



Naivasha Waterfront Development Limited v Kaigananie & 2 others (Environment & Land Case 41 of 2023) [2023] KEELC 20077 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 41 OF 2023
A OMBWAYO, J
SEPTEMBER 22, 2023**

BETWEEN

NAIVASHA WATERFRONT DEVELOPMENT LIMITED PLAINTIFF

AND

MARK KARIUKI KAIGANANIE 1ST DEFENDANT

WELLIUM KARIUKI 2ND DEFENDANT

PETER KAIGANANIE KARIUKI 3RD DEFENDANT

RULING

1. The plaintiff filed the instant application dated June 27, 2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and determination of this suit the honourable court be pleased to issue:
 - a. A temporary injunction restraining the defendants whether by themselves, their agents, employees and/or servants or any person claiming through them from entering, remaining onto, constructing, developing, transferring, charging, leasing, sub-leasing or from taking possession or in any way interfering with the plaintiff's ownership and quiet possession of land reference No 395/7 (original 395/2/2) (registered at the Government Lands Registry at Nairobi in Volume H 5 Folio 376/7 (hereinafter referred to as "the Property")



5. That this honorable court be pleased to give any such other and/or further order(s) as it may deem fit.
6. That the costs of this application be borne by the defendants.
2. The application was based on grounds set out and supported by the affidavit of Edwin Ng'ang'a Karanja, the director of the plaintiff company herein sworn on June 26, 2023. He stated that the plaintiff is the legally registered owner of the suit property. That the suit property had been initially allocated by the President to Simon Niven Murray-Wilson on November 1, 1984 for a term of 45 years after which it was later transferred to three other parties. He further stated that beginning this year the defendants illegally trespassed and/or encroached into the plaintiff's suit property to the extent of having taken possession. He stated that the defendants have since claimed ownership of the suit property threatening the plaintiff's title over the property.
3. That in the defendants attempt to forcefully take over the suit property, they have erected illegal structures and involved goons to occupy the property in order to dupe unsuspecting buyers. He added that the trespass by the defendants has caused the plaintiff irreparable harm which cannot be compensated through damages save by an injunction order. In conclusion, the plaintiff urged the court to allow the prayers sought in the application.

Response

4. The 1st defendant filed a replying affidavit dated July 7, 2023 where he averred that together with Ngari Muchoki Mahihu, Naivasha Properties Limited and Lago Naivasha Investments Limited they are owners of the plaintiff company registered under CPR/2010/27713. He averred that they both got into an agreement with Gavin Peter Laurence for the sale and purchase of the suit property. That they later entered into an agreement with Naivasha Properties Limited and Lago Naivasha Investments Limited which came in as investors for their business. He averred that they signed a joint venture agreement as business partners and registered a company under the name Naivasha Waterfront Development Limited.
5. He further averred that the directors later unanimously agreed to have the suit land transferred to the company's name in line with its objectives. That the company has been legally conducting its business operations pursuant to acquisition of its certificate as annexed. He averred that from the documents supplied, the company registered under CPR/2010/27713 legitimately owns the suit property together with developments made.
6. He further averred that they intend to make an application to have the Attorney General enjoined to explain the existence of two certificates under the same name with different registration numbers. In conclusion, he averred that granting the orders being sought by the plaintiff would prejudice the operations of the company registered under CPR/2010/27713.
7. In response to the 1st defendant's replying affidavit, the plaintiff filed a supplementary affidavit dated July 18, 2023. He stated that the 1st defendant's statement in the said affidavit is to the exclusion of the 2nd and 3rd defendant. He added that the averments against the 2nd and 3rd defendants remain uncontroverted and urged the court to allow the application as prayed against them.
8. He further stated that the plaintiff's company was registered on October 9, 2009 as CPR/2009/11981 which precedes the one by the 1st defendant which was registered on July 22, 2010 as evidenced from the search dated July 11, 2023. He stated that the 1st defendant annexed a copy of the registration certificate but failed to produce any CR12 search certificate indicating directorship of the alleged company.



