



REPUBLIC OF KENYA



KENYA LAW
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**Nganga & another v Chege & 3 others (Environment & Land Case
E424 of 2022) [2023] KEELC 18713 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E424 OF 2022**

**MD MWANGI, J
JULY 13, 2023**

BETWEEN

CATHERINE NJERI NGANGA 1ST PLAINTIFF

PETER GATHII REUBEN 2ND PLAINTIFF

AND

SIMON NJUGUNA CHEGE 1ST DEFENDANT

MARGARET WAMBUI GITHAGUI 2ND DEFENDANT

NEWTON KULA 3RD DEFENDANT

CHARLES MUREITHI 4TH DEFENDANT

RULING

Background of the Application

1. The Plaintiffs aver that they are the registered owners of the suit property LR No 209/2389/19, IR 247686 situated at Pangani in Nairobi (hereinafter referred to as ‘the suit property’) which they have allegedly been in occupation of since the year 1990. They aver that they have enjoyed quiet and uninterrupted possession since then.
2. It is the Plaintiffs’ case that the Defendants have without any colour of right been threatening them with goons in an attempt to remove them from the suit property. They allege that the Defendants have also attempted to sell the land. Despite seeking assistance from the police, the Plaintiffs aver that the Defendants have continued to intimidate and harass them. The Plaintiffs seek the protection of the court.
3. The Plaintiffs have exhibited a copy of the title in their name as proof of ownership of the suit property. Upon expiry of the lease, the Plaintiffs sought an extension which was approved and granted and they



were issued with a new certificate of title on June 3, 2022. They too have annexed the same as an exhibit. The Plaintiffs are apprehensive, as they put it, that the Defendants' action could be part of a wider scheme to defraud them of the suit property. They are also afraid that the Defendants may also interfere with the Land records hence the prayer for an order of inhibition.

Response by the Defendants.

4. The Defendants' response was by way of a replying affidavit sworn by Margaret Wambui Githagui.
5. The deponent denies that the Plaintiffs bought the suit property on March 8, 1990 since they have not annexed any agreement for sale and or any evidence of payment of the purchase price, if at all. The Deponent further deposes that the family of Bertha Wamina Mugo have been the ones in possession of the suit property since 1984 until October 28, 2021 when an individual by the name of 'Sangira Stephen Ochalla', an alleged director of 'Kachuodho Holdings Ltd' invaded the suit property and with the help of goons and the OCS demolished the house that had been on the suit property using a court order issued in Nairobi Milimani Commercial Court Chief Magistrate's Court Case No E11808 of 2021. The application before the Chief Magistrate's court was however, subsequently dismissed and the deponent was reinstated into the suit property on November 8, 2021.
6. The Deponent further states that upon perusing the documents attached to the Plaintiffs/Applicants Notice of Motion application under consideration, it is apparent that the documents they used to apply for extension of the lease are the same documents the Applicants used in hijacking the process and having themselves illegally and fraudulently registered as owners.
7. The Deponent asserts that the suit property has been prone to land grabbing as the registered owner and family matriarch is deceased. She has exhibited the lease and certificate in the name of Bertha Wamina Mugo.
8. It is the deponent's position that they have always occupied the suit property and have continued to pay land rates to the Nairobi City County Government including the rates for the year 2023.
9. The Deponent alleges that the Land Registrar has canceled the title in the names of the Plaintiffs/Applicants after he detected the fraud.

Plaintiff's counter – response.

10. The Plaintiffs filed a supplementary affidavit deposed by Catherine Njeri Nganga. The Deponent denies that the Defendants have been in occupation of the suit property at any one time or as alleged in the replying affidavit.
11. The Deponent denies any link to the individual named in the replying affidavit as 'Sangila Stephen Ochala' or 'Kachuondo Holdings Ltd'. Further that the proceedings in Milimani Commercial Court Case No E11808/2021 have no basis in these proceedings since none of the Plaintiffs was a party to the said case.
12. The Deponent asserts that even after the filing of this suit, she has conducted a search on the title to the suit property which confirms that the Plaintiffs are still the registered owners of the suit property. The search was issued on January 20, 2023.

Further affidavit by the Defendants.

13. The Defendants filed a further affidavit deposed by Margaret Wambui Githagui.



14. The Deponents asserts that the Plaintiffs have not been in occupation of the suit property. That, according to the Deponent is the reason why they have not attached any evidence to proof occupation. On their part, the Defendants have paid all the rates due and owing to the Nairobi City County including those for the year 2023. She asserts that she has been managing the suit property with her brother, one Joseph Mureithi Mugo. As further proof that she has been the one in occupation of the suit property, she exhibits an agreement entered into in the year 2020 with the Nairobi Water & Sewerage Company Ltd allowing her to pay water arrears of Kshs 273,140.24 by instalments. The Deponent has also exhibited correspondence applying for conversion of the electricity meter into tokens.
15. The deponent states that upon expiry of the lease over the suit property they engaged the firm of Kibue Associates to help with the extension of the lease and which was successfully extended for 50 years.
16. The deponent expresses reservations on the authenticity of the search exhibited by the Defendants. She exhibits the statement of the Land Registrar allegedly recorded at the Directorate of Criminal Investigations (DCI) where the Registrar states that he had canceled the title of the Plaintiffs as it was invalid.
17. I note that the Plaintiffs filed yet another affidavit without leave of the court reiterating their earlier position of having been in possession of the suit property.

