



**Pwani Baridi Waterways Limited v Muya & another (Environment & Land
Case 74 of 2020) [2022] KEELC 14582 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 14582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 74 OF 2020**

**AE DENA, J
JUNE 30, 2022**

BETWEEN

PWANI BARIDI WATERWAYS LIMITED PLAINTIFF

AND

LINUS CHIRA MUYA 1ST DEFENDANT

LAND REGISTRAR KWALE 2ND DEFENDANT

RULING

1. On February 14, 2022 this court rendered itself on an application for review/setting aside the instant application for injunction which had been dismissed for non-attendance by Justice C Yano. By an order of this court, the application was to be set down for hearing within 30 days which has been complied with by parties. The court is therefore tasked with making a finding over the reinstated application dated February 8, 2021 filed under certificate of urgency for orders;
 - a. Spent
 - b. Spent
 - c. That an order of temporary injunction be issued restraining the 1st Defendant/Respondent, its servants, agents and/or employees or any other person whomsoever claiming under it from developing, interfering remaining on and trespassing onto all that parcel of land known as plot Kwale/Tiwi/1734 and from doing any other prejudicial act thereon pending the hearing and determination of the suit herein.
 - d. That the 2nd Defendant/Respondent be ordered to produce all the documents used to effect transfer upon the 1st Defendant /Respondent within a period of seven [7] days upon service of this application
 - e. That orders of this court be enforced by the Tiwi Officer Commanding Station



- f. That costs of this application be borne by the Defendants/Respondents.
2. The application is supported by an affidavit of Hellen Mutie a Co-Director of the applicant. It is averred that the applicant is the lawful registered proprietor of the suit property Kwale/Tiwi/1734. That sometime in 2019 the title deed to the property was lost whereupon a report was made at the Yatta Police Station and an announcement placed in a local daily newspaper. That in the year 2020 after the lifting of covid 19 restrictions, on trying to follow up on replacing the title, the deponent was shocked to find that the suit property had been registered in the 1st Defendant's name. She states that the property is family and company owned and has been their dwelling home since 1993.
 3. The applicant also filed a further affidavit on March 8, 2022 and deponed that the suit premises was the property of Pwani Baridi Waterways Limited registration No C93007 and not Pwani Barindi Waterways Limited which was not a genuine entity. That the 1st respondent has failed to produce a CR12 and hence it has not been elaborated how the transfer was effected without the said document. The court is beseeched to grant the orders sought expeditiously as the applicant stands to suffer irreparable loss.

Responses to the Application

- 4 In response to the application the 1st Defendant filed a replying affidavit dated November 16, 2021 sworn by the 1st Defendant who avers that the applicant is not the owner of the suit property as no evidence of such ownership has been presented. It is further averred that the suit property was acquired legally by the 1st Defendant. It is the 1st Defendant's case that the applicant has not demonstrated the conditions set for the orders sought to be granted. The court was asked to dismiss the application with costs for being baseless.
- 5 The 2nd respondent opposed the application by an affidavit sworn by Thati Widad Alamin the County Land Registrar II. Grounds of opposition were also filed where validity of this suit was contested on grounds of lack of authority by way of resolution of the applicants Board of Directors as to the institution of the suit, failure to discharge the burden of proof as to ownership of the property and lastly that the suit is statute barred under section 3 of the *Public Authorities Limitations Act Cap 39*. It is averred that the records at the 2nd respondent's office show a clear line of transfer to the defendant. That the suit parcel Kwale/Tiwi/1374 was originally owned by Mohammed Mwaranguo. Thereafter an entry of a cancelled title issued to the plaintiff and a transfer dated December 16, 1983 from Mohammed Mwaranguo to Pleracy Limited. From then there was a transfer registered on January 23, 2002 from Prelacy Limited to the plaintiff. It also stated that on March 3, 2020 the plaintiff transferred the suit property to the 1st Defendant and the same was registered as entries no 6 and 7 of the green card and a charge of Kshs 10,000,000/- registered in favour of Kenya Pipeline Company Limited.
6. It is deposed that the present application is defective for failure to provide proof of resolution as to the appointment of the firm of Nancy M Kilonzo & Co Advocates and for institution of a suit on behalf of the plaintiff. The authorities of Kenya Commercial Bank Limited V Stage Coach Management Ltd HCC No 45 of 2012 and *East African Portland Cement Ltd V The Capital Markets Authority & 5 others Petition No 600 of 2013* were relied upon. Further that the applicant has failed to establish a prima facie case and hence the balance of convenience lay in not granting the prayers as was held in *Florence Khayanga Musanga V Transnational Bank Ltd & Another [2020] eKLR*. The 2nd defendant prayed for the application to be dismissed.

