



Case Number:	Environment and Land Case 17 of 2021
Date Delivered:	03 Nov 2021
Case Class:	Civil
Court:	Environment and Land Court at Kitui
Case Action:	Ruling
Judge:	Lilian Gathoni Kimani
Citation:	Joshua Masila Malombe v Cosmus W. Malombe & another [2021] eKLR
Advocates:	Chelagat Advocate for the Plaintiff/Applicant Mwendwa for the 1st Defendant/Respondent Mwendwa for the 2nd Defendant/Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kitui
Docket Number:	-
History Docket Number:	-
Case Outcome:	Plaintiffs notice of motion dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITUI**

**ELC CASE NO.17 OF 2021**

**JOSHUA MASILA MALOMBE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**COSMUS W. MALOMBE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to an Application by the Plaintiff/Applicant dated 22<sup>nd</sup> January 2020 brought by way of Notice of Motion seeking for orders:

**a) Spent**

**b) THAT an order of temporary injunction do issue restraining the 1<sup>st</sup> Defendant by himself, his agents, servants or any other person acting through the defendants' instructions from encroaching upon, trespassing onto, constructing thereon, transferring, remaining on or in any way whatsoever interfering with all that parcel of land known as KYANGWITHYA/MULUTU/1078 pending the hearing and determination of this suit.**

**c) THAT the OCS Kitui Police Station to enforce and ensure compliance of the orders sought.**

**d) THAT the costs of this application be borne by the Defendant/Respondent.**

2. The application is supported by an affidavit of the applicant sworn on 22<sup>nd</sup> January 2020. The 1<sup>st</sup> Respondent filed a replying affidavit and a further affidavit sworn on 20<sup>th</sup> November 2020 and 1<sup>st</sup> December 2020 respectively while the 2<sup>nd</sup> Defendant/Respondent did not file any reply.

**SUMMARY OF FACTS**

3. The Applicant claims in this suit that he is one of the administrators and a beneficiary of the estate of the late MALOMBE MWANIKI ILUMBI (Deceased) who was the registered owner of the suit property, KWANGWITYA/MULUTU/41.

4. The Plaintiff avers that the 1<sup>st</sup> Defendant has caused illegal sub-division of the above property when the succession proceedings in the estate of MALOMBE MWANIKI ILUMBI (Deceased) were still ongoing. The subdivisions resulted in many parcels of land including KWANGWITHYA/MULUTU/1078 which is registered in the name of the 1<sup>st</sup> Defendant. The Applicant claims that the same has encroached onto his adjacent property.

5. The Applicant claims that despite being served with summons in this suit and having filed a statement of defence, the 1<sup>st</sup> Defendant has started construction on the suit plot and that he has threatened to proceed with the illegal construction on the suit property and will continue doing so to the detriment of the Applicant.

6. The Applicant claims that unless the 1<sup>st</sup> Defendant, his agents and proxies are restrained by this Honourable Court's injunction order, they will proceed with their illegal developments on the plaintiff's entire land, shall continue trespassing onto the subject land unabated frustrate the suit-and the plaintiff and the estate of the deceased will suffer irreparable loss and damages as a result.

7. The 1<sup>st</sup> Defendant denies the Applicants claim and states that the sub-division of land parcel KWANGWITYA/MULUTU/41 was lawfully done as a result of a court order issued in **Kitui Senior Resident Magistrate's Court Case No.296 of 2006** where the Plaintiff was one of the Defendants. The 1<sup>st</sup> Defendant further states that the 2<sup>nd</sup> Defendant acted on the strength of the same court order in issuing title deeds to purchasers hence the process was legal.

8. The 1<sup>st</sup> Defendant also denies that he influenced or was capable of influencing the Surveyor who was carrying out the statutory duty of sub-division as ordered by the court and that there is no evidence that the surveyor created a wide road as alleged.

