



REPUBLIC OF KENYA



Kamau & 2 others v Njau & 4 others (Environment & Land Case 445 of 2014) [2023] KEELC 20876 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 445 OF 2014**

**JO OLOLA, J
OCTOBER 19, 2023**

BETWEEN

**GATHEE KAMAU 1ST PLAINTIFF
MWANGI KAMAU 2ND PLAINTIFF
NGUYO KAMAU 3RD PLAINTIFF**

AND

**NDUNG’U NJAU 1ST DEFENDANT
DAVID MARARO 2ND DEFENDANT
THE COUNTY GOVERNMENT OF NYERI 3RD DEFENDANT
MIRIAM WANJIKU NJIRI 4TH DEFENDANT
JOHNSON KAMUNGE GICHURI 5TH DEFENDANT**

RULING

1. I have before me for determination two applications. By the First Notice of Motion dated November 24, 2022, the 1st, 2nd and 4th defendants pray for an order of permanent injunction to issue restraining the 3rd defendant County Government from executing against the 1st defendant for non-payment of rates pending the hearing and determination of this suit.
2. The First Application is supported by an Affidavit sworn by Ndung’u Njau (the 1st defendant) and is premised on the grounds:
 - (i) That the 1st defendant has been and remains in possession of the suit property;
 - (ii) That there is an on-going suit pertaining to an ownership dispute which seeks to determine the owner of the land;



- (iii) That there is imminent danger of the 1st defendant losing the property as a result of non-payment of rates while there is a pending suit;
 - (iv) That the 3rd defendant had held a hearing on this matter and directed that the 1st defendant and the 1st, 2nd and 3rd plaintiffs each do bear half share of the rates for the land in dispute;
 - (v) That the 1st defendant has complied with orders as to payment of his half share of the rates; and
 - (vi) That no Party will suffer prejudice if an injunction is issued barring the 3rd defendant from executing for non-payment of rates;
3. The First Application is opposed by Gatheo Kamau (the 1st plaintiff). In his replying affidavit sworn on December 15, 2022, the 1st plaintiff avers that the 1st defendant should cease to occupy the plaintiff's left portion on the Western side of the property if he wishes them to pay half rates and pay mesne profits from the year 2000 to-date at the current market rate of Kshs.8,000/- per room per month.
 4. It is the 1st plaintiff's case that the 1st defendant is to blame for accumulating rates to the tune of Kshs.1,000,000/- and he asserts that the 1st defendant should pay the rates. He opposes the grant of any orders in favour of the 1st defendant and urges the Court to issue an order to enforce the eviction of the 1st defendant from the plaintiff's portion of land and to order him to pay mesne profits and damages worth Kshs.3,000,000/-.
 5. By the Second Notice of Motion dated 15th December, 2022 the 1st plaintiff prays for orders against the 1st defendant as follows:
 1. ...
 2. That Judgment on admission be entered against the 1st defendant "Ndung'u Njau" for admission that he entered and took possession of the half share of plot L.R Karatina/ Municipality Block B1/142 belonging and owned by the plaintiffs and that they had not sold their portion to him contained in Paragraph 13 & 15 of his affidavit sworn on November 24, 2022 (sic);
 3. That an order do issue against the 1st defendant "Ndung'u Njau" to vacate from the plaintiff's portion of half of the left (Western side) of L.R Karatina Municipality Block B1/142;
 4. That the 1st defendant be ordered to pay mesne profits but which were dispossessed by the 1st defendant in 2000 with tenants and be ordered (sic) to pay to the plaintiffs mesne profits at the current rent of Kshs.6,000/- per room per month to-date being Kshs.6,000/- x 4 x 12 x 23 years viz Kshs.6,624,000/- (sic);
 5. That in the alternative the plaintiffs be granted leave to amend the Plaint and add the current valued market rent receivable from the four rooms from the year 2000 to 2022 and the amended Plaint annexed herein be deemed served and filed in Court upon issuance of leave and paying Court fees; and
 6. That the 1st defendant be ordered to pay rates demanded by the 3rd defendant and land rents due to (the) Kenya Government.
 6. The Second Application is supported by an affidavit sworn by the 1st plaintiff and is premised on the grounds inter alia:
 - (a) That in the amended Plaint filed on 16th June, 2006, the plaintiffs pray for eviction of the 1st defendant and his tenants;



