



**Mwangi v Indigo Universe Supply Limited & another (Environment & Land
Case E020 of 2023) [2023] KEELC 19164 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E020 OF 2023**

**JA MOGENI, J
JULY 17, 2023**

BETWEEN

JULIA WANJIRU MWANGI PLAINTIFF

AND

INDIGO UNIVERSE SUPPLY LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

RULING

1. Before this Honorable Court for its determination are two applications brought by both the 1st defendant/respondent and the plaintiff/applicant in a span of one month. The first application is dated 11/04/2023 by the plaintiff applicant and the second application is dated 8/05/2023. The first Notice of Motion was filed by the plaintiff applicant and the second was filed by the 1st defendant/applicant herein respectively.
2. The first application is brought under sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya; Order 40 Rules 1, 2, 4 and 8, Order 51 Rule 1 of the Civil Procedure Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking the following orders:
 - i. Spent
 - ii. That the Honorable Court be pleased to issue an order of temporary injunction restraining the 1st Defendant/Respondent whether by themselves, their agents, servants or other person acting on their behalf from dealing, meddling, selling, leasing, charging or in any way interfering with the plaintiff/applicant's occupation and possession of all that parcel of land known as Plot LR No. 9042/587 situated Off Outer Ring Road in Embakasi East Constituency – Nairobi County pending the hearing and determination of this application inter parties



- iii. That the Honorable Court be pleased to issue an order of temporary injunction restraining the 1st Defendant/Respondent whether by themselves, their agents, servants or other person acting on their behalf from dealing, meddling, selling, leasing, charging or in any way interfering with the plaintiff/applicant's occupation and possession of all that parcel of land know as Plot LR No. 9042/587 situated Off Outer Ring Road in Embakasi East Constituency – Nairobi County pending the hearing and determination of this suit herein.
 - iv. That the officer in charge of Embakasi Police Station be directed to ensure compliance with the court orders accordingly.
 - v. That the costs of this Application abide the outcome of the main suit.
3. The grounds of this application which are 12 in number are supported by the annexed affidavit of Julia Wanjiru Mwangi the plaintiff/ applicant herein and there is no need of repeating them here.
4. This application was brought under certificate of urgency and the court did not certify it urgent but before the application could be listed for hearing the 1st defendant filed another application dated 08/05/2023 which is the second application under certificate of urgency. When the parties appeared in court on 11/05/2023 for inter parties hearing of the 2nd application the parties agreed and were directed to canvass both applications by way of written submissions.
5. The second application was brought under section 1A, 1B, 3A, and 63E of *Civil Procedure Act* Cap 21 Laws of Kenya, Order 40 Rules 1, 2, 4, 8, Order 51 of the Civil Procedure Rules 2010 Article 40 and 64 of *the Constitution* of Kenya enabling provisions of the law seeking the following orders:
- i. Spent
 - ii. Pending the hearing and determination of this application inter partes there be a temporary injunction restraining the plaintiff/respondent by herself, her agents and or by any other person from interfering with the 1st defendant's quiet possession and enjoyment of the suit land LR 9042/587 IR 72111 and premises.
 - iii. Pending the hearing and determination of the suit there be a temporary injunction restraining the plaintiff/applicant by herself, her agents and or by any other person from interfering with the 1st defendant's petitioner's quiet possession and enjoyment of the suit land LR 9042/587 IR 72111 and premises.
 - iv. Pending the hearing and determination of this application inter partes there be an injunction restraining the plaintiff from collecting any rent from the 1st defendant's/applicant's tenants demised premises in the land LR 9042/587 IR 72111.
 - v. Pending the hearing and determination of this application inter partes there be an injunction restraining the plaintiff from collecting any rent from the 1st defendant's tenants in demise premises on the land LR 9042/587 IR 72111



- vi. The Respondent be ordered to reimburse the 1st defendant/applicant all rental income received from the tenants in the suit premises from September 2021 to date.
 - vii. The OCPD Embakasi do oversee the implementation and enforcement of this order.
- Costs of this application be provided for .

6. The application has ten (10) grounds which are supported by the annexed affidavit of Moses Machira The General Manager of the 1st defendant/ applicant herein which I also choose not to replicate here.

The Plaintiff/Applicant’s Case.

