Peter & 3 others (Suing as the Officials of the Solidarity Jua Kali Association) v Kenyan Urban Roads Authority (Environment & Land Case E345 of 2021) [2023] KEELC 18867 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18867 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E345 OF 2021

OA ANGOTE, J

JULY 19, 2023

BETWEEN

JOSEPH OURU PETER .... 1ST PLAINTIFF

MICHAEL OWINO OREMO .... 2ND PLAINTIFF

JANE WANJIRU NDUNGU .... 3RD PLAINTIFF

FRANCIS MWAU KAMWEA .... 4TH PLAINTIFF

SUING AS THE OFFICIALS OF THE SOLIDARITY JUA KALI ASSOCIATION

AND

KENYAN URBAN ROADS AUTHORITY .... DEFENDANT

RULING

1. Before this Court for determination is the Plaintiffs'/Applicants' Notice of Motion application dated 29th September, 2021 brought pursuant to the provisions of Order 40 Rule 1(a) and (b) and Section 3A of the *Civil Procedure Rules*, 2010 seeking the following reliefs:

   i. That this Honourable Court do issue interim orders to restrain the Defendant, its agents/servants and or contractors from evicting and/or removing the members of Solidarity Jua Kali Association from the sides of Lumbwa and Meru streets pending the hearing and determination of this suit.

   ii. That this Honourable Court do order the Defendant to convene and hold a stakeholder consultative meeting with the Plaintiffs.

   iii. That the OCS Commanding Kamukunji Police Station do supervise compliance of the said orders.

iv. That the costs of the application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the 1st Plaintiff who deponed that he is one of the officials of Solidarity Jua Kali Association having been a member since its inception; that they are a group of open air small businessmen and women and that they operate their furniture, timber, jikos, metal boxes and other related businesses along Lumbwa, Meru and Kinyanjui roads.

3. It was deposed by the 1st Plaintiff that they have been in the area for a very long time with some members having been there for more than 30 years; that they have in the operation of their businesses always abided by both municipal and national laws and that they have always maintained and facilitated both vehicular and pedestrian traffic.

4. The 1st Plaintiff deponed that the last time the government re-carpeted Lumbwa street, they were able to organize their members to allow for smooth re-carpeting of the road and that they kept at least 4 feet back from the road. It was deposed that on 1st September, 2021, they were served with a notice for the removal of their business structures; that they were taken aback as they had not been consulted on how to organize their businesses and that the move to remove them from the suit property is draconian and meant to "kill" their businesses.

5. It is the Plaintiffs' case that they wrote to the Defendant asking to be allowed to stay while the roads were being done or to be given an alternative site but the same was not responded to and that the Court should order that a consultative meeting be held to chart the way forward.

6. In response to the application, the Defendant/Respondent, through its environmentalist, Lawrence Muhoro Wachira, deponed that as per its statutory mandate, the Defendant embarked on the improvement of access roads to Starehe Affordable Housing Project within Nairobi City County, which contract was duly awarded to Vaniax Developers Limited and that the contract period was between July, 2021 to December, 2022.

7. It was deposed by the Defendant's officer that the scope of the project included reconstruction of the existing pavement layers to carriageway as well as construction of walkways, cycle tracks and bus bays in line with the required standards; that the proposed project is located on a road reserve and that the entire property in question is public land, which the Plaintiffs are encroaching on.

8. It was deponed that contrary to the allegations by the Plaintiffs, the Defendant held several public consultative meetings in line with Article 10 read together with Article 47 of the *Constitution* which were attended by the community leaders, local administration and representatives of the affected persons and that following the public participation, it was agreed that all those who had encroached on the reserve be given a grace period to deplete their stock and vacate during the month of August, 2021.

9. It was deposed that a one months' notice dated 1st September, 2021 was issued in liaison with the local National Government Administrative Officers where all individual traders were served and required to vacate by 30th September, 2022 and that the objective of the project is to improve the general service on the road network, ease travel times and costs and reduce construction costs.

10. The 1st Plaintiff filed a Further Affidavit in which he deposed that at no point did they lay claim to the land on which the road is to be paved or drainage system improved; that the roads can be improved while they run their Jua Kali businesses and that this has been done in the past and they were able to mobilize their members to facilitate improvement of the road while they trade. The Plaintiffs' advocate filed submissions which I have considered.