Submissions of the Parties

7. The parties filed and exchanged submissions.



Plaintiff/Applicants submissions

8. It is submitted through the firm of Nancy M Kilonzo & Company Advocates that the 1st defendant has failed to produce the CR12 form that clearly indicates that the suit property was legally transferred from the directors of the applicant to him. That from the record the applicant is Pwani Baridi Waterways Company while the other party whom the 1st defendant claims to have bought the suit property from are Pwani Barindi Waterways Limited though they share the registration No 93007. The applicant submits that the suit property belongs to them and the same has been transferred to the 1st defendant through fraudulent means. That the 1st defendant has therefore trespassed on the property deployed building material with a view to developing the property. In accordance to the provisions of Order 40[1][a] and [b] of the [Civil Procedure Rules 2010](#) it was necessary that the suit property is protected against wastage among others. It is the Plaintiff's case that they have established a prima facie case and are bound to suffer irreparable harm in the event that the instant application is not allowed since the 1st defendant has entered the suit property, built a wall fence and renovated and occupied the house together with his family and the defendant's motives for the suit property were unclear. Authorities relied upon were *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125* and [Pius Kipchirchir Kogo versus Frank Kimeli Tenai \(2018\)eKLR](#).
9. On balance of convenience it is submitted that the plaintiff suffers greater inconvenience compared to the 1st defendant by the defendants fraudulent actions that were depriving the plaintiffs from using the suit property as well as the developments undertaken by the 1st defendant. Refereeing to [American Cyanamide Co Limited Vs Ethicom Limited \(1975\) A AER 504](#) it was contended that the matters raised in the claim were serious to warrant the orders of injunction.
10. The court is asked to allow the application.

1st Defendant's submissions

11. The 1st Defendant submitted through the firm of Sachdeva Nabhan & Swaleh Advocates. It is submitted that the Plaintiff has failed to satisfy the conditions for the grant of interlocutory injunction as set out in *Giella Versus Cassman Brown & Co Ltd [1973] EA 358*. That is the Plaintiff has failed to demonstrate that it is the bonafide owner of the suit property or has been in occupation of the same at any given time. The claim of lost title was denied and that the reports made pursuant thereto were not in accordance to the statutory procedure for replacement of a lost title.
12. It is pleaded that the suit property number in the plaint has been quoted as Kwale/Tiwi/1374 while that in the application has been quoted as Kwale/Tiwi/1734. That the two were different and hence ownership of an entirely different plot is being pleaded which was not the suit property. That the lack of precision on which parcel the application is based rendered the application ambiguous since the applicant is bound by his pleadings.
13. Counsel emphasised that the parcel no Kwale/Tiwi/1374 belongs to the defendant/respondent who acquired the same legally and procedurally as evidenced by copies of the title deed, transfer forms and search over the suit property which were annexed. It is further stated that the suit property was acquired from different persons and hence it is not expected that the applicant would have signed any of the transfer forms. It is also averred that the suit property was acquired by the applicant allegedly in 2002, transferred to the 1st defendant in 2020 and a new tile issued on March 4, 2020. It is pointed that according to the certificate of incorporation produced by the 1st defendant the company was incorporated on March 1, 2001 but on the applicants list of documents it is indicated that the applicant was incorporated on June 11, 2010 meaning the property belonged to the 1st defendant 8 years earlier.



That from the evidence presented the applicant adopted a name of an existing company in an attempt to illegally acquire the land belonging to the 1st defendant.

