



Madobe v Esli Hub Restaurant Limited t/a Matrix Restauran (Environment and Land Constitutional Petition E011 of 2023) [2023] KEELC 20224 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E011 OF 2023
JO MBOYA, J
SEPTEMBER 21, 2023**

BETWEEN

DURAN HUSSEIN MADOBE APPLICANT

AND

**ESLI HUB RESTAURANT LIMITED T/A MATRIX
RESTAURAN RESPONDENT**

RULING

Introduction and Background

1. The Petitioner/Applicant herein contends that same is a Joint Proprietor of all that piece of land, namely, L.R No. 36/IIV/436; situate within city of Nairobi; alongside one Mr. Mohamed Kassim Muhamud, who is not a Party, vide an Indenture of conveyance dated the 11th March 2010.
2. Nevertheless and despite (sic) being a Joint Proprietor of the suit property, the Petitioner/Applicant avers that the Respondent herein has since entered upon and taken possession of the suit property and same has undertaken various renovations therein and is currently operating a Restaurant, on the Ground floor of the suit property, albeit without the consent and/or permission of the Petitioner/Applicant.
3. Arising from the foregoing, the Petitioner/Applicant has therefore approached the Honorable court vide Petition dated the 6th September 2023; and in respect of which same seeks for the following reliefs;
 - i.Spent.
 - ii. That the Honorable court be pleased to issue a Temporary Injunction restraining the Respondent herein either by its agents, invitees and/or servants from entering and in any other way trespassing onto the property known as Land Reference Number 36/VII/436 situated in the City of Nairobi pending hearing and determination of this application.



- iii. That the Honorable court be pleased to issue a Temporary Injunction restraining the Respondent herein either by its agents, invitees and/or servants from entering and in any other way trespassing onto the property known as Land Reference Number 36/VII/436 situated in the City of Nairobi pending hearing and determination of this Petition.
 - iv. In the alternative, this Honorable court be pleased to order the Respondent to deposit the rent proceeds to a Joint Bank account to be registered in both the names of the Petitioner and the Respondent pending the hearing and determination of this Application and the Petition.
 - v. The officer in charge of Pangani Police Station and/or Pumwani Police Station to supervise the execution of these orders.
 - vi. This Honorable court be pleased to make all such or further orders as it deems fit and just to grant; and
 - vii. The costs of this Application be awarded to the Petitioner/Applicant
4. The instant Application is premised and/or anchored on various grounds which have been alluded to and enumerated in the body of the Application. Furthermore, the Application is supported by the affidavit of the Applicant sworn on even date and to which the Applicant/ Deponent has attached three sets of annexures.
 5. Be that as it may, even though the subject Application was served on the Respondent, same neither filed any Grounds of opposition nor Replying Affidavit.
 6. Additionally, it is important to point out that the instant Application came up for hearing on the 21st September 2023, when Learned counsel for the Petitioner/Applicant implored the court to proceed and allow the Application as prayed; insofar as the Respondent had neither opposed nor contested the application beforehand.
 7. However, it is important to underscore that even though the Application was not opposed by and on behalf of the Respondent, the court still directed Learned counsel for the Petitioner/Applicant to canvass the Application and in this regard, counsel for the Applicant made brief submissions in support of the Application.

Parties' Submissions:

a. Applicant's Submissions:

8. Learned counsel for the Applicant adopted the contents at the foot of the Grounds of the Application; and further adopted the averments at the foot of the supporting affidavit. In addition, Learned counsel thereafter highlighted three salient issues for due consideration by the court.
9. Learned counsel for the Applicant submitted that the Applicant herein is a Joint owner/ Proprietor of the suit property alongside Mr. Mohamed Kassim Muhamud, vide an Indenture of conveyance dated the 11th march 2010. In this regard, Learned counsel contended that by virtue of being a Joint proprietor of the suit property, same cannot be dealt with, disposed of or otherwise demised to any third party without his consent, permission and/or involvement.
10. Secondly, Learned counsel has also submitted that the Respondent has since entered upon and carried out substantive renovations on the suit property and thereafter commenced to operate a Restaurant on the ground floor of the suit property, to the prejudice of the Applicant.



11. Thirdly, Learned counsel for the Applicant has submitted that insofar as the Applicant holds a legitimate stake and/or right, same has therefore established and demonstrated the existence of a prima facie case to warrant the grant of the orders of temporary injunction, in the manner sought vide the instant application.
12. Premised on the foregoing submissions, Learned counsel for the Petitioner/Applicant has therefore proceeded to and implored the court to find merits in the application herein and to grant same, with a view to protecting the suit property from wastage, disposal and/or further alienation.

b. Respondent's Submissions:

13. Though served with the current Application, the Respondent herein neither filed Grounds of opposition nor any Replying affidavit or otherwise. Furthermore, the Respondent did also not attend court on the scheduled hearing.
14. In a nutshell, no submissions were made and/or tendered on behalf of the Respondent.

