



REPUBLIC OF KENYA



KENYA LAW
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**Kungu v Safaricom Limited (Environment & Land Case
2 of 2019) [2022] KEELC 2291 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 2 OF 2019**

YM ANGIMA, J

MAY 19, 2022

BETWEEN

DAVID MUCHANGI KUNGU PLAINTIFF

AND

SAFARICOM LIMITED DEFENDANT

RULING

A. Introduction

1. By a plaint dated 26.03.2019 the Plaintiff sued the Defendant claiming general damages for trespass and malicious damage to property in the sum of Kshs.65,400,000/= together with costs and interest. The Plaintiff pleaded that he was the proprietor of all that parcel of land known as 446 Kerati Settlement Scheme – Koinange Township and that the Defendant had in October 2006 unlawfully invaded the suit property and erected a BTS Mast thereon without his authority. The Plaintiff contended that as a result of the Defendant’s said conduct he had suffered loss and damage hence the suit.

B. The Plaintiff’s Application

2. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 26.3.2019 under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 5 rule 17(1), (2), 3, 51 Rule 1 of the *Civil Procedure Rules 2010* (the Rules) seeking the following orders:
 - (a) Spent;
 - (b) Spent;
 - (c) That, the honourable court be leased to grant orders by way of injunction so as to restrain the Defendant/respondent whether by their agents, servants, and/or employees from interfering with the Plaintiff/applicant’s land parcel.446 Karati Settlement Scheme, Koinange Township, pending the final determination of the present application.



- (d) That, this honourable court be pleased to issue an order for the attachment of the Defendant/respondent's money, funds and/or assets; pending the final determination of the present application.
 - (e) That, in the alternative, the Defendant/respondent be ordered to furnish security into court which will satisfy the decree which may likely be issued in the suit herein.
 - (f) That, in default a warrant of attachment be issued against the Defendant/respondent for the attachment of its goods/property which will satisfy the eventual decree to be issued in this suit.
 - (g) That, any other order which the honourable court may deem fit and just to grant in the circumstances.
3. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 26.3.2019 and the exhibits thereto. The Plaintiff contended that the Defendant had unlawfully invaded the suit property and erected a BTS Mast thereon without his consent with a view to expropriating his property. It was further contended that despite demand the Defendant had neglected to offer adequate compensation to the Plaintiff for trespass and occupation of the suit property hence the application.

C. The Defendant's Response

4. The Defendant filed a replying affidavit sworn on 11.02.2022 by Fredrick Ochieng' Okech, a Principal Officer of the Defendant responsible for lease Renewals and Access Management in opposition to the application. It was contended that the suit property No.446 was the subject of NBI ELC.No.893 of 2015 David Muhangi Kungu –vs- The Hon. Attorney General & Another in which it became clear that portions of the suit property had been allocated to squatters by the Government of Kenya. It was contended that Plot No.200 Koinange Village was one such Plot and that was where the Defendant had erected the BTS Mast.
5. The Defendant stated that it entered into a lease agreement with the allottee of Plot 200 one, John Kinyanjui Njihia after undertaking due diligence and ascertaining from various government agencies that the said lessor was the owner thereof. The Defendant exhibited letters from the National Land Commission, District Land Officer Nyandarua and the District Land Registrar – Nyandarua to that effect. The Defendant further contended that it had been paying the contractual rent to the entitled owner hence the Plaintiff had no legitimate claim against it. The court was consequently urged to dismiss the said application with costs.

D. The Plaintiff's Supplementary Affidavit

6. The Plaintiff also filed a supplementary affidavit sworn on 22.01.2022 in which he exhibited a copy of the decree in NBI ELC No.893 of 2015 – David Muhangi Kunga –vs- The Attorney General and Another and copy of a ruling dated 06.07.2021 in the same suit.
7. The Plaintiff reiterated that he was the legitimate owner of the suit property as per the decree and that the Attorney General's application for review of the decree was dismissed by the trial court on 06.07.2021. He further stated that the Attorney General had not filed any appeal against the ruling of 06.07.2021.

E. Directions On Submissions

8. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were granted 14 days each to file and serve their respective



submissions. The record shows that the Plaintiff filed his submissions on 12.11.2021 whereas the Defendant filed its submissions on 15.02.2022.

F. The Issues For Determination

9. The court has perused the Plaintiff's notice of motion dated 26.3.2019, the Defendant's replying affidavit in opposition thereto, the Plaintiff's supplementary affidavit as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
- (a) Whether the Plaintiff has made out a case for the grant of an interlocutory injunction.
 - (b) Whether the Plaintiff has made out a case for attachment of the Defendant's assets before judgment.
 - (c) Whether the Defendant should be ordered to furnish security for satisfaction of any possible decree against it.

G. Analysis And Determination

a. Whether the Plaintiff has made out a case for the grant of an interlocutory injunction.

