Oduor & 2 others v County Government of Nairobi & another (Environment & Land Case E93 of 2023) [2023] KEELC 18224 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18224 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E93 OF 2023

JO MBOYA, J

JUNE 21, 2023

BETWEEN

MICHAEL ODUOR .... 1ST PLAINTIFF

JOHN ODHIAMBO ODEK .... 2ND PLAINTIFF

IBRAHIM ODHIAMBO NDOO .... 3RD PLAINTIFF

AND

COUNTY GOVERNMENT OF NAIROBI .... 1ST RESPONDENT

SHAURI MOYO AFRICAN TRADERS ASSOCIATION .... 2ND RESPONDENT

RULING

Background And Introduction

1. *Vide* Notice of Motion Application dated the 4th April 2023, the Plaintiffs/Applicants herein have approached the Honorable Court seeking for the following Reliefs;

   i. ....(Spent).

   ii. Leave be granted to the Plaintiff/Applicant application by way of Notice of Motion to be set down for hearing before the Honourable Duty Judge during the High Court Vacation.

   iii. Pending hearing and determination of this application and with immediate effect an order of injunction prohibiting and restraining the Defendants whether by themselves, employees, servants and/or agents or otherwise assigns and or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from taking possession, leasing, alienating, transferring or otherwise in any manner interfering with the Plaintiffs tenancy and/or management of running of Toilet Block Number B (4236T), situated within Shauri Moyo Market, Nairobi County.

iv. That pending the hearing and determination of this Suit and with immediate effect an order of injunction prohibiting and restraining the Defendants whether by themselves employees, servants and or agents or otherwise assigns and or any person whatsoever acting on their behalf and or under their mandate and or instructions from taking possession, leasing, alienating, transferring or otherwise in any manner interfering with the Plaintiffs tenancy and or management of running of Toilet Block Number B (436T) situated within Shauri Moyo Market, Nairobi County.

v. Costs of this Application be provided for.

2. The instant Application is premised on the various Grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the Supporting affidavit of one Michael Oduol; sworn on the 4th April 2023 and the further affidavit sworn on the 25th May 2023, respectively.

3. On the other hand, the Defendant/Respondent reacted to the application by filing a Replying affidavit sworn by one Nassir Mchana Maasai, sworn on the 19th May 2023; and in respect of which the Deponent has controverted the averments contained at the foot of the supporting affidavit filed on behalf of the Applicant's.

4. Be that as it may, the Application beforehand came up for hearing on the 31st May 2023, when the advocates for the respective Parties agreed to canvass and ventilate same by way of written submissions.

5. For good measure, the Honourable court thereafter directed that the written submissions be filed and exchanged within circumscribed timelines. In this regard, the Applicants thereafter proceeded to and filed their written submissions which are undated, whereas the Defendant/Respondent filed written submissions dated the 6th June 2023.

Submissions By The Parties

a. Applicants' Submissions: Honourable

6. The Applicants herein have raised, highlighted and canvassed three salient issues for consideration and ultimate determination by the Honourable court.

7. Firstly, Learned counsel for the Applicants has submitted that the City Council of Nairobi, now defunct issued to and in favor of the Applicants a Letter of allotment whereby the City Council of Nairobi allocated to and in favor of the Applicants the management of the toilets/sanitary facility namely, Block (T436), situate within Shauri Moyo Market.

8. Furthermore, Learned counsel for the Applicants has submitted that other than the Letter of allotment dated the 12th February 2010, the City Council of Nairobi also forwarded a tenancy agreement, which the Applicants herein were required to execute and thereafter return to the City Council of Nairobi.

9. Additionally, Learned counsel for the Applicants has submitted that the Applicants herein proceeded to and duly executed a tenancy agreement and thereafter caused same to be returned to the City Council of Nairobi, in the manner prescribed and indicated in the letter of allotment.

10. In the premises, Learned counsel for the Applicants has therefore submitted that there exists a valid tenancy agreement between the Applicants and the Respondents herein, whose terms ought to be respected and/or adhered to.

11. Secondly, Learned counsel for the Applicants has submitted that despite the clear terms of the tenancy agreement, the Respondent herein has since proceeded to and served the Applicants with a Letter

dated 14th February 2023; and in respect of which the Respondent herein is seeking to terminate the tenancy relationship with the Applicants, albeit without following the prescribed provision/clauses of the tenancy agreement.

12. Premised on the foregoing, Learned counsel for the Applicants has therefore submitted that the impugned letter dated 14th February 2023; constitutes and amounts to breach of the contract.

