



Kiarie & 4 others v Orbit Chemicals Industries Limited & 4 others (Environment & Land Case E048 of 2023) [2023] KEELC 19340 (KLR) (15 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E048 OF 2023
EK WABWOTO, J
AUGUST 15, 2023**

BETWEEN

**JORAM KAGIMBI KIARIE 1ST PLAINTIFF
NELIUS KARIUKI 2ND PLAINTIFF
HOTTENSIAH WANJIRU GATURU 3RD PLAINTIFF
PETER C KIMANI 4TH PLAINTIFF
ZIPPORAH M NDUNGU 5TH PLAINTIFF**

AND

**ORBIT CHEMICALS INDUSTRIES LIMITED 1ST DEFENDANT
JOSEPH GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND
DEFENDANT
CHAIRPERSON, TREASURY AND SECRETARY KWARE MUKURU KWA
NJENGA ASSOCIATION 3RD DEFENDANT
THE MINISTRY OF LANDS, PUBLIC WORKS, HOUSING AND URBAN
DEVELOPMENT 4TH DEFENDANT
THE CHIEF LAND REGISTRAR 5TH DEFENDANT**

RULING

1. Before court for determination is the plaintiffs' notice of motion dated August 8, 2023 and the 1st and 2nd defendants notice of preliminary objection dated August 11, 2023.
2. The plaintiffs sought an order of temporary injunction to restrain the 1st and 2nd defendants from claiming their authority or otherwise from selling the properties known as plot numbers 38, 51. 22/32,



- 49, 34, 35, 136, 17 and 18 (now known as LR No Nairobi Block 263/1253, 1242, 1267, 1268, 1240, 1250, 1262 and 1263) situate in Mukuru kwa Njenga Area through a public auction.
3. The application is premised inter alia on the grounds that the plaintiffs have been in possession after purchasing the suit properties on diverse dates between 2001 and 2009 and were issued with ownership certificates by the 3rd defendant, that the plaintiffs have undertaken multi storey buildings comprising residential and commercial units, that they have not relinquished any proprietary rights over the commercial and residential properties and that they have not received any notice in writing from the 2nd defendant in accordance with rule 15 (d) of the [Auctioneers Rules 1997](#).
 4. In opposition to the present application, the 1st and 2nd defendants filed a preliminary objection dated August 11, 2023 and a replying affidavit sworn by Sachin Chandaria a director of the 1st defendant on August 11, 2023.
 5. The application was heard by way of oral submissions from the parties. Learned counsel Ms Moturi submitted on behalf of the plaintiffs, learned counsel Mr Kenyatta submitted on behalf of the 1st and 2nd defendants while learned counsel Mr Allan Kamau made submissions on behalf of the 4th and 5th defendants. There was no representation from the 3rd defendant despite service and being notified of the court's proceedings.
 6. The plaintiffs argued that the 1st defendant is not the owner of the buildings and cannot purport to sell them as doing so would amount to unjust enrichment. Counsel for the Plaintiffs submitted that the injunction was sought with a view of preserving the subject matter.
 7. It was also argued that rule 15 (d) of the [Auctioneers Act](#) requires a notice to be given and none had been issued herein. The only notice was in respect to the advertisement of the property in the local daily.
 8. It was also submitted that the plaintiffs will suffer irreparable harm having been in the suit property for over 20 years.
 9. On whether or not the suit res judicata, counsel submitted that the in the current suit the parties were different from the previous suits referred to by the 1st and 2nd defendants and further that there was no representative suit involving the plaintiffs. It was also argued that the issue of ownership had been contested in the current suit and it is a substantial issue for determination.
 10. Relying on the cases of [George Orango Orago v George Liewa Jagalo & 3 others](#) [2010] eKLR, [Giella v Cassman Brown](#) (1973) EA 358 and [Mrao Ltd v First American Bank of Kenya Ltd & 2 Others](#) (2003) eKLR it was argued that the plaintiffs had established a *prima facie* case with a likelihood of success by exhibiting an infringement of their rights.
 11. The application was opposed by the 1st, 2nd, 4th and 5th defendants. The preliminary objection filed by the 1st and 2nd defendant was raised on the grounds that; the suit was res judicata by dint of petition No 62 of 2018 [Mukuru Kwa Njenga Slum Residents & 12 Others](#) (2020) eKLR, J.R Misc Application No 748 of 1996 (Amina Mohamed & 7 Others v Chief Embakasi location & 2 Others) (2005) eKLR, and HCCC No 876 of 2004 (Orbit Chemical Limited v The Hon. Attorney General). It was also argued that in a ruling delivered in [Zipporah Muthoni Ndungu & 5 Others v National Bank of Kenya Ltd & 12 others](#) [2021] the ELC confirmed the 1st defendant's ownership of the suit properties and held that the applicants therein had no *prima facie* case as against the 1st defendant. It was also argued that by dint of those cases, the issue of ownership had been litigated severally where courts had confirmed that the 1st defendant is the owner of the suit properties.



