



REPUBLIC OF KENYA



**Makau & another v Nzioka (Environment & Land Case E002 of 2022)  
[2023] KEELC 16714 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16714 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E002 OF 2022  
CA OCHIENG, J  
MARCH 29, 2023**

**BETWEEN**

**JANET MBOLI MAKAU ..... 1<sup>ST</sup> PLAINTIFF**

**NZEMBI MAKAU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JUDITH N'THENYA NZIOKA ..... DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the January 13, 2022, where they seek the following orders:
  1. Spent.
  2. That the Honourable Court be pleased to issue an injunction on the ongoing construction on the land reference number 2949 located in Tala along Kangundo road.
  3. The Honourable Court be pleased to stop the ongoing construction on the land said above.
  4. This Honourable Court be pleased to stop the construction of a mortuary on the suit land.
  5. The Defendant herein to return and surrender back the piece of land she illegally and forcefully acquired.
2. The Application is premised on the grounds on the face of it and supported by the Affidavit sworn by one Janet Mboli Makau, the 1<sup>st</sup> Plaintiff herein. She deposes that she has the authority of the 2<sup>nd</sup> Plaintiff to swear the Affidavit on behalf of the Plaintiffs. She avers that the Plaintiffs were the owners and administrators of the suit land and annexed a copy of the Grant of Letters of Administration Intestate to that effect. She states that the Defendant had taken advantage of the 2<sup>nd</sup> Plaintiff's old age and entered into a Sale Agreement for the sale of the suit land and has now encroached over and above



the parcel she is entitled to. She claims the Defendant has become rude and even refused to attend to the area chief as indicated in the letter annexed to the Affidavit and marked JMM3. She contends that they had tried to engage with the Defendant but they had been met by goons at the gate. She explains that the Defendant is illegally owning an extra piece of land and unless she is stopped by an injunction, the Plaintiffs are likely to lose their other piece of land. She reiterates that the Defendant has erected a mortuary on the suit land.

3. The Defendant opposed the Application by filing a Replying Affidavit sworn by herself where she deposes that she entered into a Land Sale Agreement with the 2<sup>nd</sup> Plaintiff on October 24, 2018. She claims that she later entered into another Sale Agreement with the 2<sup>nd</sup> Plaintiff on July 23, 2021 and annexed copies of both Sale Agreements. She claims before purchasing the suit land, she had conducted a search and confirmed that the 2<sup>nd</sup> Plaintiff was the duly registered owner of the suit lands. She explains that prior to construction of the mortuary, she had conducted a public participation forum in line with NEMA conditions after which she was granted a letter from the County Government of Machakos dated the July 12, 2019 confirming that no objection had been lodged against the construction of the funeral home. She avers that she was granted a NEMA license dated June 27, 2019 allowing her to commence the construction and annexed a copy of the said license. She confirms that she proceeded with the construction and completed the same and attached photos to that effect. She insists that since it began operations, the funeral home has received and helped preserve over one hundred bodies, and that there are still bodies awaiting discharge at the said funeral home. She reiterates that issuing injunctive orders at this stage is tantamount to passing Judgment before hearing the parties and that she had spent enormous time including resources to put up the funeral home which is filled with body preservation equipment, generators and specialized body transportation motor vehicles acquired through bank financing. She contends that she will suffer massive loss if the operations are put on halt since she is still servicing the loan and that the 2<sup>nd</sup> Plaintiff sold her the land vacant of possession. Further, that she has invested heavily on the suit land raising its value to over Kshs. 20,000,000. She sought for orders of status quo to be maintained pending determination of the suit.
4. The Plaintiffs filed a Further Affidavit sworn by the 1<sup>st</sup> Plaintiff where she insists that the 2<sup>nd</sup> Plaintiff was illiterate and over 68 years of age hence she was misguided into entering in the Sale Agreement. She states that the family had appointed her to administer the Estate of their late father and that she had not allowed any sale of the suit land. She avers that the 2<sup>nd</sup> Plaintiff was also in shock and the purported transaction was fraudulent because it was as a result of undue influence on the 2<sup>nd</sup> Plaintiff. She challenges the signatures of the 2<sup>nd</sup> Plaintiff and insists there are inconsistencies in both agreements. She states that witnesses in the Sale Agreement had also distanced themselves from the same. She reiterates that there was no Land Control Board Consent in support of the said transaction as required by law. Further, that the Defendant had grabbed the land and constructed a mortuary close to a residential area and other institutions including a school. She argues that the mortuary was constructed near the main water point in the village and residents had signed a letter in objection to the said construction of a mortuary but the Defendant had proceeded since she has financial muscle. She did annex a letter and Minutes of a meeting wherein the villagers had opposed the construction of the mortuary on the suit land.
5. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

6. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivalling submissions, the only issue for determination is whether the Plaintiffs are entitled to



orders of temporary injunction restraining the Defendant or her agents from the suit land pending the outcome of the suit.