10. The court has considered the material and submissions on record on this issue. The Plaintiff submitted that he had satisfied all the requirements for the grant of an interim injunction and urged the court to grant the same. The Plaintiff relied upon *Giella -vs- Cassman Brown & Co. Ltd* [1973] EA 358 and *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] eKLR in support of his application. The Defendant, on the other hand, submitted that the Plaintiff had failed to meet the requirements for the grant of an injunction and relied on the cases of *Giella -vs- Cassman Brown & Co. Ltd (supra)*; *Nguruman Ltd -vs- Jan Bonde Nielson & 2 others* [2014] eKLR; and *Mrao Ltd -vs- First American Bank of Kenya Ltd (supra)* in opposition to the application.
11. The principles for the grant of an interim injunction were summarized in the case of *Giella -vs- Cassman Brown & Co. Ltd* as follows:
- (a) An applicant must demonstrate a prime facie case with a probability of success at the trial.
 - (b) An injunction will not normally be granted unless the Applicant might suffer irreparable loss or injury.
 - (c) Where the court is in doubt on (b) above it shall determine the application on a balance of convenience.
12. The court has closely examined the basis of the Plaintiff's claim and application for interim orders. The Plaintiff contends that he is the legitimate proprietor of parcel 446 of which Plot No.200 is part. He further contended that the court had affirmed his ownership of parcel 446 in NBI ELC No.893 of 2015. He therefore considered the Defendant to be a trespasser on any portion of parcel 446.
13. The court has noted that the Plaintiff did not make any reference to two crucial holdings in the judgment in NBI ELC No.893 of 2015 which stated as follows:
- “(50) That the Defendants are directed to ascertain the portion of the suit property on which they have resettled squatters and issue a title deed to the Plaintiff for the remainder of the land which he currently occupies. If the Government wishes to acquire the suit property for purposes of developing a Township,



then it will have to pay just compensation to the Plaintiff for the part of the suit property that may be required for the settlement scheme under the *Land Act*.

(51) The Defendants are directed to compensate the Plaintiff for the portion of the suit property allocated to squatters. The Plaintiff will have the costs of the suit.”

14. The Defendant has deposed in its replying affidavit that parcel 200 was one of the portions allocated to squatters out of parcel 446 and that it leased the same from the allottee. The Defendant exhibited copies of letters from at least 3 government agencies which indicated that the owner of Plot 200 was John Kinyanjui Njihia who leased it to the Defendant in the first instance. The Plaintiff did not file any affidavit disputing the genuineness of the 3 letters exhibited by the Defendant. He did not dispute that the Defendant’s BTS Mast was located on Plot 200 and that the same was originally part of parcel 446.
15. The court is of the opinion that on the basis of the material on record Plot No.200 on which the Defendant has an asset falls within the terms of the judgment in so far as compensation is concerned. The court is of the provisional view that the entity responsible for compensating the Plaintiff for loss of any portion of parcel 446 is the Government of Kenya and not the Defendant. The court is thus not satisfied that the Plaintiff has made out a prima facie case with a probability of success against the Defendant.
16. The court has further considered the material and submissions on record on the aspect of irreparable damage. In the case of *Nguruman Ltd -vs- Jan Bonde Nielson & 2 Others* (*supra*) irreparable injury was described as follows:

“.....the equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury is such that monetary compensation, of whatever amount, will never be adequate remedy.”
17. The Plaintiff has not demonstrated that the loss or user of plot 200 constitutes irreparable injury and that it is incapable of monetary compensation. There is no evidence on record to demonstrate that it shall be impossible to conduct an accurate valuation of the plot or that the Defendant shall be incapable of meeting an award of compensation with respect thereof. On the contrary, the Plaintiff has quantified his entire claim against the Defendant in monetary terms. In fact, the only substantive claim in the plaint is a claim for damages in the sum of Kshs.65,400,000/=. The rest of the prayers relate to costs and interest. In the premises, the court is not satisfied that the Plaintiff has satisfied the second principle for the grant of a temporary injunction. In view of the Plaintiff’s failure to meet the first two requirements, it shall not be necessary to consider the 3rd principle on balance of convenience.

(b) Whether the Plaintiff has made out a case for attachment of the Defendant’s assets before judgment.

18. The Plaintiff’s prayer for attachment was presumably predicated upon Order 39 rule 1 of the Rules. The said rule stipulates that:
 - “1. Where at any stage of a suit, other than a suit the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by the affidavit or otherwise:



- (a) That the Defendant with intent to delay the Plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him –
 - (i) has absconded or left the local limits of the jurisdiction of the court; or
 - (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
 - (iii) has disposed or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
- (b) That the Defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit,

The court may issue a warrant to arrest the Defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the Defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the Plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.”

19. It is evident from the material on record that the Plaintiff has not proved, or even alleged, that the Defendant is about to abscond from the local limits of the court or that it has disposed of its property or any part thereof with a view to defeating execution of any possible decree that may be passed against it. There is no material on record to demonstrate that the Defendant intends to avoid, delay or obstruct any court process in so far as the instant suit is concerned.
20. In the case of *Kuria Kanyoko t/a Amigos Bar and Restaurant –vs- Francis Kinuthia Nderitu and others* [1988] 2KAR/26 which was cited by the Plaintiff it was held, *inter alia*, that:

“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38 rule 5 namely that the Defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

The court finds absolutely no evidence to support the Plaintiff's prayer for attachment before judgment. Accordingly, the court finds and holds that the Plaintiff is not entitled to such order.

(c) Whether the Defendant should be ordered to furnish security for satisfaction of any possible decree against it.

21. As with the preceding issue the court finds no material on record to justify the prayer for provision of security. The Plaintiff has not alleged or demonstrated that the Defendant is on the verge of insolvency and that it shall not be able to meet an award of Kshs.65,400,000/= which he has sought in the plaint



together with any costs and interest. Accordingly, the court is not inclined to grant the Plaintiff the prayer sought.

H. Conclusion And Disposal

22. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for various interim orders. Accordingly, the Plaintiff's notice of motion dated 26.03.2019 is hereby dismissed in its entirety with no order as to costs.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF MAY, 2022.

In the presence of:

N/A for the Plaintiff

Mr. Oyando for the Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

