



Kangatta Properties Ltd v Kagotho & 2 others; Mimemia & another (Interested Parties) (Environment and Land Case Civil Suit E059 of 2023) [2023] KEELC 21108 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E059 OF 2023
JO MBOYA, J
OCTOBER 26, 2023**

BETWEEN

KANGATTA PROPERTIES LTD PLAINTIFF

AND

PETER KAGOTHO 1ST DEFENDANT

JENIPHER MUNJIRU KARANJA 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

AND

FREDRICK KIMANI MIMEMIA INTERESTED PARTY

LUSIKI HOLDINGS LTD INTERESTED PARTY

RULING

Introduction and Background

1. The Plaintiff/Applicant herein has filed the Application dated the 14th August 2023; and in respect of which same has sought for the following reliefs; [verbatim];
 - i.Spent.
 - ii.Spent.
 - iii. Pending the hearing and determination of the suit, there be a Temporary Order of Injunction restraining the Respondents whether by themselves, their agents and/or servants, employees, assigns, Successors, Nominees or anybody taking or assuming title from any one of them or otherwise howsoever described, be temporarily enjoined from transferring, alienating,



selling, disposing of, subdividing, fencing, making use of, charging, breaking into, entering, demolishing and/or remaining thereon and/or undertaking any other destruction or in any manner interfering with the Applicants quiet enjoyment and exercise of its proprietary rights of the suit property known as L.R. No. Nairobi/Block 40/526 (formerly L.R. 209/3531/15); situated at park road, Nairobi.

- iv. That the OCS Pangani Police Station to Maintain peace and order while overseeing of this order
2. Instructively, the Application is premised on the various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of one Peter Kimani Kangatta, sworn on the 14th August 2023.
3. Suffice it to point out that upon being served with the instant Application, the 1st and 2nd Defendants filed Replying affidavits sworn on the 5th September 2023, respectively; and wherein same have contended, inter-alia, that the instant suit has been filed using the name of the Applicant, albeit by a person without the requisite Locus standi.
4. Other than the foregoing, it is instructive to state that the Interested Parties herein have neither filed any Grounds of Opposition nor Replying affidavit.
5. Moreover, the Application herein came up for hearing on the 18th September 2023, whereupon the Advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submission. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.

Parties' Submissions:

6. Pursuant to and in compliance with the directives of the court, the Applicant herein proceeded to and filed written submissions dated the 29th September 2023; and in respect of which same has raised, canvassed and amplified three issues for due consideration by the court.
7. In particular, the Applicant has contended that same is the lawful and legitimate proprietor of the suit property and thus the facts of the case have established and demonstrated a Prima facie case with reasonable probability of success to warrant the grant of the orders sought.
8. On the other hand, the 1st and 2nd Defendants filed written submission dated the 7th October 2023; and wherein same have similarly raised and canvassed three pertinent issues for consideration by the Honourable court.
9. To the contrary, the 1st and 2nd Defendants/Respondents have contended that the Applicant herein has neither established nor demonstrated the existence of a prima facie case, to warrant the issuance of the orders sought at the foot of the Application.
10. Furthermore, the 1st and 2nd Defendants/Respondents have also contended that the instant suit has been filed in the name of the Applicants, but through a person, who is divested of the requisite locus standi and hence the entire suit is a non-starter

Issues for Determination:

11. Having reviewed the Application beforehand and the Responses thereto; and upon consideration of the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination;



- i. Whether the instant suit has been duly authorized by the Applicant or otherwise.
- ii. Whether the facts of the instant suit demonstrate the existence of a Prima facie case.
- iii. Whether the orders sought ought to be granted taking into account the entire circumstances of the instant matter.

Analysis and Determination:

Issue Number 1

Whether the instant suit has been duly authorized by the Applicant or otherwise.