7. The Plaintiffs in their submissions reiterated their averments as per the Affidavits and insisted that they had established a prima facie case to warrant the orders of injunction as sought. They confirmed that they adhered to the due process and were administrators of the Estate of Peter Makau Ndonge vide Grant of Letters of Administration Intestate issued in HC/RM 2975 of 2005. They insisted that the Defendant had trespassed on the suit land and constructed a mortuary thereon. To support their averments, they relied on the following decisions: ELC Appeal No. 16 of 2017 *Gichinga Kibuthia V Caroline Nduku; Mrao Limited v First American Bank of Kenya & Others* (2003) KLR and *Raphael Mulinge Muthusi & 2 Others v Mary Nyoko and Mount Robbin Limited v Salim Toza* (2022) eKLR.
8. The Defendant reiterated the contents of her Replying Affidavit and insisted that the Plaintiffs had not established a prima facie case to warrant the orders of injunction as sought. She insisted that she legally purchased the suit land from the 2<sup>nd</sup> Plaintiff as evidenced by the Sale Agreements and consequently obtained requisite approvals from the relevant authorities to construct the funeral home. She further submitted that the Plaintiffs are not likely to suffer irreparable harm if the orders sought are not granted. It was her submission that halting the activities of the mortuary would lead to massive harm and losses on her part. She argued that an injunction would also amount to rendering a premature Judgment and yet she had spent enormously in putting up the funeral home and was servicing bank loans. To buttress her averments, she relied on the following decisions: *Giella v Cassman Brown* [1973] EA 358; *East African Development Bank V Hyundai Motors Kenya Limited* [2006] eKLR and *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR.
9. The Plaintiffs have sought orders of injunction to restrain the Defendant from interfering with the suit land, which fact is opposed by the Defendant. The principles for granting of interlocutory injunction is well established in the case of *Giella v Cassman Brown & Co Ltd* (1973) EA 356, while in the case of *Mrao Ltd v First American Bank Ltd & 2 Others*, (2003) KLR 125 the court provided an apt definition of what a prima facie case should be. The 1<sup>st</sup> Plaintiff claims that the 2<sup>nd</sup> Plaintiff who is her mother is illiterate and sold the suit land to the Defendant without consulting her as a co-administrator of her late father's Estate. She further claims that the Defendant encroached on an extra portion of the suit land and constructed a mortuary thereon which villagers have resisted as evident in the Minutes produced. The Defendant in response insists that she purchased the suit land from the 2<sup>nd</sup> Plaintiff and annexed two Sale Agreements to prove her claim. Looking at the documents presented by both parties, I note the 2<sup>nd</sup> Plaintiff was indeed the registered proprietor of the suit land being Machakos/Nguluni/2949 as at May 13, 2013 as per annexure 'JNN 3'. Further, the 2<sup>nd</sup> Plaintiff entered into two Sale Agreements dated the October 24, 2018 and July 23, 2021 in respect to sale of suit land, which have been annexed to the Replying Affidavit. The Defendant has constructed a mortuary on the disputed land and insists she got all the requisite approvals to do so which fact the 1<sup>st</sup> Plaintiff opposes insisting the villagers are opposed to the said mortuary. The 1<sup>st</sup> Plaintiff insists that the mother who is the 2<sup>nd</sup> Plaintiff was manipulated into entering into the first Sale Agreement. She disputes the second Sale Agreement insisting the 2<sup>nd</sup> Plaintiff is illiterate and cannot even write her name. I note the 2<sup>nd</sup> Plaintiff has however not sworn any Affidavits to refute the two Sale Agreements purportedly entered into with the Defendant. The 1<sup>st</sup> Plaintiff claims the Defendant has encroached on an extra portion of land which the mother had not sold. The 1<sup>st</sup> Plaintiff claims the mortuary was constructed illegally but from the annexures in the Replying Affidavit, I note there are various approvals the Defendant obtained from the County Government of Machakos and NEMA. Be that as it may, at this juncture, this court finds that the issues to be determined are weighty as they touch on allegations of fraud, land grabbing and undue influence. The Minutes of the meeting allegedly attended by several villagers vis a



vis the alleged public participation forum by the Defendant need to be put to strict proof. Insofar as I find that the Plaintiffs have raised triable issues and established a prima face case that warrant the court's determination, I am however of the view that since there is already an ongoing mortuary business on the suit land which was allegedly sold by the 2<sup>nd</sup> Plaintiff as per the aforementioned Sale Agreements, while associating myself with the decision of Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co Ltd v MW (Minor suing thro' next friend and mother (HW)) [2016] eKLR where the court defined a conservatory order as follows:-

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

10. I find that an order of obtaining status quo would suffice pending the outcome of the suit. I further direct that no party should be allowed to interfere with the other party nor put up any further developments on the suit land.
11. The upshot of this is that the Notice of Motion Application dated the January 13, 2022 partially succeeds.
12. Costs shall abide the outcome of the suit.
13. Parties are directed to comply with Order 11 of the Civil Procedure Rules within thirty (30) days from the date hereof and set the suit for hearing.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29<sup>TH</sup> DAY OF MARCH, 2023**

**CHRISTINE OCHIENG  
JUDGE**

