



Naki Investments Company Limited & another v Vikeira (Environment & Land Case E172 of 2023) [2023] KEELC 19156 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E172 OF 2023**

**MD MWANGI, J
JULY 28, 2023**

BETWEEN

NAKI INVESTMENTS COMPANY LIMITED 1ST PLAINTIFF

**LT. GEN (RTD) LAZARUS SUMBEIYWO (SUING AS THE EXECUTOR
OF THE ESTATE OF THE LATE DR. WALTER KIPRONO KILELE
DECEASED) 2ND PLAINTIFF**

AND

HARISH VIKEIRA DEFENDANT

(In respect of the Plaintiffs' Notice of Motion application seeking amongst other orders an order of temporary injunction pending the hearing and determination of the suit)

RULING

1. The Plaintiff's Notice of Motion dated June 7, 2023 is brought under the provisions of Order 40 rules 1, 2 & 4 of the [Civil Procedure Rules](#) and Sections 1 A, 1B and Section 63(b) (c) & (e) of the [Civil Procedure Act](#). The motion seeks a number of orders, namely:
 - a. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants and/or their servants/agents or anyone claiming through them from further excavating, constructing, developing, trespassing or in any other manner interfering with the Plaintiffs quiet possession of the suit land pending the hearing and determination of this application.
 - b. That this Honourable Court do issue a mandatory injunction commanding the Defendants and/or their servants/agents or anyone claiming through it to restore the 1st Plaintiff property to the condition it was prior to the breach and/or destruction set out in No 2 above.



- c. That upon granting order 2 and 4 above this Honourable Court be pleased to order the Defendants to vacate the suit land forthwith.
 - d. That upon granting prayer 5 above this Honourable Court be please to direct the OCS Embakasi Police Station to supervise the order.
 - e. That this Honourable court be pleased to grant any other orders that it may deem just.
2. The application is premised on the grounds on the face of it and the supporting and the supplementary affidavits of LT. General Sumbeiywo. The Plaintiffs' claim is that the 1st Plaintiff is the legal and lawful owner of all that parcel of land known as LR 20266 measuring 1 hectare on Deed Plan No 211680. The Plaintiffs allege that they still hold the original physical title to the suit property. They accuse the Defendants of trespassing into the land, erecting a gate and excavating without any colour of right in total violation of the Plaintiffs' interest in the land.
3. On their part, the Defendants/Respondents in response to the Plaintiffs' application denied the Plaintiffs' claim in respect of the property LR No 20266. In the replying affidavit sworn by Harish Vekaria on June 20, 2023, the Defendants affirmed that property LR No 20266 does not exist as alleged in the application by the Plaintiffs and the amended plaint since a change of user of the property resulted in issuance of a new reference No 32247, which the 2nd Defendant owns and possess having purchased the same from Hotel Sisters and SPA Ltd ("Hotel Sisters") through a sale agreement dated June 15, 2022.
4. The deponent alleges that prior to the purchase they had conducted due diligence involving physical inspection of the suit property as well as inquiries from the Directors of the Hotel Sisters. The Hotel Sisters on their part had purchased the suit property in 2017 from the 1st Plaintiff. The change of user was actually procured by the Hotel Sisters before selling the suit property to the 2nd Defendant.
5. The Defendants therefore assert that they are the lawful owners of the suit property and the Plaintiffs' allegations of trespass are baseless. The Defendants further aver that the orders sought by the Plaintiffs of mandatory injunction, eviction and restoration are final in nature and cannot be issued at this interlocutory stage. In any event, the Defendants assert that the Plaintiffs have not established basis for the grant of such orders. The Defendants contend that the issuance of orders stopping them from further developing the suit property would amount to infringement of their right to own property.
6. The Defendants also filed a 2nd affidavit sworn by one Sebastian Kyengo Kivuvo on June 20, 2023. The deponent affirms that he is a director/shareholder of Hotel Sisters & SPA Ltd who sold the suit property to the 2nd Defendant. The Hotel Sisters had in turn purchased the suit property from the 1st Plaintiff.
7. The Plaintiffs in response filed a supplementary affidavit sworn by LT. General Lazarus Zumbeiywo. In the said affidavit, the deponent asserts that he is in possession of the original title of the suit property as well as the original Deed Plan which ordinarily are required to be surrendered before a change of user or transfer is allowed. His position is that any purported change of user of the suit property was irregular in view of the fact that the original tile and deed plan were not surrendered as by law required before the change of user was effected.



Court's Directions.

8. The court directed that the application be heard by way of oral submissions. Advocates for both sides made their arguments before the court on 27th June 2023. The proceedings of the day form part of the court record. I need not replicate them in this ruling.

Issues for determination.

9. The issue that the court is called upon to decide at this point in time is whether the Plaintiffs are entitled to the orders sought at this interlocutory stage.

Analysis and determination.

