



Kenya Sunny Industries Company Ltd v Ocharo & 2 others (Land Case E002 of 2023) [2023] KEELC 16879 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
LAND CASE E002 OF 2023
E ASATI, J
APRIL 20, 2023
IN THE MATTER OF: LAND PARCEL KAKAMEGA/ MBALE/328
& KAKAMEGA/MASANA/1182**

BETWEEN

KENYA SUNNY INDUSTRIES COMPANY LTD PLAINTIFF

AND

MICHAEL OMOLE OCHARO 1ST DEFENDANT

KITIGU RESOURCES LTD 2ND DEFENDANT

LAND REGISTRAR - VIHIGA COUNTY 3RD DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Notice of Motion application dated 14th February 2023 and filed in court on behalf of the Plaintiff/Applicant on the same date. The application was presented under certificate of urgency hence prayers 1 and 2 thereof were dispensed with at the initial stage. The substantive prayer for determination herein is prayer No. 3 of the application which is a prayer for temporary order of injunction restraining the 2nd Respondent from dealing in, interfering with, using, transferring and/ or otherwise disposing of the suit parcels Kakamega/Mbale/328 and Kakamega/Masana/1182, except with the authority of the Plaintiff/Applicant, pending hearing and determination of the suit. The application was stated to be brought pursuant to the provisions of sections 1A, 1B, 3, 3A, 63(e), 80 and 99 of the *Civil Procedure Act*, Order 40 Rules 1, 2 and 4 and Order 51 of the *Civil Procedure Rules 2010* and articles 40 (1) (a), 49 and 50 of the *Constitution* of Kenya 2010 and article 17 of the *Universal Declaration of Human Rights*. The grounds upon which the application was brought are contained on the face of the Notice of Motion and the Supporting Affidavit sworn by Ren Zhijian on 13th February



- 2023 and the annexures thereto and the Further Affidavit sworn by the same deponent and filed in court on 24th March 2023 and the annexures thereto.
2. The 1st and 3rd Respondents filed no response to the application.
 3. The 2nd Respondent, against whom the order is sought, opposed the application vide the Replying Affidavit sworn on 8th March 2023 and the annexures thereto and the Further Affidavit sworn by Yao Youming on 5th April 2023 and the annexures thereto.
 4. The application was canvassed by way of written submissions. Written submissions dated 23rd March 2023 were filed on behalf of the applicant by the firm of Amondi & Co Advocates. Written submissions dated 11th April 2023 were filed on behalf of the 2nd Respondent by the firm of Osoro, Onyiego, Manyara & Co. Advocates.

The applicant's case

5. The applicant's case was that it invested over Kshs 65,000,000 (sixty five million) in the prospecting for minerals, buying of machinery, and in the purchase of land parcels Kakamega/Mbale/328 and Kakamega/Masana/1182 (the suit lands herein) which fall within the applicant's prospecting area and yet it has been skimmed and completely hived off the business by the 1st and 2nd Respondents who are in occupation of and are illegally doing business thereon. That the Respondents conspired to have the suit lands transferred into the name of the 2nd Respondent while knowing the interest the applicant had in the suit lands and that the 2nd Respondent is not a bona fide purchaser in good faith. That the Respondents have denied the applicant user of the suit lands thereby occasioning financial loss. That the 1st Respondent deliberately defrauded the applicant of the suit lands and transferred them to the 2nd Respondent who is a foreign company and prohibited by law from owning land in Kenya. That the Respondents' actions amount to an infringement of the principles of social justice under article 10 (2) (b) of the Constitution as the applicant's economic and social rights are being compromised contrary to articles 13, 40 (1) and 65 of the Constitution of Kenya 2010 and article 17 of the Universal Declaration of Human Rights. The applicant prayed that the application be allowed.

