



Mweya v Nahoco Housing Cooperative Society (Environment & Land Case E155 of 2022) [2023] KEELC 16264 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E155 OF 2022
OA ANGOTE, J
MARCH 16, 2023**

BETWEEN

CHRISTOPHER MWEYA PLAINTIFF

AND

NAHOCO HOUSING COOPERATIVE SOCIETY DEFENDANT

RULING

1. Before the court for determination is the plaintiff's (hereinafter 'applicant') Notice of Motion dated 10th June 2022 brought under Order 51 Rule 1 of the *Civil Procedure Rules* and sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*. The applicant is seeking for the following orders:
 - a. The respondent and any other person be ordered to stop any developments on Plot No. 44 (hereinafter the 'suit property').
 - b. Any ongoing developments be stopped pending the hearing and determination of the main suit.
 - c. The costs of the application be provided for.
 - d. The court be pleased to make such further or other orders as it may deem fit and just to grant.

2. The application is supported by the affidavit and supplementary affidavit of the plaintiff/applicant who deponed that he instituted a suit against the Respondent who denied him title to Plot No. 43 and 44 and despite having knowledge of his ownership of the suit property, the Respondent allowed a stranger to develop it.



3. According to the Applicant, he acquired the suit property from his father who was a member of the Respondent; that his father was shown Plots No. 43 and 44 by a representative of the respondent and not Plots No. 39 and 43 as alleged by the respondent and that his father paid for Plots No. 43 and 44.
4. The respondent's manager swore a replying affidavit in which he deponed that the applicant is aware that his plots are No. 39 and 43 while the suit property (plot 44) is owned by one Martha Kinoti. Additionally, it was deponed, the Applicant had been advised to engage the said Ms. Kinoti if he was interested in swapping plots as the Respondent has no authority to interfere in the ownership of individual plots.
5. The deponent argued that the applicant has not met the requirements for grant of an injunction because the respondent did not authorize development on the suit property. Further, it was deponed, Ms. Kinoti had deposited bricks on the suit property some time back and not recently as alleged by the applicant.
6. It is the respondent's case that there is no urgency in the application; that the applicant has not been issued with a certificate by the respondent and that his Plots No. 39 and 43 have not been interfered with.
7. The respondent's Manager finally deponed that the applicant has not come to court with clean hands having failed to pay Kshs. 120,000 for issuance of title deeds for his plots. In any event, it was deponed, the person developing the suit property is not a party to the suit and an injunction cannot be issued against a party not enjoined in the suit.
8. In view of the foregoing the respondent's Manager has deponed that the applicant has not established a prima facie case with a probability of success to warrant the issuance of an injunction.

Submissions

9. Relying on the cases of *Giella v Cassman Brown & Co Ltd* [1973] EA 358, *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the applicant submitted that he has a legal and equitable right to the suit property.
10. The applicant submitted that he has a beneficial interest in the suit property having acquired it from his father who had paid the Respondent for it and that when he started to follow up on the title to the suit property, the Respondent maliciously delayed the process and purported to issue the suit property to a stranger.
11. On the issue of irreparable harm, the applicant relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR to submit that he stands to suffer irreparable harm having contributed to the purchase of the suit property through his father's salary deductions that were effected until his retirement in 1998.
12. Relying on the cases of *Pius Kipchirchir Kogo* (*supra*) and *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR, the applicant submitted that the balance of convenience tipped in his favour because the suit property is at risk of being wasted, the Respondent having already allowed a stranger on the suit property who has dug trenches on the same.
13. On the other hand, the respondent submitted that the Applicant has no legal nor equitable right in the suit property and that there are no ongoing developments on the applicant's plots which are No. 39 and 43.



14. On the issue of irreparable harm, the Respondent submitted that the applicant is not likely to suffer irreparable harm as his Plots No. 39 and 43 are intact and that the court cannot issue an injunction against the legal owner of the suit property considering that she is not a party to the suit.
15. The respondent submitted that it cannot interfere with how the legal owner of the suit property uses her land and that the applicant had not satisfactorily proven that the respondent had given a stranger authority to develop his land.
16. In conclusion, it was submitted by the respondent that the application should be dismissed with costs to the respondent as the applicant had not established a prima facie case with a probability of success.

Analysis and Determination

17. Based on the foregoing, the following one issue arises for determination:

Whether an order of injunction should be granted.

18. The requirements for grant of an injunction were set out as follows in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358:

“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 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.”

In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 the court defined a prima facie case as follows:

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

19. The applicant has stated that he should be granted an order of injunction because he is the legal and equitable owner of plot number 44 (suit property) having acquired it from his father who paid the respondent for it.
20. The applicant asserts that his right is being infringed upon by the respondent who has allowed a third party to develop the suit property. The respondent has denied the existence of such a right stating that the applicant’s Plots are 39 and 43 which have not been interfered with. It is the respondent’s case that the suit property belongs to a third party - Ms. Kinoti, who has a title to it and who is within her right to develop it.
21. The court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR further clarified as follows on the issue of a prima facie case:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an



urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

22. The right the applicant is seeking is that of a legal and equitable interest acquired by way of purchase of the suit property by his father. However, the respondent has disputed this ownership stating that the applicant owns Plots No. 39 and 43 not the suit property, which is Plot No. 44.
23. The applicant has failed, prima facie, to prove that the right legal and equitable right he has has been infringed by the respondent. The respondent stated that the suit property belongs to one Ms. Kinoti who is developing it, and not the Respondent. Indeed, the record shows that on July 5, 2022, the applicant’s advocated confirmed that the suit property was being developed by a third party.
24. The Applicant is seeking to have the court restrain acts that are being carried out by a party who is not enjoined in the proceedings. That is unacceptable. The person who is developing the suit property has a right to be heard before any injunctive order can issue, if at all.
25. In view of the foregoing, and in consideration of the fact that the applicant has failed to prove that there is a clear and unmistakable right that has been infringed/threatened by the respondent, I find that the applicant has not established a prima facie case with a probability of success, and is therefore not entitled to an injunction.
26. For those reasons, the application dated June 10, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 16TH DAY OF MARCH, 2023.

O. A. ANGOTE

JUDGE