14. Submissions were made to the effect that the applicant had not demonstrated the loss they were to suffer. That the defendant on his part had demonstrated being on the suit property and hence he was to suffer loss if the prayers sought are granted. The court was asked to dismiss the application for lacking in merit.

2nd Defendant's submissions

15. The 2nd defendant's submissions were filed on June 13, 2022 through Mrs Njau Senior State Counsel. Counsel submitted on three issues summarized as follows; -
16. On whether there was a transfer of plot Kwale/Tiwi/1374 it is submitted that from the record, there was a transfer of the suit property to the 1st defendant. A clear sequence on the transfer was reiterated as already enumerated by the 2nd defendants. Counsel termed the allegations that the 2nd defendant aided in illegal and fraudulent means of acquiring property as mere allegations without proof falling short of compliance with the provisions of Order 2 Rule 10[1] on pleading fraud. Reference on proof of fraud was made to the case of *Ratil Patel V Lalji Makanji EA 1957* and in [*Vijay Morjaria V Nansingh Madhusingh Darbar & Another \[2000\] eKLR*](#).
17. On whether there is proof of resolution as to the appointment of the firm of advocates on record, it is submitted that no proof as mandated under Section 107 and 109 of the *Evidence Act*, has been tendered in form of a resolution from the company appointing the firm of Nancy M Kilonzo. Reference was made to the Ugandan case of *Bugerere Coffee Ltd V Sebaduka & Another [1970] 1EA 147* and [*Philomena Ndanga Karanja & 2 Others V Edward Kamau Maina \[2015\] eKLR*](#). Also attached was Kenya Commercial Bank Limited Vs Stage Coach Management Ltd (2014) eKLR.
18. On whether the Plaintiff has adduced evidence sufficient to warrant the orders sought, it is stated that fraud had not been proved. There was no resolution from the company to file the suit. The application is termed as being defective and the court is urged to dismiss the same.

Analysis and Determination

19. The court has considered the pleadings herein together with the submissions filed by the parties. The pertinent issues for determination are whether the application meets the threshold for granting of the temporary orders of injunction and whether the suit is fatally defective for failure of a resolution by the company directors authorising institution of the same. However there some preliminary points raised which require to be considered ahead of the issues the court has identified. These were the failure to produce certain resolutions as earlier discussed by the defendants.
20. On the failure to produce a resolution, I will make reference to the case of *Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR* which was referred to in the Kenya Commercial Bank Limited Vs. stage Coach Management Ltd. Justice Odunga, J was in agreement with the decision of Kimaru J in the case of [*Republic vs Registrar General and 13 Others Misc Application No 67 of 2005 \[2005\] eKLR*](#) where the court stated:

' Such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.'



21. Further, Odunga J in his Judgement in the Leo Investments case[supra] referred to the holding of Hewett, J in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No 391 of 2000* as follows:
- a. 'It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect. As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.'
22. This court concurs with the foregoing dictum. It is therefore clear that even though the applicant has failed to attach a copy of the resolution from its board of directors to institute suit, the pleadings can still be ratified before the matter is set down for hearing. Consequently, the lack of such resolution is therefore not fatal to the suit and the instant application. I have read the ruling of the learned judge in *Philomena Ndanga Karanja & 2 Others V Edward Kamau Maina [2015] eKLR* which has been relied upon by the second defendant. In that case the learned judge circumstances for allowing the objection was the deliberate attempt by counsel to conceal the fact that the specific resolution was not available by insisting on a letter of instructions. Further the indolence on the part of the said counsel to obtain the same and amend the pleadings appropriately even after being made aware. Each case is decided on its own merits.
- The above finding shall apply to the resolution from the company appointing the firm of Nancy M Kilonzo.
23. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -
- ' Where in any suit it is proved by affidavit or otherwise—
- b. 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 [Rev 2012] Civil Procedure CAP 21 [Subsidiary] C17 – 165;
 - c. 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.'
23. The test for granting of an interlocutory 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. There must be a serious/fair issue to be tried, damages are not an adequate remedy and the balance of convenience lies in favour of granting or refusing the application. These echo the principles in *Giella Versus Cassman Brown & Co Ltd 1793 EA 358*.
24. On whether the applicant herein has established a prima facie case, it is the applicant's case that the suit property has been acquired fraudulently by the 1st defendant. The particulars of such fraud are pleaded



