



REPUBLIC OF KENYA



Mildsteel Engineering Works Limited v Nunda & 3 others (Environment & Land Case E283 of 2022) [2023] KEELC 17903 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E283 OF 2022**

**JA MOGENI, J
MAY 23, 2023**

BETWEEN

MILDSTEEL ENGINEERING WORKS LIMITED PLAINTIFF

AND

DANIEL NUNDA 1ST DEFENDANT

VIRGINIA NJERI KUNGU 2ND DEFENDANT

MARY KAZIRA 3RD DEFENDANT

NAIROBI CITY COUNTY 4TH DEFENDANT

RULING

1. This is the Notice of Motion dated 25/04/2022 brought under section 1A, 1B, 3A & 63 (e) of the [Civil Procedure Act](#), Order 50 Rule 1 of the [Civil Procedure Rules](#). It seeks orders:-
 - i. Spent.
 - ii. That this Honourable Court be pleased to issue an order of restraining the Respondents, their servants, agents, employees and or persons claiming title from the Respondents from alienating, disposing, selling, utilizing and or interfering with LR No. B5-105 Kayole pending determination of this application.
 - iii. That this Honorable Court be pleased to issue an order of mandatory injunction to compel the Respondents to remove construction material deposited on House LR No. B5-105 Kayole pending the hearing and determination of this application.
 - iv. That this Honorable Court be pleased to issue an order of temporary injunction to restrain the Respondents, their Agents and or Servants from developing, alienating, disposing, charging,



selling and or in any manner whatsoever dealing with all that property known as LR No. B5-105 Kayole pending the hearing and determination of this suit.

- v. That cost of this application be provided for.
2. The grounds are on the face of the application and are set out in paragraphs (a) to (e).
3. There is a supporting affidavit sworn by Militus Oluoch, the director of the Plaintiff/Applicant herein sworn on the 25/04/2022.
4. The application is opposed. There is a Replying Affidavit dated 15/05/2023 sworn by Daniel Nunda on behalf of Mary Kazira Kiruru who has given him the authority.
5. On the 22/02/2023, the court with the consent of parties directed that the Notice of Motion be canvassed by way of written submissions.
6. I have considered the notice of motion, the supporting affidavit and the annexures. I have also considered the replying affidavit and the annexures. The parties have not filed any written submissions as at the date I was writing the ruling. The issues for determination are:-
 - i. Whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.
 - ii. Whether the plaintiff's/applicant's application meets the threshold for grant of a mandatory injunction.
 - iii. Who should bear costs of this application?
7. In an application for injunction, the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2013] KLR 125 the Court of Appeal stated what amounts to a *prima facie* case. I am guided by the above authorities.
8. It is the Plaintiff's case that the plaintiff is the registered owners of plot (B5) 105 Kayole, having bought it on 5/02/2012 from one Peter Luas Kavila Kilonzo and fully paid for it. He annexed a copy of the Agreement, copy of the Allotment Letter and Beacon Certificate. He stated that they have fully paid for the suit property.
9. That on 30/01/2022 when they visited the plot they found that the 1st Respondent/Defendant had started construction without the knowledge of the plaintiff. They then reported to the chief but the 1st defendant seems to be determined to continue the illegal construction and may dispose of the suit property if not stopped by the court and the plaintiff will suffer loss and damage since the 1st defendant has refused to remove their construction materials.
10. 3rd Defendant/Respondent in his response avers that the plaintiff is a busybody who has never owned nor been in possession of the suit property.
11. He averred that the 3rd defendant purchased the suit property from one Virginia Njeri Kungu who was registered owner. That the purchase agreement was executed on or about 8/02/2012 after doing a search. He annexed copies of the Agreement and the search.
12. He averred that the 4th Respondent approved the transfer of the suit property to the 3rd defendant and they issued her with the booklet for plot No B5-105. A copy of which was annexed. Further that upon purchase the 3rd Respondent commenced development until the Plaintiff intercepted and fenced off



the suit property. He prayed for the application to be dismissed since the applicant is a stranger to the suit property.

The Principles on mandatory Injunction orders

13. The Applicant has also made an application for a mandatory injunction. Before proceeding further, it is significant to appreciate the great distinction between the prohibitory injunction as envisaged in the “Locus Classicus” case of “Giella v Cassman Brown, (Supra) and a Mandatory Injunction. The first authority on making this distinction was “*Shepard Homes v Sandham* [1970] 3 WLR Pg. 356 Case” in which Megarry .J as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.

14. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “*Malier Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella v Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd v Washington Okeyo [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

15. Further the same Court of appeal in the case of “*Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others* CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

16. Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of *Locabail International Finance Limited v Agro Export and others* [1986] All ER 906, the court held thus:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant



attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application”.

17. The reason for this rule on granting of Mandatory Injunction is plain. Megarry. J put is succinctly in a subsequent passage in the case of “*Shepard Homes Case* (Supra) as follows:-

“if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trail whether the injunction should be dissolved or contained”

18. For these reasons therefore this Court finds that the applicant has demonstrated their case and met the fundamental threshold on being granted mandatory injunction as laid down in law. The defendants should therefore remove the construction material deposited on House No. B5-105 Kayole.

19. In conclusion, I find merit in this application make the following orders:

- i. An Order be and is hereby issued restraining the Respondents, their servants, agents, employees and or persons claiming title from the Respondents from alienating, disposing, selling, utilizing and or interfering with LR No. B5-105 Kayole pending determination of this suit.
- ii. A mandatory injunction be and is hereby issued to compel the Respondents to remove construction material deposited on House LR No. B5-105 Kayole pending the hearing and determination of this suit.
- iii. A temporary injunction be and is hereby issued to restrain the Respondents, their Agents and or Servants from developing, alienating, disposing, charging, selling and or in any manner whatsoever dealing with all that property known as LR No. B5-105 Kayole pending the hearing and determination of this suit.
- iv. Costs of the application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 23rd DAY OF MAY 2023

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MOGENI J

JUDGE

In the virtual presence of:

Ms Kirui holding brief for Mr Kwengu for Plaintiff

Mr Maranga for 1st, 2nd and 3rd Respondent

Mr Sonoiya for the 4th Respondent

Ms. Sagina : Court Assistant

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MOGENI J

JUDGE