- 7. The plaintiff/applicant herein instituted a suit by way of Originating Summons dated 11/04/2023 against the 1st & 2nd defendants/respondents herein. From the said suit, the plaintiff/applicant sought among numerous prayers, a declaration that the applicant had been in uninterrupted exclusive and physical possession of the suit land all that parcel of land Plot LR No. 9042/587 (Hereinafter referred to as “The Suit Property”) situated at Outer Ring Road in Embakasi East Constituency – Nairobi pursuant to the doctrine of adverse possession in terms of sections 7,13, 37 and 38 of the Limitations Act for 12 years from 12/10/2009. The OS is still pending hearing and determination by court.
- 8. The plaintiff/applicant brought the application dated 11/04/2023 during the pendency of the Originating Summons suit seeking the orders as enumerated hereinabove.
- 9. The plaintiff/applicant has maintained that she has occupied the suit property for over 12 years and build permanent structures including residential units and several shops. That she is a licensed Pharmacist who carries on her business on the suit land where she has developed tow extensive buildings. She however avers that she was issued with a notice of eviction dated 15/03/2022 by the 1st defendant/respondent who claimed to have purchased the suit property from Equity Bank.
- 10. She avers that the notice to vacate should be stayed and suspended so that she does not lose her right to adverse possession accumulated for a period of more than 12 years.

The 1stDefendant/Applicant’s case.

- 11. On this application the 1st defendant filed a replying affidavit to the application dated 11/04/2023 which was sworn by Dorcas Ndungwa Mulinge a director of the 1st defendant. She averred that the plaintiff/applicant had been staying on the suit property not as a trespasser but a tenant who paid rent to the farm owner Jackson Mutugi Mwangi. She stated that the plaintiff/applicant was in arrears of rent and this is evidences by the rent schedule which was provided by Homeplus Realtors Limited which was attached and marked as DNM1.
- 12. Further, she stated that the plaintiff concealed material facts to show that the property belonged to her deceased husband and that they had transferred the same by way of sale to Jackson Mutugi Mwangi, whose loan repayment fell into arrears due to the failure and this was because of the refusal of the plaintiff to pay up her rent.
- 13. She testified that vide a court case Nairobi HCC Commercial and Admiralty Civil Suit No. 402 of 2016 the court declined to grant reliefs to the plaintiff’s husband when he filed the suit on realizing that the bank (Equity Bank) Limited wanted to sell the property. Further that another ruling from Nairobi Commercial & Admiralty Civil Suit No. 302 of 2017 between Jackson Mutugi Mwangi vs Equity



Bank Limited dismissed the reliefs sought. A copy of the ruling dated 9/08/2019 was also attached and marked as DNM3.

14. She also averred that Equity Bank advertised to sell the suit property on 02/08/2021 and it was sold on 17/08/2021 and the 1st defendant company was the successful bidder. That the plaintiff has frustrated the effort the 1st defendant to take over the suit property and she has refused to pay rent.
15. She stated that the plaintiff's claim is res judicata since the same claim was litigated in the two commercial suits already referred to herein.
16. In response the plaintiff filed a supplementary affidavit dated 5/05/2023 stating that there is no existent covenant between herself and the 1st defendant as alleged by the 1st defendant concerning rent remittance. That the payment schedule produced is a fraudulent and it has been manufactured to portray the plaintiff/applicant as being a tenant and she is not
17. She denies having been a co-owner with her deceased husband and therefore a stranger to the alleged transactional dealing with 1st defendant/respondent and also a stranger to dealing between Jackson Mutugi Mwangi and Equity or any other person.
18. She stated that no one had interrupted her occupation of the suit property nor laid claim to the suit property to disrupt her utilization and adverse possession claim. She averred that no notice of entry to the suit property was ever served on her nor was she aware of any advertisement of the suit property or its alleged sale. It was her contention that without being served with any notice there was no disruption of the adverse possession.
19. She averred that she applied and obtained a Kenya Power and Lighting connection to the suit property and has attached the supporting document which is marked as JWM-1. She stated that since the property was sold without vacant possession on 17/08/2021, the 1st defendant/respondent chose not to disturb her until 15/03/2023. Further that had the disturbances come on the day 7 of purchase then her claim of adverse possession and prescriptive rights would have been lost.
20. She averred when there was damage to the suit property the matter was reported to Embakasi police station vide OB No. 73/13/4/2023 a copy of the OB document is attached as JWM-6. She contended that her claim of adverse possession is not res judicata.

The Notice of Motion application dated 8/05/2023.

