



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 792 OF 2015

GOLDEN LION REAL ESTATE COMPANY.....APPLICANT

VERSUS

JAMES ONUNGA.....1ST RESPONDENT

FRANK LOGISTICS LIMITED.....2ND RESPONDENT

ASHOK KUMAR SOOD.....3RD RESPONDENT

CHIEF LANDS REGISTRAR.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

PHILLIPS INTERNATIONAL LIMITED.....6TH RESPONDENT

CREDIT BANK LIMITED.....7TH RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion application dated 17/12/2021 filed under Sections 1A, 1B, 3A of the Civil Procedure Act, Order 40 Rule 1(a), 3(1) & (2), 4(1), (4), 5 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law. The Applicant is seeking for the following Orders:

a. *Spent.*

b. *Pending the hearing and determination of this application, a temporary injunction be issued restraining the 6th and 7th Respondents either by themselves, their servants, workers, agents and/or employees from interfering, trespassing, alienating, auctioning, selling, transferring or in any other manner dealing or disposing of the property known as L.R. No. 1/381 [I.R. No. 20011] otherwise known as the Blacky' Lounge situated along Argwings Kodhek Road, next to Chaka Place opposite the Priory, Kilimani, Nairobi or any part thereof;*

c. *Pending the hearing and determination of this suit, a temporary injunction be issued restraining the 6th and 7th Respondents either by themselves, their servants, workers, agents and / or employees from interfering, trespassing, alienating, auctioning, selling, transferring or in any other manner dealing or disposing of the property known as L.R. No. 1/381 [I.R. No. 20011] otherwise known as the Blacky' Lounge situated along Argwings Kodhek Road, next to Chaka Place opposite the Priory, Kilimani, Nairobi or any part thereof; and*

d. *Costs be provided for.*

2. The Application is opposed. There is replying affidavit sworn by Wainaina Francis Ngaruiya, the Head of Legal of the 7th Respondent Bank dated 13/01/2022.

3. On 17/01/2022, the matter was canvassed orally in virtual court and a Ruling date was scheduled.

4. I in turn have had time to analyze the emerging issues therein. The instant Application relates to the grant of temporary injunctive relief

pending the hearing and determination of this application.

5. The substantive law on this matter is **Order 40 Rule 1(a) of the Civil Procedure Rules 2010** which provides:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

6. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in **Giella vs. Cassman Brown & Co. Ltd supra**.

7. In **The Siskina (Owners of the Cargo Lately On Board) vs Distos Compania Naviera SA: HL 1979 [1979] AC 210**, Lord Diplock said:

"A right to obtain an interlocutory judgment is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment of the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

8. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** observed that:

"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.

9. 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 supra**. The court was clear that *"...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."*

10. Drawing positive inspiration from the **Nguruman v Jan Bonde Nielsen & 2 others [2019] eKLR**, the Court of Appeal in **Total Kenya Limited v David Njane t/a Argwings Twin Service Station & 2 others [2018] eKLR** restated the requirement that the three conditions for granting an injunction ought to be considered sequentially. In essence, the Court reasoned that the conditions for irreparable damage and balance of convenience ought not to be considered if a prima facie case had not been established.

11. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a prima facie case. A prima facie case was defined in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, where Bosire, JA stated as follows:

"So what is a prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter."

12. The Court of Appeal deliberating what amounted to a prima facie case in **Nguruman (Supra)** made the following comments:

"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."

13. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.

14. In my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.

15. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavits, both parties are making a claim to the suit land which though the land registration numbers are presented as different the physical location seems to be the same. It is evident therefore that the dispute between the parties is the location of their respective plots. It is unfortunate that the 4th defendant nor the 5th defendant who would shade more light as to the physical location of the plots have failed to file a response to this application though duly served.

16. Nevertheless the nature of the dispute is one which cannot be adjudicated over at this interlocutory stage. The general principle is such that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in trial. This was deliberated in the case of *Ougo & Another vs Otieno Civil Appeal No. 3 of 1987 (1987) KLR*.

17. It is apparent that if suit property LR 1/381 or LR 1/1381 which shows on the charge document for the 6th and 7th Respondents as having been originally LR1/835 which is the land being claimed by the plaintiff then there is need to preserve it as it is until the issues in contention are deliberated and settled.

18. Whereas the parties have submitted that there is an order from the High Court Commercial Division case No. E813 of 2021 it is in respect of the 2nd Respondent being ordered to pay all arrears by 21/02/2022. I am aware that this matter is scheduled for PTC on 15/02/2022. Preservation of status quo is simply a case management strategy that will assist the court in preserving the subject of the suit as it is.

19. Since the description and location of the suit property by the plaintiff fits the description and location of the suit property as is claimed by the 6th and 7th respondents then it is important that as Lord Diplock (supra) states ‘...*it is prudent to take such measures as are calculated to preserve the status quo....*’ Only until the matters are litigated, evidence adduced and finalized.

20. It is the view of the court that the applicant has established a prima facie case with a probability of success against the Respondents. At this point the court cannot tell whether the land in question is the same or not the same with what each party is claiming and this can only be adduced at the main trial. As regards irreparable damage, I take the view that should the injunction not be granted the substratum of this case will be destroyed and the applicant will suffer irreparable loss which may not be quantified in damages.

21. There has been an auction notice issued already and therefore without the benefit of an interim injunction the entire process will purely be academic. The court never acts in vain. Therefore, if I had any doubts, I am now clear in thought and action that the balance of convenience does tilt in favour of the applicant purely for purposes of safeguarding the current status quo of the subject matter of the suit pending hearing and determination.

22. Therefore, arising from all the above, I truly find merit in the application. Accordingly, I allow the Notice of Motion dated 17/12/2021 in terms of prayer 2.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2022.

MOGENI J

JUDGE

IN THE PRESENCE OF:

Mr. Mwangi h/b for Mr. Nyaoga SC for the Applicant

Ms. Awandu h/b for Mr. Were for the 2nd Respondent

Mr. Mugisha for the 6th and 7th Respondents

N/A for the 1st, 3rd, 4th and 5th Respondents

Kevin Court Assistant