



Waska Company Limited v Gatabaki & another (Environment and Land Case Civil Suit E174 of 2023) [2023] KEELC 18399 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E174 OF 2023**

JO MBOYA, J

JUNE 16, 2023

BETWEEN

WASKA COMPANY LIMITED PLAINTIFF

AND

NANCY WANJA GATABAKI 1ST DEFENDANT

NEW ATTITUDE LIMITED 2ND DEFENDANT

RULING

Background And Introduction

1. Vide Notice of Motion Application dated the May 18, 2023; the Plaintiff/Applicant herein has approached the Honorable court seeking for the following reliefs;
 - i.(Spent).
 - ii. A Temporary Injunction be issued restraining the 1st Defendant/Respondent (1st Respondent) by herself, agents, servants, employees and or otherwise from encroaching and/or interfering with the Applicant's suit Property designate LR No 28223/33/C2 pending hearing and determination of the Application.
 - iii. That an order do issue commanding the Officer Commanding Police Division (OCPD) Kasarani to enforce the Injunction by this Honourable court by affording the Applicant such protection as is required for it to establish the beacons of the suit property and continue enjoying possession of its said peaceful and effectively parcel of land.
 - iv. A Temporary Injunction be issued restraining the 1st Defendant/Respondent by herself, agents, servants, employees and or otherwise from encroaching and/or interfering with the Applicant's suit property designate LR No 28223/33/C2 pending hearing and determination of the Suit herein.



- v. That any other relief be issued that may be just to meet the end of Justice in this case.
- vi. That the cause of this Application be in the cause.
2. The instant Application is premised on various, albeit numerous grounds, totaling 24 in number and which have been enumerated at the foot of the Application. Further, the Application is anchored on the Supporting affidavit and Further supporting affidavit sworn by one Stephen Kamunge Wainaina on the May 18, 2023 and May 31, 2023, respectively.
3. Upon being served with the subject Application, the 1st Defendant/Respondent entered appearance and thereafter filed a Replying affidavit sworn on the May 26, 2023; and in respect of which the 1st Respondent has annexed a total of nine documents, *inter-alia* a private investigators Report alluding to the propriety of (sic) of the Deed Plan Number 309532 dated the May 27, 2010.
4. On the other hand, the 2nd Defendant duly entered appearance and thereafter filed Grounds of opposition dated the May 26, 2023; and in respect of which same has contended that the instant Application does not disclose any reasonable cause of action as against the 2nd Defendant/Respondent.
5. Suffice it to point out that the instant Application came up for hearing on the June 6, 2023; whereupon the advocate for the respective Parties agreed to canvass and ventilate same by way of oral submissions.
6. Consequently and in this respect, the Parties thereafter proceeded to and rendered their respective submissions.

Submissions By The Parties

a. Applicant's Submissions:

7. Learned counsel for the Applicant adopted the Grounds contained at the foot of the Application and thereafter reiterated the averments contained in the Supporting affidavit and the Supplementary affidavit sworn by one Stephen Kamunge Wanaina.
8. Further and in addition, Learned counsel for the Applicant thereafter raised, highlighted and canvassed four (4) pertinent issues for consideration and determination by the Honourable Court.
9. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein was desirous to purchase and or acquire a portion of land; and in this respect, the Applicant approached the 1st Respondent herein with a view to leasing a portion of land otherwise known as LR No 28223/33. However, Learned counsel contended that upon the Applicant approaching the 1st Respondent, the 1st Respondent referred the Applicant to the 2nd Respondent, who was indicated to own a portion of LR No 28223/33.
10. Furthermore, Learned counsel contended that the Applicant herein proceeded to and engaged the 1st Respondent with a view to acquiring a portion of LR No 28223/33, culminating into the drafting of a sale agreement.
11. On the other hand, Learned counsel for the Applicant submitted that subsequently the sold portion of land was demarcated and thereafter transferred to and registered in the name of the Applicant. For good measure and in this respect, Learned counsel pointed out that the resultant property was and became known as LR No 28223/33/C2.
12. Arising from the foregoing, Learned counsel for the Applicant has therefore submitted that the Applicant herein is the lawful and legitimate owner and/or proprietor of the suit property and thus



same is entitled to absolute and exclusive possession, occupation and use thereof, to the exclusion of all and sundry, the Defendants/Respondents not exempted.