Analysis & Determination

11. Having canvassed the Motion, Affidavits and submissions, the sole issue that arises for determination is whether the Plaintiffs/Applicants have met the threshold to warrant the grant of a temporary injunction. The law on the grant of interlocutory injunctions is provided for under Order 40 Rule 1 of the *Civil Procedure Rules*, 2010.

12. The principles guiding the Court in determining whether or not to grant temporary injunctive orders were set out in the celebrated case of *Giella v Cassman Brown* (1973) EA 358 as follows:

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

13. The Plaintiffs/Applicants in this case are expected to meet the three principles and surmount them sequentially. This was expressed by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR thus;

> " 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) Ally 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 is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86) If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

14. And what is a *prima facie* case? The answer was given by the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as follows:

> " ....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."

15. More recently, the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others*(*supra*) while agreeing with the definition of a *prima facie* case in the *Mrao Case* (supra) went ahead to further expound as follows;

> "We adopt that definition save to add the following conditions by way of explaining it. 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

16. The Court will be guided by the foregoing principles as well as by the general principle that no definitive findings on law or facts should be made at this interlocutory stage.

17. Vide the present application, the Plaintiffs have averred that they are open air traders carrying on their jua kali businesses along Lumbwa, Meru and Kinyanjui roads; that sometime on 1st September, 2021, they were served with a removal notice and that no consultation preceded the removal notice and as such, the Defendants actions violated Article 47 of the *Constitution*.

18. The Plaintiff adduced a copy of the notice dated 1st September, 2021 as well as a copy of a letter by themselves to the Defendant asking to be allowed to stay on the suit premises as the roadworks are undertaken or to be relocated to an alternative site.

19. In contrast, the Defendant maintains that the property occupied by the Applicants is a road reserve; that they held public consultative meetings which resolved that all those who had encroached on the road reserve be given time to deplete their stock and vacate during the month of August, 2021 and that they thereafter issued to the Plaintiffs the removal notice dated September, 2021.

20. To begin with, it is not disputed that the Plaintiffs have been carrying out their businesses along a public road, and in doing so, have encroached on the road and the road reserve. Indeed, the Plaintiffs are not laying any claim to the land on which they have set up their bussinesses. The point of contention is that the Defendant did not carry out any consultative meeting before issuing them with the removal notice.

21. The Defendant is a statutory body established by the *Kenya Roads Act* 2007, with the responsibility of managing, developing, rehabilitating and maintaining of the National Trunk Roads in the urban areas in the country. Pursuant to its mandate aforesaid, it set out to carry out construction/improvement works on the roads in question, the suit property herein, and sought to have the Plaintiffs remove their structures from the road.

22. Section 49 of the *Kenya Roads Act*, 2007 prohibits the construction or establishment of any structure on a road reserve without the responsible authorities' written permission. The responsible authority in this instance being the Defendant. The said section provides as follows;

> "(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission—
>
> (a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;
>
> (b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or
>
> (c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated."

23. Sub-section (4) provides as follows:

> "Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorised structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice"

24. While conceding to have had a working relationship with the Plaintiffs, the Defendant indicated that when it undertook the improvement project of the roads, the Plaintiffs stay thereon was no longer tenable. It is evident that the Defendant has all along been very accommodative to the Plaintiffs, even granting them a grace period of one month before issuance of the removal notice in September, 2021.

25. It having been admitted that the Plaintiffs were encroaching on the road and a 30-day notice having been issued to them, the Court is not convinced that the Plaintiffs have established any right that has been violated by the Defendant.

26. Further, it is trite that injunctive orders are equitable orders, and the Plaintiffs being in breach of the *Kenya Roads Act* cannot benefit from the same. As to the question of consultation, it has not been demonstrated that the same was a mandatory requirement which invalidated the removal notice. In the end, the Court finds that no prima facie case has been established.

27. With regard to irreparable harm, the damage caused to the Applicants should be such that it cannot be remedied by damages. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra*)the Court stated as follows on irreparable injury or damage:

> "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."

28. The Plaintiffs have not established nor indeed alleged that they stand to suffer irreparable injury if the orders sought are not granted. On the contrary, they admit that they have temporary structures on the road and this, together with the value of their business can easily be ascertained and compensated. The Court finds that this limb has also not been met by the Plaintiffs.

29. For those reasons, the Notice of Motion application dated 29th September, 2021 is found to be unmerited. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Allan Kamau for Defendant/Respondent

No appearance for Plaintiff/Applicant

Court Assistant - Tracy