12. It is common ground that the Plaintiff herein is a Limited Liability Company and by virtue of being such a company, there is no gainsaying that the Applicant can only act through her Directors and/or Principal officers, duly authorized vide Resolution under the seal of the company.
13. Furthermore, it is also important to observe that where an officer of a limited liability company, the Applicant not excepted, is mandated to undertake an act or perform a duty on behalf of the company, then it behooves the designated officer to exhibit and/or display the source of his authority in terms of the resolution of the company.
14. To be able to appreciate the significance of a resolution of a company, it is imperative to take cognizance of the provisions of Order 9 Rule 2 of the Civil Procedure Rules, 2010, which provides as hereunder;
 2. Recognized agents [Order 9, rule 2.]

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

 - (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;
 - (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
 - (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.
15. Other than the foregoing provisions, it is also important to underscore the significance of Order 4 Rule 1(2) of the Civil Procedure Rules 2010.
16. For ease of reference, the said provisions are reproduced as hereunder;
 1. Particulars of plaint [Order 4, rule 1.]
 - (1) The plaint shall contain the following particulars—
 - (a) the name of the court in which the suit is brought;
 - (b) the name, description and place of residence of the plaintiff, and an address for service;



- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
 - (d) the place where the cause of action arose;
 - (e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and
 - (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.
- (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.
 - (3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.
 - (4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.
17. From the foregoing provisions, (whose details have been reproduced herein before), it is important to emphasize that there was need for the person propagating the instant suit for and on behalf of the Applicant, namely, the Concerned (sic) Director to file the requisite resolution under seal, with a view to demonstrating that indeed same is duly authorized.
 18. However, it is not lost on the court that the current suit has not been accompanied by any such resolution under seal and hence it is difficult to authenticate and/or verify whether the suit has been sanctioned by the Applicant.
 19. Notwithstanding the forgoing, it is worthy to note that there appears to be a conflict between the Directors of the Plaintiff/Applicant, whereby one Peter Kimani Kangatta, (the proponent of the suit) is contending that various transactions on behalf of the Company have been taken by persons who are otherwise not Directors of the Applicant company.
 20. On the contrary, the 1st and 2nd Defendants have taken a diametrically opposed position and same have contended that the actions complained of were indeed taken by one Josephine Njeri Kangatta and George Kihara Kangatta, respectively, who are the legitimate Directors of the Applicant company.
 21. Clearly, there is an apparent conflict as to who are the lawful Directors of the Applicant company and for as long as the conflict pertaining to the Directorship remains, it is difficult to discern who therefore has the mandate to authorize the transactions for and on behalf of the Applicant company.
 22. Be that as it may, the point that I am making is to the effect that it was incumbent upon Peter Kimani Kangatta, who is the originator of the instant suit to demonstrate that indeed the company has sanctioned and/or authorized the filing of this suit.
 23. Further and aany rate, the necessity to display and/or avail to court the resolution of the company authorizing the instant suit became more imperative taking into account the depositions by and on behalf of the 1st and 2nd Respondents in terms of Paragraphs 23, 24, 25, 26 and 28 of the Replying affidavit sworn by Jenifer Munjiru Karanja.



24. To the extent that Peter Kimani Kangatta has not availed the requisite resolution under seal, it is my finding and holding that the instant suit, though filed in the name of the Applicant company, has certainly not been sanctioned by the company, either in the manner provided under the law or at all.

Issues Number 2 and 3

Whether the facts of the instant suit demonstrate the existence of a Prima facie case.

Whether the orders sought ought to be granted taking into account the entire circumstances of the instant matter.

