Muthoni v Mburu (Suing on behalf of Joy Valley Association Security and Welfare) (Environment and Land Appeal 29 of 2018) [2023] KEELC 17232 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17232 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 29 OF 2018

OA ANGOTE, J

APRIL 27, 2023

BETWEEN

FAITH MUTHONI ..... APPELLANT

AND

VICTOR MBURU (SUING ON BEHALF OF JOY VALLEY ASSOCIATION SECURITY AND WELFARE) ..... RESPONDENT

(Being an Appeal against the order and decree of Honourable Mr. D. Ocharo (Senior Resident Magistrate) delivered on the 31{{^st}} of May 2018)

JUDGMENT

Background

1. By way of brief background, the Respondent (Plaintiff) filed a Plaint dated 31st January, 2018, seeking inter-alia, a permanent injunction halting the construction of high-rise apartments by the Appellant (Defendant) on the suit property and a mandatory injunction requiring her to bring down any stories above the regulations as per the Respondents' guidelines. Simultaneously filed with the Plaint was an application seeking temporary injunctive orders restraining any further construction on the suit property.

2. In the application for injunction, the Respondent contended that it is a registered society with membership drawn from the proprietors of the plots in Joy Valley Clayworks Estate in Kasarani whose duty is to, among others, ensure compliance with the development controls guidelines for the Estate.

3. The Respondent herein deposed that the Appellant is a member of the Association and voluntarily committed to abide by all the Association's requirements and that the Appellant is the proprietor of Plot 57/440 and is in the process of illegally building a high rise Apartment on the aforesaid plot contrary to the controlled development guidelines.

4. The Respondent adduced vide affidavit evidence a copy of the registration certificate and constitution for Joy Valley Association, a copy of the control guidelines, a copy of the Appellant's commitment to the Association, copies of notices requiring a new developer to consult the Association before commencing any development, copies of photographs of the Appellant's development, demand letter to the Appellant and a Petition to City Halls' Planning Department.

5. The Appellant responded to the application vide a Replying Affidavit as well as Grounds of Opposition both dated 8th February, 2018 in which he deposed that the Respondent has no locus to institute the suit; that there has been unreasonable delay in filing the suit and that the application has not met the threshold for the grant of temporary injunctive orders.

6. The Appellant deposed that the approval of construction of buildings is done by the City Planning Department under the provisions of the Physical Planning Act upon application by a developer; that whereas the development regulations for the area are for a single dwelling unit, a developer can apply to the City County for change of user to multiple dwelling units, which is what the Appellant did and that she received all the relevant approvals and informed the Respondent of the same before undertaking the construction. It was the Appellant's deposition that there are several buildings in the vicinity, some of which have two to three floors.

7. The Appellant adduced vide Affidavit evidence the application for development permission, the change of user from single to multiple dwelling, notification of approval of development permission dated 11th August, 2016, receipts for building plans approval fees, construction site board fees, certificate of structural design, letter dated January, 2004 indicating that the estate is not a controlled development area, and photos of two and three-story developments within the area.

8. Vide a Supplementary Affidavit, the Respondent stated that there had been no delay in filing the suit as the constructions were undertaken in the last quarter of 2017 and that the Association has severally petitioned the City Hall Department to enforce the controlled development guidelines and no objections were raised in this respect.

9. The Respondent deposed that the allegations of non-disclosure are unfounded as the controlled development regulations are a matter of public knowledge and that the violation of the Association's regulations by other plot owners does not justify the Appellant's violation.

10. The parties before the lower court argued the application by way of written submissions. The learned Chief Magistrate in a Ruling delivered on 31st May, 2018 found the application to be warranted. The relevant part of the Ruling was in the following terms:

    a. A temporary injunction is hereby issued restraining the Defendant from carrying out construction on his Plot No 57/440 in Lower Joy Valley, Clay Works Estate, Kasarani Nairobi exceeding the two-floor limit set out by the Plaintiff's Association and Security Welfare pending the hearing and determination of this suit.

    b. The Defendant/Respondent is at liberty to proceed with the construction on the undisputed floors which is to say the ground floor and the first floor.

