Ouma (Suing as the legal representative of the Estate of the Late Jackson Muthamia Nyaga) v Wazir (Environment and Land Appeal E035 of 2022) [2023] KEELC 18300 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18300 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E035 OF 2022

NA MATHEKA, J

JUNE 19, 2023

BETWEEN

MAUREEN AKINYI OUMA ..... APPELLANT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JACKSON MUTHAMIA NYAGA

AND

JOSEPHAT ODARO WAZIR ..... RESPONDENT

JUDGMENT

1. The Appellant herein being dissatisfied with the decision of the Honorable M. Nabibya in Civil Suit No 1363 of 2021 delivered on the 2nd August 2022 appealed against the entire ruling and Order on the following grounds;

    1. The learned trial Magistrate erred in law and fact by reaching a finding based on a Replying Affidavit of the Respondent as though those facts were in support of the Appellants Application.

    2. The learned trial Magistrate erred in law and fact referring and considering the Replying Affidavit filed on the 22nd September 2021 as an Affidavit in Support of the motion by the Appellants.

    3. The learned trial Magistrate erred in law and fact by failing to consider the Appellants further affidavit filed on the 18th October 2021.

    4. The learned trial Magistrate erred in law and fact by reaching a finding that subject in dispute is the house and not the parcel of land.

5. The learned trial Magistrate erred in law and fact by concluding that the Appellant failed to demonstrate loss suffered.

6. The learned trial Magistrate erred in law and fact by failing to properly apply the legal principles in granting injunctions.

7. The learned trial Magistrate erred in law and fact by reaching a finding that the Respondent has demonstrated the process of acquisition of the suit property.

8. The learned trial Magistrate erred in law and fact by failing to consider the Order in Environment & Land Case No 51 of 2013.

9. The learned trial Magistrate erred in law and fact when he failed to consider the Appellant arguments, submissions and authorities when arriving at his decision.

2. The Appellant prays that the appeal against the ruling and order of the Trial Magistrate delivered on the 2nd day of August 2022 be allowed with costs.

3. This is an appeal from a ruling delivered on 2nd August 2022 by Hon Maureen Nabibya Principal Magistrate in Mombasa RMCC 1363 of 2021 Maureen Akinyi Ouma v Josphat Odaro Wazir. The Learned Magistrate dismissed the Appellant's application dated 25th August 2021 which sought interlocutory injunctive orders against the Respondent pending the hearing and determination of the suit. The background to the dispute giving rise to this appeal is the Appellant's application dated 25th August 2021, seeking to restrain the Respondent from in any way dealing with Plot No. 106/1/MN Subdivision No. 12194/I/MN pending the hearing and determination of the suit. The Appellant contended that she is the bonafide owner of the suit property, which the Respondent was invited into after he was evicted from the neighbouring plot. The Appellant claimed that she wanted to develop her plot, and she requested the Respondent to relocate from her suit property, but the Respondent has refused to move and is barring her servants from accessing the suit property. The Respondent in his Replying Affidavit dated 20th September 2021 has rejected the Appellant's claim and maintained that he is the owner of the suit property, having bought the same from one Naswir Khalid Bin Ali for Kshs 165,000/= on 19th November 2012.

4. The main issue for consideration is whether the Learned Magistrate disallowed the prayer for interlocutory injunction and properly exercised her discretion or misdirected herself and arrived at a wrong decision. The court is being invited to determine whether the Appellant presented a *prima facie* case with a probability of success before the Magistrate court, whether the irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in favour of the Appellant. These were the principles that were laid down by *Giella v Cassman Brown* (1973) EA 358.

5. The first issue to consider is whether the Appellant had proved the existence of an arguable case which raise a serious question to be tried. The Court of Appeal in *Mrao Ltd. v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 fashioned a definition for "*prima facie* case" in civil cases in the following words;

> "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."

6. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR held that;

> The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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."

7. The Appellant demonstrated that her late father Jackson Muthengi made some payments towards the suit property on 7th February 1986 and 8th May 1986. She also demonstrated through pictures that there was a water business being conducted within the suit property, which the Respondent has admitted to conducting. The trial court erred in law and in facts by finding that the Appellant's case has no chance of success since they laid claim to the suit property without evidence of its acquisition process. In my view, the learned magistrate gave a final decision while discharging the *prima facie* case at the interlocutory stage. The Appellant did not need to establish title, all she needed to show is that she had a bonafide question as to the existence of the right she alleged to have over the suit property. The test of a *prima facie* case is on a balance of probabilities and based on the face of the pleadings, more so the Respondent did not prove he was the registered proprietor but rather had a beneficial interest as a bonafide purchaser. The trial court ought to have reserved its final determination as to whether the Appellant's case was successful after hearing parties on oath and examining the evidence that would have been produced. Further to that on paragraph 10 of his replying affidavit admitted that the Plaintiff's house stood on the suit property, it means therefore that both parties were in physical occupation of the suit property.

8. On the second issue of irreparable damage, I am guided by the Court of Appeal in *Nguruman* (*supra*), where it was held that;

> 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."

9. The Appellant has averred that the suit property is her home alongside her mother. The actions of the Respondent of drilling the borehole, pipping and drawing water from the well as well as building a water tower are in my view not only noisy and disruptive to the everyday life of the Appellant. In my view, no amount of monetary compensation can be sufficient to remedy the Appellant, while the Respondent is in the business of buying and selling water, if he becomes successful in his counterclaim, the court can quantify his loss suffered. The Trial Magistrate erred in law and in facts when she reached

a conclusion that the Appellant stood to suffer no loss when the suit property was her home and had nowhere else to move to if the Respondent is allowed to continue with his business of selling water. I find that the Appellant's damages cannot be quantified, and even if it would have been, her family would be adversely affected if the sought injunction is not granted. It is my finding that the injunction sought is not farfetched and I am persuaded to exercise my discretion and tilt the balance of convenience in favour of the Appellant and maintain the status quo, which will preserve the suit property until the suit is heard and determined.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE