



Ivory Concepts Limited v Ndegwa & 2 others (Environment & Land Case E226 of 2023) [2023] KEELC 21324 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E226 OF 2023
MD MWANGI, J
OCTOBER 31, 2023**

BETWEEN

IVORY CONCEPTS LIMITED PLAINTIFF

AND

FRANCIS NDEGWA 1ST DEFENDANT

JOHN NJUGUNA KIBUTHU ALIAS MUGUNA 2ND DEFENDANT

DIRECTOR OF SURVEY 3RD DEFENDANT

RULING

Background

1. This Ruling is in respect of the Plaintiff's application dated 20th June, 2023 expressed to be brought under the provisions of Section 3 & 3A [Civil Procedure Act](#) and Order 40 and 51 of the Civil Procedure Rules. The Plaintiff is seeking for orders:
 - a. That pending the hearing and determination of the main suit, the Honorable Court does issue an order restraining the 1st and 2nd Respondents herein, its servants, agents, and/or employees, and anyone from entering into, continuously constructing, developing, alienating, trespassing, and/or interfering with the Plaintiff's rights to quiet possession and/or ownership of a parcel of land known as Land Reference Number 12257 (IR 243936) under Deed Plan Number 99939 situated at the junction of Marula close and Marula Lane in Karen in the city of Nairobi in the Nairobi area district.
 - b. That the Karen Officer Commanding Station (OCS) be ordered to enforce the orders issued herein.
 - c. That the costs of this application be provided for.



2. The application is premised on the grounds on the face of it, the Supporting Affidavit of Daniel Peterson Samba, one of the Plaintiff Company's Directors, deposed on the 20th June, 2023 and the further affidavit deposed on the 13th July, 2023. The deponent avers that the Plaintiff is the registered proprietor of the parcel of land known as Land Reference Number 12257 situated at Karen, Nairobi. Without any right known in law, the 1st and 2nd Defendant/ Respondents have invaded into the suit property, fenced it off and commenced sub-division and sale of the resulting plots to members of the public in spite of the "Not for Sale" sign on the suit property. The Plaintiff reported the invasion of its property at Karen Police Station and was issued with an OB Number OB No. 37/20/02/2022. However, the 1st and 2nd Respondents have continued with their unlawful activities undeterred.
3. The deponent states that upon conducting its investigations, it has found out that the 1st and 2nd Respondents have interfered with the Applicant's ownership documents at the 3rd Respondent's office. They have attempted to reconsolidate the land which was already consolidated vide an F/R Number 379/30. He asserts that the actual authentic amalgamation was done and a deed plan number 99939 issued on 30th July, 1976. He annexes a copy of the said Deed Plan. That the 1st and 2nd Respondents were not owners of LR 9419/2 or LR 2259/159 as of 24th October, 2012 to enable the alleged amalgamation.
4. The deponent further alleges that the Respondents tried to recreate documents to show that the land was purportedly amalgamated on the 24th October, 2012 and proceeded to re-sub-divide it into 17 plots even without acquiring a new title of their alleged amalgamation.
5. He avers that the 1st and 2nd Respondent have allowed other people on the said land as potential buyers; one has even started fencing off and constructing a temporary house, hence the need to restrain the Respondents from trespassing, developing, selling or in any manner interfering with the suit property as well as halting any sub-division, conversion, or otherwise registration of any new RIM numbers pending hearing and determination of the suit.

Replying Affidavit by the 1st Defendant

6. In response to the application, the 1st Defendant, Francis Mungai Ndegwa filed a Replying Affidavit deposed on the 29th June, 2023. He avers that he is not a proprietor of LR No. 12257 and that he is not aware of the location of the alleged parcel. He denies interfering with the alleged parcel and therefore asserts that the applicant has misdirected its claim to a wrong party.
7. He asserts that the only piece of land he has interest as a beneficiary of his father's estate is parcel No. 9419 and 2259/159 which has not been amalgamated as alleged. He denies the existence of a plot No. 9419/2 on the ground. He further avers that he is a mere beneficiary and not an administrator of his late father's estate.
8. The deponent states that his deceased father was issued with a title to the suit property on 18th August, 1973 being title No. 9419. A legal charge was created over the title by Barclays Bank in 1975. There is an entry in the register indicating who the administrators of the estate of his deceased father are.
9. The deponent further alleges that on 20th December, 1976, his late father was issued with Title Number 2259/159 and the grant of letters of administration registered against it by the administrators. He annexes a copy of the said title to his replying affidavit.
10. The deponent further asserts that the Plaintiff's purported title was only issued on 17th November 2020. It purports to be a new allotment despite the fact that there was no surrender of the old title. He terms it fraudulent. He points out that the Plaintiff has not given the history of how the title was



acquired. He further notes the flaws on the deed plan in support of the plaintiff's title including the Surveyor's stamp of 17th November, 2023 after the purported title had been issued.

11. The 1st Defendant states that the parcel of land purportedly claimed by the Plaintiff has a house erected on it and one the beneficiaries of his late father's estate has lived in it since the 1970s. The said titles have been the subject of a Family Division Cause for purposes of distribution of the estate since 1996. The administrators have been paying rates for the same parcel. He exhibits the rates payment receipts.
12. The 1st Defendant faults the search exhibited by the Plaintiff as fraudulent. The document is indicated to be 'for internal use only' and cannot be used as a public document or as proof of ownership by the Plaintiff.

2nd Defendant's Replying Affidavit

13. The 2nd Defendant, John Njuguna Kibuthu, filed a Replying Affidavit dated 29th June, 2023. He asserts that he is not a proprietor of the suit property, hence not a proper party to the suit as no evidence has been adduced to demonstrate how he is interfering with the Plaintiff's alleged property. He denies ever meeting the Plaintiff company's directors or having any dealings with them.
14. He asserts that the Plaintiff's suit does not raise any triable issues and the same is misguided, adventurous and based on imaginations. It does not warrant the issuance of the orders sought. The application should therefore be dismissed with costs.

Court's Directions

15. With the agreement of the parties, the court directed that the application be dispensed with by way of written submissions. Both sides complied. The Plaintiff's submissions are dated 13th July, 2023 whereas the 1st and 2nd Defendants' submissions are dated 24th July, 2023. The court has read the submissions.

Issues for Determination

16. I have read and carefully considered the application, the rival affidavits and submissions made by the parties herein, the issues for determination are:
 - i. Whether the Plaintiff has met the threshold for the grant of temporary orders of injunction sought.
 - ii. Which appropriate orders should the court issue?

Analysis and Determination

17. The guiding principles for the grant of orders of temporary injunction are well settled since the decision in *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR 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”.

18. Consequently, the Plaintiff/Applicant ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that it had established a prima facie case. The Plaintiff referred to the decision in *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR in which the Court of Appeal defined a prima facie case, as:

“... 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.”

19. In support of its application, the Plaintiff has adduced a title to the amalgamated land LR 2259/159 and LR 9419 as well as a search to demonstrate ownership of the contested parcel of land.
20. Secondly, the Plaintiff has to demonstrate that irreparable injury will be occasioned to it if an order of temporary injunction is not granted. The decision in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury. The court in the 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.”

21. The Plaintiff has deposed as to how the 1st and 2nd Defendants/Respondents have invaded into the suit property and commenced sub-division and some construction activities.
22. The 2nd Respondent on his part avers that the subject property was owned by his deceased father who had erected a house thereon back in 1976. One of the beneficiaries of the deceased’s estate is currently in occupation of the house.
23. In rebuttal, the Plaintiff averred in his Further Affidavit at Paragraph 10 (d) that it is not true that the beneficiaries built a house on the land. The deponent avers that the house was built by the former colonial owners of the land who left it behind. The 1st Respondent and his family have forcefully taken control of this house.
24. Evidently, the 1st Respondent was already in occupation as at the time the Applicant moved this court. Issuing the injunctive orders sought will therefore tantamount to evicting before the suit is heard on its merits.
25. Section 13(7)(a) of the *Environment and Land Court Act*, 2015(2011) gives this court the power in appropriate cases to grant interim preservation orders.
26. In the case of *Musa Angira Angira v ICDC* (2015) eKLR, J.M Mutungi J, was of the view that since the issues were highly contested, the order that was merited at the interim stage was one conserving and or preserving the suit property until the suit was heard and determined on merit rather than an injunction in the terms sought by the plaintiff. Accordingly, he granted a status quo order in respect of the suit property. I am in agreement with the reasoning of the learned Judge.
27. It is settled law that the court may grant an order for the maintenance of status quo over the property in question until the suit is heard and determined or terminated; see *Ogada v Mollin* (2009) KLR 620.



28. In the instant case, there is need to preserve the suit property. It is the finding of this court that bearing in mind the particular circumstances of this suit, a status quo order is the most appropriate order at this stage in order to preserve the suit property pending the hearing and determination of the suit.
29. Based on the foregoing, the application is determined in the following terms:
- a. The court orders that the prevailing status quo in respect of the suit property at the time of this ruling be maintained. In particular, the Respondents shall remain in possession but shall not continue with any developments, sub-divisions, leasing, selling, alienating or disposing of the suit property, Land Reference Number 12257 (IR 243936) under Deed Plan Number 99939 situated at the junction of Marula close and Marula Lane in Karen within the city of Nairobi pending the hearing and determination of this suit.
 - b. The costs of this application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2023

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Angaya for the Plaintiff

Mr. Maina for the 1st and 2nd Defendants/Respondents