13. Secondly, Learned counsel for the Applicant has submitted that even though the 1st Respondent does not own the suit property, same has however trespassed onto and/or interfered with the Applicant's Rights to and in respect of the suit property, albeit without any lawful cause and/or basis.
14. Thirdly, Learned counsel has submitted that the 1st Defendant/Respondent herein has neither responded to nor controverted the Applicant's claim and title to and in respect of the suit property. For good measure, Learned counsel has pointed out that all that the 1st Respondent has stated is that same is a stranger to the allegations/claims adverted to by the Applicant.
15. Fourthly, Learned counsel for the Applicant has submitted that the instant suit touches on and concerns trespass to land and not ownership. In this respect, Learned Counsel has pointed out that the Applicant herein currently owns a Certificate of title over and in respect of the suit property, which Certificate of title has neither been challenged, impugned and/or invalidated.
16. Additionally, Learned counsel has submitted that insofar as the Applicant's title to and in respect of the suit property has neither been revoked nor canceled, the Respondents cannot enter upon and/or trespass onto the suit property, without the lawful consent/ permission of the Applicant.
17. Finally, Learned counsel for the Applicant has submitted that the 2nd Respondent is the one who sold and ultimately transferred the suit property to and in respect of the Applicant and that at the time of sale, the 2nd Respondent represented to the Applicant that same had the requisite capacity and rights over the suit property.
18. In addition, Learned counsel has submitted that having given a warranty to and in favor of the Applicant as pertains to the validity and propriety of the title to the suit property, it behooves the 2nd Respondent to ensure that the Applicant enjoys quiet possession and use of the suit property.
19. In any event, Learned counsel contended that insofar as the 2nd Respondent sold and transferred the suit property to and in favor of the Applicant, the 2nd Defendant/Respondent shall therefore not suffer any prejudice or detriment, if the orders sought are granted.

b. 1st Respondent's Submissions:

20. Learned counsel for the 1st Respondent intimated to the Honourable court that same had filed a Replying affidavit sworn by the 1st Defendant/Respondent on the May 26, 2023 and same sought to adopt and reiterate the contents of the named Replying affidavit.
21. Other than the foregoing, Learned counsel for the 1st Respondent has highlighted and canvassed four (4) pertinent issues for due consideration and determination by the Honorable court.
22. First and foremost, Learned counsel for the 1st Respondent has submitted that no orders of injunction can issue and/or be granted as against the 1st Defendant/Respondent, over and in respect of the suit property, in the absence of any contractual relationship between the Applicant and the 1st Respondent herein.
23. Furthermore, Learned counsel for the 1st Respondent has submitted that the Applicant herein has neither tabled nor placed before the Honourable court any evidence of a contract, entered into and executed with the 1st Respondent to warrant the issuance of the impugned orders.
24. Secondly, Learned counsel for the 1st Respondent has submitted that the 1st Respondent herein cannot be restrained and/or prohibited from occupying and/or using own land. In this respect, Learned



counsel invited the court to take into account the contents of prayer three (3) of the Application dated the May 18, 2023.

25. Thirdly, Learned counsel for the 1st Respondent has submitted that the Applicant herein only entered into and executed a sale agreement with the 2nd Respondent and not otherwise. Consequently and in this regard, it was submitted that the Applicant's cause of action, if any, lies against the 2nd Respondent and not otherwise.
26. Lastly, Learned counsel for the 1st Respondent has submitted that the Applicant herein has neither established nor proved the requisite ingredients to warrant the issuance of an order of Temporary injunction, either in the manner sought or at all.
27. Instructively, Learned counsel for the 1st Respondent has submitted that the Applicant herein has neither established the existence of a *prima facie* case nor a likelihood to suffer irreparable loss, if the orders of temporary injunction are not granted.
28. Consequently and in the premises, Learned counsel has therefore contended that in the absence of a *prima facie* case with a likelihood of success and in the absence of Irreparable loss, the current Application which seeks for orders of Temporary injunction cannot be granted, either as prayed or at all.

c. 2nd Respondent's submissions:

