Mutua v The County Government of Narok; National Land Commission (Interested Party) (Environment & Land Case E007 of 2021) [2022] KEELC 2231 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2231 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE E007 OF 2021

CG MBOGO, J

JUNE 23, 2022

BETWEEN

GODFREY MUTUA ..... APPLICANT

AND

THE COUNTY GOVERNMENT OF NAROK ..... RESPONDENT

AND

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

RULING

1. What is before this court for determination is a notice of motion application dated 8th April, 2021 filed by the applicant and brought pursuant to Article 159 of *the Constitution*, Sections 1,1A,3 and 3A of *the Constitution*, Orders 40 Rule 1 and 2 and 51 (1) and (3) of the *Civil Procedure Rules* seeking the following orders: -

    1. Spent.

    2. Spent.

    3. Pending hearing and determination of this suit, an order of temporary injunction do issue restraining the defendant whether by its agents, employees, servants or any other person working under the defendant's instructions and authority from in any way evicting, interfering with the applicant's quiet possession, entering, trespassing, occupying, demolishing structures or in any other way at all dealing with the plaintiff's/applicant's property Plot No. 212 Block 5 formally plot No. 211 Block 5 in Narok town.

    4. The costs herein be in the cause.

    5. Any other relief the court may deem fit to grant.

2. The application is premised on the grounds on the face of it and in the supporting affidavit of the applicant sworn on 8th April, 2021.The applicant deposed that having bought plot No. 211 Block 5 situate in Narok town from Ms. Patricia Sangriaki and upon payment of transfer fees of Kshs. 15,000/-, he was issued with allotment letter for the suit property in compliance with Town Planning Committee minutes as adopted by the full council minutes and that pursuant to a letter of no objection issued by the defendant's Chief Officer for Planning and Urban Development in January 2018, there is no doubt that the defendant has not raised any challenge in his bid to process the lease certificate for the suit property.

3. The applicant further deposed that owing to his proprietorship of the suit property, he has received demand notices for rent and that he has engaged the defendant and obtained various approvals to construct a residential building in the suit property. That on 10th February, 2016, the National Environment Management Authority issued him with a license to proceed with construction.

4. The applicant further deposed that the Director of Physical Planning vide a notice dated 24th September, 2012 in the dailies invited interested persons for public inspection, which he attended since the said development is adjacent to the suit property. Subsequently, the Director for Physical Planning gazzetted a notice for completion of the part development plan for Narok town on 2nd April, 2015 and the suit property was gazzetted as commercial property. Further, in the course of construction, the District Public Health officer vide a letter dated 13th September, 2007 purported that the construction of his development was unauthorized which was likely to interfere with the hospital drainage. The applicant further deposed that he was shocked when sometime in March 2021 he was informed that he ought to vacate the suit property or otherwise face demolition and eviction and based on that the 1st respondent is misguided that the subject property is located on the hospital's land which has caused the applicant fear and anxiety. That the applicant is at risk of suffering irreparable injury which cannot be compensated by an award of damages.

5. The application is opposed by the replying affidavit of the respondent sworn on 22nd October, 2021 by Vincent Onyango Osewe, the Senior Assistant Director Physical Planning. The respondent deposed that he is the bonafide owner of the land as designated in the approved Narok Development Plan No. 25 as attached to the extract and the designated site was set aside for existing District Hospital and existing County Council Housing by the defunct County Council of Narok hence was not available for alienation. The respondent further deposed that the site has been utilized for public purposes and there is still desire to maintain it for public purposes for future expansion of the existing hospital as per the approved plan of 1985 and that the purpose of the preparation and approval of Narok Zoning Plan of 2016 was to provide a spatial framework for regulation and control in the use of land and therefore was not meant to provide a basis for allocation or formalization of previous allocation.

6. The respondent further deposed that he is aware that the designation of land as county council housing was and remains an allocation for public purposes and that public interest in land outweighs an individual's right to own the same property and further that the applicant has not been in quiet possession from the year 2007 as there have been several letters from the respondent notifying the applicant to keep off public land and that regardless of the amount of time, the applicant has stayed on the land, his status remains that of an illegal squatter. As such, the applicant is in contravention of the *Physical and Land Use Planning Act* of 2019 and does not qualify protection by this court. The respondent further deposed that the applicant's structure sits on the hospitals sewer trunk line which is the only sewer outage which is critical for running of the hospital sewer.

