Njoroge v Sigimo Entrprises Limited & another (Environment & Land Case 286 of 2016) [2023] KEELC 16960 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16960 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 286 OF 2016

LN MBUGUA, J

APRIL 20, 2023

BETWEEN

AMBASSADOR NG'ETHE NJOROGE ..... PLAINTIFF

AND

SIGIMO ENTRPRISES LIMITED ..... 1ST DEFENDANT

AFRILAND INVESTMENTS LIMITED ..... 2ND DEFENDANT

RULING

1. Before me is a notice of motion application dated 4.7.2022, where the plaintiff seeks the following orders;

> "That pending the hearing and determination of this suit, this Honourable Court be pleased to issue interim injunction restraining the Defendants either by themselves, their servants, agents, employees or any person acting under the Defendant's instructions, from wasting, selling, alienating, disposing, transferring, signing any instrument of transfer and or disposition, entering into a sale agreements for the suit property or in any way whatsoever dealing with leases registered as IR 143950 Apartment D7 , IR 143951 Apartment B5 and IR 143952 Apartment A8 erected on Land Reference 8248 Nairobi."

2. The application is premised on the grounds on the face of the application and the supporting affidavit of the applicant. The applicant's case is that he was the registered owner of property L.R. Number 209/8248 Nairobi valued at Ksh. 50,000,000 then.

3. The applicant, the 1st Defendant and Xenia (the Developer) entered into a Joint Venture Agreement dated 5th September 2006, for the purposes of Developing all that piece of Land known as Land Reference Number 209/8248 Nairobi where it was agreed that;

i. The Applicant shall transfer the property to Xenia Apartments Limited. Prior to transfer of the property to Xenia Apartments, the Applicant was required to sign all necessary documents, which was done.

ii. Xenia Apartments Limited shall construct 31 apartments on the property.

iii. The Applicant shall have the option to retain not more than three (3) apartments upon completion of the project.

iv. The Applicant was to be paid Ksh. 50,000,000 less the value of the apartments he may have chosen to retain.

4. The Applicant avers that the 1st Respondent breached the terms of the joint venture agreement to the Applicant's detriment necessitating the institution of the suit.

5. The applicant contends that he has come across advertisements placing the suit property on sale. He avers that he has a prima-facie case with high chances of success and he stands to suffer irreparable damage unless the injunctive orders are granted.

6. In his submissions, the applicant has invoked the doctrine of lis-pendens averring that any determination rendered by the court will be frustrated as the suit property will no longer be in possession of the parties unless the application is allowed. Thus the court has jurisdiction control over the suit property while legal action is pending. It was also argued that the applicant shall stand to suffer irreparable damage and that the balance of convenience tilts in his favour.

7. Further, the applicant avers that the application is not *res-judicata* to the application dated 23.3.2016 which was withdrawn because the plaint was amended, thereby the earlier application was overtaken by events.

8. In support of his case, the applicant relies on the following authorities: *East African Development Bank v Hyundai Motors Kenya Limited* (2006) eKLR, *Stek Cosmetics Limited v Family Bank Limited & another* [2020] eKLR, *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Amos Kibata Githeko v Loise Gachiku Kinuthia & 4 others* [2018] eKLR, *JM V SMK & 4 others* [2022] eKLR, *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, *Nganda Kalandi v Timothy Mutinda Nzioka* [2012] eKLR, *Isaac Musyoki Komoni v Sammy Kaumbulu Mbuvi* [2022] eKLR.

9. The defendants have opposed the application via the Grounds of opposition dated 12.10.2022 where they contend that the current application is res-judicata to the application dated 23.3.2016, that the application is bad in law as it is predicated on a suit which is time barred under *limitation of actions act* and that the applicant has no proprietary or possessory interests in the suit properties.

10. In their submissions dated 20.2.2023, the defendants have reiterated their grounds of opposition, asserting that the application is not merited, adding that the applicants have not demonstrated that the respondents are incapable of meeting an order of compensation in the event that prayer no. F in the amended plaint is allowed.

11. In support of their arguments, the defendants have profered the following authorities: *Uhuru Highway Development Ltd –vs- Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation)* and *Kamlesh Mansukhlal Pattni, Ram Kirpal – vs – Rup Kuari* (I.L.R.) Vol VI 1883 Allahabad Series and *Omondi –vs- National Bank of Kenya Ltd & Others* (2001) KLR 579.

12. I have considered all the issues raised herein. To grant or not to grant the injunctive orders is the issue for determination.

13. On res judicata, I find that indeed the plaintiff had filed the very first application contemporaneously with the suit dated 23.3.2016. A perusal of the initial plaint reveals that all the final orders sought there in were anchored on the determination of the arbitration proceedings. Thus the substantive prayer in the application pf 23.3.2016 was the issuance of the injunctive orders pending the determination of the arbitration process.

14. However, on 20.2.2019, the plaintiffs addressed the court as follows;

> " I wish to withdraw the notice of motion dated 23. 3.2016 seeking injunctive orders. The 2nd and 4th defendants were not parties to arbitration agreement".

15. Subsequent to the withdrawal of the aforementioned application, the plaint was duly amended where prayers sought hinged on the arbitration proceedings were abandoned. It is therefore clear that the plaintiffs had laid a basis for the withdrawal of the initial application which was never determined on merits. It follows that the authorities advanced by the respondent on the issue res-judicata are not applicable herein. I conclude that the current application is not res-judicata to the application of 23.3.2016.

16. On limitation, I find that the subject of contest in the application relates to the issuance of injunctive order. If the respondents desire to have the issue of limitation a subject of contest, they are at liberty to do so in the usual manner that is by proffering a preliminary objection before this court.

17. On injunction, I make reference to the provisions of Order 40 Rule 1 and 2 of the *Civil Procedure Rules*, 2010 which stipulate that a Court may grant a temporary injunction or such order for the purpose of staying and preventing the wasting damaging or disposition of the property as the court thinks fit. The issue on grant of temporary injunctions was settled in the case of *Giella v Cassman Brown* (1973) EA and reiterated in several case laws including *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR; whereby courts held that the applicants must satisfy that they have a prima facie case with a probability of success. Secondly, an interlocutory order will not be granted unless it is demonstrated that the applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience.

18. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, the court held that;

> " An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration."

19. I find that the general conduct of the plaintiff in the prosecution of this case whereby delay has been manifested at every turn of events is wanting. At some point, the suit was even marked for a notice to show cause as to why the suit should not be dismissed. The mediation was recorded as having failed on 23.3.2022, but the applicant did not file the current application until 4 months or so later.

20. Further, this court has taken into account the age of the alleged agreement, a joint venture dating 17 years or so ago and counting. "Equity aids the vigilant and not the indolent", so goes a maxim of equity.

Thus legal claims should be brought in a reasonable and timely period, particularly when transactions relate to costly and sensitive ventures. With that background in mind, the applicants ought to have been at the forefront of prosecuting the main suit instead of filing interlocutory injunctions.

21. Finally, I find that the applicant has not demonstrated that damages would not suffice if the injunctive orders are not given. If anything, the applicants have an alternative prayer in the plaint that is; to be paid the market value of the suit premises.

22. Taking all the relevant factors into consideration, I find that the application is not merited. The same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Gachugi for the Plaintiff

M/s Kinyua holding brief for Kenneth Wilson for Plaintiff/Applicant

Court assistant: Joan