11. The aforesaid decision triggered the present Appeal. Vide the Memorandum of Appeal, the Appellant has set out ten Grounds of Appeal which are;

    i. The Learned Magistrate erred in law and in fact when he restrained the Appellant from erecting a building on L.R No 57/440 Kasarani, Nairobi

beyond the first floor when the Appellant showed all the necessary approvals and permits for the building which entitled her to go beyond the 1st floor.

ii. The Learned Magistrate erred in law and in fact when he gave an order that was clearly inconsistent with the Physical Planning Act and which order was clearly illegal.

iii. That the Learned Magistrate erred in law and in fact in issuing an order on an Application that did not fulfil any of the conditions for granting an order as are enshrined in the case of Giela vs Cassman Brown[1973]E.A 358.

iv. The Learned Magistrate erred in law and in fact when he granted the Application when the supporting evidence did not disclose a prima facie case with a probability of success, having regard to the documents in support of the Application.

v. The Learned Magistrate erred in law and in fact in issuing an order in favour of a party who did not have any locus standi to institute the proceedings before the Court and who was clearly in breach of Order 1 Rule 8 of the Civil Procedure Rules.

vi. The Learned Magistrate erred in law and in fact in not following the authorities the Appellant quoted in opposing the Application and by not following the cited authorities, the Magistrate came to a wrong conclusion.

vii. The Learned Magistrate erred in law and in fact in deciding the Application on considerations unknown in law.

viii. The Learned Magistrate erred in law and in fact by delaying the delivery of the ruling before him beyond the mandatory statutory period, without good reason, and by so delaying, the interim order of stoppage worked a lot of injustice to the Appellant.

ix. The Learned Magistrate erred in law and in fact when he did not order the Respondent to provide an undertaking to pay damages owing to the perishable nature of the building materials on the site and the questionable locus standi of the Respondent.

x. The Learned Magistrate erred in law and in fact in deciding and granting the Application before him against the weight of the Affidavit evidence that was offered.

12. The Appellant therefore seeks that;

a. The Order of the Magistrate given on the 31st May, 2018 be set aside and substituted with an order dismissing the Application of 31st January, 2018.

b. Pending the hearing of the Application for stay and the main appeal, there may be a stay of execution of the said order issued on 31st May, 2018.

c. Costs of the Appeal be borne by the Respondent.

13. The Appeal was canvassed by way of written submissions.

Submissions

14. The Appellant, through his counsel, filed submissions on the 12th May, 2022. Counsel submitted on two issues, the first being that the Respondent did not meet the conditions for the grant of an injunction and secondly, that the Respondent had no locus to institute the application and the suit.

15. It was submitted by the Appellant that with respect to the question of a prima facie case, the Magistrate was only required to determine whether on the evidence before him, a prima facie case had been made; that he was not required to answer that question with certainty and that the fact that the Magistrate noted that he could only make a determination upon the production of more evidence, it follows that the evidence before him was insufficient and as no prima facie case had been established, he ought not have granted the injunction.

16. It was deponed that no prima facie case was established as the regulations relied on by the Respondent were unclear on the permitted floors whereas the Appellant adduced evidence showing receipt of all the relevant approvals.

17. It was submitted that the Magistrate failed to make a determination as to whether the Respondent would suffer irreparable harm instead opting to address the issue of balance of convenience; that whereas the Magistrate found that the balance of convenience favoured the Respondent, it was not indicated how he came to this conclusion and that the Appellant having received all the necessary approvals for erecting the building, there can be no purported injury to the neighboring buildings upon which a suit can be founded.

18. According to the Appellant, having received all the relevant approvals, there was no basis for the suit and subsequently no grounds warranting the grant of the injunction and that on the issue of locus, the Respondent did not establish the same because despite alleging to be suing on behalf of Joy Valley Security Association Security and Welfare, the Certificate of Registration exhibited referred to Joy Valley Security and Welfare.

19. It was the Appellant's submissions that there was no document showing that Victor Mburu is the Respondent's Chairman nor minutes of the meeting showing authorization for the appointment of the Respondent's counsel pursuant to the provisions of Clause 6.0 of *the constitution* of the Group and that having failed to establish his locus, the proceedings by the Respondent are void.