Issues for Determination:

15. Having reviewed and considered the Application dated the 6th September 2023; and upon taking into consideration the oral submissions made by and on behalf of the Applicant, the following issues do emerge and are thus pertinent for consideration.
 - i. Whether the Applicant herein has established a prima facie case with a probability of success as against the Respondent.
 - ii. Whether an order of Temporary Injunction, in the manner sought can issue as against the Respondent, who is admittedly in occupation and possession of the suit property.
 - iii. Whether the Applicant is bound and/or disposed to suffer Irreparable Loss.

Analysis and Determination:

Issue Number 1

Whether the Applicant herein has established a Prima facie case with a probability of success as against the Respondent

16. From the grounds alluded to and enumerated at the foot of the current Application, coupled with the contents of the supporting affidavit thereto, it is evident that the Applicant herein avers that the suit property is Jointly owned by himself and one Mohamed Kassim Mohamud. Furthermore, the Applicant has thereafter proceeded to and annexed a copy of the indenture of conveyance dated the 11th march 2010.
17. Without going into the validity or otherwise of the indenture of conveyance, which has been availed to the court by the Applicant herein, it is imperative to state and underscore that where a property is Jointly owned by two or more persons, each of the Joint owners is deemed to own every portion and/or segment of the subject property.
18. Furthermore, it is also worthy to point out that in the case of joint ownership, like the one beforehand, none of the joint owners can stake or lay a claim to exclusive and absolute ownership of any portion of the suit property. In this respect, if the Petitioner/Applicant is a joint owner, then same is not seized



of exclusive and absolute rights to the suit property or otherwise, to warrant him/her mounting the instant suit by himself.

19. To the contrary, I hold the humble view that if the Respondent has since entered upon and/or trespassed onto the suit property, either in the manner contended by the Applicant, then it behooved the Applicant to implore the other joint owner to sue alongside himself, because only then can the Applicant herein stake a claim to exclusivity as against a Third-party trespasser.
20. Other than the foregoing, it may appear that the impugned actions and/or activities which are complained of by the Petitioner/Applicant have the blessings and/or the concurrence of (sic) the other joint owner and in this regard, the Applicant must address the dispute with the other joint owner before escalating the dispute further and in any event; before commencing suit against the Respondent.
21. Premised on the foregoing and based on the fact that the Applicant herein is the sole Petitioner, I hold and entertain deep reservations as to whether the Applicant herein is indeed seized of the requisite locus standi, either to commence and/or maintain the instant suit. For good measure, it important to recall that Locus Standi is a threshold question and thus the absence of same will impact on the existence of a Prima facie case.
22. To buttress the position that one Joint tenant does not stake exclusive rights to and/or in respect of a jointly owned property, it is imperative to take cognizance of the dictum of the Court of Appeal in the case *Mukazitoni Josephine versus Attorney General Republic Of Kenya* [p2015] eKLR, where the court stated and observed thus;
 34. “The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.
 35. A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as *totem tenet et nihit tenet*, a joint tenant holds everything and nothing.”
23. From the foregoing excerpts, it is evident and apparent that if the Petitioner herein is a true joint owner of the suit property, then same owns every part thereof alongside the other joint owner or conversely, owns nothing on his/her own, subject to the Doctrine of Survivorship. Consequently, the legal position that emanates from the foregoing is that the Applicant herein cannot maintain the instant suit by him/herself, to the exclusion of the other joint owner.
24. Additionally, I beg to underscore that insofar as the ability and/or capacity of the Applicant herein to sue on his/her own, is in question, then same impacts on and nay, negates proof of a prima facie case, which is critical and integral in a matter, before the Honourable court can grant and/or issue an order of temporary injunction.



25. Notably, what constitutes a prima facie case was elaborated upon and/ or expounded on, in the case of Nguruman Limited versus Jan Bonde Nielsen (2014)eKLR, where the court stated and held thus;

“Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

26. Suffice it to point out that in the absence of a prima facie case, in the manner defined by the Court of Appeal in the case (supra), no order of temporary injunction can issue and/or be granted in favor of the Applicant.

Issue Number 2:

Whether an order of Temporary Injunction, in the manner sought can issue as against the Respondent, who is admittedly in occupation and possession of the suit property.

