



Elmi t/a Elmi Traders v Chief Land Registrar & 3 others (Environment & Land Case 1437 of 2016) [2022] KEELC 2350 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2350 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1437 OF 2016
OA ANGOTE, J
JUNE 23, 2022**

BETWEEN

ABDIRAHMAN MOHAMED ELMI T/A ELMI TRADERS PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

UNITED CARE LIMITED 4TH DEFENDANT

RULING

Background

1. Before this court for determination is the 4th Defendant's/Applicant's Notice of Motion application dated February 8, 2022, seeking for the following orders:
 - a) Pending the hearing and determination of this suit, this Honourable Court do issue an injunction restraining the Plaintiff whether by himself, his employees, agents and any representative whatsoever from trespassing, occupation, wastage, building, excavation, selling, leasing, mortgaging, charging, constructing on, remaining on the premises, transferring or in any other manner howsoever dealing with all that property comprised in Land Reference Number 21939 within Nairobi County.
 - b) That costs be provided for
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Rishad Hamid Ahmed, the Director of the 4th Defendant who deponed that the 4th Defendant/



Applicant is the registered owner of all that piece of land comprised in LR No 21939 within Nairobi County (hereinafter suit property) and in this respect holds a Certificate of Title No IR 179436.

3. It was deponed by the 4th Defendant's Director that the Plaintiff instituted the present suit alleging that he is the rightful proprietor of the suit property having been allotted the same; that the Plaintiff does not have any title documents to the suit property and that notwithstanding the lack of title documents aforesaid and during the pendency of the suit, the Plaintiff has built walls around the suit property and has commenced construction on the suit property, which actions are not only illegal and fraudulent but calculated to have the 4th Defendant incur heavy costs in removing the structures.
4. It was deponed that the Plaintiff is a perennial litigant who has filed similar suits claiming other persons' properties, which suits have been unsuccessful; that unless the Plaintiff's actions are stopped, the 4th Defendant will be prejudiced; that the Plaintiff who holds no title to the suit property will not be prejudiced if the orders sought are granted and that the 4th Defendant has a prima facie case with a high likelihood of success.
5. In response to the application, the Plaintiff deponed that the 4th Defendant's claim is fraudulent and a non-starter having been instituted by a company that was allotted a property twelve years before its incorporation and that pursuant to an investigation carried out by the Ministry of Lands and after a hearing conducted before a panel of registrars, it was determined that the title held by the 4th Defendant be cancelled in accordance with Section 79(2) of the [Land Registration Act](#) for the reason that the 4th Defendant was not in existence in 1996 and had used a fraudulent fee receipt to pay stand premium and other outgoings.
6. The Plaintiff deponed that vide its Ruling of 30th November, 2017, the court made a finding of fact that the 4th Defendant's allocation of the suit property was fraudulent; that the 4th Defendant has several pending land court cases resulting from their fraudulent activities; that following the cancellation of the 4th Defendant's title, he was issued with a title deed and that he was allotted the suit property on April 15, 1996 and has been in occupation and paying land rent and rates since then.
7. The Plaintiff finally deponed that the 4th Defendant's claim to the ownership of the suit property is based on fraudulent documents; that as a result of the fraud aforesaid resulting in the cancellation of the 4th Defendant's title, it is not entitled to the equitable reliefs sought; that there is a caveat on the suit property and hence no risk of disposal of the suit property and that he is in occupation of the suit property and will be greatly prejudiced if the orders sought are granted.
8. The Attorney General filed Grounds of Opposition to the application and averred that the application constitutes an abuse of the court whose aim is to derail the hearing of the suit; that the application does not meet the mandatory requirements of Order 40 Rule 2(2) of the [Civil Procedure Rules](#) and that the grant of the orders sought would have the effect of granting permanent or mandatory injunctions.
9. The Attorney General averred that pursuant to paragraphs 28 (k) and 32 of the Practice Directions, this court has discretion to order for the maintenance of status quo; that the court ought to be cautious and avoid making final determinations in interlocutory applications and that the Applicant is basing its application on forged documents.
10. Vide a Further Affidavit, it was deponed by the 4th Defendant that the Replying Affidavit of the Plaintiff is fatally defective as it is not dated; that the Plaintiff herein has not produced any evidence to prove that the 4th Defendants' title has been revoked and that prior to the filing of this suit, the 4th Defendant was not aware of any investigation by the Ministry of Lands in respect of the suit property and has never been summoned for hearing as alleged or at all.