Court's directions.

18. The court's directions were that the application be canvassed by way of written submissions. Both sides complied and I have had the opportunity to read the submissions filed.

Issues for Determination.

19. The sole issue for determination in this matter is whether the Plaintiffs' application has met the threshold for the grant of an order of temporary injunction and an order of inhibition pending the hearing and determination of the main suit.

Analysis and determination.

20. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the decision in the case of *Giella vs Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions by various superior 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 upheld the principles spelt out in *Giella vs Cassman Brown* but also added 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 rests 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”.



21. The first hurdle for an applicant of an order of temporary injunction is to establish that he/she has a *prima facie* case before an order of injunction can be issued. The Court of Appeal in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) eKLR defined a *prima facie* case to mean;
- “In civil cases, 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.”
22. The Plaintiffs/Applicants herein submit that they have established a *prima facie* case. They attached a copy of the certificate of lease backed up by two copies of searches. Although the Defendants’ position is that the title has been canceled, they have not provided sufficient evidence to support the allegation.
23. The 2nd Defendant who was the deponent of the affidavits in response to the Plaintiffs’ application further alleged that her deceased mother, the late Bertha Wamina Mugo is the actual registered owner of the suit property. She claims beneficial interest in the suit property. She has not clearly come out to state who the administrator of the estate of her late mother is after the death of her father who had been appointed as the administrator.
24. In the above cited case of *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* (supra) the court was categorical that at this stage of the proceedings, the court must not examine the merits of the case closely. The court was emphatic that: -
- “..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 its 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 rights which he alleges.”
25. Ringera J (as he then was) in the case of *Airland Tours and Travels Ltd vs National Industrial Credit Bank* Nairobi (Milimani) HCCC No 1234 of 2002 too 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 propositions of law.”
26. In view of the foregoing and the affidavit evidence presented by the Plaintiffs, I find that the Applicants have established a *prima facie* case.
27. The second consideration would be whether the Plaintiff has demonstrated that irreparable injury will be occasioned to her if an order of temporary injunction is not granted. The judicial decision in the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury. The court in that case stated that;
- “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.”



28. The Plaintiffs' case is that the Defendants have without any colour of right been threatening them with goons in an attempt to remove them from the suit property. The Defendants have also allegedly attempted to sell the suit property. The Plaintiffs are therefore apprehensive that the Defendants' action is part of a wider scheme to defraud them of the suit property.
29. Warsame J, (as he then was) in the case of *Joseph Siro Mosioma Vs Housing Finance Company of Kenya & 3 others* (2008) eKLR, considering what would constitute irreparable injury stated that damages is not an automatic remedy when deciding whether to grant an injunction or not. He proceeded to note that,

“damages is not and cannot be a substitute for the loss, which (may) be occasioned by a clear breach of the 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.”
30. As I have already pointed out above, the 2nd Defendant alleges apparent equitable and beneficial interests over the suit property. She also alludes that the Land Registrar who had registered the Plaintiffs' title over the suit property had allegedly canceled it. She attached a copy of what she called a statement recorded at the DCI.
31. At this juncture, the court is not able to, neither is it required to make any conclusive or definitive findings of fact or law.
32. The responsibility of the court at this point in time is to preserve the substratum of this suit pending the hearing and final determination of the rights of the parties.
33. The court therefore, considering the competing interests of the parties demonstrated at this interlocutory stage by the affidavit evidence placed before it and in order to preserve the suit property without giving any party undue advantage over the other party, considers it appropriate to issue a status quo order rather than an order of temporary injunction. The court therefore directs that the status quo be maintained pending the hearing and determination of this suit. It is apparent that the Plaintiffs are in physical possession of the suit property at this point in time. They shall continue being in possession; however, they shall not carry out any developments, construct on the suit property, subdivide, sell or in any other way deal with the suit property pending the hearing and final determination of this suit.
34. Further, after carefully considering the issues raised herein, the court orders, under the provisions of Order 1 rule 10(2) of the *Civil Procedure Rules*, and for the purposes of effectually and completely determining and settling all the questions in this suit, that the National Land Commission and the Chief Land Registrar be joined as Interested Parties in this matter. The Plaintiffs shall therefore in the next 21 days from the date hereof, amend their Plaint accordingly for that purpose. The Plaintiffs shall also serve the interested parties with all the pleadings in this matter within the same timelines.
35. For avoidance of any doubt, the court's directions are as follows;
 - a. The *status quo* in respect of the suit property be maintained pending the hearing and determination of this suit. The Plaintiffs shall remain in possession of the suit property but are ordered not to undertake any developments, construction activities thereof, subdivide, sell or in any other way deal with the suit property from the date of this order pending the hearing and final determination of this suit.
 - b. The Officer Commanding Station, Pangani Police Station is directed and/or ordered to enforce, implement and/or otherwise oversee compliance with the orders of the Honorable Court.



- c. The Plaintiffs shall in the next 21 days from the date hereof amend their Complaint, join the National Land Commission and the Chief Land Registrar as Interested Parties in this matter and serve them with all the pleadings in this matter.
- d. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Murage for the Defendants/Respondents.

Mr. Kirimi for the Plaintiffs/Applicants.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