The 2nd Respondent's case

6. The 2nd Respondent's case was that it is the bona fide purchaser of the suit land which it bought at Kshs 13,000,000 and that the applicant has no legal rights over the same. That the 2nd Respondent is a company which is duly registered in Kenya as per the Companies Act. That the court does not have jurisdiction to entertain these proceedings and that the application is frivolous, vexatious and an abuse of the process of the court. That the applicant's prospecting license attached to the application expired on 7th October 2021 and the applicant no longer has the authority or the power to mine in the areas of Kisumu, Vihiga Kitui or the suit lands. That the 2nd Respondent is currently in possession of the latest Mining License to conduct mining on the suit lands. That it has multiple employees currently assigned to execute mining activities on the suit lands and any interference of the mining activities will occasion mass unemployment. That it is suffering financial loss occasioned by the court order in place. The 2nd Respondent prayed that the application be dismissed for lack of merit.

Issues for determination

7. The issue of whether or not the court has jurisdiction to entertain the matter was decided in the ruling dated 28th March 2023. This being an application for temporary order of injunction pending hearing of the suit, the sole issue for determination is whether or not the applicant has made out a case for grant of the orders sought. In addition to the provisions of Order 40 Rule 1, the courts have laid down the



criteria for grant of temporary injunctions (see cases of *Giella v Cassman Brown Co. Ltd* [1973]358 and *East African Industries Limited v Trufoods Ltd* [1972] E A 420) to be: -

- a. the Applicant must show a prima facie case with a probability of success,
- b. an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that
- c. if the court is in doubt, the matter should be decided on a balance of convenience.

Determination

8. On whether or not the applicant has demonstrated a prima facie case with a probability of success the Plaintiff firstly claims infringement of its proprietary rights over the suit lands. The applicant claimed that the suit lands belong to it, though fraudulently transferred by the 1st Respondent to the 2nd Respondent. That it entrusted Mr. Michael Ocharo, the 1st Respondent with purchase of land that it would use for mineral prospecting. That being prohibited by law to own free hold land as a foreigner, the applicant provided money to the 1st Respondent to buy land and register it in his (1st Respondent's). That the 1st Respondent breached the trust and after buying the suit lands herein he converted it to his own private and beneficial use through Rio Kavirondo Ltd in Migori County and Kitigu Resource Ltd in Vihiga County. That the 1st Respondent has also converted the applicant's major investments namely the mines and processing factory on the suit lands in Vihiga which were established using the applicant's funds. That the suit properties were transferred by the 1st Respondent to the 2nd Respondent without the applicant's consent.
9. To the Supporting Affidavit, the applicant annexed documents marked RNZH-6(a), (b) and (c) which it states to be true copies of screen shots of communication between the deponent of the Supporting Affidavit and the 1st Respondent in respect of purchase of the suit lands, RNZH- 7 (a) and (b) which it states to be true copies of the bank statements evidencing the payment of Kshs 65,093,709, RNZH- 8 (a),(b), (c) and (d) copies of photographic evidence of operations going on at the Vihiga mine by the 2nd Respondent, RNZH 9 stated to be a true copy of the due diligence search certificate and green card in respect of the two parcels of land.
10. Counsel submitted on behalf of the applicant that registration of the suit lands in the name of the 1st Respondent was in trust for Ren Zhijian (for the applicant) as the applicant is a Chinese Company and hence is not allowed to own free hold land in Kenya. That the 1st and 2nd Respondents denied the applicant user of the suit lands thereby occasioning financial loss at Kshs 10,000,000 per day. That the loss in terms of business volume from 5/5/2022 to 5/3/2023 can be conservatively pegged at Kshs 3,000,000,000(KSHS Three Billion Only). Counsel relied on the cases of *Nguruman Limited v Jan Bond Nielsen & 2 Others*[2014]eKLR, *Chebi Kipkoeh v barnabas tuitoek Bargonja & Another* [2019]eKLR and *Halsbury's Laws of England*, 3rd edition vol. 21, paragraph 739 page 352 to submit that the applicant has met the threshold for grant of the orders sought.
11. The 2nd Respondent's response to the applicant's claim of ownership of the suit lands, mines and processing factory is that the 2nd Respondent is the legal owner and bona fide purchaser of the suit lands after having purchased it from the 1st Respondent at a purchase price of Kshs 13,000,000 and had it registered in its name. that the Plaintiff/Applicant has failed to adduce any agreement between it and the 1st Defendant/Respondent to show that money sent by the applicant to the 1st Respondent was for purchase of the suit lands. That there is no evidence to authenticate that the screen shots are communication on proof of alleged purchase of the suit lands. That the factory and machines on the suit lands belong to the 2nd Respondent.



