



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO. E008 OF 2021

JOHN NZOMO WAMBUA.....PLAINTIFF/APPLICANT

-VERSUS-

JOSEPH TAITI WAMBUA.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the application dated 23rd March 2021 wherein the Plaintiff/Applicant seeks orders that:

a. Spent.

b. Spent.

c. THAT pending the hearing and determination of the suit herein, an order of injunction do issue restraining the defendant/respondent whether by himself, his agents, servants and /or any other person claiming under him from in any way at all selling or in any way disposing off, fencing, evicting or in any way at all engaging in any acts of dispossessing and/ curtailing use by the plaintiff all that parcel of land known as MAKUENI/KAKO/371;

d. THAT costs of this application be paid by the defendant/respondent.

2. The application is supported by the applicant's affidavit and is premised on the grounds that: -

a. THAT the plaintiff is a son of Joel Wambua Nzioki who was the owner of all that land known as MAKUENI/KAKO/269 and MAKUENI/KAKO/371. As such therefore the same forms part of ancestral land.

b. THAT his late father had two wives, Beatrice Ndunge Wambua and Beth Mbuli Wambua.

c. THAT his late father had prior to his death settled his two wives separately with Beatrice Ndunge Wambua living on MAKUENI/KAKO/269 and Beth Mbuli Wambua living on MAKUENI/KAKO/371.

d. THAT the late Joel Wambua Nzioki who died on 14/6/1984 had the following children who claim entitlement to his properties:

· Joseph Taiti Wambua

· John Nzomo Wambua

· *Beatrice Ngelewa Mathuku*

· *Agnes Mbeti Mulatya*

· *Serah Nduku Ngao*

e. THAT the plaintiff has been residing on MAKUENI/KAKO/371 while the defendant resides on MAKUENI/KAKO/269.

f. THAT by the time survey came to the area, his father Joel Wambua Nzioki had died.

g. THAT the Defendant being the oldest son of the late Joel Wambua Nzioki and seeing as he was already residing on the land, he was registered as the owner of all that land known as MAKUENI/KAKO/269 in trust for himself and the other siblings but fraudulently failed to cause that trust entered into the register.

h. THAT the fraud was perpetuated by the defendant by: registering the parcel of land in his name alone well aware that it was family land thus ancestral land, failing to cause a registration of customary trust in the register of the parcel of land while being well aware of the same, and refusing to have MAKUENI/KAKO/269 listed as one of the assets available for distribution in the estate of Joel Wambua Nzioki. That the plaintiff and the defendant continued to co-exist peacefully with each occupying their respective and actually sold the land to one John Kimatu Kilokwe. The defendant has started interfering with the plaintiff's occupation of his share and has resulted to destroying the plaintiff's property without lawful excuse.

i. THAT the defendant has declined to have MAKUENI/KAKO/269 listed as one of the properties of their late father claiming that he is the sole registered owner of the property.

j. THAT the plaintiff filed a citation cause in the senior principal magistrate's court in Makueni being citation cause no. E50 of 2020.

k. THAT the defendant claimed to have no objection to the filing of a succession cause but refused to have the have the land known as MAKUENI/KAKO/269 listed as one of the assets available for distribution citing sole ownership of the same.

l. THAT as a result, the plaintiff avers that the actions of the defendants are illegal and unlawful thus actionable in a court of law thus this suit.

m. THAT unless the orders sought are granted, the applicant and his siblings shall suffer irreparably because the estate of their late father will not be distributed in a just manner.

n. THAT it is in the interest of justice to grant the orders sought.

3. The defendant/respondent opposed the application through the replying affidavit dated 13th April 2021.

4. The defendant/ respondent avers that the application is frivolous, non-starter and a clear waste of the court process.

5. He alleges that he was not served with any supporting document annexed to the replying affidavit.

6. He avers that he is the son to the late Joel Wambua Nzioki who is the registered owner of land parcel number MAKUENI/KAKO/371.

7. He is the registered owner of land parcel number MAKUENI/KAKO/269 and the same therefore does not therefore form part of ancestral land.

8. The defendant /respondent contests the contents of paragraph 4 of the supporting affidavit that they are an apparent falsity. He states that he is the son of Beth Mbuli Wambua whereas the plaintiff/applicant is the son of Beatrice Ndunge Wambua.

9. The defendant /respondent avers that the survey of the area where the suit parcels of land are situated was conducted between the year 1963 to 1969 and this explains the reason why the respondent was the registered as a first owner of land parcel number MAKUENI/KAKO/269 on 1st September, 1967.

10. That the plaintiff/applicant has not tendered any documentary evidence before this honourable court to support the allegations of fraud he has made against the defendant/respondent. That if indeed the allegations of harassment by the applicant are true then he ought to have reported the same to the relevant authorities.

11. That it is surprising that the plaintiff/applicant wishes to have MAKUENI/KAKO/269 to be included in the succession cause yet it does not belong to their late father. That it is evident that the applicant does not have any locus standi to file this suit since the land parcel number MAKUENI/KAKO/371 is registered under their deceased father and the applicant is not the legal administrator of his estate.