9. The 1<sup>st</sup> Defendant filed a Preliminary Objection on the ground that *inter alia* this suit is *Re-Judicata*. The Preliminary Objection was heard and a ruling delivered on 30<sup>th</sup> July 2021 striking it out with costs for the reasons that the pleadings and the decision of the court in Kitui PMCC No. 296 of 2006 were not produced before the court. There is currently an application pending before court for review that order.

10. In the further affidavit sworn on 20<sup>th</sup> November 2020 the 1<sup>st</sup> Defendant has annexed copies of the Certificate of Confirmation of Grant, the sale agreement between him and Boniface Kasee Malombe, court proceedings and order in SPMCC **Case 296 of 2006 Kitui**.

11. The 1<sup>st</sup> Defendant further challenged the Applicants reasons for bringing this suit against him alone while there were other beneficiaries of the subdivision of land parcel **KWANGWITHYA/MULUTU/41** who were also parties in SPMCC **Case 296 of 2006 Kitui**.

#### **The Plaintiff/Applicant's Submissions**

12. The Applicant submitted that the principles for granting an injunction as enumerated in the cited case of **Giella v. Cassman Brown & Co. Ltd (1973)EA 35** have been met. That he has established a prima facie case with a probability of success by showing that he is one of the administrators of the estate of Malombe Mwaniki Ilumbi (deceased) who was the registered owner of suit property Kwangwithya/Mulutu/41.

13. It is submitted that at the time when the 1<sup>st</sup> Defendant alleges that he purchased the suit land from one Boniface Kasee Malombe in 1997, the estate of Malombe Mwaniki Ilumbi had not been administered. In the circumstances such a seller could not pass any right/title to the property. It is submitted that such a sale amounted to intermeddling with the estate of the deceased. That the person who sold the land to the 1<sup>st</sup> Defendant did not have any proprietary rights in it which he could have passed to him.

14. The Applicant claims that the subdivision of land parcel Kwangwithya/Mulutu/41 was illegal and the same resulted in the wastage of and intermeddling with the property Kwangwithya/Mulutu/41 belonging to the deceased.

15. The Applicant submitted the case of **Mrao vs First American Bank of Kenya Limited & 2 others(2003)KLR 125** where the court defined what a "prima facie case is".

16. On irreparable loss, the Applicant submitted that the 1<sup>st</sup> Defendant is continuing with acts of wastage on the suit property, threatening to proceed with the construction on the suit property. The Plaintiff said that unless the 1<sup>st</sup> Respondent is restrained from such acts, the applicant and other beneficiaries of the estate stand to lose the land to the 1<sup>st</sup> Defendant.

17. The Applicant further submitted that when there is a breach in law, the breach should not be allowed to continue simply because the loss arising from the breach is compensable in damages. While citing the case of **Joseph Siro Mosioma vs Housing Finance Company of Kenya & 3 others (2008) eKLR** the Plaintiff submitted that the estate would suffer irreparable loss if the injunctive orders are not issued.

18. The Applicant submitted that the balance of convenience tilts in his favour since the 1<sup>st</sup> Defendant caused sub-division of the mother title while proceedings were still ongoing in the succession cause.

19. Finally, the Applicant submitted that, injunctive orders would serve to preserve the suit property pending the hearing and determination of this suit.

### **1<sup>st</sup> Defendant's Submissions.**

20. The 1<sup>st</sup> Defendant submits that he purchased a portion of land parcel Kwangwithya/Mulutu/41 from one Boniface Kasee Malombe, a beneficiary of the estate of Malombe Mwaniki Ilumbi. Further that he together with 16 others sued the Applicant together with 4 others in SPMCC **Case 296 of 2006 Kitui** for having sold to them various portions of land parcel Kwangwithya/Mulutu/41 and failed to effect transfer of the said land. He claims that judgement was entered by consent wherein it was agreed that the Defendants were to transfer to the Plaintiffs in that suit their respective plots.

21. The 1<sup>st</sup> Defendant submits that arising from the judgement referred to above, the land was subdivided and portions thereof given to the various Plaintiffs in the suit.

