



Hakim & 6 others v Joz & another (Environment & Land Case E093 of 2022) [2022] KEELC 2911 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E093 OF 2022**

JA MOGENI, J

MAY 24, 2022

BETWEEN

OJAY HAKIM 1ST APPLICANT
PETER NJUGUNA 2ND APPLICANT
MARTIN MUIA 3RD APPLICANT
BERNARD KOTONYA 4TH APPLICANT
OJWANG 5TH APPLICANT
STEVE BIKO 6TH APPLICANT
SARAH MAINA 7TH APPLICANT

AND

MUHAMAD JAMIL JOZ 1ST RESPONDENT
ELIAS KARANI NDAMBIRI 2ND RESPONDENT

RULING

1. The plaintiffs/applicants filed a Notice of Motion dated 10/03/2022 in which they sought for an injunction restraining the 1st and 2nd defendant/respondent specifically the 2nd defendant/respondent whether by themselves or their agents, servants, employees, workers and/or workmen from trespassing from entering, from perforating, from constructing on the perimeter stone wall, from occupying from carrying out business at the perimeter wall and/or from dealing in any way whatsoever with the perimeter wall adjacent to parcel known as LR No. 3858/44, Villa Franca Estate or at all pending the hearing and determination of this suit and/or until further orders of the Honorable Court. Including the costs of this application to be provided for. The plaintiffs/applicants brought this application under Order 40 Rule 1 (a), (b), rule 4(2), rule 10 and Order 51 rule 1 of the *Civil Procedure Rules*



and Sections 1 A, 1 B, 3 A of the [Civil Procedure Act](#) and Section 13(7) of the [Environment and Land Court Act](#).

Plaintiffs/Applicants' Case

2. It is the plaintiffs' case that Villa Franca Estate has been in existence for over 25 years but the 2nd defendant who is only 10 months old in the estate has disregarded the controlled estate development and security rules as per the Villa Franca Estate Residents and their rights and perforated a perimeter wall thus trespassing and interfering with a private property. That they have held meetings with the 2nd defendant but these have not bore any fruits and the construction and perforation of the perimeter wall has continued.
3. That the 1st to 7th plaintiffs/applicants are and were officials of the Villa Franca Residents Estate Association and they have approached court in their own capacity as residents but also as officials of the Association. A demand notice was issued on 7/01/2022 to the 2nd defendant.
4. The 1st and 2nd defendant/respondent were served with the application on 18/03/2022 but they did not file any response therefore this application is unopposed.

Analysis and Determination

5. I have carefully considered the plaintiffs/applicants' application which is unopposed. I am well aware that even in circumstances where the defendant has failed to file a response through filing of a replying affidavit, as a Court of Law, I have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, that the application is meritorious and the prayers may be granted.
6. The Court therefore needs to consider whether the plaintiffs applicants have met the threshold for grant of injunctions. Order 40 Rule 2 of the Civil Procedure Rules 2010 which provides as follows:
 2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]
 - (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
7. The court is also guided by the conditions to be met by an applicant as was held in the case of *Giella vs Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself as follows:-

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.



8. The first hurdle for an applicant is to establish that he/she has a prima facie case before an order of injunction can be issued. Does the applicant have a good case to entitle it to complain against the defendant/respondents activities in the long run? From the pleadings and the documents availed to the court, it is evident that there is a cause of action arising from defendants' action of perforating a perimeter wall that is the subject of the instant suit. At this point I am alive to the fact that at I am not at this stage called upon to determine the rights of the parties as this will only become clear after a full hearing.

In the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR the Court of Appeal stated that:

With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus,

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

9. The documents presented attest to the fact that there have been attempts to resolve the case but this action has not been successful. Therefore there is a prima facie case established
10. I have also considered the submissions filed by the plaintiffs/applicants on 27/04/2022. This being an application for injunction I must decide whether the applicant has met the threshold for grant of the injunction. The purpose of a temporary injunction is to preserve the property until the dispute is determined. The plaintiffs/applicants have quoted several cases one of which is *Films Rover International Ltd vs Cannon Films Sales Ltd* (1986) 3 All ER where the court observed that while considering whether or not to grant an interlocutory injunction the court must take the route that appears to carry the lower risk of injustice should it turn out to have been “wrong”.
11. In the instant case, it is clear that at the time the plaintiffs/applicants moved to court, the defendants had already started construction on and perforation of the perimeter wall. Further the plaintiffs/applicants issued a demand notice on 7/01/2022 to the defendants which from the look of things was not headed and that is why the application is in court.
12. The purpose of an interlocutory injunction is to preserve the subject matter before the suit is heard and determined and that purpose would be defeated if a temporary injunction is not granted. It is therefore my finding that the plaintiffs/applicants have demonstrated that if a temporary injunction is not granted they will suffer irreparable loss.
13. As I have already held that the plaintiffs/applicants have satisfied the first and second conditions, I need not consider the balance of convenience. Be that as it may, even if I was to consider the same I hold that the balance of convenience tilts in favour of the Plaintiffs/Applicants who have demonstrated that they have been in occupation of the suit property and are conversant with the rules governing the suit property for all owners as per the constitution they attached of the welfare association. It is therefore in the interest of justice that the subject matter of the suit property be preserved until the rights of the parties are determined.

Determination and Disposal

14. Given the above discourse, I do allow the application for injunction dated 10/03/2022 in the following terms:-



- a. That pending the hearing and determination of this suit, there is hereby issued and order of injunction restraining the 1st and 2nd defendants/respondents, and specifically the 2nd defendant whether by themselves, their agents, servant, employees, workers and/or workmen from trespassing from entering, from perforating, from constructing on the perimeter stone wall, from occupying from carrying out business at the perimeter wall and/or from dealing in any way whatsoever with the perimeter wall adjacent to parcel known as L.R NO. 3858/44, Villa Franca Estate or at all pending the hearing and determination of this suit and/or until further orders of the Honorable Court.
- b. That this matter shall be heard and determined within the next two (2) months from the date of this ruling and therefore it is to go before the DR for Pre-trial Conference in compliance with Order 11 of the Civil Procedure Rules 2010, on 31/05/2022.
- c. Cost of this application is awarded to the Plaintiffs/Applicants to be borne by the Defendants/ Respondents herein.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2022

.....

MOGENI J

JUDGE

In the Presence of

.....Plaintiffs/Applicants

.....Defendants/Respondents

Mr. Vincent Owuor.....Court Assistant