13. Thirdly, Learned counsel for the Applicants has submitted that the Applicants herein have managed and operated the toilets/sanitary facilities since the year 2010 and that in the course of managing the said facility, same have hugely and heavily invested in the facility. For clarity, the Learned counsel for the Applicants has submitted that the Applicants has bought and installed water tanks and other related facilities in the premises.

14. Furthermore, Learned counsel for the Applicants have also submitted that the Applicants have also employed a number of persons, to run and/or operate the toilets/sanitary facility and hence, if the tenancy agreement is terminated, the employees of the Applicants herein shall lose their employment and thereby be rendered redundant.

15. Based on the foregoing, Learned counsel for the Applicants has thus impressed upon the Honourable court that the Applicants have established and demonstrated a *Prima facie* case with probability of success and furthermore, that unless the orders of injunction are granted, the Applicants herein shall be disposed to suffer irreparable loss.

16. In support of the foregoing submissions, counsel for the Applicants has cited and relied on *inter-alia Giella v Casman Brown & Company Ltd* (1973)EA, *Amos Kiereri Kayugo v Kireithi Trust* (2017)eKLR and *Hezron Kamau Gichuru v Kianjoya Enterprises Ltd & Another* (2022)eKLR, respectively.

b. Respondents Submissions

17. The Respondents herein has filed written submissions dated the 6th June 2023 and in respect of which same has raised, highlighted and amplified two issues for due consideration by the Honourable court.

18. First and foremost, Learned counsel for the Respondent has submitted that even though the City Council of Nairobi allocated to and in favor of the Applicants herein the toilets/sanitary facilities within Shauri Moyo Market, the allocation of the said facility did not vests and/or bestow upon the Applicants perpetual rights and/or interests to manage the said facility.

19. Furthermore, Learned counsel for the Respondent has submitted that the relationship between the City Council of Nairobi (now defunct) and the Applicants herein, was one of licency. In addition, counsel has submitted that the relationship in question was capable of being terminated and/or determined by either the City Council of Nairobi or the city County Government of Nairobi.

20. Premised on the foregoing, Learned counsel for the Respondent has therefore submitted that it is erroneous on the part of the Applicants to purport and/or contend that the Respondent herein cannot terminate the relationship pertaining to and or concerning the management of toilets/sanitary facility in question.

21. Secondly, Learned counsel for the Respondents have submitted that the decision to terminate the relationship between the Applicant on one hand and the Respondents on the other hand; was arrived at by the Intergovernmental Relationship Steering Committee and which decision has since been adopted and ratified by the County Secretary and Head of the County Public Service in terms of the Memo reference number NCC/MKT/1/23/2023 and dated the 13th January 2023.

22. Additionally, counsel has contended that insofar as the decision of the Intergovernmental steering committee, which underscored the necessity to revert the management of the toilet/sanitary facility to the market management, has not been vacated; the instant application is therefore misconceived and without merits.

23. In any event, Learned counsel for the Respondent has contended that the Applicants herein have neither met nor established the requisite conditions to warrant the grant of Temporary Injunction either as sought or at all.

24. In support of the foregoing submissions, Learned counsel for the Respondent has cited and quoted, *inter-alia*, the case of *Roda Gatwiri Kirigia v Kathurima Magambo* (2004)eKLR, *Stek Cosmetics Ltd v Family Bank Ltd & Another* (2020)eKLR, *Nguruman v Jan Bonde Nielsen & 2 Others* (2014)eKLR and *Susan Wanjiru Muchoki v Kuka & 2 Others* (2005)eKLR, respectively.

25. In a nutshell, Learned counsel for the Respondent has therefore impressed upon the Honourable Court to find and hold that the subject application is devoid of merits and thus same ought to be dismissed.

Issues For Determination

26. Having reviewed the instant Application and the Response thereto and upon taking into account the written submissions filed by and on behalf of the respective Parties, I come to the conclusion that the following issues are pertinent and thus worthy of determination;

    i. Whether the Applicants herein have established and demonstrated a *Prima facie* case with probability of success.

    ii. Whether the Applicants herein shall be disposed to suffer Irreparable loss or otherwise.

    iii. Whether the grant of the orders sought on the face of the Application herein shall determine the entire suit and thus create an impression of issuance of Final orders albeit at an Interlocutory stage.

Analysis And Determination

Issue Number 1 Whether the Applicants herein have established and demonstrated a Prima facie case with probability of success.

27. The Plaintiffs/Applicants herein have approached the court with a view to procuring and obtaining an order of temporary injunction pending the hearing and determination of the suit beforehand.

28. In seeking for the orders of temporary injunction, the Applicants herein have contended that the City Council of Nairobi issued a Letter of allotment to and in their favor and thereafter dispatched a tenancy agreement, which was ultimately executed by the parties, culminating into the existence of a tenancy agreement.