22. The 1<sup>st</sup> Defendant claims that he has a good title to the suit land. He further claims that the Plaintiff does not have a title to the land and he did not appeal against the said court order awarding the land to the 1<sup>st</sup> Defendant. He has relied on the case of **Jamin Kiombe Lidodo -vs Emily Jerono & Anor HCCC NO. 801 of 2005 and Alexander Karioko Benjamin -vs- Diocese of Embu Trustees Registered (2021) eKLR** for the holding that "*when an applicant has not shown title to the suit land it is unsafe to hold that a prima facie case is established*".

23. The 1<sup>st</sup> Defendant submitted that the Applicant has not demonstrated how he would suffer irreparable injury and said that he became an administrator of the Estate long after the court had awarded the 1<sup>st</sup> Defendant his parcel of land. Counsel for the 1<sup>st</sup> Defendant cited the case of **Ngumman Limited -vs- Jan Bonoe Nielson & 2 others; CA No.77 of 2012** while stating that the mere allegation that you will suffer irreparable loss is not enough.

24. The 1<sup>st</sup> Respondent also submitted that the Applicant has not committed to pay damages to the 1<sup>st</sup> Respondent if it turns out that the injunctive orders were not merited and cited the case of **Gati -vs- Barclays Bank (K) Ltd (2001)** where the court stated that this is one of the criteria for granting an injunction.

25. The 1<sup>st</sup> Respondent finally submitted that he is the registered owner of the suit land obtained through a court order and has almost completed constructing on the land for the last 7 years undisturbed and therefore stated that the balance of convenience tilts in his favour and not the Applicant.

26. The 1<sup>st</sup> Defendant also states that the Applicant has not met the threshold for injunction orders to be granted and states that the Applicant has nothing to lose that cannot be compensated by way of monetary terms and if the orders sought are not granted, no irreparable loss will be suffered by him. He also states that the balance of convenience lies in his favour since he has enjoyed quiet possession of the suit land since the court gave it to him in 2006.

27. In the Further Affidavit sworn on 1<sup>st</sup> December 2020 the 1<sup>st</sup> Defendant has annexed copies of the Certificate of Grant of Confirmation, the sale agreement between him and Boniface Kasee Malombe.

28. There has been no appearance from the 2<sup>nd</sup> Defendant/Respondent.

### **Issues For Determination**

29. I am of the opinion that the following issues arise for determination in this matter:

a) Whether the Application dated 22<sup>nd</sup> January 2020 has met the threshold for the grant of an injunction as prayed

b) What orders should the court make"

### **Analysis And Determination**

30. **Whether the Application dated 22<sup>nd</sup> January 2020 has met the threshold for the grant of an injunction as prayed**

The case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358** sets out the conditions to be met before an interlocutory injunction can be granted as,

*“First, 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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”*

31. In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** the Court of Appeal held:

*“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.”*

32. From the affidavits filed in court by both parties and the documents attached to the said affidavits, certain facts are apparent. That the 1<sup>st</sup> Defendant is the registered proprietor of land parcel No. **KYANGWITHYA/MULUTU/1078**. The said land is one of the various subdivisions of land parcel KWANGWITHYA/MULUTU/41 which was owned by the deceased MALOMBE MWANIKI ILUMBI. Subdivision of the said land was carried out on the strength of a Judgement of the court entered by consent on 20<sup>th</sup> February 2008 in SPMCC **Case 296 of 2006 Kitui** where the parties to this suit were also some of the parties to the said suit. An order was made in the said suit authorizing the executive officer of the court to sign all land control board and transfer of land documents to give effect to the decree issued by the court. The court process then culminated in the issuance of title deeds to the resulting subdivisions of the land.

