



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kanee v Viridi & 2 others (Environment & Land Case  
E288 of 2020) [2022] KEELC 2655 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2655 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E288 OF 2020**

**OA ANGOTE, J**

**JULY 21, 2022**

**BETWEEN**

**PETER MWANGI KANEE ..... PLAINTIFF**

**AND**

**JASPER SINGH VIRDI ..... 1<sup>ST</sup> DEFENDANT**

**DAVINDER SINGH VIRDI ..... 2<sup>ND</sup> DEFENDANT**

**JESMINDER SINGH VIRDI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Background**

1. Before this court for determination is the Plaintiff's Notice of Motion application dated 8<sup>th</sup> December, 2021 brought pursuant to the provisions of Section 68 (1) of the *Land Registration Act*, 2012, Section 81 of the *Civil Procedure Act*, 2010 and Orders 40 Rules 1,2,3 & 4 of the *Civil Procedure Rules*, 2010 seeking the following reliefs;
  - a. That Pending the hearing and determination of this suit, this Honourable Court be pleased to issue a Temporary Injunction restraining the Defendant and or her agents and or servants and or employees and or relatives from entering and or trespassing into or evicting and or alienating and or transferring, or in any manner whatsoever interfering with the Plaintiffs' right to ownership, possession and use of a portion of Land Reference Number 12458/8 situated at Industrial Area, Enterprise Road, Nairobi County.
  - b. That the officer commanding Reuben Police station assist to enforce the court order issued.
  - c. That the costs of the Application be borne by the Defendants.



2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Peter Mwangi Kanee in which he deponed that he is the rightful owner of all that property known as L.R NO 12458/8 (herein after the suit property) as evinced by the Certificate of Search generated on 16<sup>th</sup> March, 2021 and that he has been in possession of the suit property alongside other residents since 1971 and has been paying rent and rates over the property.
3. The Plaintiff deponed that him, together with his family, have been threatened, humiliated and evicted from the property at the behest of the Defendants and are at the risk of losing their property; that despite the ongoing court proceedings, the Defendants have blatantly began construction on the suit property which they have no legitimate claim over and that he stands to suffer irreparable loss if the orders sought are not granted.
4. The 1<sup>st</sup> Defendant did not respond to the application.
5. In response to the application, the 2<sup>nd</sup> Defendant on his own behalf and on behalf of the 3<sup>rd</sup> Defendant filed a Replying Affidavit in which he deponed that there is a similar unprosecuted application for injunction dated 30<sup>th</sup> October, 2021 and that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants only became aware of the Plaintiff's claim over the suit property when the 1<sup>st</sup> Defendant forwarded to them a letter from the Plaintiff's then counsel demanding that the 1<sup>st</sup> Defendant ceases all activities on the suit property.
6. According to the 2<sup>nd</sup> Defendant, their counsel responded to the letter by asking the Plaintiff to furnish them with the transfer documents used to transfer the parcel of land to him, which request the Plaintiff declined; that the 1<sup>st</sup> Defendant secretly sub-divided their land –L.R No 12458/5 into two portions being L.R No 12458/8 (suit property) and 12458/9 and that on 12<sup>th</sup> December, 2012, the 1<sup>st</sup> Defendant filed a suit against the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants being ELC Civil Suit No 978 of 2012 seeking an order to compel them to execute relevant documents to facilitate registration of the sub-divisions.
7. It was the deposition of the 2<sup>nd</sup> Defendant that on 5<sup>th</sup> May, 2020, Justice Christine Ochieng delivered a judgment in the aforesaid suit revoking the sub-divisions L.R No 209/12458/8 and L.R No 209/12458/9 and compelled the 1<sup>st</sup> Defendant herein to sub-divide L.R No 209/12458/5 equally among the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants as tenants in common.
8. The Defendants deponed that they went to the office of the Director of Criminal Investigations and gave them a copy of their Title Deed and the alleged Lease Title held by the Plaintiff and requested them to investigate its validity; that the DCI conducted investigations which concluded that the Plaintiff's title is not legitimate and that it is apparent that the Plaintiff has no legal interest in the suit property.
9. The Plaintiff's and the Defendants filed written submissions which I have considered. I have also considered the filed authorities.

### **Analysis & determination**

10. The law on grant of interlocutory injunctions is provided for in Order 40 Rule 1 of the Civil Procedure Rules, 2010. The same 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.”

11. Therefore, under Order 40 Rule 1 of the Civil Procedure Rules, an order of temporary injunction may issue where the court is satisfied that there is a likelihood of the suit property being wasted or alienated before the suit is heard and determined.
12. Being an application for injunctive orders, the same shall be weighed against the requisite essentials set out in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358 thus:

“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.”

