



REPUBLIC OF KENYA



KENYA LAW
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**Gikonyo v Khan (Environment & Land Case 88 of 2021)
[2022] KEELC 3034 (KLR) (14 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 88 OF 2021**

**MAO ODENY, J
JUNE 14, 2022**

BETWEEN

PETERSON NDUNGU GIKONYO PLAINTIFF

AND

KAKA ANIF KHAN DEFENDANT

RULING

1. This ruling is in respect of an application dated October 28, 2021 by the plaintiff/applicant seeking the following orders: -
 - a) Spent
 - b) Spent
 - c) That pending the hearing and determination of the suit, a temporary injunction be issued restraining the Defendant/ respondent either acting by himself, his servant, and / or agent from trespassing, entering, excavating, quarrying occupying and/ or in any other manner interfering and or dealing with the applicant's parcel of land known as Plot No. 700/III/MN situate in Kanamai area of Kilifi County.
 - d) That the costs of the application be borne by the respondent.
2. This matter was filed under certificate of urgency whereby the court granted interim orders of injunction pending the hearing and determination of the application inter partes. Counsel agreed to canvas the application by way of written submissions which were duly filed.

Applicant's Case

3. The Applicant relied on the grounds on the face of the application together with the supporting affidavit where he deponed that he is the registered proprietor of parcel of land known as Plot Number



700/III/MN measuring approximately 1.081 Hectares situate in Kanamai area of Kilifi County and has been in possession of the same since its purchase.

4. The Applicant also stated that he purchased the suit property on July 30, 2010 at a consideration of Kshs 4,005,000.00 and was issued with a title deed. That on or about October, 2021 the applicant visited the suit property and found that someone was quarrying on the suit property and upon investigation, he established that it was the defendant who was quarrying limestone products and coral blocks without his authority.
5. It was the applicant's case that the defendant's activities on the suit land amounts to trespass and should be stopped by way of an injunction to avoid further activities injurious to the suit land.

Defendant/respondent's Case

6. The defendant/ respondent filled a replying affidavit and deponed the suit land has had ownership dispute and discovered when he wanted to rent the property for purposes of quarrying that the owner was one Lawrence Kazungu Ndoro who showed him an allotment letter dated February 24, 1998.
7. It was the defendant's case that having been convinced that Lawrence Kazungu Ndoro was the owner of the property he entered into a lease agreement dated May 19, 2020 which explains how he got into possession of the suit land.

Plaintiff's Submissions.

8. Counsel relied on the principles for grant of injunctions as was laid down in the case of *Giella vs Cassman Brown*, that an applicant must demonstrate a prima facie case with high chances of success, that he/she is likely to suffer irreparable damages which may not be compensated by way of monetary terms and if the court is in doubt may rule on a balance of convenience.
9. Mr. Mkomba submitted that the plaintiff has established a prima facie case by producing a copy of the title to the suit land hence he is the absolute and indefeasible owner of the property and cited section 26 of the *Land Registration Act*.
10. Counsel relied on the cases of *Kiplangat Shelisheli Mutarakwa v Joseph Rotich Kones* (2018) eKLR and *Mohamed Ahmed Dabia & 3 others v Abbey Hassan Maalim* (2020) eKLR.
11. It was counsel's further submission that between the alleged letter of allotment and a registered title, the holder of a registered title would be superior to that of the holder of an allotment letter over the same property and relied on the case of *Njuwangu Holdings Ltd vs Langata KPA Nairobi & 5 others* (ELC No. 139 of 2013). Counsel therefore urged the court to allow the application as prayed.

Defendant's Submissions

12. Counsel for the defendant submitted that the applicant has not met the threshold for grant of injunctions as was laid down in the *Giella v Cassman Brown* case. That the respondent took over possession and use of the suit property after entering into an agreement on May 19, 2020 and that he believed that the lessor was the owner of the suit property.
13. Ms Achieng further submitted that the applicant has not established any right over the suit property and that damages are ascertainable hence can be compensated and urged the court to dismiss the application with costs.



Analysis and Determination.

14. The issue for determination is whether the evidence tabled before the court is sufficient to meet the conditions for grant of orders of a temporary injunction as per the case of *Giella –versus- Cassman Brown and Company Limited* (1973) E. A.
15. Where an applicant has not established a prima facie case in the first instance then that is the end of any claim to interlocutory relief as was held in the case of *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR the Court of Appeal stated that:-

“With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus,

“If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant’s proposed activities that is the end of any claim to interlocutory relief.”
16. Has the plaintiff/applicant established a prima facie case with a probability of success? The Plaintiff stated that he bought the suit property vide a sale agreement dated July 30, 2010 from Abbas Gedi Gullet for a consideration of Kshs. 4,005,000.00 and produced a copy of a title deed. This is prima facie evidence that he is the absolute and indefeasible owner of the suit land unless there is evidence of fraud or misrepresentation as provided for under section 26 of the *Land Registration Act*. At this interlocutory stage the defendant/respondent has not brought forth any evidence that the Plaintiff fraudulently acquired the suit land.
17. The respondent claimed that he entered into a lease agreement dated May 19, 2020 with one Lawrence Kazungu Ngoro who claims to be the owner of the suit land and possesses an allotment letter. The Respondent also deponed that there has been a dispute as to the ownership of the suit land.
18. The respondent further submitted that damages are ascertainable hence the plaintiff will not suffer any irreparable damage as claimed. it is trite law that where there is breach of the law, an applicant cannot be compelled to accept damages as compensation as was held in the case of *Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 others* [2008] eKLR it was held as follows by Warsame, J (as he was then); -

“...that damages are 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.”
19. The nature of activities claimed to be taking place on the suit land is quarrying which changes the character of the suit land. Quarrying activities such as limestone extraction entail significant impacts and degradation problems as a result of soil depletion and deep alteration to the original topography.
20. The suit land can be at a high risk of erosion due to removal of vegetation and in addition, the common method of quarry exploitation increases drainage and the physical and chemical erosion which hinders natural germination and establishment of young plants. Therefore, even if the court orders for rehabilitation, the damage done cannot be compensated by way of damages as it can never be the same.



21. I have considered the application, the submissions by counsel and the relevant authorities and find that the plaintiff has established a prima facie case with a probability of success against the defendant hence entitled to an order of temporary injunction as prayed.

DATED AND DELIVERED AT MALINDI THIS 14TH DAY OF JUNE 2022

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M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

