



**Mau Resort Limited v Narok County Government (Environment & Land  
Case 181 of 2017) [2022] KEELC 3112 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3112 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 181 OF 2017**

**CG MBOGO, J  
JUNE 30, 2022**

**BETWEEN**

**MAU RESORT LIMITED ..... PLAINTIFF**

**AND**

**NAROK COUNTY GOVERNMENT ..... DEFENDANT**

**RULING**

1. Before this court for determination is the notice of motion application dated April 19, 2020 expressed to be brought under Order 51 Rule 1, Order 40 Rule (1) and (2) of the [Civil Procedure Rules](#), Sections 1A and 1B of the [Civil Procedure Act](#) seeking the following orders: -
  1. Spent.
  2. Spent.
  3. That a temporary injunction be issued restraining the defendant/respondent whether by itself, servants and agents or whomsoever is acting on its behalf from, setting up a market place, erecting any structures thereon, depositing any construction material, alienating, demolishing, trespassing onto or in any way dealing with Plot No 300/7 Narok Township in any manner whatsoever pending the hearing and determination of this suit.
  4. That the officer commanding Narok police station (OCS) assists to implement this order.
  5. That the plaintiff application dated November 2, 2016 pending before this court be dispensed with and the instant application herein take precedence.
  6. That the costs of this application be borne by the respondent/defendant.
2. The application is premised on the grounds inter alia that the applicant is the registered proprietor of the suit land known as Plot No 300/7 Narok Township and that on or about April 17, 2020, the



respondent without any colour of right vandalised and destroyed water tanks and other construction materials at the site without any colour of right the same amounting to trespass.

3. The application is supported by the affidavit of Patiye Naikumi-Director of the applicant sworn on April 19, 2020. The applicant deposed that it is the registered proprietor of the suit land known as Plot No 300/7 Narok Township having acquired the same in the year 2010 with a valid allotment letter and has been in actual possession since then. Further, as a director of the applicant, they receive annual rates demand notices for the respondent and dutifully pay the same annually and by virtue of that, the respondent is fully aware of the proprietary rights of the applicant over the suit land and has even gone ahead and approved a development plan for the suit land.
4. That on or about April 17, 2020, the defendant's agents/servants vandalised and destroyed water tanks and construction materials on the suit land without any justification which the applicant later learnt that the suit land is to be converted into an open air market. The applicant further deposed that sometime in the year 2016, there was trespass on the suit land by the defendant but the same was resorted (sic) through an out of court settlement and since then, it has been enjoying vacant possession.
5. The applicant further deposed that the respondent is keen on dispossessing it from the suit land even after receiving payments and now claim that the National Museums of Kenya obtained authority to use the area as a temporary market place. Further, that the actions of the respondents are illegal and amount to trespass and that it has suffered loss and damage arising out of the destruction.
6. The application is opposed by the replying affidavit of the respondent sworn on November 30, 2020 by Elizabeth Sanangoi Lolchoki, the County Secretary. The respondent deposed that the application is premised on gross misrepresentation and deliberate concealment of pertinent facts in a bid to unjustly gain the court's sympathy. That the allocation letter produced by the applicant indicated that the suit land was allocated to it on July 22, 2010 but it has not indicated when the town planning committee sat to approve the said allocation and the minutes thereof and as such their claim of ownership is contested. Further, that a perusal of the respondent's records contains no record of minutes of the committee approving the said allocation and that the only documents in their records show that the suit land is public land legally allocated to the National Museum vide the allocation letter dated February 19, 2010.
7. The respondent further deposed that it has established the directors/shareholders of the applicant through a CR 12 dated October 21, 2020 and it is evident that the applicant illegally managed to acquire the suit land because all of its shareholders/directors were either members of the council's planning committee, markets and public health committee or officials in the council who colluded with the Town Clerk, to allocate the applicant the suit land. That the respondent having inherited the council's Local Authorities Integrated Financial Operations Management System (LAIFOMS) it has continually generated automatically demand for rates from the applicant. That having shed light on the false hood spread by the applicant, the orders issued on April 22, 2020 should be set aside and that an injunction being an equitable remedy, is granted on the basis of evidence and sound legal principles and in this case, the applicant has not shown a *prima facie* case with a probability of success.
8. The applicant filed written submissions dated February 17, 2021. The applicant raised two issues for determination which are whether the application dated April 19, 2020 and filed on April 22, 2020 meets the threshold for grant of temporary injunction and who bares the costs for the application. The applicant submitted that it has exhibited its proof of ownership from the year 2010 and has a valid letter of allotment and has been dutifully paying rates and is also in occupation where it intends to carry out its hotel business. The applicant relied on the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and *Mohamed Ahmed Dabia & 3 Others v Abbey Hassan Maalim* [2020] eKLR.