29. Learned counsel for the 2nd Respondent adopted and reiterated the contents of the Grounds of opposition dated the May 26, 2023; and thereafter raised and canvassed Four (4) salient issues for consideration by the Honourable court.
30. Firstly, Learned counsel for the 2nd Respondent has submitted that the current Application which has been filed by and on behalf of the Applicant has neither sought nor alluded to any relief as against the 2nd Defendant/Respondent. In this regard, counsel has submitted that in the absence of any prayer/relief being sought against the 2nd Respondent, then the entire Application is misconceived and legally untenable as against the 2nd Respondent.
31. Secondly, Learned counsel for the 2nd Respondent has submitted that upon entry into and execution of the sale agreement, the 2nd Respondent caused the sold the portion of land to be transferred to and registered in favor of the Applicant.
32. In addition, Learned counsel for the 2nd Respondent has submitted that upon the same transfer and eventual registration of the suit property in favor of the Applicant, the 2nd Defendant/Respondent duly and effectively discharged her rights as provided for and captured under the Contract of sale.
33. Thirdly, Learned counsel has submitted that the dispute which has been placed before the Honorable court relates to a cause of action for trespass and not for ownership. Furthermore, Learned counsel has pointed out that the question/issue of breach of warranty in the sale of the suit property therefore does not arise.
34. Lastly, counsel for the 2nd Respondent has submitted that the entire Application that has been filed before the Honourable court and which does not seek any relief as against the 2nd Respondent, is therefore misconceived.



Issues For Determination:

35. Having reviewed the Application dated the May 18, 2023; together with the Supporting and Further supporting affidavit thereto and having taken cognizance of the Responses filed thereto; and upon consideration of the oral submission canvassed on behalf of the Parties, the following issues do arise and are thus worthy of determination;
- i. Whether the Applicant herein has established, demonstrated and or proved the existence of a *Prima facie* case as against the Respondents or otherwise.
 - ii. Whether there is a likelihood of the Applicant accruing and/or suffering Irreparable loss, if the orders of Temporary Injunction are not granted.
 - iii. What Reliefs ought to be granted.

Analysis And Determination

Issue Number 1

Whether the Applicant herein has established, demonstrated and or proved the existence of a *Prima facie* case as against the Respondents or otherwise.

36. The Applicant herein has averred that same hitherto approached the 1st Respondent with a view to leasing and/or acquiring a portion of land situate along Kiambu Road, but registered in the name of the 1st Respondent. In this regard, the Applicant added that same indeed made contact and engaged the 1st Respondent, with a view to ascertaining whether same was intent and desirous to dispose of a portion of her land in favor of the Applicant.
37. Further, the Applicant has deponed that upon making contact with the 1st Respondent, the said 1st Respondent is the one who guided and directed the Applicant to the 2nd Respondent and thereafter causing the Applicant to follow up with the 2nd Respondent on the question of whether the 2nd Respondent would be amenable to sell a portion of LR No 28223/33, situate along Kiambu Road.
38. In addition, the Applicant averred that having made contact with the 2nd Defendant/Respondent, an agreement was thereafter crafted and executed between the Applicant on one hand and the 2nd Defendant/Respondent on the other hand.
39. Furthermore, it was posited that after the entry into and execution of the sale agreement, the portion of LR No 28223/33, which was sold to and in favor of the Applicant was delineated, demarcated and thereafter became known as LR No 28223/33/C2, which is the suit property herein.
40. In addition, the Applicant also averred that subsequently the suit property was transferred and registered in her name culminating into a sub-lease, bearing the names of the Applicant. In any event, it was averred that the sub-lease, which was registered in the name of the Applicant was ultimately charged to and in favor of a Banking Institution, in terms of the charge registered on the November 7, 2017.
41. In a nutshell, it is the Applicant's position that same is the lawful and legitimate proprietor of the suit property, having bought and acquired same from the 2nd Defendant/Respondent.
42. At any rate, the Applicant has contended that by virtue of being the lawful and registered proprietor of the suit property, on the basis of the sub-lease, the Applicant is therefore entitled to occupy, possess and use the suit property to the exclusion of the Defendants/Respondents.