- (b) That there is need for Judgment to be entered in favour of the plaintiffs based on admission of facts at Paragraphs 13 and 15 of the 1st defendant's affidavit dated November 24, 2022; and
- (c) That the plaintiffs should be allowed to amend the Plaint and an independent valuer to table a valuation report for mesne profits and general damages for loss of use of his premises from May 9, 2000 to-date.
7. The 1st defendant is opposed to the 1st plaintiff's application. In his replying affidavit sworn on January 4, 2023 as filed herein on January 13, 2023, the 1st defendant denied that he has made any admission as alleged by the plaintiffs either in the supporting affidavit sworn on November 24, 2022 or in the Supplementary one sworn on January 4, 2023.
 8. The 1st defendant avers that the plaintiffs are clutching on straws following the errors of typing in the supporting affidavit which he has since corrected vide the supplementary affidavit. It is further his case that arising from the foregoing, there is absolutely no need for this court to grant leave to the plaintiffs to amend the Plaint.
 9. I have carefully perused and considered the two applications by both the 1st defendant and the 1st plaintiff as well as the respective responses thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties herein.
 10. By the First Application dated 2 November 4, 2022, the 1st defendant prays for an order of injunction barring the 3rd defendant – the County Government of Nyeri from executing against himself for non-payment of rates pending the hearing and determination of the suit.
 11. The conditions that a party must satisfy for the court to grant an interlocutory injunction were long stated in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358 where it was held that:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
 12. In *Mrao v First American Bank Limited and others* (2003) KLR 125, the Court of Appeal defined a *prima facie* case in a civil case such as this to mean:

“... a case which on the material presented to the court, a tribunal properly directed itself will conclude that there exists a right which has apparently been infringed by the opposite Party as to call for an explanation or rebuttal from the latter.”
 13. In the matter before me, it is the 1st defendant's case that he did purchase the suit property from the Administrator of the Estate of one Njiri Githongo on March 10, 2000. It is his case that after the purchase, he came to realise that the property was owned as a tenancy in common with each owner having rights to half a share. The 1st defendant further avers that before his share could be transferred to him, the same was contested by the other tenant in common and the matter ended up in court.
 14. The 1st defendant further asserts that following a consent order registered in court on May 7, 2002, he was allowed to retain his half portion and that he has been paying his half share of the rates to the 3rd defendant. The 1st defendant is however apprehensive that the Estate of Francis Kamau (the plaintiffs)



who claim the other half share in the tenancy have not been paying their share of the rates to the 3rd defendant.

15. While the 3rd defendant has not responded to the Application, it was apparent from the annexures attached to the 1st defendants Affidavit, that they required the Parties herein to settle the outstanding rates said to be in excess of Kshs.1,518,516/- as at November 24, 2022. From the Replying Affidavit of the 1st plaintiff filed in opposition to the 1st defendant's application, it was apparent that they have not been paying any rates as they accuse the 1st defendant of entering and occupying even their portion of land. It was therefore the position of the plaintiffs that the 1st defendant ought to settle all the rates and that no injunction should issue in favour of the 1st defendant.
16. As it were, it was clear to me that the Parties have disagreed on the portions of the land occupied by the 1st defendant and that on the understanding that he had only acquired half a share of the suit property, the 1st defendant has been paying half the rates due to the County Government. It is apparent from the plaintiff's response that they have no intention of settling the balance of the rates as they accuse the 1st defendant of encroaching on their land. it was therefore evident that pending the settlement of the dispute between the Parties herein, the 1st defendant who has been paying his portion of the rates was likely to be prejudiced and that he is likely to suffer irreparable loss if the suit property was to be disposed to a third party on account of the outstanding rates.
17. As the Court of Appeal stated in *Assanand v Pettit* (1989) KLR 242:

