



REPUBLIC OF KENYA



KENYA LAW
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**Muriithi v Banita Real Estate Limited & 7 others (Environment and Land Case
Civil Suit E036 of 2020) [2022] KEELC 53 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 53 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E036 OF 2020
SO OKONG'O, J
APRIL 28, 2022**

BETWEEN

LILIAN MURIITHI PLAINTIFF

AND

BANITA REAL ESTATE LIMITED 1ST DEFENDANT

PAUL MULINGE MUNYAO 2ND DEFENDANT

COLLINS WAWERU NJUGUNA 3RD DEFENDANT

SIMON AMAYA JUMBA 4TH DEFENDANT

JOSEPH MUTUOTA MUTURI 5TH DEFENDANT

MICHEL MAKHOTSA MBAYAH 6TH DEFENDANT

KENNETH GAKURU MBUGUA 7TH DEFENDANT

ELIAS KINYUA NJERU 8TH DEFENDANT

RULING

1. What is before the court is the Plaintiff's amended Notice of Motion dated May 10, 2021 seeking the following orders;
 1. Pending the hearing and determination of this suit, this court be pleased to issue an order of inhibition restraining any and all further sub-division, construction, alienation or any other dealings or transactions in respect of Land Title No. Nairobi/Block 118/755 in Drumvale, Kamulu (hereinafter referred to as "the suit property");
 2. Pending the hearing and determination of this suit or until further orders of this court, an order of injunction do issue restraining the Defendants whether by themselves their servants,



nominees and/or agents or their associates or otherwise howsoever from remaining on or continuing in occupation or carrying out any excavation or works or development or otherwise alienating or disposing of the suit property;

The Applicant's Case:

2. The application is brought on the grounds set out on the face thereof and on the affidavits sworn by the Plaintiff (hereinafter referred to as "Applicant") on July 27, 2020 and May 10, 2021 respectively. The Applicant has stated as follows in her affidavits in support of the application: She is the owner of the suit property. She purchased the suit property from the 2nd Defendant in 1998 at a consideration of Kshs. 170,000/-. The 2nd Defendant was a member of Drumvale Co-operative Society Limited (in liquidation) (hereinafter referred to as "Drumvale"). Drumvale was the original owner of the suit property. She was carrying out subsistence farming on the suit property from the time she acquired the same without any interruption until around November 2017 when the Defendants trespassed on the suit property, fenced the same and demolished temporary structures that were erected thereon. In 2018 the Defendants took possession of the suit property and commenced excavation works thereon causing irreversible damage to the same.

She sought assistance from the area Assistant Chief and the Land Fraud Unit of the Directorate of Criminal Investigations to stop the grabbing of the suit property to no avail. The Defendants refused to stop the activities they were carrying out on the suit property claiming that the same is owned by them. The Applicant has annexed to her affidavits in support of the application several documents.

The Respondents' Case:

3. The application is opposed by the Defendants (the Respondents) through various replying affidavits. The 1st Defendant has opposed the application through an affidavit sworn by its Executive Director, Wilson Mwangi Kago on May 24, 2021. The 1st Defendant has contended that the orders sought in the Applicant's application have been overtaken by events and that the court would be acting in vain to grant the same. The 1st Defendant has contended that it acquired the suit property from the 2nd Defendant in 2020 at a consideration of Kshs. 5,000,000/- which it paid in full and that the 2nd Defendant furnished it with the original letter of allotment for the suit property that was issued to him by virtue of his membership of Drumvale where he was Member No. 467. The 1st Defendant has averred that it thereafter settled the outstanding land rent and rates for the suit property before it obtained the necessary approvals to subdivide the same into various portions. The 1st Defendant has averred that after subdividing the suit property, it sold the portions thereof to the 3rd to 8th Defendants who have taken possession of the same and are carrying out construction thereon. The 1st Defendant has contended that the Applicant's case as originally presented is inconsistent with the amended case. The 1st Defendant has contended that the documents that were annexed to the Applicant's affidavit in support of the original application for injunction and those annexed to the affidavit in support of the present application leave no doubt that the Applicant does not have a genuine claim and that she has approached the court with unclean hands. The 1st Defendant has contended that the sale agreement and receipts produced by the Applicant in support of her case are fake.
4. The 1st Defendant has contended that the Applicant never dealt with the 2nd Defendant who was the owner of the suit property. The 1st Defendant has contended that the Applicant purported to acquire the suit property from a company known as Ken Rest Homes Agencies Limited that she has not joined to these proceedings. The 1st Defendant has contended that it is this company which drew the purported sale agreement, received the payment from the Applicant and issued the contradictory receipts. The 1st Defendant has stated that the Applicant made complaints to the County



Commissioner and County Government of Nairobi concerning the ownership of the suit property. The 1st Defendant has contended that whenever a meeting was set up to determine the dispute, the Applicant never appeared when she learnt that the 2nd Defendant was going to be present at the meeting. The 1st Defendant has denied that the Applicant was in occupation of the suit property. The 1st Defendant has contended that it acquired the suit property in vacant possession. The 1st Defendant has contended that the Applicant has not established a prima facie case. The 1st Defendant has contended that the suit property is now registered in the names of the 3rd to 8th Defendants who are also in possession thereof. The 1st Defendant has contended that the Applicant has not produced any evidence in support of her ownership claim apart from a contentious sale agreement and a receipt for payment made for a different property.