12. The 2nd Respondent annexed to the Further affidavit documents marked YY1 stated to be CR12, YY2 stated to be copy of titles in respect of the suit lands, YY3 copy of list, purchase receipts and records of importation of machines, YY4 stated to be copy of the sale agreement for the suit lands and YY5 bank statements showing payment of the purchase price of Kshs 13,000,000.
13. The 2nd Respondent submitted that under sections 24 (a) and 26 (1) of the [Land Registration Act](#), a certificate of title issued by the Land registrar upon registration of land 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 of the land and shall not be subject to be challenged except on grounds of fraud, misrepresentation or where the title was obtained illegally, un-procedurally or through a corrupt scheme. That no fraud or misrepresentation has been proved.
14. I have considered the evidence and the rival submissions on this. There appears to have been dealings between the parties particularly the applicant and the 1st Respondent involving finances. Annexure RNZH- 7 which is stated to be the bank statements does not disclose what the monies were for. There is no land sale agreement exhibited between the applicant and the original owners of the suit lands or the applicant and the 1st Respondent. The certificate of official search and copy of register annexed to the application show that the suit lands are registered in the name of the 2nd Respondent. The communication contained in the screen shots annexed to the application does not reveal what land was involved. According to the communication, a fake lease in respect of the land was being worked on. How the land got registered in the name of the 2nd Respondent and whether the applicant who claims to be a foreigner and prohibited by law from holding free hold interest in land can claim an interest in the suit lands are issues for interrogation in the hearing of the main suit. At this stage, prima facie the land is registered in the name of the 2nd Respondent who is entitled to the use thereof subject to the law, and in this case, the provisions of the [Mining Act](#).
15. The second basis of the applicant's claim is infringement of the applicant's mineral rights emanating from the prospecting license No. PL/2017/0029. The applicant contends that as the holder of the prospecting license in Vihiga County, it has exclusive mining rights and the 2nd Respondent's mining activities on the suit lands are therefore unlawful unless with the authority of the applicant and hence should be stopped. To the Supporting Affidavit was annexed a document marked NRZH-4 (a) and (b) which the applicant stated to be a true copy of Prospecting Licence Reg. No. PL/2017/0029 by the Ministry of Petroleum and Mining. The applicant stated in the Further affidavit that it has since- sought the renewal of the licence and is awaiting the outcome from the Director of Mines in the Ministry of Mining. The Applicant also annexed to the Further Affidavit a document marked RNZH-18 which it stated to be a true copy of the response by the Director Mines on the status of the pending application for renewal of the prospecting license. The applicant averred that the prospecting licence allows large scale prospecting operations and gives the applicant mineral rights over Vihiga which is classified as the applicant's mining area pursuant to section 4 of the [Mining Act](#) No. 12 of 2016. That since the prospecting tunnels and shafts at the suit lands fall within Vihiga county it follows that that they are within the applicant's mining area. That the 2nd Respondent has no mineral rights whatsoever within Vihiga. That under section 81(5) where an application has been made and the Cabinet Secretary fails to respond before the expiry of the prospecting licence, the applicant may continue the prospecting operations until the application is determined.
16. The applicant submitted that the 1st and 2nd Respondents conspired to infringe upon the applicant's mineral rights in respect of the suit lands which rights accrue from the applicant's prospecting license No. PL/2017/0029 contrary to sections 4, 44, 77 and 81(5) of the [Mining Act](#) No. 12 of 2016. That the Respondents are already illegally exercising the applicant's mineral rights with the risk that in the



event of disturbance caused to the owners of the suit lands, or damage to buildings or other immovable property, damage to water table or deprivation of water supply the applicant who is the prospecting license holder may find itself liable under s. 158 (1) (e) of the *Mining Act*.