7. The applicant filed written submissions dated 19th May, 2022.The applicant raised two issue for determination which is whether the application meets the threshold for grant of temporary injunction

and who bears the costs of the suit. On the first issue the applicant while relying on the case of *Giella versus Cassman Brown & Company Limited* [1973] E.A 358 and *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 submitted that he is the duly registered owner having acquired the same through purchase. The applicant further submitted that being the registered proprietor, he has a fundamental right to enjoy the use of the land without any interference unless the interference is expressly authorized by law. The applicant relies on the case of *Mohamed Ahmed Dahia & 3 Others versus Abbey Hassan Maalim* [2020] eKLR, *Joseph Siro Mosioma versus Housing Finance of Company of Kenya & 3 Others* [2008] eKLR and *Film Rover International Limited & Others v Common Film Sales Limited* [1986] 3 AER 772.

8. The applicant submitted that on a balance of convenience, he is the rightful owner and is carrying out activities on the suit property and it is only fair that injunctive orders are issued to prevent him from suffering losses.

9. The respondent filed written submissions dated 11th May, 2022.The respondent raised three issues for determination which is: -

    i. Whether a prima case has been established

    ii. Whether the applicant stands to suffer irreparable harm that cannot be compensated by damages.

    iii. Whether the balance of convenience lies in favour of the applicant.

10. The respondent submitted that the issue of ownership is disputed and can only be ascertained during trial as the applicant has not presented any certificate of lease or title as indefeasible proof of ownership. The respondent relied on the case of *Nguruman Limited v Jan Bonde & 2 Others*. That a prima facie case has not been established as the parcel purchased differs from the parcel claimed and for this reason, the applicant has not presented a clear and unmistakable right that ought to be protected by this court.

11. On the second issue the respondent submitted that the issue of ownership of land not being clear as to whether it is plot number 211 or 212, it is also not clear what suffering will be visited upon the alleged purchaser of plot number 211 if an injunction is not issued in respect of a totally different plot which is government land. The respondent submitted that it is imminent upon a party seeking an equitable remedy to be honest and candid. The respondent relied on the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai*, *Kenleb Cons Limited versus New Gatitu Service Station Limited & Another* [1990] KLR and *Philemon L Wambia v Gaitano Lusista Mukofu & 2 Others* [2019] eKLR.

12. On whether the balance of convenience tilts in favour of the applicant, the respondent submitted that the risk in the injunction being issued is that the referral hospital will be restrained from among other things entering the part of the hospital where the sewer trunk line runs which will lead to blockage and result in irreparable harm to the respondent.

13. I have considered the pleadings and the written submissions as well as authorities cited by both parties and the issue for determination is whether temporary injunction can issue pending hearing and determination of the main suit.

14. 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.

15. 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 property is in danger of being demolished as the leader of the respondent has alluded to based on the report in the dailies attached to the applicant's supporting affidavit. The respondent however contends that it is public land reserved for use by the hospital as per the approval plan annexed in its replying affidavit.

16. 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 & 2 Others*, [2003] KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 Others versus Jane W Lesaloi & 5 Others*, (2014) eKLR, 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".

17. In the present case, I note that ownership of the suit property is disputed as the applicant claims ownership vide purchase of plot number 211 Block 5 while the respondent claims the same being public land for use by the Narok District Hospital. However, no material was placed before the court to confirm this. The applicant has not demonstrated proof of ownership, instead, he relies on a copy of an application for new letter of allotment.

18. 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 was 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"

19. 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 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." (Emphasis added).

20. Arising from the above, I find that the notice of motion application dated 8th April, 2022 lacks merit and the same is hereby dismissed. Orders issued on 9th April, 2021 are hereby vacated. Each party shall bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 23RD JUNE, 2022.

MBOGO C.G

JUDGE

23/6/2022

In the presence of: -

CA: Timothy Chuma