27. Other than the question of prima facie case, which has been discussed in terms of the preceding paragraphs, there is also the issue as to whether or not an order of temporary injunction can issue when and/or where the action complained of, has already occurred and/or arisen.
28. In respect of the instant matter, the Applicant has stated at the foot of the Application that the Respondent has unlawfully and illegally encroached upon the suit property and has since converted and re-purposed the Ground and Lower ground floor of the suit property into a Restaurant.
29. Further and in addition, the Applicant has further averred that the impugned activities by and at the instant of the Respondent have been undertaken with a view to appropriating the suit property in a brazen attempt to defeat the Applicant’s rightful claim to and in respect thereof.
30. My understanding of the position taken by the Applicant herein is to the effect that the Respondent has since taken possession and is currently operating a Restaurant therein. Simply put, the Respondent is already in occupation of the suit property in respect of which, the orders of temporary injunction are now being sought.
31. Consequently, the question that does arise in the circumstances, is how effective and efficacious will the order of temporary injunction be, in remedying the issue when dealing with a situation, where the act complained of, has already accrued and/or occurred.
32. To my mind, there is no gainsaying that an order of temporary injunction, as opposed to an order of Mandatory injunction, (the latter, which has not been sought for), is intended to prevent, pre-empt and or prohibit the occurrence of the acts complained of and not otherwise. However, if the act complained of, has already occurred, then the rightful remedy to implead and / or seek for, would have been an order of mandatory injunction, whose scope and tenor is calculated to reverse an action which has already occurred and/or accrued, albeit subject to proof of the requisite ingredients that belie the grant of such an order.



33. Be that as it may, in respect of the instant matter there is no prayer for an order of mandatory injunction and therefore, the Applicant's application must be looked at and dealt with from the stand point of whether a Temporary order of injunction would be efficacious and/or effective, in dealing with an event that has already occurred.
34. Sadly, I hold the view that an order of temporary injunction is ineffective and incapable of dealing with an act, which has already accrued and in this regard, the order of temporary injunction cannot therefore issue against the Respondent, who admittedly, is already in occupation of the Ground floor; and is operating a restaurant therein.
35. Additionally, it is important to underscore that prior to and before issuing an order, an order of Temporary Injunction, not excepted, a court of law must appraise him/herself of whether the order sought to be issued would be effectual, efficacious and effective; or otherwise.
36. On the other hand, where the court is of the view that the order sought would be an exercise in futility and/or vanity; then the court must decline to grant any such order. For good measure, a court of law does and ought not act in futility.
37. From the foregoing, I come to the conclusion that the temporary orders of injunction which are sought for by and on behalf of the Applicant herein, despite the admission that the Respondent is already in possession of the suit property and in any event, is currently operating a restaurant therein; cannot therefore be issued and/or granted.
38. Similarly and on in this ground, I also find and hold that the Applicant herein is not entitled to the orders sought, insofar as such orders, would be incapable of remedying the activities complained against.

Issue Number 3

Whether the Applicant is bound and/or disposed to suffer Irreparable Loss.

39. Additionally, there is no gainsaying that where the loss attendant to the dispute beforehand can be remedied and/or compensated by an award of damages, then an order of temporary injunction cannot be issued and/or be granted.
40. In this respect, it is important to recall and reiterate the holding of the Court of Appeal in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86, where the court stated and held thus;

“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.
41. Bearing the foregoing position in mind, it is important to consider the alternative prayer, which the Applicant has also sought at the foot of the current application and wherein same contends that the court be pleased to decree and/or order the Respondent to deposit the rent proceeds in an Escrow account in the names of the Petitioner and the Respondent, respectively.



42. Notably, what the Applicant herein concedes is that there are rental income which are being paid out of the suit property and therefore whatever loss that the Applicant may suffer, that is assuming, that the Applicant is (sic) truly a joint owner with Mohamed Kassim Muhamud, is quantifiable and ascertainable in monetary terms.
43. Furthermore, I have not had the Applicant to contend that the Respondent herein will not be in a position to pay (sic) the damages, if any is found due and payable to the Applicant. Consequently and in this regard, what I discern from the totality of the averments contained at the foot of the current Application, is that the loss, if any, is one that is quantifiable and thus payable in monetary terms, subject to the requisite proof at the opportune time.
44. Consequently and given the foregoing, it is thus evident that the Applicant herein has failed to establish and/or demonstrate that the loss, if any, to be suffered would be irreparable, so as to entitle same to an order of temporary injunction.
45. Instructively, in the absence of any evidence of irreparable loss, no order of temporary injunction can therefore issue, either as sought or at all.

Final Disposition:

46. From the foregoing analysis, it must have become crystal clear and/or apparent that the Applicant herein has not only failed to demonstrate the existence of a prima facie case; but has also failed to discharge the burden that same is disposed to suffer (sic) any irreparable loss or otherwise.
47. Consequently and in view of the foregoing, I come to the conclusion that the Application dated the 6th September 2023; is not only misconceived, but same is equally devoid of merits.
48. In a nutshell, the Application herein be and is hereby Dismissed, albeit, with no orders as to costs.
49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant.

Mr. Byamukama for the Petitioner/Applicant.

N/A for the Respondent.