21. The aforesaid application is founded on the grounds, testimony and the averments of the 26 Paragraphed Supporting Affidavit of Moses Michira Sworn and dated 8/05/2023 and nine (9) annexures marked as ("MM- 1 to 9") annexed thereto.
22. He held that it was the 1st defendant/applicant who are the legal and registered owners to the parcel of land Plot LR No. 9042/587. He averred that the 1st defendant/applicant bought the suit property through an auction after seeing an advertisement in the newspaper on 1/08/2021. That the property that was previously owned by Jackson Mutugi Mwangi was finally sold on 17/08/2021 at the fall of the hammer during the auction to the 1st defendant.
23. That the 1st defendant in taking over the suit property issued notices to the tenants and a notice for them to vacate the suit premises but the plaintiff/respondent declined, vandalized the premises and issued a notice to the tenants to ignore the notice to vacate issued by the 1st defendant/applicant.
24. The 1st defendant/applicant prays that this court issues an injunction and the plaintiff to be stopped from the collecting rent from the tenants on the suit property and also to allow the 1st defendant have



quiet possession. That the plaintiff/respondent should provide an account of the rent collected so far since the 1st defendant/applicant had projected to pay the loan with the rent so that it does not fall into arrears.

25. They urged the court to issue the orders prayed for in the Notice of Motion

Plaintiff's Response to the Application dated 8/05/2023.

26. The Plaintiff/Respondent has opposed the application and filed a 37 paragraphed replying affidavit in which she avers that the Notice of Motion Application dated 8/05/2023 is marred with falsehoods. She avers that the 1st defendant/applicant herein claims to have seen a newspaper advertisement dated 1/08/2021 yet the attached newspaper cutting is dated 2/08/2021. Further that the representative of the 1st defendant/applicant at the meeting held with attendees on 1/04/2023 identified himself as a director of the 1st defendant/applicant yet in the supporting affidavit to this application he has identified himself as a general manager.
27. She avers that there are many anomalies in the documents produced in evidence by the 1st defendant/applicant in relation to entries 14, 15 and 16 which relate to issues of registration of the suit property, gazette notices and reconstruction of the suit property file among others. She avers that the sale by auction violated the statutory 14 days which is a mandatory requirement. That the transfer that the 1st defendant/applicant was done on 13/04/2022 and not 28/03/2022 as stated in the Notice issued by the 1st defendant/applicant as indicated through the document produced and marked MM7.
28. She further avers that the 1st defendant/applicant destroyed part of the suit property and that is why she reported the matter at Embakasi Police Station and obtained an OB number which is OB 73/13/4/2023. That she is domiciled on the suit property continuously and has developed permanent structures and her occupation has never been disturbed.
29. She avers that the disturbance from the 1st defendant/applicant is as a result of her taking out the originating summons and therefore the alleged management company nor the 1st defendant do not have right to collect rent from the suit property. That there is no existent contract between the plaintiff/respondent and the alleged agent and therefore the alleged payment schedule produced as evidence is a fraudulent document since the plaintiff/respondent has never been a tenant to the 1st defendant.
30. She contends the 1st defendant/applicant never made any steps since the alleged purchase on 17/08/2021 to take over the suit property. The alleged move was only made after the plaintiff/respondent filed the suit seeking ownership by adverse possession without providing any reason for absenteeism. She therefore submits that there is no prima facie case established and no loss shall be suffered if orders sought in the application dated 8/05/2023 are not granted. She prays for the current status quo to be maintained pending determination of the suit. Further that the application is frivolous, vexatious and an abuse of the court process urging the court to dismiss it.

Analysis and Determination

31. I have carefully read and critically put into account all the filed pleadings, the well written submissions by the plaintiff/applicant since at the time of writing this ruling there were no submissions of the 1st defendant/respondent filed in court, cited authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to both the Notice of Motion application dated 11/04/2023 by the plaintiff/applicant, the one dated 8/05/2023 by the 1st defendant/applicant. It is instructive that both the plaintiff and the 1st defendant have sought interim injunctive orders pending the hearing and



determination of the applications and the suit. It is not lost to me that the first application filed for interim injunctive orders was filed by the plaintiff/applicant.

32. In the circumstances I will consider the application by the plaintiff/applicant and the first issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.
33. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

34. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) EKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

35. In the case of *Nguruman Limited V Jan Bonde Nielsen & 2 Others* (2014) eKLR the Court held as follows:

“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 it he can show that he has a fair and bona fide question to raise 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 that the court takes the view that on the face of it the applicant’s case is more likely than not to succeed.”



