/233/6, Kilifi/Mtondia/499, Kilifi/Mtondia/500 and Kilifi/Mtondia/501 from the search conducted and annexed to the supporting affidavit establishes the existence and ownership of the suit land which belonged to Jesse Simiyu Machuka.
10. Counsel further submitted that the search also indicated that the suit land was latter registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants which entries were made vide transmission pursuant to Orders in the Nairobi Succession Cause No. 3297 of 2014 in the matter of the Estate of Jesse Simiyu Machuka.
11. It was Mr. Wati's submission that Paragraphs 8-16 of the 3<sup>rd</sup> plaintiffs affidavit shows that the payments to Jesse Machuka were made both in dollars and Kenya shillings in full for the purchase of Kilifi



1705/233/6. Further that the e-mail conversations, show payment by EFT in the late Machuka's J.P Morgans Chase Bank Account, payment in cash and in Bankers cheques by the 3<sup>rd</sup> Plaintiff are captured to prove that the payments were made and that 1st defendant and the late Jesse Machuka personally identifying the perimeters, fencing and physically handing over possession of the respective subject parcels of land.

12. Counsel relied on the Court of Appeal case of *Serab Njeri Mwobi v John Kimani* (2013) eKLR, to show that the intention of Jesses Simiyu Machuka to sell the suit parcel.

### **Defendant/respondents' submissions**

13. Counsel submitted that the plaintiffs have failed to prove their proprietary interest on the suit properties as the documents produced by the applicants in support of ownership claims are fraudulent, illegal and unlawfully obtained.
14. Counsel further submitted that the plaintiffs have not demonstrated how the suit properties are in danger of being alienated or transferred to a third party. That the suit properties are registered in the name of the deceased thus no evidence of irreparable damage likely to be occasioned to the plaintiffs and the balance of convenience favours the defendants.
15. Counsel relied on the cases of *Giella v cassman Brown* [1973] EA 358, *Mrao Ltd v First American Bank of Kenya Limited & 2 others* [2003] eKLR and *Nguruman Limited v Jan Bonde Nielson 2 others* [2014] eKLR and 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 injunctions as was held in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358.
  1. A party making an application for temporary injunction must establish that he/she has a prima facie case with a probability of success, demonstrate irreparable injury if a temporary injunction is not granted, and if the court is in doubt it should decide on a balance of convenience.
17. Similarly Order 40 r. (2) *CPR* provides that: -
  - “(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
  - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”
18. The plaintiffs' have given a detailed background of how they entered into a sale agreement with the late Jesse Simiyu Machuka, how they paid the purchase price in full and took possession of the suit parcels of land.



19. The 1<sup>st</sup> defendant who is the wife of the deceased and an administrator of the estate of the deceased has also stated that she was approached by the 3<sup>rd</sup> defendant who claimed that he had bought the suit land from the deceased. That she was suspicious and reported the matter to DCI.
20. The 1<sup>st</sup> defendant further stated that she was unaware of the said transactions and in the event the same indeed occurred, then they would be willing to refund the monies paid.
21. The evidence on record from the averments, it is not in doubt that the plaintiffs entered into a sale agreement with the deceased, what the defendants are claiming, is that the transaction documents were fraudulent and illegally obtained which allegation the court will determine at the hearing of the main suit.
22. I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the plaintiffs have established a *prima facie* case with a probability of success against the defendants hence they are entitled to an order of injunction as prayed. The application is therefore allowed as prayed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF FEBRUARY 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 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](#).