29. Furthermore, the Applicants have also contended that though the tenancy agreement contained clauses for termination, the Respondent herein has failed to comply with and/or adhere to the termination clauses.

30. Other than the foregoing, the Applicants have also averred that without due regard to the terms of the tenancy agreement which was signed and dispatched back to the City Council of Nairobi, now

defunct, the Respondent herein is now keen to remove the Applicants from the Management of the toilets/sanitary facility situate within Shauri Moyo Market.

31. On the other hand, the Respondent adopts the contrary position and avers that even though the Applicants had been allocated the management of the toilets/sanitary facility within Shauri Moyo market, the Intergovernmental relationship steering committee met and passed a resolution that the management of the toilets/sanitary committee ought to be reverted to the management committee of the market and not to individuals.

32. In addition, the Respondent has also contended that the decision of the Intergovernmental relationship steering committee was thereafter adopted and ratified by the County secretary and head of County Public Service.

33. Based on the foregoing, the Respondent contends that the decision to revert the management of the toilets/sanitary facility to the management committee of Shauri Moyo Market was therefore in the interests of the Public and hence same ought not to be restrained.

34. Further and in any event, the Respondent have also averred that the fact that the Applicants herein were granted the authority to manage the toilets/sanitary facility, does not mean that the Applicants herein were to hold such rights in perpetuity.

35. Having reviewed the rivaling positions taken by the Applicants and the Respondents, respectively; the question that deserves to be dealt with and disposed of is whether or not the relationship between the Applicants and the Respondents herein was capable of determination one way or the other.

36. Without seeking to make a final pronouncement, which in any event falls within the mandate of the trial court, there is no gainsaying that the tenancy agreement which was executed by the Applicants and thereafter dispatched to the City Council of Nairobi (now defunct), contained a clause for termination by the Respondents upon issuance of One-month calendar notice. In this regard, it is not debatable that the relationship between the Applicants and the Respondents was capable of termination.

37. Furthermore, even though the Applicants herein have contended that the Respondent has breached and/or violated the termination clauses, it is instructive to state and underscore that the question of breach and violation can only be determined during a plenary hearing and not otherwise.

38. Notwithstanding the foregoing, one critical thing stands out. For good measure, this relates to the issue that the Intergovernmental relationship steering committee reached and arrived at the decision that the management of the toilets/sanitary facility within Shauri Moya Market would revert to the management committee of the market.

39. Even though the Applicants herein have referred and alluded to the said decision of the Intergovernmental relationship steering committee dated the 2nd July 2021 and which has been highlighted in the body of the Letter dated the 14th February 2023, it is instructive to underscore that the Applicants herein have not sought to impeach and/or challenge the named decision.

40. To my mind, for as long as the named decision has not been challenged and/or impeached, any attempt to restrain the import and tenor of the letter dated 14th February 2023, would be superficial and cosmetic.

41. Nevertheless, it is also not lost on this Honourable court that the facility which is the subject of the dispute actually belongs to the Respondents and hence the Respondent has the mandate to manage same, in such a manner that benefits the general public and not a segment of persons, the latter who are keen to extract Economic benefit therefrom.

42. Taking into account the totality of the circumstances surrounding the subject matter and coupled with the position that the decision of the Intergovernmental relationship steering committee, has not been impugned, I am afraid that the Applicants herein have neither established nor demonstrated the existence of a *Prima facie* case with probability of success.

43. As pertains to what amounts to and or constitutes a *Prima facie* case, it is expedient and appropriate to reiterate the holding of the Court of Appeal in the case of *Mrao Ltd v First American Bank Ltd* (2003)eKLR, where the court stated as hereunder;

> "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."

44. It is imperative to underscore that the existence of a *Prima facie* case whose import and tenor has been highlighted in the decision (*supra*) is paramount, nay, critical in granting an order of temporary injunction.

45. Notably, where the Applicant does not establish and demonstrate the existence of a *Prima facie* case, then the Honorable court has no business venturing to and addressing the question of irreparable loss and balance of convenience.

46. For good measure, the position of the law as propounded in the preceding paragraph was amplified and underscored in the case of *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86;

> If *Prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

47. Be that as it may, having hitherto serialized the issues for determination, elsewhere herein before and despite the explicit position underscored in the decision (supra); I shall endeavor to discuss the two outstanding issues, albeit in summary.

Issue Number 2 Whether the Applicants herein shall be disposed to suffer Irreparable loss or otherwise.

