



REPUBLIC OF KENYA



**Talent Academy Limited v Kidioni & 3 others (Environment & Land
Case E002 of 2022) [2022] KEELC 2195 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E002 OF 2022
LC KOMINGOI, J
JUNE 16, 2022**

BETWEEN

TALENT ACADEMY LIMITED PLAINTIFF

AND

PATRICK VIRAGE MIRINGA KIDIONI 1ST DEFENDANT

EDWARD KEEN 2ND DEFENDANT

CHIEF LANDS REGISTRAR 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This is the Notice of Motion application dated 5th January 2022.
2. It is brought under Order 40 Rule 1, 2 and 4 of the [Civil Procedure Rules](#) 2010 and Section 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law.
3. It seeks orders:-
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction restraining the 1st Defendant/1st Respondent either by himself, his agents, servants and /or personal representatives from selling, charging, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as L.R No.21920 situated along Kumbe Road, Karen, Nairobi.



- d. That the officer commanding police station Karen Police Station be and is hereby directed to ensure enforcement with orders (b) herein.
 - e. That pending the hearing and determination of this suit, and in furtherance to the preservation of the suit property, the Chief Land Registrar be and is hereby directed to register an inhibition order against the suit property within the next 30 days inhibiting any other or further dealings with the property.
 - f. Spent.
 - g. That the costs of this application be provided for.
4. The application is based on grounds set out in paragraphs 1-32 of the Notice of Motion. It is supported by the supporting affidavit sworn on the 5th day of January 2022 and the supplementary affidavit sworn on 7th April 2022 by Sarah Anzazi Omondi, the Plaintiff's director.
 5. She deponed that the Plaintiff is registered owner of L.R No.21920 situated along Kumbé Road, Karen, Nairobi since 1st May 1995 and that it has enjoyed open and exclusive possession since then. She further deponed that sometime in November 2021, the directors of the Plaintiff were alerted by a vigilant neighbor in the adjacent property that some strangers had trespassed on the Plaintiff's property and appeared to be surveying the land. She added that on 1st January 2022, intruders gained access using a tractor and started ploughing the land.
 6. She deponed that the Plaintiff instructed its Advocate on record to visit the suit property and assess the damage. She added that Mr. Steve Ogolla who is Plaintiff's counsel visited the property and found a surveyor on site who shared telephone contacts of two men believed to own the suit land being the 1st Defendant and one Abdiqani Said. She further stated that the two persons were summoned by the Director of Criminal Investigations at Karen Police station where this incident was reported.
 7. She deponed that the 1st Defendant did not appear but Abdiqani Said honored the summons accompanied by his Advocates and that he clarified that he had no legal rights as he was merely an agent of the 1st Defendant instructed to sub-divide the suit property and advertise it for sale. She deponed that the Plaintiff is apprehensive that if not restrained, the 1st Defendant will alienate the suit land.
 8. The application was opposed by the 1st Defendant vide his replying affidavit sworn on 25th February 2022. He deponed that he was allotted the suit land by the Government of Kenya and was subsequently duly registered as proprietor on 1st August 1998. He added that he has been in occupation since registration and has planted trees that are over twenty (20) years old. He further deponed that in December 2020, he erected a fence and gate which are still intact on the property.
 9. Mr. Miringa also deponed that the orders sought to would seriously prejudice his constitutional right to property and that they are akin to eviction orders which being mandatory injunctions ought not to issue at the interlocutory stage. He refuted the Plaintiff's claims that he was summoned by the police.
 10. On the 28th February 2022, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Plaintiff's/Applicant's submissions

11. They are dated 4th April 2022. Counsel for the Plaintiff raised the following issues for determination:-
 - a. Whether the Applicant has satisfied the test for granting an injunction?
 - b. What are the appropriate remedied in the circumstances?



12. It was counsel for the Plaintiff's submission that the Applicant has satisfied the test for granting an injunction set out in the case of *Giella v Cassman Brown & Company Limited* (1973) E A 358. He pointed out that the Plaintiff has established a prima facie case since the orders sought are to protect the Plaintiff's legal right to ownership of the suit property which it holds title to and to established who is the registered proprietor. He relied on the case of *Moses C Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others* (2014) eKLR.
13. Counsel also submitted that the Applicant will suffer irreparable injury if the order is not granted since the Respondent who has another title may alienate the suit land and sell to 3rd parties. He relied on the case of *Tritex Industries Limited & 3 others v National Housing Corporation & Another*[2014]e KLR. He added that the balance of convenience lies in the Applicant's favour as it has established that it holds a valid title thus it has ownership rights on the property.

