



Otieno (Suing on behalf of Embakasi Youth Juakali Project) & another v National Land Commission & another (Environment & Land Case E036 & E152 of 2021 (Consolidated)) [2023] KEELC 16915 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E036 & E152 OF 2021 (CONSOLIDATED)
OA ANGOTE, J
APRIL 20, 2023**

BETWEEN

SAMSON OTIENO (SUING ON BEHALF OF EMBAKASI YOUTH JUAKALI PROJECT) PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

JOSEPH NGUME MURAYA 2ND DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE E152 OF 2021**

BETWEEN

SAMSON OTIENO MAGOGO PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

JOSEPH NGUME MURAYA 2ND DEFENDANT



RULING

1. Before the court for determination is the 2nd defendant's (hereinafter 'Applicant') notice of motion dated August 4, 2021 and brought under section 3A of the *Civil Procedure Act*, order 51 rule 1 and order 40 rule 1 of the *Civil Procedure Rules*. The applicant is seeking that:
 - a) An order of temporary injunction be issued pending the hearing and determination of the suit, restraining the Plaintiff/Respondent jointly and severally, its members particularly Victor Wambua Kivindu, Caroline Mueni Muindi, Peninah Wambua and Dickson Nyandika, its employees, servants and/or agents or anybody else claiming under it howsoever from dealing, developing, transferring or in any way whatsoever interfering with the Applicant's peaceful and quiet possession of the property known as Nairobi/Block 82/5871 (hereinafter the 'suit property').
 - b) The orders of the Court be enforced by the Officer Commanding Police Division (OCPD), Buruburu Police Station by ensuring compliance and providing police protection and supervision.
 - c) Costs of the Application be in the cause.
2. The application is based on various grounds and the supporting affidavit of the 2nd defendant/applicant who deponed that he is the registered proprietor of the leasehold interest that comprises the suit property.
3. According to the 2nd defendant/applicant, he acquired the suit property from the first allottee, one Rose Njoki who had been allotted the suit property (then known as Plot F) by the Government of Kenya around 1st August 1994 and that a lease was registered over the suit property on 10th December 1996 and given Title Number Nairobi/Block 82/5871.
4. It was deponed by the applicant that after purchasing the suit property, he obtained the above mentioned documents as well as a survey map; that he ascertained the validity, correctness and existence of the suit property and the ownership documents and that however, the Plaintiff's members have jointly and severally fraudulently invaded the suit property causing unauthorized demarcation and construction thereon without any valid ownership documents.
5. The 2nd Defendant/Applicant averred that he deserves a temporary injunction as the Plaintiff and its members are threatening his interest in the suit property and that the suit property is at risk of waste and loss.
6. The Plaintiff/Respondent filed an affidavit stating that after conducting due diligence at the lands office, he discovered that the title deed exhibited by the Applicant was a forgery; that the person who allegedly sold the suit property to the Applicant was serving a sentence for murder and that the Applicant did not attach any sale agreement nor satisfactorily explained the circumstances of the transaction between him and Rose Njoki.
7. The Plaintiff/Respondent deponed that on 20th March 2021, the Nairobi Metropolitan Services stated that the purported title deed was a road reserve and that the Applicant should not be allowed to benefit from an illegality.



8. The Defendant/Applicant submitted that he is entitled to the injunctive orders sought being the registered owner of the suit property; that he has shown a prima facie case with a probability of success and that the Respondents are constructing on his land thus causing him irreparable harm which cannot be adequately compensated by an award of damages.
9. The Applicant submitted that the Respondent had admitted to constructing on riparian land and that the Respondent had raised the issue of fraudulent title in a general manner rather than alleging it distinctly as required by law.
10. The Respondent submitted that the suit property was surrendered to the government and constituted public and riparian land and was thus not available for allocation and that the City Council of Nairobi allowed the Respondent to plant trees along the riparian zone of Nairobi river.
11. In conclusion and relying on articles 67 and 69 of *the Constitution*, section 6(2) of the *National Land Commission Act* and section 42(1) of the *Environmental Management and Coordination Act*, the Respondent submitted that an inquiry needs to be conducted into the validity of the Applicant's title.
12. Based on the foregoing, the following one issue arises for determination:
Whether the Applicant is entitled to an order of injunction.
13. The requirements for the grant of an injunction were set out as follows in the case of *Giella v Cassman Brown & Co Limited* [1973] EA 358 as follows:

“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.”
14. 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.”
15. The Applicant has stated that he has a prima facie case because he is the registered owner of the suit property. This right has been disputed by the Respondent who stated that the Certificate that was exhibited by the 2nd Defendant/Respondent was a forgery the suit property having been declared riparian land.
16. The Certificate of Lease of the previous owner of the suit property was exhibited in support of the Applicant's assertion. It was further asserted that the previous owner of the suit property was serving a jail sentence and the Applicant had not produced the sale agreement in respect of the transaction.
17. Based on the evidence on record, I am convinced that the Applicant has not shown a clear and unmistakable right over the suit property for lack of a sale agreement between himself and the purported vendor, contrary to the provisions of section 3 (3) of the *Law of Contract Act*.



18. In any event, it would appear that it is the Plaintiff who is in possession of the suit property. An order of injunction will therefore amount to an order of eviction which cannot be granted at this stage.
19. Considering that the plaintiff has deponed that the suit property is riparian land, meaning that the Plaintiff is not laying claim to the land, save for usufructuary rights, the order that commends itself is that of maintenance of the current status quo so as to preserve the current status of the land.
20. For those reasons, the court makes the following orders:
 - a. The application dated August 4, 2021 is hereby dismissed.
 - b. The prevailing status quo to be maintained pending the hearing and determination of the suit.
 - c. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF APRIL, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mburu for 2nd Defendant

No appearance for Plaintiff

Court Assistant - June