11. It was deponed by the 4th Defendant's Director that the 2nd Defendant has no powers to cancel or revoke a title to a property and by purporting to do so, it acted ultra vires and that the said cancellation, if at all, was null and void. It was deponed that similarly, the alleged issuance of the title to the Plaintiff is null and void that the fact that the 4th Defendant has been on the suit property is evinced by the placing of a caveat on the title by the Plaintiff. All the parties filed submissions and authorities which I have considered.

Analysis & Determination

12. The only issue for determination is whether the 4th Defendant/ Applicant has met the threshold to warrant the grant of a temporary injunction pending the hearing and determination of the suit.
13. The law on the grant of interlocutory injunctions is provided for under Order 40 Rule 1 of the [Civil Procedure Rules](#), which provides as follows;

“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 if 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.”

14. Being an application for injunctive orders, the same shall be weighed against the requisite essentials set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 where it was held as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

15. The 4th Defendant/Applicant in this case is expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the Court stated 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 Afraha 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."

16. As correctly cited by the parties, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined prima facie thus;

"...So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

17. More recently, the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)* while agreeing with the definition of what a prima facie case is in the *Mrao case (supra)* went ahead to further expound as follows;

"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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."

18. This court will be guided by the foregoing principles as well as by the general principle that no definitive findings of law or facts should be made at this interlocutory stage.
19. It is the 4th Defendant's/ Applicants' case that it is and has at all material times been the duly registered proprietor of the suit property and holds a certificate of title; that it has at all material times been in possession of the suit property and that the Plaintiff, despite not having any title documents in respect of the property, and during the pendency of this suit, has commenced construction on the suit property.



20. On the other hand, the Plaintiff asserts that he was allotted the suit property in April 1996 and has been in occupation ever since; that he has been paying land rent and rates for the land and that a meeting held by the Ministry of Lands on February 9, 2020 in respect of the suit property resolved that the 4th Defendant's title be cancelled in accordance with Section 79 (2) of the [Land Registration Act](#) for having been obtained fraudulently.
21. It is the Plaintiff's case that the 4th Defendant's title was indeed cancelled and the Plaintiff issued with a title in respect of the suit property. The Plaintiff adduced among other documents the Letter of Allotment and the Certificate of Title for the suit property in his names/and the minutes of the meeting held at Ardhi House on February 9, 2020 resolving to revoke the 4th Defendant's title.
22. The Plaintiff also produced in evidence photos showing the status of the suit property, a letter by the Ministry of Lands to the Director of Surveys requesting for another Deed Plan in order to process the Lease, property rates payment requests dated 26th and May 27, 2021, Rent Clearance Certificate for and up to December 31, 2021, letter from the postal corporation indicating that the address used by the 4th Defendant in requesting for allocation was non-existent, a charge sheet in respect of the 4th Defendants Director, amongst other documents.
23. It is apparent from the foregoing narration that both the Plaintiff and the Defendant are claiming ownership of the suit property and both have what appear to be titles to the land. In addition, each of the parties has alleged fraud as against each other. All these issues cannot be conclusively determined on the basis of the untested Affidavit evidence that is before this court.
24. The record shows that vide its Ruling of November 30, 2017, the court decreed that the caveat in place to remain until the hearing and determination of the suit. As such, there is no danger of alienation or disposal of the suit property before the hearing pending the hearing and determination of the suit. I say so because granting a temporary injunction at this stage will mean evicting the Plaintiff from the suit property before trial.
25. That being the case, and considering that the photographic evidence shows that it is the Plaintiff who is possession of the suit property, the most appropriate order to make at this stage is for the maintenance of the prevailing status quo.
26. For those reasons, the court dismisses the application dated February 8, 2022 and makes the following orders:
 - a) The prevailing status quo in respect of Land Reference Number 21939 to be maintained pending the hearing and determination of the suits.
 - b) No new structures, development and or construction should be undertaken on the suit property by any party pending the hearing and determination of the suit.
 - c) Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF JUNE, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ochieng Oduol for the Plaintiff



Mr. Ondati for the 4th Defendant

Mr. Allan Kamau for 1st and 3rd Defendants

No appearance for 2nd Defendant

Court Assistant: June/Tracy