25. The Applicant herein seeks to be granted an order of temporary injunction pertaining to and in respect of the suit property. For clarity, the Applicant herein contends that same is the lawful and legitimate proprietor of the suit property.
26. Additionally, the Applicant contends that despite being the lawful proprietor of the suit property, which is currently under the occupation of the Interested Parties, the 1st and 2nd Respondents are now threatening to enter upon and take possession of the suit property.
27. Arising from the foregoing, the Applicant has therefore implored the Honourable court to grant the orders of temporary injunction over and in respect of the suit property; and in particular, to prevent the 1st and 2nd Defendants from, inter-alia, entering upon and taking possession thereon.
28. Nevertheless, what appears to be evident is that the 1st and 2nd Defendants herein seem, nay, to be deriving an interest over the suit property flowing from the actions of (sic) the Directors of the Applicant company.
29. On the other hand, it is also apparent that Peter Kimani Kangatta, who has used the name of the company, seems to be propagating a scheme, which is intended to divest a segment of the Directors of the company from partaking of and/ or deriving benefits attendant to the suit property.
30. Furthermore, though the Applicant seeks orders of temporary injunction (sic) on the basis that same is the owner, however there appears to be something which is sinister, suspicious; and beyond logical comprehension.
31. To this end, it is appropriate to reproduce the reliefs which have been sought at the foot of the Plaint dated 14th August 2023.
32. Same are reproduced as hereunder;
- i. Permanent injunction restraining the Defendants, their agents, employees, workers or persons claiming under them from acting on their behalf and by whatever name called from in any way interfering with or entering onto, transferring, taking possession, dealing with, occupying or in any way seeking occupy the suit property known as Nairobi/Block 40/526 (formerly L.R 209/3531/15) situated at park road, Nairobi.
 - ii. A declaration that the issuance of certificate of lease dated the 26th May 2023 in respect to the suit property the suit property known as Nairobi/Block 40/526 (formerly L.R 209/3531/15) situated at park road, Nairobi and all procedural steps leading thereto are null and void and of no effect and that same be canceled forthwith.
 - iii. Costs of this suit.



33. From the reliefs sought, it is baffling that the Applicant who is seeking to procure and obtain an order of temporary injunction over and in respect of the suit property, is at the same time seeking a contrary relief, whose net effect is to negate the very title that is claimed by the Applicant.
34. In my humble view, the Applicant herein cannot be allowed to approbate by the contending to be the lawful owner of the suit property; while at the same time reprobating by seeking to have the very title of the suit property revoked.
35. Surely, something somewhere is amiss; and (sic) the “human hand”, which is driving the current suit and the attendant Application, must be informed by some ulterior and/or sinister motive.
36. If that is not the case, then it is difficult to understand how an Applicant, who lays a claim to ownership of the suit property, would at the sometime be imploring the Honourable court to revoke the Certificate of Title of the same property.
37. Consequently and in view of the foregoing, I find credence and indeed substance in the deposition by the 1st and 2nd Respondents that Peter Kimani Kangatta, who has filed the instant suit albeit in the name of the Applicant company, is indeed being dishonest with the court; and by extension the Due process of the law.
38. Arising from the foregoing, I am therefore unable to come to the conclusion that a Prima facie case has been established and/or demonstrated by the Applicant herein, to warrant the grant of the orders of temporary injunction.
39. Suffice it to point out, that a Prima facie case denotes the existence of a genuine and arguable case. Consequently, where the court entertains doubts or reservations on the genuineness of the case, then the basis for the grant of an order of temporary injunction is negated and thus dissipates.
40. As pertains to the meaning, import and tenor of what constitutes a Prima facie case, it suffices to adopt and reiterate the holding in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others [2014] eKLR, where the Court of Appeal stated and observed as hereunder;

“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.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained,

41. Notably, in the absence of a prima facie case, it behooves the court to decline to grant the orders of temporary injunction. In any event, where the court comes to the conclusion that no prima facie case has been established, like in the instant case, then the court has no business venturing to consider the question of irreparable loss or balance of convenience.



42. To this end, it is appropriate to take cognizance of the ratio decidendi in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. Where the court 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.

If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

43. In short, I come to the conclusion that no basis and/or foundation has been established by the Applicant herein, to warrant the grant of the orders of Temporary injunction, pertaining to and concerning the suit property.

Final Disposition:

44. Having analyzed the issues for consideration, which were itemized in the body of the Ruling herein, it is apparent, nay evident, that the Applicant herein, has neither established nor proved the existence of a Prima facie case, to warrant the grant of the orders sought.

45. In a nutshell, I find and hold that the Application dated the 14th August 2023; is devoid and bereft of merits. Consequently, be and is hereby dismissed with costs to the 1st and 2nd Respondents.

46. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2023.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Ongeru for the Plaintiff/Applicant.

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

Mr. Daniel Orenge for the Interested Parties