12. The 1st and 2nd defendants also added that the plaintiffs had not met the principles for grant of an injunction since the 1st defendant is the registered owner of the suit properties including all buildings erected on the same.
13. It was also argued that the current suit was not a claim of adverse possession and that no evidence had been brought before this court to show that indeed the plaintiffs bought the suit properties from the 3rd defendant.
14. In respect to whether or not a notice had been issued pursuant to rule 15 (d) of the Auctioneers Act, it was argued that the said auction was not being done pursuant to a default of a charge and hence the same was not applicable herein.
15. The 4th and 5th defendants in relying on the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR submitted that in an interlocutory injunction application, the applicant has to satisfy the triple requirements to; establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and allay any doubts 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.
16. In respect to the issue of *res judicata*, learned counsel also submitted that the issue of ownership of the suit property to the 1st defendant had been determined on merit in the previous cases.
17. I have considered the application filed by the plaintiffs herein, the rival affidavits filed together with the oral submissions made by counsel for the parties. In my humble view, the main issues for determination are as follows;
 - i. Whether this suit is *res judicata*?
 - ii. Whether the plaintiffs have demonstrated that they are entitled to the injunctive orders sought.
18. I shall now proceed to address the said issues sequentially.
19. Section 7 of the Civil Procedure Act, reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated as follows: -
 - i) The suit or issue raised was directly and substantially in issue in the former suit.
 - ii) That the former suit was between the same party or parties under whom they or any of them claim.
 - iii) That those parties were litigating under the same title.
 - iv) That the issue in question was heard and finally determined in the former suit.
 - v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
20. In the instant suit, the 1st defendant has outlined the previous cases where the issue of ownership of the suit properties was litigated and the courts subsequently conferred the 1st defendant as the registered owner in respect to the same. In Petition No 62 of 2018 Mukuru Kwa Njenga Slum Residents & 12 others (2020) eKLR, the ELC court upheld the 1st defendant's proprietary rights and interests over the suit properties. In J.R Misc Application No 748 of 1996 (*Amina Mohamed & 7 others v Chief*



Embakasi location & 2 others) (2005) eKLR, the High Court upheld the 1st defendant's proprietary rights and interests over the suit property and ordered the evictions of all squatters therein and HCCC No 876 of 2004 (Orbit Chemical Limited v The Hon General), the 1st defendant's ownership of the suit property was also upheld and equally in [Zipporah Muthoni Ndungu & 5 Others v National Bank of Kenya Ltd & 12 others](#) [2021] the ELC confirmed the 1st defendant's ownership of the suit properties and held that the applicants therein had no prima facie case as against the 1st defendant.

21. The plaintiffs in countering this position argued that the same was not *res judicata* for the reasons that the parties in the previous matters were different and that further the previous suits were not brought as representative suit.
22. Having keenly considered the decisions rendered in the previous suits, it is common ground that the same dealt extensively on the issue of ownership of the suit properties herein and involved parties who are equally present in this suit and in the circumstances this court agrees with the submissions made by the 1st, 2nd, 4th and 5th defendants that indeed the plaintiffs claim as captured in both the plaint and applications is *res judicata* for the reasons that the issues raised therein have already been heard and determined by the ELC court as between the parties and essentially parties under whom they are claiming. Courts will generally refrain from pronouncing themselves and or issuing orders in matters which have already been dealt with by another court of same jurisdiction. In view of the foregoing, it is the finding of this court that this suit is *res judicata*.
23. The second issue for determination is whether or not the plaintiffs have made out a case to warrant the grant of the injunctive orders sought. The plaintiffs are required to satisfy the criteria upon which jurisdiction to grant an interlocutory injunction is granted. The criteria was outlined in the often cited case of *Giella v Cassman Brown* (1973) EA 358. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate to the court that if the interlocutory injunctive relief is not granted, he would stand to suffer damage that may not be indemnified through an award of damages. Third, should the court have doubt on the applicant's satisfaction of both or either of the above requirements, the application is to be determined based on the balance of convenience. This was also reiterated in the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR where the Court of Appeal stated that in an interlocutory injunction application, the applicant has to satisfy the triple requirements to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and ally any doubts 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.
24. In the instant case, the plaintiffs have not provided any evidence before this court to show that the 3rd defendant had the capacity to sell to them the suit properties this is in view of the fact that the 1st defendant has demonstrated that the issue of ownership of the suit properties has already been settled by the ELC. Equally the plaintiffs claim herein in not a claim of adverse possession. Having also found that courts before me have pronounced themselves on the issue of ownership and given eviction orders there is no basis upon which a prima face case can be inferred.
25. In this case, it is clear that the plaintiffs have failed to satisfy the conditions necessary for the grant for a temporary injunction and in the circumstances, the notice of motion dated August 8, 2023 lacks merit. The action of the plaintiffs is clearly an abuse of the court process. in view of the foregoing analysis, I must stay that even though a court of law should try as much as possible to allow a suit to be determined



on its merits, the court should not shy off from acting to rid the court process of proceedings that are clearly an abuse of court process.

26. In the circumstances, having found that the issues herein have already been determined by several other courts and that the suit herein is *res judicata*, this court shall proceed to strike out the same falling under such abuse of the court process. Consequently, the following disposal orders are issued;
- a. The preliminary objection dated August 11, 2023 is upheld.
 - b. The application dated August 8, 2023 and the entire suit is hereby struck out with no order as to costs.

DATED, SIGNED AND DELIVERED BY EMAIL AT NAIROBI ON 15TH AUGUST 2023.

E.K. WABWOTO

JUDGE