“The object of an injunction is to keep things in status quo so that, if at the hearing the plaintiff obtains a Judgment in their favour, the defendants will have been prevented from dealing in the meantime in the property in such a way as to make the Judgment ineffectual.”
18. In the matter before me, the suit herein is meant to determine the ownership of the suit property and I think it is only proper that the property be preserved pending the hearing and determination of the suit.
19. In the premises, I am satisfied that the First Application as filed by the 1st defendant has merit and I allow the same.
20. By the Second Application dated December 15, 2022 the plaintiffs pray for orders that Judgment be entered on admission against the 1st defendant on the basis that in his supporting affidavit to the motion dated November 24, 2022, he has admitted that he entered and took possession of L.R No. Karatina/ Municipality Block B1/142 belonging to the plaintiffs.
21. The said admission is said to arise from Paragraph 13 of the 1st defendant's Supporting Affidavit wherein he averred as follows:
 13. That I had taken possession of the half share of land owned by Francis Kamau and that they had not sold their portion to me.
22. In a supplementary affidavit sworn on January 4, 2023, the 1st defendant asserts that there was a typing error in the above paragraph and that he has never taken possession of property owned by the said Francis Kamau as long as the matter has been in court. At Paragraph 5 of the Supplementary Affidavit, the 1st defendant asserts that instead of what is in Paragraph 13 of the Supporting Affidavit what he meant to state was:

“That I have not taken possession of the half share of land owned by Francis Kamau and that they had not sold their portion to me.”



23. According to the plaintiffs, the admission made by the 1st defendant is clear and obvious and the attempt by the 1st defendant to explain it away as a typing error is feeble and illogical. The plaintiffs submit that the averments made in the Supplementary Affidavit are nothing but an attempt at curing an obvious admission and that the same cannot just be wished away.
24. I have carefully considered both Affidavits as sworn by the 1st defendant together with the Notice of Motion dated November 24, 2022. Contrary to the assertions made by the plaintiffs, I was not persuaded that the 1st defendant had made any admission as purported. A perusal of both Paragraphs 12 and 13 of the Supporting Affidavit reveals that the 1st defendant was simply trying to clarify his exact area of interest in the suit property which explanation starts at Paragraph 12.
25. Indeed, the explanation offered at paragraph 5 of the supplementary affidavit is clearly in synch with the purpose of the Motion dated November 24, 2022 and the rest of the contents of the Supporting Affidavit. As was stated in *Guardian Bank Limited v Jambo Biscuits Kenya Limited* (2014) eKLR:
- “The principle applicable in Judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern.”
26. Again, as was stated by Mativo J (as he then was) in *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* (2021) eKLR:
- “It may not be safe and correct to pass Judgment under Order 13 Rule 2 when a case involves disputed questions of fact and law which require adjudication and decision. Even when a party has made an admission, the court need not dismiss or allow the suit. Where questions of law and fact have been raised, which can be decided only at the time of trial, a Judgment under Order 13 Rule 2 cannot be pronounced on the basis of alleged admissions in the Written Statement.”
27. It follows that I did not find any merit in the prayer for Judgment to be entered for the plaintiffs on the purport that an admission had been made. The issues herein need to be ascertained fully and properly at a full trial.
28. In a similar vein, I did not find any basis for the alternative prayer for the plaintiffs to amend their Plaint to include certain figures which they now want to claim as mesne profits. This suit was filed some 22 years ago. The plaintiffs have testified and closed their case. The 1st, 2nd and 3rd defendants have also testified.
29. In my considered opinion, while Courts need to be liberal in granting leave to amend pleadings, any such amendments at this stage would cause a grave injustice and would be prejudicial to the defendants.
30. In the premises I did not find any merit in the 1st plaintiff’s application.
31. Accordingly I hereby allow the 1st defendant’s Motion dated November 24, 2022 and dismiss the 1st plaintiff’s Motion dated December 15, 2022.
32. The costs of the two applications shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 19TH DAY OF OCTOBER, 2023.**

In the presence of:



No appearance for the plaintiffs

Mr. Maina Karingithi for the 5th defendant

Court assistant - Kendi

.....

J. O. Olola

JUDGE