43. On her part, the 1st Defendant/Respondent has stated that same is a stranger to the allegations pertaining to and or concerning the purchase, acquisition and registration of the suit property in favor of the Applicant. In any event, the 1st Respondent has contended that there is no privity of contract between herself and the Applicant herein as pertains to the suit property or at all.
44. Other than the foregoing, the 1st Respondent has thereafter ventured and averred that same commissioned investigations to ascertain and authenticate the circumstances leading to the creation of LR No 128223, which gave rise to *inter-alia*, LR No's 28223/2, 28223/2/1 and 28223/33; the latter parcel which is said to have given rise to the suit property.
45. Furthermore, it is the deposition of the 1st Respondent that upon commissioning the investigations through a private investigator, same has since established that LR No 28223/33, which is the precursor of the suit property is dubious and was fraudulently registered, albeit on a Deed of amalgamation relating to LR No's 5980 and 4508/1, respectively.
46. In short, it is the 1st Respondent's contention that the title over and in respect of the suit property, which is claimed by the Applicant, is therefore a forgery and thus incapable of bestowing/ conferring any Legal rights and Interests to and in favor of the Applicant herein.
47. From the foregoing depositions, whose details have been highlighted in the preceding paragraphs, there is no gainsaying that the Applicant herein is currently the registered owner/proprietor of the sub-lease relating to the suit property.
48. Further and in addition, it is also common ground that the sublease over and in respect of the suit property is currently charged to and in favor of a Banking institution in terms of the charge registered on the November 7, 2017.
49. Nevertheless, the 1st Respondent has adopted a dual/two- pronged approach to the matter, wherein same contends that she is a stranger to the existence of the Applicant's title/ Certificate of Lease. Consequently and in this respect, it is evident that the 1st Respondent is saying that she has nothing to do with the suit property in respect of which the Applicant is seeking temporary injunction.
50. On the other hand, the 1st Respondent has adopted a diametrically opposed position and same has averred that the title over and in respect of the suit property was procured and acquired through fraud and forgery and thereafter same has chronicled various allegations purporting to show the manner in which the fraud and forgery was committed.
51. Be that as it may, I beg to point out that at this juncture, this Honorable court is not called upon to interrogate and investigate the propriety of the title belonging to and registered in the Applicant. Furthermore, the court is not seized and possessed of the requisite mandate to speak to the questions of fraud and forgery, either as alluded to by the 1st Respondent or otherwise.
52. Suffice it to point out that the various averments touching on and or concerning the fraud and forgery, which have colored the Replying affidavit filed by the Respondents can only be adverted to and determined during the plenary hearing and not otherwise.
53. Notwithstanding the foregoing, it is also imperative to underscore that even though the 1st Respondent has adverted to and alluded to fraud and forgery, it is not lost on the Honourable Court that the 1st Respondent has however not filed any counterclaim, so far to impugn and/or challenge the Applicant's title.
54. First forward, it is important to recall and reiterate that at this juncture, the Applicant holds a certificate of lease/sublease, which *prima facie* vest and confers rights and interests thereto in her favor. For good



measure, the issuance of a Certificate of lease vest in the registered owner certain statutory rights and privileges as elaborated upon by dint of Sections 24 and 25 of the [Land Registration Act](#).

55. To the extent that the Applicant herein is so far the bearer of the sublease, there is no doubt that the Applicant would therefore be entitled to enter upon, take possession of and make use of the suit property, until and unless the certificate of lease/sublease in her favor, is impeached and/or impugned by a court of competent jurisdiction.
56. Consequently and in the premises, it is my humble position that the Applicant herein would be entitled to an order of temporary injunction to protect and vindicate his rights and privileges over and in respect of the suit property. For good measure, a failure to grant and issue the orders of temporary injunction would be tantamount to negating, impeaching and/or invalidating the Applicant's title, albeit before the hearing and determination of the suit.
57. Clearly, such a situation would bring forth adverse and far reaching consequences on the owner of a parcel of land, (the Applicant not excepted), whose rights may be defeated, on mere allegation of fraud and forgery, albeit before the full hearing.
58. To vindicate the foregoing exposition, it is appropriate to take cognizance of the enunciation of the law, as espoused in the case of [George Orango Orago versus George Liewa Jagalo & 3 others](#) [2010]eKLR, where the court of appeal stated and held thus;

“*Prima facie*, he is the owner of the land and until his title to it is set aside, there would be no proper basis for dispossessing him of the land. The denial of injunction has the effect of dispossessing the appellant of his land. The purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.”

59. At any rate, taking into account the deposition contained at the foot of the Supporting and Supplementary affidavits filed by the Applicant; it is evident and apparent that the Applicant herein has proved and established that same has a prima facie case over and in respect of the suit property and hence entitled to the protection of the law.
60. Instructively, what amounts to and or constitute a prima facie case has variously been defined and explained. In this regard, it is appropriate to reiterate the explanation contained at the foot of the case of [Mrao Limited versus First American Bank & Others](#) (2003)eKLR, where the court stated and held thus;

“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.”

61. Consequently and in the premises, I come to the conclusion that the Applicant herein has placed before the Honorable court sufficient and credible material to warrant a finding that there exists a prima facie case over and in respect of her claim to and in respect of the suit property.

Issue Number 2

Whether there is a likelihood of the Applicant accruing and/or suffering irreparable loss, if the orders of Temporary Injunction are not granted.