13. The Plaintiff/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 vs Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court stated thus;

“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) Alleviate 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.”



14. As correctly cited by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, the Court of Appeal in *Mrao Ltd vs 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.”

15. More recently, the Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*(supra) while agreeing with the definition of a prima facie case 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.”

16. The Court will be guided by the foregoing principles as well as the general principle that no definitive findings on law or facts should be made at this interlocutory stage.
17. Vide the present application, it is the Plaintiff’s/ Applicant’s case that he is and has at all material times been the duly registered proprietor of the suit property having been allotted the same by the Government and has been in possession thereof since 1971, been paying land rates and rents and that he resides on the suit property with his family.
18. It is the Plaintiff’s case that he owns a car wash business situate on the suit property; that notwithstanding the suit, the Defendants have begun construction on the suit property and that the Defendants have no legitimate claim over the property.
19. The Plaintiff annexed on his Affidavit a certificate of official search dated 16<sup>th</sup> March, 2021, Rent Clearance Certificate for the years 2019 and 2020, Rates Payment Receipts and photos showing the Defendants’ construction on the suit property.
20. In contrast, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that the Plaintiff has no legitimate claim to the suit property which in any event does not exist having been revoked by the court in ELC 978 of 2012; that the suit property arises from an illegal sub-division of L.R No 209/12458/5 and that any purported transfer thereof was fraudulent and illegal. According to the Defendants, investigations by the DCI affirmed that the Lease Certificate held by the Plaintiff is not legitimate.



21. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants adduced in evidence a copy of the application dated 30<sup>th</sup> October, 2021 and the response thereto dated 9<sup>th</sup> April, 2021, the judgment in ELC 978 of 2012, correspondence between the Plaintiff's counsel and their counsel, a report from the Directorate of Criminal Investigations and Deed Plans for the sub-divisions of L.R 209/12458/5.
22. It is apparent from the foregoing that the Plaintiff's title to the suit property is disputed. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants maintain that the same arises from an illegal sub-division of their property being L.R No 12458/5. They also assert that the same was revoked by the court in ELC 978 of 2012 and has been declared illegal by the Directorate of Criminal Investigations. At this point, the court will not engage in a discussion with respect to the impact of the Judgment in ELC No. 978 of 2012 or the allegations of fraud which are issues best left for the main hearing.
23. The above notwithstanding, it is common ground that where a registered proprietor's root of title has been challenged, he is obligated to demonstrate how he acquired the land. This was aptly expressed by the Court of Appeal in the case of *Munyru Maina vs Hiram Gathiba Maina* [2013] eKLR which held as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal, and free from any encumbrances including any and all interests which would not be noted in the register?”
24. In this instance, the Plaintiff has not attempted to demonstrate how he acquired the title. Further, while asserting that he has been in occupation of the suit property and is running a business thereon, no evidence has been availed in this respect. The Plaintiff did not also respond to the legality of his title in view of the Judgment in ELC No. 978 of 2012 cancelling the mother title which gave rise to the title he is holding.
25. The certificate of official search, the rates clearance certificate and the property rates requests are insufficient for purposes of establishing a prima facie case, and more so considering the documents annexed on the 2<sup>nd</sup> Defendant's Affidavit. That being the case, the court is constrained to make a finding that the Plaintiff has not established that he has a prima-facie case with chances of success.
26. With regard to irreparable harm, the damage caused to the Applicant should be such that it cannot be remedied by damages. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (supra) the Court stated as follows on irreparable injury or damage:

“On the second factor, that the applicant must establish that he might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”



27. As stated above, no evidence has been adduced with respect to the Plaintiff's alleged possession of the suit property nor the business which has been established thereon. The Court is therefore unable to make a finding that the Applicant will suffer irreparable damages that cannot be compensated if the prayers sought are not granted.
28. In conclusion, the court declines to grant the prayers sought in Notice of Motion Application dated 8<sup>th</sup> December, 2021. However, to preserve the suit property in its present status pending the hearing of the suit, the court makes the following orders:
- a. Pending the hearing and determination of this suit, and until further orders by the court, neither party shall develop, sell, transfer, lease, charge or in any other manner alienate the suit property namely, Land Reference Number 209/12458/8 situated at Industrial Area, Enterprise Road, Nairobi County.
  - b. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21<sup>ST</sup> DAY OF JULY, 2022.**

**O. A. ANGOTE**

**JUDGE**

In the Presence of;

No appearance for Plaintiff

Mrs Gichuhi for Defendant/Respondent

Court Assistant - June