12. That defendant/respondent argues that there is no correlation between the application and the plaint filed by the applicant. It is common adage that the orders sought in the two pleadings must have some sought of conformity.

13. That the plaintiff/applicant has not established a prima facie case with a probability of success as it is required under the relevant statutory provisions. That it is clearly an abuse of the court process and the application ought to be dismissed forthwith.

14. The application was canvassed by way of written submissions.

15. The plaintiff/applicant submitted that the defendant/respondent in his replying affidavit has attached a copy of the title deed of all that land known as MAKUENI/KAKO/269 and a current search. That it is not in dispute that he is currently the registered owner of that land. The question before this court and which will be answered during trial is the circumstances under which that came to be. The instant application relates to land parcel MAKUENI/KAKO/371 where the plaintiff/applicant has been residing. The defendant/respondent does not live on the land. He has been on a selling spree of the land notwithstanding the fact that he has no valid letters of administration. The plaintiff/applicant submitted that the respondent has already disposed a few acres of the land and he is in the process of selling the rest.

16. The plaintiff/applicant submitted that he and his siblings stand to suffer irreparably if the actions of the defendant/respondent remain unchecked. MAKUENI/KAKO/371 is ancestral land belonging to their late father. The defendant/ respondent has singlehandedly been disposing off the same and pocketing the proceeds with no concern for his other siblings. The defendant/respondent has already pocketed an unknown amount after selling the land to one John Kimatu.

17. The plaintiff/applicant submitted that an injunction is the only way of safe guarding his interests as the defendant/respondent is in no position to reimburse the current market value of the suit land if he disposes the same.

18. The plaintiff/applicant submitted that the defendant/respondent does not reside on the property. He will not in any way be adversely affected if the orders sought are granted. He cited the case of *Paul Gitonga Wanjau Vs Gathithis Tea Factory Company Limited & 2 Others [2016] Eklr.*

19. The plaintiff/applicant has disclosed all the relevant to this court. He has attached pleadings of another case before the Chief Magistrate being **Citation Cause E50 of 2020** which necessitated the filing of this suit when it became clear that the respondent had caused the property of a deceased person to be registered in his name. That in the interest of justice, the court has to issue conservatory orders to ensure that the suit property is not alienated to the detriment of the plaintiff/applicant and other children of Joel Wambua until the suit is heard and determined. He cited the case of *Kenleb Cons Ltd New Gatitu Service Station Ltd & Another, [1990] Eklr.*

20. The plaintiff/applicant submitted that he has satisfied all the conditions required before an order of injunction can be issued. That merited and the same should be allowed.

21. The defendant/respondent submitted that the plaintiff/applicant has not challenged the manner in which the defendant/respondent acquired his title to the suit property. Therefore, the defendant/respondent submitted, the legality of the said title remains unchallenged. The plaintiff/applicant has not produced any evidence to challenge the *status quo*. He cited the case of

Mrao ltd vs First American Bank of Kenya Limited and 2 others[2003] eKLR

22. The defendant/respondent submitted that the late Joel Wambua Nzioki died in the year 1984 while the defendant/respondent was registered as the first owner of the land parcel number MAKUENI /KAKO/269 on 1st September, 1967 when their late father was still alive. Therefore, he submitted, that land parcel no, MAKUENI /KAKO/269 is absolutely a private property that belongs to him.

23. The defendant/respondent submitted that he and the plaintiff/applicant are both sons of the late Joel Wambua Nzioka. That all children of the late Joel Wambua Nzioka are entitled to a share the defendant/respondent included and this has not been challenged and therefore an injunction restraining the defendant/respondent from entering into the piece of land which he is entitled to a share would be prejudicial to him.

24. The defendant/respondent submitted that the plaintiff/applicant being in possession of some part of the land parcel no. MAKUENI /KAKO/371 cannot be an evidence of a prima facie case with a probability of success as it was held in the case of **Margaret Njambi Kamau Vs John Mwatha Kamau & Another [2019] eKLR**. He urged that the applicant has not presented a prima facie case with a probability of success.

25. The defendant/respondent submitted that the plaintiff/applicant will not suffer irreparable harm and loss if the orders sought are not granted. That in fact the defendant/respondent will greatly suffer irreparable loss and harm if the orders sought are granted for being denied access and control to a parcel he is entitled to benefit from.

26. The defendant/respondent submitted that from the application and evidence before the court, it is evident that the land parcel no. MAKUENI/ KAKO/371 is an ancestral land and thus customary land. He went on to submit that all children of Joel Wambua Nzioka have the right over the land and it would be prejudicial for the defendant/respondent to be denied use and accessing his own share. He cited the case of **Paul Gitonga Wanjau Vs Gathithis Tea Factory Company Limited & 2 Others [2016] Eklr**.

27. The defendant/respondent submitted that they pray for costs against the plaintiff/applicant.

28. In conclusion the defendant/respondent submitted that the plaintiff/applicant has not demonstrated a case that merits an injunction to issue against him. He prayed for the application to be dismissed with costs.