9. He further stated that upon writing to the registrar of company, their response was that they disowned the registration certificate by the 1st defendant and confirmed that the one owned by the plaintiff was the genuine one. That transfer of the suit property was fraudulently done. Further, that the 1st defendant did mischief by attaching a copy of the title and conveniently leaving out pages 3 and 4. He stated that the 1st defendant produced a forged land rent payment request but the same indicated the land owner as Gavin Peter Laurence. He urged the court to grant him the injunction orders being sought.

Submissions

10. The plaintiff filed its submissions dated July 18, 2023 on the same day and based its issues on the principles governing the grant of an interlocutory injunction as stated in the case of *Giella v Cassman Brown* (1973) EA 358. On whether it has established a *prima facie* case, the plaintiff submitted that it is the legal and registered owner of the suit property LR No 395/7 by virtue of the conveyance on July 9, 2012. He cited numerous cases including the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR
11. On the second issue of whether damages are an adequate remedy, the plaintiff relied on the case of *Panari Enterprises Limited v Lijoodi & 2 others* [2014] eKLR among others. It submitted that any loss occasioned to the plaintiff by dint of the defendants fraudulent acts purporting to defraud the plaintiff of its property cannot be adequately be compensated by damages.
12. On the final issue, the plaintiff cited numerous cases including the case of *Pbigeof Company Limited v Aftin Chorica Hassanow* [2017] eKLR and submitted that the balance of convenience tilts in favour of the plaintiff. It submitted that it has more to loose since the defendants will have probably transferred the suit property to unsuspecting third parties.
13. On the other hand, the defendants filed their submissions dated July 13, 2023 on July 17, 2023 and identified two issues of facts for determination. One whether the plaintiff adduced evidence to demonstrate that it took the requisite steps to acquire the suit property. The defendants submitted in the negative. On whether there are two companies registered in the same name, they submitted in the affirmative and added that there exist two companies registered under Naivasha Waterfront Development Limited but with different registration numbers.
14. On the legal issues arising, the defendants identified one issue for determination being whether the applicant has made out a case to warrant granting of an injunction. They cited several authorities including the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR. On the issue of *prima facie* case, the defendants submitted that the plaintiff has not demonstrated any legal right created by the purported acquisition of the title under its name.
15. On whether there will be irreparable damage caused should the court fail to grant injunctive orders, the defendants submitted in the affirmative and argued that the same would cause great injustice to the 1st defendant as it has been conducting its business operations on the suit land for many years now. On the final issue, the defendants submitted that the balance of convenience lies in favour of not issuing the injunctive orders going by the evidence produced.

Analysis and Determination

16. This court has looked into the application and is of the view that the main issue for determination is whether the plaintiff has met the threshold for grant of an injunction. The principles upon which the court may consider an application for injunction were laid out in the case of *Giella v Cassman*



Brown (1973) EA 358. The applicant must first demonstrate a prima facie case with a probability of success; secondly, the court will not normally grant an injunction unless the applicant stands to suffer irreparable loss which cannot be compensated by an award of damages; and finally where there is doubt the court decides the matter on a balance of convenience.

17. The essence of an application for injunction is for the court to make an order on how the subject matter of the suit ought to best to be preserved pending the substantive hearing of the matter. This court has perused the pleadings and noted that as from the certificate of confirmation of grant dated June 18, 2008, the suit property is to be distributed to both the 1st plaintiff and defendant in equal shares. The plaintiffs' filed a plaint dated October 31, 2022 and sought for cancellation of the subdivided titles that emanated from the suit property. The plaintiff alleges that the defendant secretly divided the suit property and intends to sell his portion. This court cannot tell at this stage whether such sale or intended sale has or will take place. However, from the material placed before me the plaintiffs have laid out a *prima facie* case with a probability of success. In the event that I was to consider the balance of convenience, the same tilts in favour of maintaining the suit property so that its proprietorship does not change, as the matter is yet to be heard. The plaintiff no doubt stands to suffer irreparable loss if the suit property is interfered with pending the hearing of this suit. The balance of convenience in the circumstances of this case lies in favour of preserving the suit property against alienation or selling to third parties.
18. I therefore allow the application and issue an order of injunction restraining the defendant from selling, leasing or in any other way deal with the suit land pending the hearing and determination of this suit. The costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2023.

A O OMBWAYO

JUDGE

