



**Ndana v Gitau (Environment and Land Appeal E086 of 2021)
[2022] KEELC 3331 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E086 OF 2021**

JG KEMEI, J

JULY 28, 2022

BETWEEN

EPHANTUS NDANA APPLICANT

AND

EUNICE WANJIKU GITAU RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion Application dated 31/5/2022 premised on Order 22 rule 22, Order 42 Rule 6 and Order 50 rule CPR, Sections 1A, 1B, 3A & 63(e) *Civil Procedure Act* and Article 159 (d) Constitution of Kenya seeking Orders THAT;
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of this appeal there be a stay of execution of the judgment delivered by the Honorable C.K Kisiangani SRM in Ruiru SPMCC MCLE Case No. 51 of 2020 delivered on the October 14, 2021 and all consequential orders.
 - d. This Honorable Court be pleased to grant an order of temporary injunction restraining the Respondent, her agents and/or representatives from developing, selling, charging, subdividing or in any way dealing with the property known as Ruiru/Ruiru East Block 2/2135 pending the hearing and determination of this Application.
 - e. This Honorable Court be pleased to grant an order of temporary injunction restraining the Respondent, her agents and/or representatives from developing, selling, charging, subdividing or in any way dealing with the property known as Ruiru/Ruiru East Block 2/2135 pending the hearing and determination of Applicants' appeal.
 - f. The costs of this Application be in the cause.



2. The Application is based on the grounds on the face of it which are reiterated in the Supporting Affidavit of Ephantus Ndana, the Applicant. He deposed that he is in occupation of Ruiru/Ruiru East Block 2/2135, the suit land and aggrieved by the trial Court judgment delivered on 14/10/2021 and annexed copy of the decree as EN1. That the Respondent has moved the trial Court for orders of demolition and eviction against him in execution of the impugned Judgment to his detriment and family. A copy of the Respondent's Application is annexed as EN2. That he filed the instant appeal to challenge the finding of the trial Court on ownership of the suit land in favour of the Respondent and that if the demolition and eviction is not stopped, he would lose his homestead as shown by annexed photographs EN3 rendering his appeal nugatory. He also swore his willingness to deposit any reasonable amount as security for the appeal.
3. The Application is vehemently opposed.
4. The Respondent Eunice Wanjiru Gitau swore her lengthy Replying Affidavit on 29/6/2022. She averred that the instant Application is an abuse of the Court process as the Applicant filed a similar application for stay of execution and injunction dated October 21, 2021 that was dismissed on 5/5/2022 by this Court; copies of the said Application and Ruling were annexed as EWG1. That accordingly the instant application is res judicata and the Court is functus officio and if the Applicant is dissatisfied; his remedy lies in an appeal or review of the Ruling. That this Court should not entertain the Applicant's attempt to appeal that Ruling or re-litigate his application by way of edits.
5. Furthermore, the Respondent avowed that she is the registered owner of the suit land as shown by her title deed, EWG3 and affirmed by the trial Court Judgment, EWG2 which the Applicant is hellbent on frustrating her rightful enjoyment. That the Applicant has not adduced any evidence to demonstrate his purported ownership of the suit land and how he acquired it if at all, thus failing to prove any prima facie case in his favor. She urged the Court to dismiss the application with costs.
6. On 28/6/2022 directions were taken for the parties to canvass the application by way of written submissions. None of the parties complied as at 27/7/2022.
7. The sole issue calling for determination is whether the instant application is merited. It is not in doubt that the Applicant had filed a similar application dated October 21, 2021 principally seeking a stay of execution of the impugned trial Court judgment and the same was dismissed on 5/5/2022. It is against this background that the Respondent argues that the instant Application offends the doctrine of res judicata but the Applicant was insistent that there was change on the state of affairs as the Respondent had moved the trial Court for demolition orders necessitating the filing of this Application.
8. The legal provision on res judicata is anchored in Section 7 *Civil Procedure Act* that;
 - “7. Res judicata
No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
9. The issue of stay of execution of judgment was directly and substantially heard and finally determined by this Court in the Ruling delivered on 5/5/2022. It cannot be re-litigated upon at this juncture and as rightly pointed out by the Respondent, the Applicant's recourse is to appeal or Review the said



Ruling. The Applicant's reliance on the provisions of Order 22 rule 22, Order 42 rule 6 and Order 51 rule 1 Civil Procedure Rules do not contemplate re-litigation of the instant nature.

10. The other prayers 4 & 5 chiefly seek temporary injunction against the Respondents from adversely dealing with the suit property. The legal provision for temporary injunction is found in Order 40 Rule 1 of the CPR that;

“ 1. Cases in which temporary injunction may be granted

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 orders.”

11. It is now well settled law that the granting of injunctive relief is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience. See the celebrated cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR.

12. The starting point is to establish whether the Applicant has demonstrated a prima facie case to grant the orders sought. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 123, 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 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.”

13. In *Nguruman* case supra the Court of Appeal went on to further state 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. 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.

14. The Applicant's case is that if the Application is not granted, the Respondent will proceed to obtain eviction orders against him and he stands to lose his homestead of over a decade's occupation. The



Applicant annexed EN2, copy of the Applicant's application in the trial Court. However he did not file his response thereto (if any) for this Court's to consider and satisfy itself of the claims he has raised herein. On the other hand, the Respondent adduced a copy of the suit land title deed in her favor and the trial Court's judgment affirming her ownership. The totality of the foregoing in my view is that the Applicant has not proven a prima facie case that this Court would infer that a right has been infringed as was held in the Mrao case supra.

15. The other two tests (whether an award of damages would be insufficient to alleviate any damage caused and the balance of convenience) are consecutively considered upon a claimant's proof of a prima facie case. Having failed to do so, then those tests are moot for deliberation. See the case of Kenya Commercial Finance & Co. Ltd v Afraha Education Society [2001] 1 EA 86, where the Court held that:-

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the Court is in doubt it will decide the application on a balance of convenience. See *Giella v Cassman Brown & Co. Ltd* [1973] EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt then the third condition can be addressed.”

16. In the end the application is unmerited. It is dismissed with costs to the Respondent.

17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JULY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Bore for the Appellant

Mokaya for the Respondent

Court Assistant – Phyllis Mwangi