9. The applicant further submitted that under Article 40 of the Constitution, private property is protected and may not be taken away arbitrarily without due process. The applicant relied on the case of *The Iron & Steel Limited Civil Appl No 48 of 1958; Nganga v Kimani [1969] E A 67*. The applicant further submitted that unless the injunction is granted, the applicant would suffer irreparable damage which cannot be adequately compensated by way of damages. The applicant submitted it seeks protection of this honourable court to prevent the illegal, irregular and unlawful acquisition of its property by the respondent that is being used by rogue officials. The applicant relied on the case of *Film Rover International Limited & Others v Common Film Sales Ltd [1986]3 AER 772* and *Waithaka v Industrial & Commercial Development Corporation [2001] KLR 374 (unreported)*.
10. The applicant submitted that on a balance of convenience, the applicant is the rightful owner and is already suffering irreparable loss which cannot be compensated with damages since the respondent has encroached and the structures therein destroyed.
11. The respondent filed written submissions dated June 13, 2022. The respondent raised three issues for determination as follows: -
  - a. Whether the plaintiff has met the threshold in law to entitle her to the orders it seeks;
  - b. What is the effect of the plaintiff's misrepresentations and falsehoods on the orders it seeks on its application; and
  - c. What orders should be as to costs.
12. The respondent submitted that in an application for injunction, the onus is on the applicant to satisfy the court that it should grant an interlocutory injunction. The respondent relied on the case of *Giella v Cassman Brown [1973] EA 358*, *Nguruman Limited versus Jan Bonde Nielsen & 2 Others [2014] eKLR* and *Mrao Limited v First American Bank of Kenya Ltd [2003] KLR 125*. The respondent submitted that it has provided evidence that the said letter of allotment is non-existent and that further the CR 12 indicated the shareholders/directors as former members of various committees within the council. The respondent further submitted that the mere fact that the evidence adduced by its county secretary has not been rebutted, is proof that it is factual and thus admissible.
13. The respondent further submitted that the sanctity of the applicant's title has been questioned and the respondent has indeed submitted it is indeed public land which has been obtained illegally and that this court must interrogate unlawful claims of proprietorship. The respondent relied on the case of *Kenya National Highway Authority v Shailen Masood Mughal & 5 Others [2017] eKLR*. The respondent further submitted that the applicant's directors/shareholders acted dishonourably, illegally, fraudulently and immorally in a corrupt and illicit bid to divest the respondent of the property it holds in trust for the public and that it has not shown a clear and unmistakable right to the suit land that can be protected for the injunctive orders it seeks to be granted. That since the issue of *prima facie* evidence is not established, the issues of irreparable injury and balance of convenience need not be considered.
14. On the issue of misrepresentations and falsehoods, the respondent submitted that the law enjoins an applicant appearing before the court without notice to the other party to exhibit a high quality and degree of sincerity and honesty and that where disclosure has not been met, the court should not even decide the applicant's application on merit. The respondent relied on the case of *Abraham Lenauia Lenkeu versus Charles Katekeyo Nkaru [2016] eKLR*, *Esther Muthoni Passaris v Charles Kanyuga & 2 Others [2015] eKLR* and *Rex versus Kensington Income Commissioners, Ex parte Princess Edmond De Polignac [1917]1KB 486*.



