Mutunkei v Ndoho (Environment & Land Case E085 of 2021)
[2022] KEELC 2826 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2826 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT & LAND CASE E085 OF 2021

MN GICHERU, J

JUNE 27, 2022

BETWEEN

JOHN KETUKEI MUTUNKEI ..... PLAINTIFF

AND

ISAIAH MWAURA NDOHO ..... DEFENDANT

RULING

1. This ruling is on the Notice of Motion dated December 20, 2021. It seeks a temporary injunction to restrain the defendant/respondent whether by himself, his servants or agents from entering, alienating, interfering, collecting rent, or in any other way dealing with the property known as plot no. B 687(formerly 3357) situated at Noonkopir Trading Centre.

2. The Application which is under Order 40 rules 1,2,3,4 and 5 and Order 51 rule 1 *Civil of the Procedure Rules*, sections 3A,1A and 1B of the *Civil Procedure Act*, Article 159(2) of *the Constitution* of Kenya and all other enabling provisions of Law and procedure is supported by four grounds, a 30 paragraph supporting affidavit and ten annexures.

3. The gist of the above material is that the applicant is the owner of plot number B687 (formerly 3357) Noonkopiar Trading Centre which he has occupied for about 15 years. The Plot is developed with residential units. The applicant was in need of money to develop and subdivide a different property that he owned. He was introduced to the respondent as a money lender.

   The plaintiff and the defendant agreed that the defendant would lend the plaintiff a total of Ksh.1, 497,000/= and the interest would be Ksh.1, 448,000/= to make a total of Ksh.2, 945,000/= payable within 3 months.

   The defendant then took the plaintiff to his advocate and the agreement was reduced into writing. At the advocate's office, the defendant insisted that the agreement should take two forms namely an agreement for sale and a reconveyance.

Since the plaintiff was desperate, he accepted to sign the two agreements. However, the actual agreement between the parties was that the property belonged to the plaintiff and once he paid the agreed sum to the defendant, he would reconvey the property to the plaintiff on paper.

According to the plaintiff, the contents of the sale agreement are not true because he only received Ksh.1, 497,000/= and not Ksh.2, 945,000/= as alleged in the agreement.

The plaintiff acted with speed and paid for the subdivision of the other property. However, there were some delays and the subdivided plots did not sell as anticipated. When the plaintiff realized that he would not comply with the agreement and meet the deadline of November 18, 2021, he went to the defendant and asked for more time. The defendant was non-committal and this made the plaintiff seek the services of his current advocate. He also cautioned the suit land.

The plaintiff got alarmed when the defendant visited the suit premises and told the tenants that they should pay rent to him. He also visited that National Government Administration offices and told them that the suit land belonged to him. The amount of the debt is not commensurate with the value of the suit premises.

4. The application is opposed by the respondent who has sworn a 16 paragraph affidavit with four annexures. The gist of the defendant's deposition is that he purchased the suit premises and paid a total of Ksh.2,945,000/-.The sale agreement was witnessed by an advocate. The property was transferred to him after a lengthy process. Later on, the plaintiff offered to purchase the same property that he had sold to the defendant and they entered into a fresh agreement. He urges the court to look at the agreement and find that the plaintiff acknowledged receipt of the total consideration of Ksh.2, 945,000/= and dismiss the application for injunction.

5. I have carefully considered the application in its entirely including the affidavits, grounds, annexures and the pleadings.

It is trite law that the applicant must establish a prima facie case with a probability of success and also prove that he stands to suffer irreparable damage that cannot be adequately compensated by an award of damages. If the court is not sure of the above prerequisites, it must look at the balance of convinience. This is the law on temporary injunctions as it was laid in the case of *Giella v Cassman Brown* (1973) E A 358.

Applying those principles on this case, I find that there are three issues which are to be decided in those case namely-

(a) has the applicant made out a *prima facie* case with a probability of success?

(b) has he proved that he stands to suffer loss that cannot be adequately compensated by an award of damages?

(c) If the court is not sure of the above, who does the balance of convenience favor between the plaintiff and the defendant?

6. On the first issue, I find that the plaintiff has established a prima facie case with a probability of success. Looking at the totality of the case, the applicant is more convincing that the respondent. He is categorical that he was not selling the suit land and all that he wanted was money to subdivide another property that he owned so that he could sell it.

On the other hand, the respondent says that he was actually buying the land and not lending money to the applicant. This is doubtful, especially at this stage where not all evidence has been adduced because of the emergence of the agreement for reconveyance dated November 18, 2021.This agreement raises

the obvious question as to why the respondent would be selling the same land that he bought from the applicant, to the applicant exactly three months after he bought it. This agreement took place on the exact date when the agreement of September 17, 2021 was to be completed. It is, at this early stage, the applicants' explanation that is more credible than that of the respondent.

Secondly, the agreement of August 18, 2021 which is the respondents' annexure provides at paragraph 2(a) that Kshs.1, 448,000/= is paid in cash and at 2(b) Kshs.1, 497,000/= would be paid into the applicants KCB account. While it is perfectly proper for parties to agree on the modalities of payment, the applicant says that he only received the money paid in the bank. The applicants word is again more credible than that of the respondent.

7. On the second issues, I find that the applicant will suffer loss that would not adequately be compensated with an award of damages because he has a bigger stake in the suit property than the respondent. He has occupied the land for over 15 years and has developed it. It is the respondent who is assured of a refund of his money in the event that the applicant succeeds in the suit. There may be delay in getting a refund of the loan but there will eventually be no loss to the respondent.

8. Finally, though I am not obligated to deal with the third issue, having found the first two is favour of the applicant, I find that the balance of convenience favours the applicant. This is because he is in possession as per the current order dated 15/3/2022 which said that the status quo is that the plaintiff is on occupation.

For the above stated reasons, I find merit in the notice of motion dated December 20, 2021and I allow it in it's entirely.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF JUNE, 2022.

M.N. GICHERU

JUDGE