10. Order 40 of the *Civil Procedure Rules* deals with temporary injunctions and interlocutory orders.
11. Over 200 years ago, Cotton, LJ defined the term “interlocutory” in the case of *Gilbert v Endean* (1878) 9 ChD 259. He stated that interlocutory applications are,

“those applications.....which do not decide the rights of the parties, but are made for the purpose of keeping things in status quo till the rights can be decided or for purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”
12. The courts of this country too have made similar pronouncements concerning interlocutory applications.
13. The Court of Appeal in the case of *Rockland Kenya Ltd v Elliot white Miller* (1994) eKLR defined the purpose/object of an interlocutory injunction. Gicheru, JA (as he then was) stated that,

“The object of an interlocutory injunction is to protect the Plaintiff against injury by violation of his legal right for which he could not be adequately compensated in damages recoverable in the action if the matters in dispute were resolved in his favour at the trial. However, his need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the subject matter of the trial was decided in his favour.”
14. The Learned Judge went to further state that,

“At that stage.....it is not the function of the court to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. Such matters are to be dealt with at the trial. Nonetheless the court must in the exercise of its discretionary power in this regard be satisfied that the claim in respect of which an interlocutory injunction is sought is neither frivolous nor vexatious; in other words, that there is a serious question to be tried.”



15. Ringera J (as he then was) too in the case of *Airland Tours and Travels Ltd v National Industrial Credit Bank*, stated that,

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”

16. I will begin by addressing the prayer of mandatory injunction and the other prayer that the court orders the Defendants to vacate the suit land forthwith.

17. As regard mandatory injunctions at the interlocutory stage, I would say that the law is well settled. As the Court of Appeal stated in the case of *Kenya Breweries Ltd & another v Washington Okeyo* (2002) eKLR, an interlocutory mandatory injunction will only be granted in exceptional and special circumstances and in the clearest of cases.

18. I am not convinced that there are exceptional and special circumstances in this matter to warrant the grant of an interlocutory mandatory injunction. The Plaintiffs have not brought forth any to warrant the issuance of such an order.

19. Regarding the prayer that the court orders the Defendants to vacate the suit land forthwith, I certainly agree with the Defendants’ submissions that this is an order that is final in nature. It may only be granted after a full hearing when the court is able, after considering all the evidence to pronounce the rights of the parties conclusively and authoritatively. It is not appropriate at this stage of the hearing to issue such an order.

20. This leaves me with the prayer for an order of temporary injunction to consider. The guiding principles for the grant of an order of temporary injunction are well settled. The principles which were pronounced in the now famous case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 have stood the test of time. They have been restated in numerous decisions by the Superior Courts of this country. In the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR, the Court of Appeal while upholding the principles stated 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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

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 has to surmount sequentially.”



21. On the 1st hurdle, the Court of Appeal in the *Nguruman* case (*supra*) stated that in considering whether or not a prima facie case has been established, the court should not hold a mini trial and must not examine the merits of the case closely. What is expected of the court is to,
- “see that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”
22. Indeed, the court was categorical that,
- “The applicant need not establish title. It is enough if he can show that he has a fair and bonafide question to raise as to the existence of the rights which he alleges.”
23. I must be quick to point out that the court must be conscious when dealing with an interlocutory application even in its pronouncement so as not to appear to be making conclusive or definitive findings of fact or law in order not to embarrass or prejudice the trial of the case.
24. Having considered the competing positions by the parties in this case, I am persuaded that the Plaintiffs have demonstrated a prima facie case.
25. In considering the 2nd hurdle i.e irreparable injury, I am guided by the holding of Warsame J (as he then was) in the case of *Joseph Siro Mosioma v HFCK & 3 others* (2008) eKLR. The Learned Judge observed that,
- “Damages is not and cannot be a substitute for the loss which (may) be occasioned by a clear breach of law. In any case, the financial strength of a party is not always a factor to refuse an injunction. Moreso a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an injunction.”
26. I am persuaded that irreparable injury may result to the Plaintiffs in this case unless the order of interlocutory injunction is granted pending the hearing and determination of this case.
27. The balance of convenience, considering the totality of this case tilts in favour of issuance of the orders of temporary injunction.
28. Accordingly, the court hereby issues an order of temporary injunction in the following terms:
- a. The Defendants be and are hereby restrained by themselves, their agents, servants, employees or any other person claiming through them from further excavating, developing, constructing or in any other manner dealing with the suit property known as LR No 32247 (also formerly known as LR No 20266) pending hearing and determination of this suit. The Defendants shall however remain in possession awaiting the hearing and determination of this suit.
 - b. The costs of this application shall be in the cause.
 - c. The OCS Embakasi Police Station shall oversee the implementation of this order.
29. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2023.

M.D. MWANGI



JUDGE

In the virtual presence of:

Mrs. Wambugu for the Plaintiffs/Applicants.

Mr. Ng'eno holding brief for Mr. Cheruiyot for the Defendants/Respondents.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