29. The main issue for determination is whether the plaintiff/applicant has made out a case for the granting of orders of temporary injunction. It is not in doubt that there have been contradictory and contentious issues that have been raised by both parties that require proper interrogation during the main trial, by calling of evidence, testing the same through cross examination. However, the suit is still at an interlocutory stage and the Court cannot deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd... Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”

30. The law governing the granting of interlocutory injunction is set out under **Order 40(1) (a) and (b)** of the **Civil Procedure Rules, 2010** which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”

31. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"Firstly, an 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 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."

32. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited (1975) A AER 504* where three elements were noted to be of great importance namely: -

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

33. The important consideration before granting a temporary injunction under **Order 40 Rule 1** of the **Civil Procedure Rules** is the proof that any property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant/respondent threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit property; MAKUENI/KAKO/371 is in danger of being alienated as the defendant/respondent has not denied selling the same to one John Kimatu Kilokwe setting in motion the process of alienating the same.

34. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd -vs- First American Bank of Kenya and 2 others, (2003) KLR 125* which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR*, the Court of Appeal defined a prima facie case as: -

"A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

35. Has the plaintiff/ applicant herein established a prima facie case" It is not in doubt that the defendant/respondent is the registered owner of parcel no. MAKUENI/KAKO/269. Though the defendant/respondent has refuted this and alleged that the said title was acquired fraudulently, the said contention cannot be settled at this juncture. As already stated above, these are contentious and contradictory statements of facts that cannot be determined at this stage. This Court will have to determine the same at the main hearing. However, as a registered owner, the defendant/respondent is deemed to be an **absolute** and **indefeasible** proprietor whose proprietorship can only be challenged as provided by the law. See *Section 26(1) (a) & (b)* of the *Land Registration Act*.

36. The instant application relates to land parcel no. MAKUENI/KAKO/371. It is not in doubt that the said parcel is registered in the name of Joel Wambua Nzioki (deceased).

37. Prima facie, being the son of the registered owner of the suit property, the plaintiff/applicant has therefore established that he has an interest over the suit property. Given that plaintiff/ applicant has further alleged that the defendant/ respondent has been harassing him and sold land to one John Kimatu Kilokwe, the defendant/respondent has started interfering with the plaintiff's occupation of his share and has destroyed the plaintiff's property without a lawful cause. It is therefore not in doubt that his rights over the suit property (being the right of being in quiet possession) have allegedly been infringed upon by the defendant/ respondent by selling of the same. Consequently, the court finds and holds that the plaintiff/applicant has established a prima facie case with probability of success as his rights can only be curtailed in accordance with the law.

38. On whether the plaintiff/ applicant will suffer irreparable loss which cannot be compensated by an award of damages,- 'Irreparable loss' was described in the case of *Paul Gitonga Wanjau -Vs- Gathuthi Tea Factory Co. Ltd & 2 Others,*

Nyeri HCC No.28 of 2015, as simply injury or harm that cannot be compensated by damages and would be continuous.

39. Courts have pronounced themselves in many cases touching on injunctions restraining parties from intermeddling with suit land which is subject to succession cause.

40. It is not in doubt that the plaintiff/ applicant is in possession of the suit property. If for any reason the plaintiff/ applicant is put out of possession and taking into account that there have been various developments on the suit property and after the main hearing the plaintiff/ applicant becomes the successful litigant, this court finds and holds that the plaintiff/applicant will suffer irreparable harm that cannot be compensated by way of damages. It is trite that a crystalized right which is violated cannot be equated to compensation by damages. See the Case of Niaz Mohammed Janmohammed...Vs...Commissioner for Lands & 4 Others (1996) eKLR, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”

41. Equally in this case, the Court finds that if the plaintiff/applicant’s rights are infringed, no amount of money can compensate such infringement. For the above reasons, the Court finds that the plaintiff/applicant has established that it is likely to suffer **irreparable loss** and/or injury which cannot be adequately compensated by an award of damages.

42. On the third limb wherein if the Court is in doubt, then it ought to determine the matter on the balance of convenience, the Court finds that the balance of convenience tilts in favour of maintaining the status quo. It is not in doubt that this matter raises serious conflicts of facts. Further it is not in doubt that a temporary injunction is meant to preserve and protect the suit property. See the case of Exclusive Estates Ltd...Vs.... Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004 where the court held that: -

“A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter”

43. Further in the case of Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (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.”

44. Having now carefully considered the application, the replying affidavit and the submissions, the Court finds and holds that the Notice of Motion Application dated 23rd March 2021, as brought by the Plaintiff/ Applicant is merited and the same is allowed as hereunder: -

(i) THAT pending the hearing and determination of the suit herein, an order of injunction do issue restraining the defendant/respondent whether by himself, his agents, servants and /or any other person claiming under him from in any way at all selling or in any way disposing off, fencing, evicting or in any way at all engaging in any acts of dispossessing and/ curtailing use by the plaintiff all that parcel of land known as MAKUENI/KAKO/371;

(ii) THAT costs of this application be paid by the defendant/respondent.

DATED, SIGNED AND DELIVERED AT NAROK VIA EMAIL THIS 30TH DAY OF NOVEMBER, 2021.

MBOGO C.G

JUDGE

30/11/2021

In the presence of: -

CA:Chuma



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