17. The 2nd Respondent stated that the applicant's prospecting license expired on 7th October 2021 and cannot be said to be in effect as at when the suit herein was filed on 14th February 2023. That hence the Plaintiff/Applicant no longer has authority or power to mine in the areas of Kisumu, Vihiga and Kitui.
18. It was submitted on behalf of the 2nd Respondent that the Plaintiff's license had a duration of 3 years only from 8th of October 2018 to 7th October 2021. That the same expired and has never been renewed. That under section 37 of the *Mining Act*, one of the requirements in obtaining a mining license is to seek the consent of the owner of the property. That the two suit lands are private property and that in order for the applicant to renew its mining rights over the suit lands it needs to seek the consent of the owner of the land who is the 2nd Respondent. That the applicant does not have exclusive rights to mine on the suit lands.
19. I have considered the evidence and the submissions on this point. Annexure RNZH- 4 (a) to the application is the prospecting license No. PL/2017/0029. It can be seen from the document that the term of the prospecting licence was three (3) years commencing on 8th October 2018 and ending on 7th October 2021. That the license gave the applicant exclusive right to prospect for Gold and precious metals within the mineral area specified in annex 1 of the license. The prospecting license No. PL/2017/0029 therefore expired on 7th October 2021.
20. I have also read annexure RNZH- 18 to the applicant's Further Affidavit. It is a letter dated 23rd February 2023 signed by one Gregory N. Kituku for the director of mines and addressed to the applicant. It reads

“Re: Renewal Application Status- for PL/2017/0029

This is in reference to your letter dated 22nd February 2023 on the above subject matter. We wish to inform you that evaluation of your application for renewal of PL/2017/0029 is in progress and upon completion for grant of the prospecting license you will be notified.”

The letter was written after this suit had been filed. There is no indication as to when the application for renewal was done. The letter refers to the applicant's letter dated 22nd February 2023. It is not clear whether this was the date of the application for renewal or not.

21. The applicant relied on section 81(5) of the *Mining Act* and submitted that where an application for renewal has been made and the Cabinet Secretary fails to respond before the expiry of the license, the applicant will continue to prospect awaiting determination of the application. Section 81 of the Act makes provision for renewal of prospecting license as follows: -

- “(1) The holder of a prospecting licence may apply to the Cabinet Secretary for the renewal of the prospecting licence in respect of an area of land that forms part of the prospecting area.
- (2) An application under this section shall be made in the prescribed form and shall be accompanied by the prescribed fee.
- (3) An application for renewal of a prospecting licence shall be made three months before the expiry of the term of the current prospecting licence.



- (4) The Cabinet Secretary, on the recommendation of the Mineral Rights Board, shall respond to an application for renewal of a prospecting licence within sixty days of receipt of the application.
- (5) Where an application has been made and the Cabinet Secretary fails to respond before the expiry of the prospecting operations until the application is determined.”

There is no evidence that the application for renewal was made three (3) months before expiry of the prospecting licence that was current then pursuant to section 81(2). Three (3) months before expiry would have been sometime in the month of July 2021. There is no evidence of payment of the renewal fees as per section 81(3). And if the letter referred to in annexure RNZH-4(a) was the application for renewal, then the application was done long after the expiry of the licence and after the suit had been filed hence section 81(5) cannot be applicable. It cannot therefore be said that as at the time of filing the suit the applicant had a valid prospecting licence or exclusive mineral rights over the mining area. It can also not be said that the Applicant as at the time of filing the application held the responsibilities, liabilities and obligations attendant to a property license.

22. I have considered the authority of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR relied upon by the applicant where the Court of Appeal held that

“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 case 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.”

On the face of the application, what is apparent is that the evidence of purchase of the suit lands by the applicant is not clear, the suit lands are registered in the name of the 2nd Respondents and there is no evidence of renewal or timely application for renewal of the prospecting licence.

23. The upshot is that considering all the circumstances of the case I find that the applicant has not met the criteria for grant of temporary injunction as prayed. Irreparable injury that the applicant claims is likely to suffer is pegged to the proprietary and mineral rights which the applicant has not demonstrated prima facie. I dismiss the application. Costs to abide the main suit.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 20TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,



JUDGE.

In the presence of:

Maureen--Court Assistant.

Amondi advocate for the Plaintiff/Applicant

Kori Advocate h/b for Osoro for the 2nd Respondent.