20. The Respondent did not file submissions.

DIVISION - Analysis & Determination

21. The court has considered the Memorandum of Appeal and the submissions in support thereof. Whereas the Appellant has set out 10 Grounds of Appeal, the issues can be summarized as hereunder:

    i. Whether the Magistrate erred in finding that the Respondent had the requisite locus to institute the application and suit?

    ii. Whether the Magistrate erred in granting the temporary injunctive orders?

22. As the first appellate court, this court is alive to the fact that in determining whether or not the Trial Magistrate was justified in reaching the decision that he did, it is obligated and indeed under a duty to re-evaluate the evidence and material that was placed before the subordinate court.

23. The Court is not bound by the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of

Selle & Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123 where the court of Appeal stated thus:-

> " This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect."

24. As to the circumstances under which this Court can interfere with the decision of the subordinate court, the Court of Appeal in Khalid Salim Abdulsheikh vs Swaleh Omar Said [2019] eKLR expressed itself as follows:

> " We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings."

25. The Appellant has faulted the Magistrate for issuing orders to a party who has no locus to institute the proceedings before it. In the Motion before the Trial Court, the Appellant had vide its Replying Affidavit and Grounds of Opposition, raised an objection as to the Respondents' locus, which objection was dismissed.

26. The issue of locus standi has been widely discussed. In the case of Alfred Njau vs City Council of Nairobi [1983] eKLR, the Court of Appeal held thus;

> " The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

27. The Plaint and application in the lower court were filed by Victor Mburu, on behalf of Joy Valley Association, Security and Welfare. A look at the registration certificate adduced shows that Joy Valley Security and Welfare is a self-help group registered on 25th April, 2016 under the Ministry of Labour, Social Security and Services.

28. The question of the legal personality of self-help groups was considered by the Court in Kipsiwo Community Self Help Group vs Attorney General And 6 Others [2013] eKLR where it was held as follows:

> " It is clear that Self- Help Groups are not incorporated bodies. In fact I know of no law that recognizes them or incorporates them. They were probably the brain-child of administrators who at times had to come up with a tool to identify specific groups of people that needed assistance, or needed to undertake projects together. They seem to have helped harness resources at community level. The only problem is that the Government has not put in place any legal framework under which they can be registered and managed...."

29. It is apparent from the foregoing that a self-help group falls within the nature of bodies known as unincorporated bodies. As to the manner of institution of suits by or against such bodies, it is now settled that they can only do so in the names of, or against all the members of the body or bodies or alternatively, the suit should be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules.

30. The Court in Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank (1992) eKLR, stated thus:

> " The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules..."

31. The law on representative suits, as set out in Order 1 Rule 8(1) of the Civil Procedure Rules, is to the effect that where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them. Subsection 2 thereof provides that duly written and signed authority should be given and filed in the case.

32. As to the persons who can represent unincorporated bodies in suits by or against them, the Court is persuaded by the expression by the Court in Kituo Cha Sheria vs John Ndirangu Kariuki & Another [2013] eKLR wherein it was observed that: -

> " As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor's names."

33. Looking at the ruling, the Trial Court indeed appreciated that the Respondent's Association could only institute suits in a representative manner through its officials. It found that Victor Mburu was such an official being the Chairman of the Group and dismissed the objection on locus.

34. The Court has keenly considered the pleadings. To begin with, no authority has been filed as anticipated in Order 1 Rule 8(2) of the Civil Procedure Rules. The Respondent filed the suit in the lower court as the Chairman of the Respondent. Although this position was strongly disputed by the Appellant, the evidence of the position of the Respondent can only be determined at trial. That being the position, it is the finding of the court that the said Victor Mburu had, prima facie, the requisite locus to institute the suit.

35. The Trial Court was called upon to determine whether the Applicant thereon was deserving of injunctive orders sought which question it answered in the affirmative and in so doing restrained the Appellant from constructions beyond the first two floors.

36. The Appellant contends that the Magistrate's determination in this regard constituted a misapplication of the law and faults the Magistrate for granting the application when the evidence did not support a prima facie case nor any of the other conditions in the Giella Case.

37. The often-cited case of Giella vs Cassman Brown (1973) EA 358 is the leading authority on the conditions to be satisfied by an applicant for the grant of an interlocutory injunction. It provides as follows;

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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."

38. What amounts to a prima facie case was explained in Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR as follows:

> "A prima facie case is more than an arguable case. It is not sufficient to raise issues. 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."