33. The defendants in SPMCC **Case 296 of 2006 Kitui** did not lodge an appeal, or file an application for review against the judgement and neither did they challenge the subsequent execution orders. The said orders are in force to date. In the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others (2014) eKLR** the Court of Appeal stated as follows: -

*“..... It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing”*

34. A succession cause for the administration of the estate of MALOMBE MWANIKI ILUMBI (deceased) who was the initial owner of land parcel KWANGWITHYA/MULUTU/41 was filed initially as Machakos Succession Cause No. 247 of 2003 which later became Kitui High Court Succession Cause Number 1 of 2017. The grant issued to the Plaintiff herein together with one Boniface Kasee Malombe was confirmed on 21<sup>st</sup> February 2019 and land parcel number KWANGWITHYA/MULUTU/41 was distributed to Boniface Kasee Malombe, Joshua Masila Malombe and Patrick Muema to be registered in their names to hold in trust for Veronica Muthini Malombe, Boniface Kasee Mwanii, Mbuvi Malombe Mwaniki, Mary Mukui Malombe, Breth Kasyoka Muema, Kathini Muema and Joshua Masila Malombe. It is noted that the certificate of confirmation of grant was issued long after issuance of the court orders relating to the same parcel of land in SPMCC **Case 296 of 2006 Kitui** and further notwithstanding possible execution of the same court orders.

35. It is the Courts view that had the Succession Court in Kitui High Court Succession Cause Number 1 of 2017 been made aware of the existence of the judgement in SPMCC **Case 296 of 2006 Kitui**, it would have taken the same into account in arriving at the decision on distribution of the estate and especially the land in question in this suit. It is noted that the two administrators of the estate of MALOMBE MWANIKI ILUMBI were parties to the initial suit. The same court would have dealt with the issue of whether or not there was intermeddling with the deceased estate that is raised in submissions in this case.

36. On the face of it, having obtained a title deed to the suit land the 1<sup>st</sup> Defendant is protected under the provisions of Section 26 of the Land Registration Act which provides that a Certificate of title to be held as conclusive evidence of proprietorship. It states that:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser 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.***

37. The court is alive to the fact that this is an interlocutory application pending hearing and final determination of the main suit and the court is not required at this stage to adjudge the entire suit. The Plaintiff is in law entitled to challenge the title deed held by the 1<sup>st</sup> Defendant. In the case of Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

***“In HABIB BANK AG ZURICH V. EUGENE MARION YAKUB, CA NO. 43 OF 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:***

***“Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”***

38. Having in mind the above caution, and being aware that all a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success and that a prima facie case with a probability of success does not mean a case, which must eventually succeed I find that the Plaintiff has not established a prima facie case with a probability of success.

**39. Has the Applicant shown that he might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages"**

The Plaintiff claims that unless the court issues the orders as prayed the beneficiaries of the estate will lose their lawful inheritance. It is the courts finding that the issue of divesting the estate of Malombe Mwaniniki Ilumbi of its property land parcel KWANGWITHYA/MULUTU/41 was done through a court order. It is not shown which, if any, of the other subdivisions of the land still belong to the estate and in what way the 1<sup>st</sup> Defendant has encroached and/or trespassed on such a portion. I am therefore not satisfied that the Applicant will suffer any loss that cannot be compensated by way of damages.

40. The 1<sup>st</sup> Defendant has stated that he has been in possession of the suit land since the court gave the land to him in 2006. The Plaintiff on the other hand has not shown that the estate of the deceased Malombe Mwaniki Ilumbi has been in possession of the suit land for the period that the 1<sup>st</sup> Defendant claims the land. In the Courts view the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant.

### **Final Orders**

The final orders of the court are that the Plaintiffs Notice of Motion dated 22<sup>nd</sup> January 2020 lacks merit and the same is hereby dismissed with costs to the 1<sup>st</sup> Defendant/Respondent.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 3<sup>RD</sup> DAY OF NOVEMBER 2021.**

**L. G. KIMANI**

**JUDGE**


**Judgement read in open court in the presence of-**

C. Nzioka.....Court Assistant

Chelagat Advocate.....for the Plaintiff/Applicant

Mwendwa.....for the 1<sup>st</sup> Defendant/Respondent

Mwendwa.....for the 2<sup>nd</sup> Defendant/Respondent

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