5. The 2nd Defendant has opposed the application through a replying affidavit sworn on July 21, 2021. The 2nd Defendant has stated that the suit property was allocated to him by Drumvale as a shareholder and member No.467. He took possession of the same and fenced it until 21st February 2020 when he sold the property to the 1st Defendant. The 2nd Defendant has denied that she sold the suit property to the Applicant. The 2nd Defendant has averred that she has never met neither has she entered into any contract with the Applicant. The 2nd Defendant has contended that from the evidence presented to court by the Applicant, it is clear that the Applicant bought the suit property from another Paul Mulinge Munyao of ID Number 04xxxxx. The 2nd Defendant has averred that his Identity Card is No. 04xxxxx and as such he is a stranger to the alleged sale agreement dated September 25, 1998 between the Applicant and the said Paul Mulinge Munyao of ID Number 04xxxxx. The 2nd Defendant has averred that he is a stranger to the agreement that the Applicant entered into with Ken Rest Homes Agencies Limited. The 2nd Defendant has averred that he does not know the said Ken Rest Homes Agencies Limited and never instructed it to receive any payment on his behalf. The 2nd Defendant has denied that the Applicant has been in occupation of the suit property. The 2nd Defendant has contended that the material presented to court by the Applicant in support of her case is full of inconsistencies and contradictions. The 2nd Defendant has contended that the Applicant must have been conned by the said Ken Rest Homes Agencies Limited. The 2nd Defendant has wondered why for over 20 years the Applicant never sought title for the suit property from him. The 2nd Defendant has denied that he is a trespasser on the suit property. The 2nd Defendant has averred that he has already transferred the suit property to third parties who are in occupation of the same and as such the orders sought cannot issue against him.
6. The 3rd to 8th Defendants have opposed the application through a replying affidavit sworn on July 22, 2021 by Michael Makhotsa Mbayah on his own behalf and on behalf of the other Defendants. The 3rd to 8th Defendants have contended that the suit herein does not disclose any reasonable cause of action against them as the suit property was subdivided into 8 plots by the 1st Defendant and sold to them. The 3rd to 8th Defendants have contended that the Applicant has no interest of any nature in the suit property. The 3rd to 8th Defendants have contended that they have developed the portions of the suit property that were sold to them and that they are in occupation of the same. The 3rd to 8th Defendants have averred that the Applicant has come to court with unclean hands and that her alleged purchase of the suit property from the 2nd Defendant is marred with several inconsistencies.

The Submissions by the Parties:

7. The Applicant filed submissions dated October 8, 2021 in which she has submitted that she has met the threshold for grant of the orders sought in her application. Relying on *Giella v Cassman Brown & Co. Ltd* [1973] E.A 358, the Applicant has submitted that she has established a prima facie case against the



Defendants and that unless the orders sought are granted, she is likely to suffer irreparable injury. The Applicant has submitted that even if the court was to consider the balance of convenience, the same would tilt in favour of granting the orders sought. The Applicant has cited a number of authorities in support of her submissions.

8. The 1st Defendant filed submissions dated October 26, 2021. The 1st Defendant has reiterated that the sale agreement and receipts that the Applicant has relied on in support of her application are forgeries and that the Applicant has not produced any evidence in support of her claim that she is the owner of the suit property. The 1st Defendant has submitted that the Applicant has not satisfied the conditions for grant of the injunction sought. The 1st Defendant has submitted that the Applicant has not established a *prima facie* case with a probability of success. The 1st Defendant has submitted that the Applicant has not established an interest in the suit property capable of protection by the court. In support of its submissions, the 1st Defendant has cited *Mrao Ltd. v First American Bank of Kenya Limited & 2 others* [2003] eKLR and *Margaret Njeri Wachira v Eliud Waweru Njenga* [2018] eKLR. The 1st Defendant has submitted further that the orders sought by the Applicant have been overtaken by events.
9. The 1st Defendant has submitted further that the Applicant having failed to establish a *prima facie* case, there is no way in which she can convince the court that she will suffer irreparable harm that cannot be compensated in damages if the injunction sought is not granted. The 1st Defendant has submitted that it is not necessary for the court to consider whether or not the Applicant stands to suffer irreparable harm. The 1st Defendant has submitted that even if the court was to consider the issue, there is no way in which the Applicant who has never been in possession of the suit property would suffer irreparable harm if the injunction sought is not granted. On the issue of balance of convenience, the 1st Defendant has submitted that the Applicant has not demonstrated that the same tilts in her favour.
10. The 3rd to 8th Defendants filed submissions dated 22nd October 2021 in which they have submitted that the Applicant has failed to meet the threshold for grant of the orders of injunction sought. In support of this submission, the 3rd to 8th Defendants relied on *Giella v Cassman Brown & Co. Ltd. (supra)*. The 3rd to 8th Defendants have submitted that the Applicant has not established a *prima facie* case with a probability of success and that she stands to suffer irreparable harm of the orders sought are not granted. The 3rd to 8th Defendants have submitted further that the Applicant has not demonstrated that the balance of convenience tilts in her favour.