62. Before venturing to interrogate and or investigate whether the Applicant herein has established and demonstrated that there is a likelihood of irreparable loss arising, it is imperative to ascertain and demarcate the meaning and tenor of what constitutes irreparable loss.
63. In this regard, one does not need to go further but to take cognizance of the holding in the case of *Nguruman Limited versus Jan Bonde Nielsen* (2014)eKLR, where the Court of Appeal defined irreparable loss as follows;
- “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.”
64. Having appraised myself of the meaning and import of what amounts to Irreparable loss, it is now appropriate to consider whether the invasion of the Applicant’s land and the offensive activities perpetrated by the 1st Respondent over and in respect of the suit property, which have not been denied, are likely to subject the Applicant to irreparable loss.
65. Firstly, it is instructive to point out and underscore that the registered owner and/or proprietor of a piece of land, whether on the basis of a Certificate of title or Lease, is entitled to quiet enjoyment and possession of the land in question, to the exclusion of all and sundry.
66. However, where the right of the registered owner are threatened with violation by a Third Party, irrespective of the nature of claim by the 3rd party and provided that the certificate of title has not been impugned, then a deprivation of the owner of his/her rights to occupation would, certainly amount to and constitute Irreparable loss.
67. Premised on the foregoing, it is my humble view that the 1st Defendant/Respondent, cannot be allowed to continue with the offensive activities over and in respect of the suit property, merely on the basis that same alleges/contends that the certificate of lease/sublease over and in respect of the suit property, was (sic) procured by fraud.
68. Certainly, the various allegations which have been alluded to and elaborated upon at the foot of the Replying affidavit, shall have to await the plenary hearing. Invariably, at this juncture, the court cannot make substantive pronouncements either on the issues of facts or law. Same must await the full hearing.
69. In short, it is also my finding and holding that the Applicant herein has established and demonstrated that unless the orders sought are granted, then same shall be subjected to denial and deprivation of what is *prima facie* hers, until and unless the lease is invalidated.

Issue Number 3

What Reliefs ought to be granted.



70. Having duly addressed and considered the two pertinent issues, which constitutes the primary ingredients to be established before grant of an order of temporary injunction, it must have become evident that the Applicant is thus entitled to an order of Temporary injunction.
71. However, it is not lost on this Honourable court that when an Applicant approaches the court seeking for, inter-alia, an order of temporary injunction, like the one beforehand, then the court has a discretion to grant the orders of temporary injunction, but also to impose conditions upon the Applicant, to ensure that in the unlikely event, it turns out that the orders or temporary injunction were obtained without lawful basis, then the Respondents would have some scintilla of indemnity.
72. Consequently and in view of the foregoing, the question that I must now address relates to what conditions or better still, what terms to decree, even as I grant the order of temporary injunction.
73. To my mind, one of the conditions that the court is at liberty to invoke and grant relates to provision and filing of a suitable undertaking as to damages, of such amount as the court may deem fit.
74. Notably and in the circumstances, I am minded to order and decree that the Applicant herein shall as part of the condition for enjoying the equitable remedy of temporary injunction, procure and submit to the Deputy Registrar a Bank Guarantee in the some of Kes 1, 000, 000/= only and which shall be held by the Registrar pending hearing and determination of the suit beforehand.

Final Disposition

75. Having considered the issues/questions that were enumerated elsewhere herein before, it is my humble albeit considered opinion that the Applicant has established and proved that same is entitled to the requisite protection by grant of an order of Temporary Injunction.
76. In the premises, the Application dated the May 18, 2023; be and is hereby allowed in the following terms;
 - i. A Temporary Injunction be and is hereby issued restraining the 1st Defendant/ Respondent by herself, agents, servants, employees and or otherwise from encroaching and/or interfering with the Applicant's suit property designated as LR No 28223/33/C2; pending hearing and determination of the Suit and/ or further direction by the court.
 - ii. Nevertheless and as a condition for the grant of the order of temporary Injunction herein, the Applicant shall procure and place before the Honorable Deputy Registrar Bank Guarantee in the sum of Kes 1, 000, 000/= only which shall be held on account of security for costs, if any, that may ultimately arise in respect of the subject matter.
 - iii. For good measure, the Bank Guarantee in terms of clause (ii) herein shall be procured and submitted to the Deputy Registrar within 30 days.
 - iv. In default to procure and submit the Bank Guarantee within the set timeline, the order of Temporary Injunction herein shall lapse and/or terminate automatically.
 - v. Cost of the Application shall abide the outcome of the main suit.
77. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.



OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court assistant

Mr. AGN Kamau for the Applicant

Mr. Owang for the 1st Respondent

Mr. Ouma for the 2nd Respondent