48. Other than the requirement that an Applicant must establish and demonstrate a *Prima facie* case with probability of success, it is important to point out that the fact that an Applicant has established a *Prima facie* case, does not ipso facto catapult the Applicant to the grant of an order of temporary injunction.

49. For good measure, the establishment of a *Prima facie* case, provides a spring board and/or leverage to the Applicant to then prove and establish whether irreparable loss would accrue, if the orders sought are not granted.

50. In this respect, the principle of irreparable loss thus assumes a critical and central position in determining whether or not to grant an order of temporary injunction, albeit after proof of a *Prima facie* case.

51. Notably, there are instances where an Applicant may very well establish and demonstrate a *Prima facie* case, but still fail to procure an order of temporary injunction, merely because such an Applicant has not demonstrated culpability to suffer irreparable loss.

52. Premised on the foregoing, it was therefore incumbent upon the Applicants before the court to also demonstrate to the Honourable court that same were disposed to suffer Irreparable loss, unless the orders sought are granted.

53. Nevertheless, reading the entire supporting affidavit as well as the supplementary affidavit filed by and on behalf of the Applicants, what is discernable from the contents is that the Applicants has heavily invested in the toilets/sanitary facility, by purchasing and installing water tanks.

54. Other than the foregoing, the only other scintilla or iota of loss alluded to is that the employees who have been engaged by the Applicants herein shall lose their employment.

55. To my mind, the issues that have been captured and highlighted in the body of the supporting affidavit, as well as the further affidavit, do not espouse any irreparable loss or at all.

56. In addition, it is imperative to underscore that the investment, if any, that has been put in place by the Applicants are issues that are capable of being quantified and where appropriate remedied by payment of an appropriate award of damages.

57. In the circumstances, what is apparent and evident is that the loss, if any, which has in any event not been demonstrated, is one that is compensable in monetary terms. Consequently, same does not amount to an Irreparable loss.

58. Perhaps and for good measure, irreparable lose was aptly described and amplified in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;

> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

59. Clearly, any loss which is either speculative or otherwise remote, (like the ones alluded to by the Applicants herein) cannot therefore meet the threshold of what constitutes Irreparable loss.

Issue Number 3 Whether the grant of the orders sought on the face of the Application herein shall determine the entire suit and thus create an impression of issuance of final orders albeit at an Interlocutory stage.

60. From the body of the Plaint which has been filed, the Applicants herein have sought for the following principal reliefs;

i. An order of injunction restraining the Defendants whether by themselves, their servants, agents or otherwise howsoever from interfering with the Plaintiff's tenancy, allotment, running and management of the suit premises, Toilet Block B (4336T), Shauri Moyo Market.

61. First forward, at the foot of the current application, the Applicant has sought for a near similar relief. For good measure, the Applicants have sought for an order of Injunction pending the hearing and determination of the suit.

62. In the circumstances, the question that does arise is if the court were to grant the order of temporary injunction sought at the foot of the application; then what would remain outstanding as pertains to the current suit.

63. To my mind, the current application represents a classic situation where the grant of the interlocutory order of injunction effectively determines and dispossess the entire suit, presented to Court by the Applicants.

64. Notably, if the court were to proceed and grant the order sought at the foot of the instant application, which order replicates the final orders sought at the foot of the Plaint, then what would have arisen would be a final order disposing of the suit, albeit at an interlocutory stage.

65. Clearly, such a scenario is antithetical and contrary to the Rule of Law and may thus lead to an absurd situation, which must be frowned upon, if not eschewed.

66. Before departing from the issue herein, it is appropriate to adopt and reiterate the words of Maraga J, (as he then was) in the case of the *Headmaster Kiembeni Baptist Primary School & another v Pastor Of Kiembeni Baptist Church* [2005] eKLR, where the court held thus;

> I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also *Shah v Shah* (1981) KLR 374.

67. The forgoing excerpt, which have been reproduced in the preceding paragraph, aptly describes the situation obtaining in respect of the instant matter.

Final Disposition

68. From the discourse, which has been elaborated upon in the body of the instant ruling, it is imperative to state and underscore that the Applicants herein have neither established nor demonstrated the existence of a *Prima facie* case with probability of success.

69. Furthermore, there is no gainsaying that the loss, if any, that may be suffered by the Applicants, is one that is easily ascertainable and quantifiable in monetary terms. Further and in any event, the ability of the Respondent to pay recompense, is not in doubt.

70. Consequently and in the premises, I find and that the Application dated the 4th April 2023; is devoid of merits. In this regard, same be and is hereby dismissed with costs.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr. Muiruri Kamande for the Plaintiffs/Applicants.

Mr. Isinta for the Defendant/Respondent.