



Waganagwa v Land Registrar Kajiado & 9 others (Environment & Land Case E001 of 2023) [2023] KEELC 22608 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E001 OF 2023
LC KOMINGOI, J
DECEMBER 19, 2023**

BETWEEN

PATRICK NJIRU WAGANAGWA PLAINTIFF

AND

LAND REGISTRAR KAJIADO 1ST DEFENDANT

LAND SURVEYOR KAJIADO 2ND DEFENDANT

DCIO KAJIADO 3RD DEFENDANT

KISIO RAURAU 4TH DEFENDANT

ELIJAH NJAGI 5TH DEFENDANT

JIMMY TAUO 6TH DEFENDANT

OLE KENDARI 7TH DEFENDANT

JOSEPH LEPASO KAAKA 8TH DEFENDANT

BONIFACE WAMBUA 9TH DEFENDANT

THE ATTORNEY GENERAL 10TH DEFENDANT

RULING

1. This is the Notice of Motion application dated 11th January 2023 and Amended on 16th January 2023, brought under;

Section 1A, 1B & 3A of the *Civil Procedure Act*, Section 18(2) of *Land Registration Act* 2012, Article 167 (2) (b) of the *Constitution of Kenya* 2010, Order 40 Rule 1 & 2 and



2. It seeks under that;
 - i. Spent.
 - ii. The Honourable Court be pleased to stay and set aside the execution of the decision of the Land Registrar, Kajiado passed on 5th November, 2022 in the matter of determination of boundary lines touching on Land Title No Kajiado/Dalalekutuk 29381, 2953, 11 & 12 pending the hearing and determination of this application and the main suit.
 - iii. The court to grant temporary injunction orders restraining the Defendants/Respondents collectively either by themselves, their agents, employees, auctioneers or any persons acting under their authority from encroaching, subdividing, selling, leasing, constructing, demolishing or dealing in any manner on the land Title No Kajiado/Dalalekutuk 5282 pending hearing of the application and main suit.
 - iv. The officer commanding Kajiado Police Station to supervise the enforcement of the court orders for tranquillity purposes.
 - v. The costs of the application to be in the cause.
3. The application is premised on the grounds that the Plaintiff/Applicant is the owner of property Kajiado/Dalalekutuk 5282 who enjoyed quiet possession until the 4th Defendant trespassed on it and destroyed his fence and other properties. This was as a result of the boundary dispute decision made on 5th November 2022. The Applicant thus prayed for issuance of the orders sought else he would suffer irreparable loss and damage.
4. The 4th Defendant in his Replying Affidavit dated 28th March, 2023 contested the allegation of trespass and destruction of property deponing that his family owned property Kajiado/Dalalekutuk/12 which border parcels number 12, 2938, 11 and 2953. There was a boundary dispute, which the Land Registrar heard and determined that owner of parcel Kajiado/Dalalekutuk/2938 (which gave rise to the Plaintiff's parcel) had encroached into the 4th Defendant's land and the boundary should be rectified. The 4th Defendant deponed that after the lapse of thirty days to appeal the decision, he implemented the decision and put up his fence on the appropriate boundary only for the Plaintiff's employees to damage it on 26th January 2023.
5. He indicated that the boundary dispute had already been determined and if the Plaintiff was aggrieved with the decision he ought to have appealed but not file the instant suit. And it should be dismissed with costs. He also pointed out that his proper name was Kennedy Kissio Rawrraw and not as indicated on the pleadings.
6. This application was heard by way of written submissions.

The Plaintiff's/Applicant's submissions

7. Counsel for the Plaintiff submitted that the 4th Defendant was not party to the Land Dispute Tribunal suit hence could not appeal a matter he was not party to and the proceedings/ award should be declared null and void.
8. He submitted that the 4th Defendant's encroachment on his property in an attempt to implement the Tribunal's decision would cause him irreparable loss and damage. As such he had satisfied the



requirements for grant of an interlocutory injunction as was held in *Giella vs Cassman Brown* [1973] EA 358.

The 4th Defendant's/Respondent's submissions

9. Counsel submitted that the Plaintiff's case had not met the threshold for grant of grant of interlocutory injunction as held in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR. This is because the Plaintiff did not have a *prima facie* case since the boundary dispute had already been determined by the Land Registrar. Counsel went on to submit that the Plaintiff's title emanated from an illegal encroachment of Kajiado/Dalalekutuk/2938 on the 4th Defendant's title which could not be protected citing the Supreme Court's holding in *Dina Management Limited and County Government of Mombasa & 5 others*.
10. Counsel also submitted that the Plaintiff had not showed how he would suffer irreparable loss and as such the balance of convenience tilted to the 4th Defendant's whose boundary dispute had been determined in his favour.

Analysis and determination

11. I have considered the pleadings, the Notice of Motion, the affidavit in support and the response thereto, the rival submissions, and the authorities cited. The issues for determination are:
 - i. Whether Plaintiff/Applicant is entitled to orders of temporary injunction.
 - ii. Who should bear the costs of this application?
12. In considering whether to grant an interlocutory injunction, courts are guided by the principles set out by the Court of Appeal in the celebrated case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR which held:

" In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate 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 rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... 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. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both



that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted...”

13. In this case, the Court cited *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 on the definition of a *prima facie* case as follows:

“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, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation...

14. On the first limb of whether the Plaintiff has established a *prima facie* case, the Plaintiff states that the 4th Defendant’s implementation of the Land Registrar’s decision would be detrimental to him and cause him irreparable loss and damage. The 4th Defendant urged this court to dismiss the suit on account that the Plaintiff ought to have appealed the said decision instead of filing this suit. However, the Plaintiff averred that he was not party to the dispute tribunal’s case and as such could not appeal against it.
15. I have perused the ruling dated 5th November 2022 and note that the dispute is between the following parcels: Kajjado/Dalalekutuk/2938, 2953, 11 and 12. In the ruling the District Land Registrar held: I find that the proprietor of parcel number 12 has proved his case on a balance of probabilities that indeed the owners of parcel number 2938 have encroached into their land and the boundary should be rectified by returning it to where initially was supposed to be, point D2 in the report.
16. The Plaintiff’s parcel of land Kajjado/Dalalekutuk/5282 is not among the aforementioned parcels whose boundary dispute was determined. However, the Plaintiff has not evidenced how he shall suffer irreparable loss and damage which cannot be compensated by an award of damages.
17. In conclusion I find no merit in this application and the same is dismissed. The plaintiff/applicant is at liberty to file a boundary dispute with the Land Registrar as per Section 19 of the *Land Registration Act*. The costs of this application do abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH DAY OF DECEMBER 2023.

L. KOMINGOI

JUDGE.

In The Presence Of:



Mr. Wachakana for the Plaintiff.

N/A for the 1st – 3rd Defendants.

Mr. Ibrahim for the 4th Defendant.

N/A for the 5th-10th Defendants.

Court Assistant – Mutisya.