under paragraph 7 of the plaint and which include impersonation of the directors of the company and making false documents contrary to section 377[a] of the penal code. The said allegations are vehemently denied by the 1st defendant who claims that the suit property was sold to him by the lawful owners Luca Pastone and Elsa Lagable who are the directors of the applicant herein. That the applicant was incorporated as a company on March 1, 2001 as evidenced by the certificate of incorporation. This court takes note of the fact that the applicant has attached a different certificate of incorporation indicating the directors as Hellen Mutie Muema and Shammah Muema Kisule and which further indicates that the company was incorporated on June 11, 2010. It is also trite that at this point the court must not go into the merits of the case for this is the preserve of the trial judge and not even title is required. This is best illustrated in [Civil Appeal No 77 of 2012, Nguruman Limited v Jan Bonde Nielsen & 2 Others \[2014\] eKLR](#) which the applicant also referred to where the court delivered itself as hereunder; -

' 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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.'

25. It has been ably demonstrated by the applicant that there exists a right of ownership of the suit property which can only be fully determined upon the matter being set down for hearing but in the meantime needs to be protected. Several issues have also been raised that need the interrogation of the court and which include who are the rightful directors of the applicant and whether there was fraud in transfer of the suit property to the 1st defendant. The bottom line is that the applicant and the 1st defendant lay a claim to the property. It is this court's finding that the applicant has established a prima facie case.
26. On whether the applicant will suffer irreparable harm, it is the Applicant's case that the suit property has not only been fraudulently transferred to the 1st defendant but further bears a charge of Kshs 10,000,000/- from the Kenya Pipeline Company. The same has denied them access to the property which they term as their home. To me a party needs not to flagrantly abuse the rights of ownership of property of another party even with the notion that they can fully and ably compensate or pay for the damage that may be incurred from the said abuse. I refer to [Almed vs Mannasseh Benga & Another \[2019\] eKLR](#) where it was held that;-

'Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of *Aikman vs Muchoki (1984) KLR 353*.' See the case of [Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Ltd \(2005\)eKLR](#).



27. The Applicant may also not be compelled to accept payment for damages as was stated in *Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR*. Warsame, J(as he was then) had this to say and I concur:-

' That damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.'

28. On the balance of probability I'm guided by the holding in *Amir Suleiman v Amboseli Resort Limited [2004] eKLR*, where **Ojwang J.** emphasised that the Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice. I find that in the circumstances of this case issuance of injunctive orders will be a lower risk of injustice as compared to failure to grant the same.

29. There has been allegations that a different property has been pleaded by the plaintiff which is not the suit property. The plaintiff has not addressed this matter in her submissions. I will take a liberal approach to this matter since the numbers cited seem to have a correlation and allow an amendment in the interests of justice should it be deemed necessary before the matter is set down for hearing. In the meantime, since the objective of Order 40 is to protect the actual suit property in dispute I will refer to Kwale/Tiwi/1374 and Kwale/Tiwi/ 1734 interchangeably.

30. The upshot is that the application dated February 8, 2021 is merited.

31. To dispose of the same the following orders shall issue

1. A temporary injunction shall and hereby issues against the 1st defendant, its servants, agents and or employees or any other person whomsoever claiming under him to stop further development, wastage, transfer of the suit property Kwale/Tiwi/1374 and Kwale/Tiwi/ 1734 pending determination of this suit.
2. Costs shall be in the cause.

DELIVERED AND DATED AT KWALE THIS 30TH DAY OF JUNE 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:
for the Plaintiffs

Ms. Muema holding brief for Ms. Kilonzo

Mr.

Noor for 1st defendant

Ms. Njau for 2nd defendant

Mr. Denis Mwakina- Court Assistant.