The 1st Defendant's /Respondent's submissions

14. They are dated 7th April 2022. It was counsel for the 1st Defendant's submission that the Plaintiff has not established a prima facie case since the Plaintiff and the 1st Defendant have certificates of title issued by the Government of Kenya and on the face of it, the court cannot tell which of the two is valid. He added that the Plaintiff did not establish how it acquired its title. He added that the argument that the Plaintiff's alleged title issued on 1st May 1995 takes precedence over the 1st Defendant's title issued on 1st August 1998 is a fallacy as the court has not been told how the Plaintiff; a company registered on 11th August 1995 acquired the property with effect from 1st May 1995; which is three months before it was registered.
15. It was also counsel for the 1st Defendant's submission that the Plaintiff has not established that it will suffer irreparable injury which cannot be compensated by damages. He argued that that damages are awardable where trespass is proven thus there is no known legal injury that the plaintiff will suffer that cannot be cured through an award of damages.
16. He also submitted that the prayers seeking to restrain the 1st Defendant from "trespassing onto the land" yet he is in occupation is a kin to eviction orders which are mandatory and which ought not to issue at the interlocutory stage as its effects are drastic. He relied on the case of *Hellen Muthoni Kibora v James Kiboro & another* [2007]e KLR. He added that orders sought should be declined as the balance of convenience tilts in favour of the 1st Defendant.
17. I have considered the notice of motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. the issues for determination are:-
 - i. Whether the Plaintiff's/Applicant's application meet the threshold for grant of temporary injunction.
 - ii. Who should bear costs of this application?
18. The Plaintiff seeks an order for grant of an interlocutory injunction. The law governing the granting of interlocutory injunctions 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—

- 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."
19. The conditions for consideration in granting an injunction were settled in the case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: - "Firstly, 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."
20. The Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR reiterated the settled principles in *Giella v Cassman Brown (Supra)* 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. allay 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.”
21. The Plaintiff has established ownership of the suit property. There is evidence of a Certificate of Title to the suit property and evidence of payment of rates. It has also established that there has been interference with the suit land and that the suit land is in danger of being subdivided and sold. The Plaintiff has therefore established a *prima facie* case. In *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 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”.
22. The second limb is whether the Applicant will suffer irreparable injury. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) e KLR the court stated; “irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the



injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

23. The Plaintiff has established its apprehension. There is an agency agreement between the 1st Defendant and one Abdiqani Said to subdivide the suit land and sell 1 acre at kshs.30 million and earn commission on any mark above the reserved price. The 1st Defendant did not dispute the agency agreement. If the suit land is sold, the Plaintiff will suffer irreparable injury.
24. The third limb entails that if in doubt, the court should decide on a balance of convenience. Balance of convenience was explained by the court in Pius *Kipchirchir Kogo v Frank Kimeli Tena* [2018] eKLR, as follows; “The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”
25. The Plaintiff has satisfied this condition. If the orders are granted and the suit land is sold, the Plaintiff will be greatly inconvenienced.
26. The Plaintiff and the 1st Defendant have Certificates of Title over the suit land. They both claim to be in possession of the suit land. They also claim to own the trees planted on the suit land. The 1st Defendant argued that if the orders herein are granted, it will be tantamount to issuing temporary injunctions against him since he would be evicted as he is the one in possession. Possession is a question of fact. In my view, the Plaintiff has established that fact by evidence of rates payment. In *Virginia Edith Wambui v Joash Otieno Ougo* C.A Civil Appeal No 3 of 1987 (19876 eKLR) Cited in *Titus Abidha Gondi v Tina Nasipwondi Romano & 4 others* [2021] eKLR the court stated; “The general principle which has been applied by this Court is that where there are serious conflicts of fact, the trial Court should maintain the status quo until the dispute has been decided in a trial.”
27. There being two separate Certificates of Title issued over the suit property, it is imperative that an order inhibiting further dealings be issued.
28. In conclusion, I find merit in the application and the same is allowed in terms of prayer No (c), (d), and (e) of the notice of motion. The costs of this application do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 16TH DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kimeu with Mr. S. Ogolla for the Plaintiff

Ms Kittony for Mr. Odhiambo for the 1st Defendant



Mr. Khisa for the 2nd Defendant

Steve - Court Assistant