Determination:

11. The Applicant's application is seeking injunctive reliefs. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In *Giella v Cassman Brown & Co. Ltd. (supra)*, it was held that an applicant for a temporary injunction must establish a *prima facie* case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.
12. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal adopted the definition of a *prima facie* case that was given in *Mrao Limited v First American Bank of Kenya Limited & 2 others (supra)* and went further to state as follows:

"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. ...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 threatened with violation... The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

13. From the material before me, I am not satisfied that the Applicant has satisfied the conditions for granting a temporary injunction. First, I am of the view that the Applicant is guilty of laches. The orders sought by the Applicant are equitable remedies. It is a principle of equity that it does not aid the indolent. The Applicant who claims to have been in occupation of the suit property since 1998 and had put up temporary structures on the property admitted that her temporary structures were demolished in 2017. The Applicant took no action. The Applicant admitted further that in 2018, the 1st and 2nd Defendants took possession of the suit property. Again, the Applicant took no action to protect her interest. By the time this suit was brought in July 2020, the suit property had changed hands from the 2nd Defendant to the 1st Defendant and subsequently to the 3rd to 8th Defendants. I am of the view that if the Applicant was diligent, the dispute before the court would have been restricted to the Applicant and the 2nd Defendant. I have noted that the other Defendants did not come to the picture until 2020. In the circumstances, the Applicant's application should fail on the ground of laches.
14. I do not think that the application stands a chance even if it is considered on merit.
15. The Applicant's claim is based on a sale agreement dated September 25, 1998 allegedly made between her and the 2nd Defendant and receipts said to have been issued to her on September 25, 1998 and 16th November 1998 for the sum of Kshs. 170,000/- which she claims to have paid for the suit property. The Applicant has also placed before the court some correspondence addressed to “the Secretary Lands” by the liquidator of Drumvale. The sale agreement aforesaid was prepared by Ken Rest Homes Agencies Ltd. The payment for the suit property was also allegedly made to the said company. The 2nd Defendant has stated on oath that the Applicant is not known to him and that he never instructed the said Ken Rest Homes Agencies Ltd. to act for him in the sale of the suit property and to receive payment of the purchase price on his behalf. The 2nd Defendant has also stated that the Identity Card of the alleged Paul Mulinge Munyao from whom the Applicant purchased the suit property does not belong to him. The Applicant did not respond to these averments by the 2nd Defendant that attacked the root of her claim and did not find it necessary to join Ken Rest Homes Agencies Ltd. as a party to the suit. I am also in agreement with the Defendants that there are some unexplained inconsistencies in the receipt that was annexed to the Applicant's affidavit in support of the original application in proof of payment that was made for the suit property and the receipt annexed to the present application. This casts doubt on the legitimacy of the Applicant's claim. I have also noted that apart from the contested agreement for sale and receipts, the Applicant has nothing more in proof of her claim to the suit property. The letters by the liquidator of Drumvale that I have referred to indicates that the suit property was re-allocated to the Applicant. The Applicant did not produce her letter of allotment. Due to the foregoing, I am not satisfied that a prima facie case with a probability of success has been established.
16. On whether the Applicant stands to suffer irreparable injury if the orders sought are not granted, I have noted that the Applicant was evicted from the suit property in 2017 if at all she was in possession. That was three years before this suit was filed. I am not persuaded that the Applicant who is not in possession of the suit property will suffer irreparable harm if the injunction sought is not granted. Having found that the Applicant has not established a prima facie case with a probability of success



and that she stands to suffer irreparable harm if the injunction sought is not granted, it is not necessary for me to consider the balance of convenience.

17. The upshot of the foregoing is that the amended Notice of Motion dated 10th May 2021 has no merit. The same is accordingly dismissed with costs to the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Simiyu for the Plaintiff

Mr. Kinyua for the 1st Defendant

Mr. Mwenda for the 2nd Defendant

Mr. Kimiti for the 3rd to 8th Defendants

Ms. C. Nyokabi - Court Assistant