36. This position was also stated in the case of *Mbuthia v Jimba Credit Corporation Ltd (1988) KLR* where the court stated that:

“In an application for interlocutory injunction, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties’ cases”

37. The principle that can be gleaned from the above cited case is that at this interlocutory stage, the court should not make up its mind on whether the plaintiff/applicant has a foolproof case as all that the applicant needs to demonstrate is that she has an arguable case. In the circumstances, I am of the view that the applicant has demonstrated that she has a prima facie case with a probability of success.

38. The second condition which the plaintiff/applicant must satisfy is to demonstrate that if the order of injunction is not granted, the plaintiff/applicant shall suffer irreparable loss.

39. It is not in dispute that the applicant has been on the suit property since October 2009 and has established and managed two big buildings on the suit property without any interference since 2009. Even though counsel for the 1st defendant/respondent is their tenant on the suit property which alleged fact is denied by the plaintiff/applicant, it is not lost to me that the plaintiff is in occupancy and physical possession of the suit property. In the case of *Evans Muuru David v James Njenga Ndungi & Another (2013) eKLR* the court observed as follows:

“Given the circumstances of the matter, in the event that the applicant is successful at the trial, damages would not be an adequate remedy considering he plaintiff has a building on the suit premises and unless a conservatory order is given, the building could be demolished before the suit is determined”.

40. The court in *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR* provided an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury’.

41. The plaintiff/applicant has deposed on how she runs a chemist on the suit property and that she has also put up two buildings and rented the premises out. That the 1st defendant/respondent who also claims ownership of the suit property has already made steps towards evicting the plaintiff and this will interfere with her application for adverse possession. The plaintiff/applicant deposed that unless the injunctive order is issued, she risks being evicted by the 1st defendant/respondent who has already issued a notice to vacate to the plaintiff and the other tenants on the suit property.

42. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR* which defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance



of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

43. In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

44. The Plaintiff/Applicant contends that the balance of convenience tilts in her favour because she has been and is still in possession of the suit property since 2009.

45. The decision of Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

46. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the 1st defendant and why the plaintiff/applicant is claiming the suit property by the was adverse possession. I have also not had the opportunity to interrogate the annexures to the 1st Defendant/Respondent’s replying affidavit.

47. In Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another [2019] eKLR where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

48. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt with in the manner set out in the application and



apprehended by the plaintiff/applicant. Therefore, regarding the balance of convenience, I am of the considered view that the Applicant who has invested in the suit property would be greatly inconvenienced and that this the plaintiff/applicant.

49. On their part the 1st defendant sought a temporary injunctive order restraining the plaintiff from interfering with 1st defendant's occupation of the suit property, nor from collecting rent for the demised property nor from the tenants of the 1st defendant and seeking police protection.
50. It is not clear from the prayers sought and documents filed who are the tenants of the 1st defendant. The 1st defendant's claim to the suit property is based on the auction that was conducted which the plaintiff has cast doubts about and alleged that it was conducted fraudulently.
51. As already stated, both the plaintiff and the 1st defendant are both laying claim to the suit property and court must exercise caution to avoid making definite finding of either fact or law as doing so would encroach into the province of the trial court. The court at this interlocutory stage is only investigating if the applicant has, by their pleadings, made out a prima facie case as defined by the Court of Appeal in the case of Mrao Ltd v First American Bank Ltd & 2 Others (supra).
52. The 1st defendant's application dated 8/05/2023 filed after the plaintiff's application sought similar temporary injunctive orders against the plaintiff. The principles in Giella case (supra) will apply. But having found that the plaintiff has a prima facie case with regard to ownership that by implication ousts the defendant's claim of ownership. Should it turn out at the trial that the 1st defendant is entitled to the suit property it is the plaintiff who will lose her claim of adverse possession. I do not see the 1st defendants' loss which cannot be compensated in damages.
53. In view of the foregoing, I find that the plaintiff/applicant has met the criteria for grant of orders of temporary injunction.
54. From the foregoing analysis, I do proceed to grant the following orders: -
 - a. That the Notice of Motion application dated 11/04/2023 by the plaintiff/applicant is allowed in terms of prayers 2, 3, 4 and 5.
 - b. That the Notice of Motion application dated 8/05/2023 by the 1st defendant/applicant be and hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2023.

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MOGENI J
JUDGE