15. On the issue of costs, the respondent submitted that the same is discretionary and given that the respondents have been re-hauled to the seat of justice by the applicant, they are entitled to costs.
16. I have carefully analysed and considered the pleadings and the written submissions together with authorities relied on by both parties and the issue for determination is whether the application dated April 19, 2020 is merited.
17. In the period preceding determination of a law-suit or an application; after the law-suit or the application has been heard but not yet determined; and even after a law-suit or the application has been heard and determined, there are acts or omissions which befit restraint from doing or compulsion to do, in the vote of preventing the ends of justice from being defeated. An injunction is the order appropriate in such circumstances. An injunction is a discretionary equitable remedy in the form of a Court Order which compels a party to do or refrain from doing specified acts and granted only in circumstances where irreparable harm is likely to occur. This was the reasoning in *Charter House Investments Ltd v Simon K Sang and others* [2010] eKLR, per Omolo, Githinji and Visram JJ.A.,
18. The kind of injunction the applicant is seeking now is, a temporary restraining preliminary interlocutory injunction, one of the subsets of interlocutory injunctions which is granted inter-partes.
19. Order 40 rule (1) and (2) of the Civil Procedure Rules provides for the procedure deployable in applications for temporary injunctions. But what are the circumstances under which Order 40 of the Civil Procedure Rules is deployable? Order 40 is limited to restraining a party from wasting, damaging, alienating, wrongfully selling, or removing from jurisdiction property in dispute or from breaching a contract or committing any other injury, whether compensation is claimed in the suit or not. For purposes of this application, Rules 1 & 2 of the Civil Procedure Rules which provide for circumstances under which an injunctive relief can be granted, are key and I deem it necessary to reproduce it here. It reads: “1. Where in any suit it is proved by Affidavit or otherwise—(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a Decree; or (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any Decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders. [Order 40, rule 2.] Injunction to restrain breach of contract or other injury. 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.”
20. The test for granting of a temporary injunction was considered in the *American Cyanamid Co v Ethicom Limited* [1975] A AER 504 where three elements were noted to be of great importance namely: -
  - i. There must be a serious/fair issue to be tried,
  - ii. Damages are not an adequate remedy,
  - iii. The balance of convenience lies in favour of granting or refusing the application.



21. The important consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit land is in danger of being demolished as per the annexed photographs allegedly taken on the suit land and attached to the applicant's supporting affidavit. The respondent however contends that it is public land reserved for use by the National Museums of Kenya as per the letter dated February 19, 2010 annexed in its replying affidavit.
22. The question which therefore arises is, whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others*, [2003] KLR 125 which was cited with approval in *Moses C Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others*, [2014] eKLR, where the Court of Appeal defined a prima facie case as: -
- “A *Prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.
23. In the present case, I note that ownership of the suit land is disputed as the applicant claims ownership vide a copy of allocation of Plot No. 300 Block 7 within Stadium Ward dated July 22, 2010 while the respondent claims the same being public land for use by the National Museums of Kenya vide a copy of allocation of Plot No. Narok/Township/35 within Stadium Ward dated February 26, 2010. Interestingly, the letter of allotment dated July 22, 2010 is issued to Mau Resort Limited, the applicant herein who was incorporated on October 20, 2012, two years after issuance of allotment. It is trite law that he who comes to equity must come with clean hands and this, in my view raises queries as to the correctness of the averments of the applicant.
24. I am, therefore, not satisfied that the applicant has established a prima facie case so as to warrant the granting of the orders of injunction. I am guided by the decision of Ringera, J (as he then was) in the case of *Showind Industries v Guardian Bank Limited & Another* [2002] 1 EA 284 where the Learned Judge stated as follows: -
- “.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches”
25. Having found that the applicant has not established a prima facie case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I place reliance in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA No 77 OF 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -
- “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. See *Kenya Commercial Finance Co Ltd v Afraba Education Society* [2001] Vol 1 EA 86. 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." (Emphasis added).

26. Arising from the above, I find that the notice of motion application has no merit and, same is hereby dismissed. Each party to bear its own costs. It is so ordered.

**DATED, SIGNED and DELIVERED VIA EMAIL ON 30<sup>TH</sup> JUNE, 2022.**

**MBOGO C G**

**JUDGE**

**30/6/2022**

**In the presence of: -**

**CA: Timothy Chuma**