39. More recently, the Court of Appeal in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Others[2014]eKLR while agreeing with the definition of a prima facie case in the Mrao Case (supra) went ahead to further expound as follows;

> "We adopt that definition save to add the following conditions by way of explaining it. 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. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

40. In Nguruman Limited vs Jan Bonde Nielsen & 2 Others (supra)the Court stated as follows on irreparable injury or damage:

> "On the second factor, that the applicant must establish that he might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

41. Whereas the Court in Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR defined balance of convenience thus;

> "The meaning of balance of convenience in favour of the Plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiff, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants

if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them be greater than that which may be caused to the Defendants. Should the inconvenience be equal, it is the Plaintiff who will suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting."

42. As to whether a prima facie case had been established, the Court was unable to make a determination in this respect stating that the same would require further evidence. The Magistrate stated as follows:

> " If the Plaintiff's position be true then a prima facie case would have been established. If the Respondents position is true then no prima facie case would have been established in other words it is a matter of evidence as to whether or not the Respondent's development has exceeded the permitted standards set out in the neighbourhood associations regulations. This question will be answered with certainty upon production of evidence."

43. Moving to the question of whether the Plaintiff/ Respondent established that it would suffer irreparable harm if the orders were not granted, the learned Magistrate was unable to make a determination in this respect as well indicating as follows:

> " The question as to whether or not the Applicant will suffer irreparable injury which might otherwise not be compensated by an award of damages very much depends on the answer as to the first question as to whether the Applicant has made out a prima facie case with a probability of success."

44. The Court went ahead onto the third limb by stating as follows:

> " This Court is in doubt regarding the two questions and will therefore decide the Application on the basis of balance of convenience which in my view favours the Applicant."

45. It is now settled that the three limbs set out in the Giella case must be proved sequentially and failure to meet any one defeats the application. The Court is in this respect guided by the exposition of the Court of Appeal in Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR where the Court stated thus;

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-
>
> (a) Establish his case only at a prima facie level,
>
> (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86) If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied

that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

46. More recently, the Court of Appeal in Yellow Horse Inns Limited vs Nduachi Company Limited & 2 Others [2017] eKLR affirmed this position stating thus;

> " The three pillars are to be applied sequentially. We paraphrase the ratio decidendi in Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86 and Nguruman Limited V Jan Bonde Nielsen & 2 others Civil Appeal No. 77 of 2012 where the sequence of those conditions were elucidated. All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

47. Further, the Court of Appeal in Gesa Building and Civil Engineering Ltd vs George Ngure Chira & Another [2019] eKLR stated;

> " We truly cannot find any fault in the manner the learned (Judge) disposed of the application, save only to stress that he did not have to consider the last two principles after finding that there was no prima facie case."

48. Although the learned Magistrate was entitled to consider in whose favour the balance of convenience tilted, after expressing his doubts in respect to the two other conditions for the grant of an injunction, merely stating that the balance of convenience lies in favour of the Applicant without setting out how he came to this conclusion is not allowed.

49. Taking a look at the pleadings, and considering that the Appellant's application for the change of user of her land was approved by the Nairobi City County, after being advertised in the newspaper, it is apparent that no prima facie case had been established by the Respondents herein.

50. Furthermore, while the Respondent's contention was that the Appellant's construction was contrary to the development guidelines of the Association which provides for the maximum of one story (two floors), clause 3 (c) of the Memorandum of Understanding adduced by the Appellant was to the effect that "no residential building shall exceed three floors including the ground floor".

51. Further, the Respondent adduced evidence showing approvals for the construction including change of user approvals from the Nairobi City County pursuant to the provisions of the Physical Planning Act. In light of the conflicting evidence by the Respondent and the Appellant's evidence, this court finds that no prima facie case was established. The application ought to have failed.

52. For those reasons, the court finds the Appeal to be merited and makes the following orders:

    a. The order of the Magistrate given on 31st May, 2018 in Milimani CMCC No. 502 of 2018 be and is hereby set aside.

    b. The application dated 31st January, 2018 filed by the Respondent in Milimani CMCC No. 502 of 2018 is hereby dismissed with costs.

    c. The costs of the Appeal to be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF APRIL, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Appellants

No appearance for Respondent

Court Assistant - June