



Mwangi v Muthoni & 2 others (Environment and Land Case Civil Suit E107 of 2022) [2022] KEELC 12750 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E107 OF 2022
MD MWANGI, J
SEPTEMBER 27, 2022**

BETWEEN

JECINTA NJERI MWANGI PLAINTIFF

AND

LUCY MUTHONI 1ST DEFENDANT

JAMES MUTURI NGUGI 2ND DEFENDANT

PEJOM CONTRACTORS LTD 3RD DEFENDANT

(In respect of the Plaintiff's Notice of Motion Application dated 14th March, 2022)

RULING

Background

1. The application for determination before this court is the plaintiff's application dated the March 14, 2022. The applicant prays for orders that during the pendency of this suit;
 - a. An order of injunction be issued against the 3rd defendant or its agents from directing the storm water of the estate known as Ceder Grove Estate at the gate and property known as LR No 12500/5.
 - b. A temporary injunction to be issued against the 1st and 2nd defendants stopping them from allowing the storm water or waste from leaking or flowing into the property known as LR No 12500/5.

Plaintiff's Case

2. The applicants' case as set out in the body of the application and the supporting affidavit sworn by the applicant, Jecinta Njeri Muthoni on March 14, 2022 is as that the applicant is the registered proprietor



of the parcel of land known as LR No 12500/5 situated in Kasarani in an estate called Ceder Grove Estate Nairobi whereas the 1st respondent is the registered owner of parcel of land known as LR No 12500/4, which parcel is adjacent to the Plaintiff's land on the right boundary. The 2nd respondent on the other hand is the occupant of the parcel of land known as LR No 12500/6 which is adjacent to the plaintiff's property on the left boundary.

3. The applicant deposes that the 1st respondent has caused her bathroom water, drainage water and storm water to leak to her property by constructing a perimeter fence intentionally leaving 'space leakages' to allow the flow of water. The 2nd respondent on his part has caused the drainage water and waste water from the property he is occupying to leak into the applicant's property. The applicant also claims that the leakages from the two properties are posing environmental risks and placing her at the risk of contracting diseases from the raw sewer. Further, that her property stands to depreciate in value as a result of the damage caused by the leakages. This, she affirms is a violation of her rights to property.
4. The deponent further accuses the 3rd respondent of directing all the estate's storm water to her property while undertaking construction works on the estate's road thus blocking her from accessing her property comfortably. She affirms that the 3rd respondent has declined to direct the storm water to the public sewer drainage system or the river in the area. The refusal by the 3rd respondent to direct the storm water elsewhere is likely to cause flooding at her property during the rainy seasons. Further that the 3rd respondent did not carry out an assessment of the implications of directing storm water to her property.
5. The application was opposed by the defendants/respondents who filed a replying affidavit deposed by Lucy Muthoni dated the May 4, 2022.

Replying Affidavit

6. The deponent of the replying affidavit avers that the applicant has not disclosed any reasonable cause of action to warrant issuance of the orders sought. She states that what they actually had with the Applicant was a boundary dispute but the dispute was resolved by the local administration and a surveyor.
7. The deponent denies that any spillage or leakage of bathroom water, drainage water or storm water from her property to the plaintiff's property. She further states that the 3rd defendant was contracted by members of the estate to carry out Cabro works for ease of movement within the estate and for the benefit of every resident in the estate. That 3rd defendant set up an appropriate drainage to channel all the rain water as a prerequisite measure to ensure the construction was done efficiently and to ensure that it did not infringe on anyone's rights.
8. The deponent alleged that the application had been filed with a malicious intention of stopping the construction of the road. The issue of the encroachment is still pending before the necessary government agencies. The applicant is trying to conceal and cover up the fact that she had grabbed a portion of the road reserve.
9. In the course of the hearing of the application the Court directed that the matter be reported to the National Environmental Complaints Committee (NECC) and a report filed in court under the provisions of Section 32 of the *Environmental Management and Co-ordination Act, 1999*. NECC indeed filed a report dated April 25, 2022 in compliance with the order of the court.
10. Upon being served with the report, the defendants /respondents filed a further replying affidavit in response to the NECC Report sworn on the June 15, 2022 by the 1st respondent. The respondents



expressed their reservations about the report by NECC protesting that its signatory had not been part of the team that had visited the ground.

Court's Directions

11. The court directed that the application be canvassed by way of written submissions. The parties complied and filed their submissions. The plaintiff/applicant filed her submissions dated the July 13, 2022 whereas the defendants/respondents filed their submissions dated the July 28, 2022. Both parties reiterated their respective positions backing them up with relevant legal provisions and cited a number of authorities.

The Plaintiff/Applicant's submissions

12. The applicant submitted that in her opinion, the two issues for determination in this matter were whether she should be granted the orders sought in her application and secondly whether the report by NECC should be considered. On the first issue, the applicant submits that she has met the conditions for grant of an injunctions stated in the case of *Giella vs Cassman Brown & Co Ltd* (1973) EA 358, which are that;
 - a. an applicant must establish a *prima facie* case with a probability of success;
 - b. An applicant must demonstrate that unless orders sought are granted, she will suffer irreparable harm, and
 - c. If the court is in doubt as to the above the application will be determined on a balance of convenience.
13. On the first condition of establishing a *prima facie* case, the applicant avers that the 3rd respondent did not conduct an Environmental Impact Assessment and obtain a license before commencing construction of the road. Further that the drainage constructed by the 3rd respondent is temporary and lacks adequate capacity. She stated that the NECC report confirmed that in deed there was effluent seeping from the ground near the 1st and 2nd respondent's septic tanks through the perimeter walls into her compound. She contends that the actions are degrading and damaging her property therefore infringing on her right to quiet enjoyment of her property. The said infringement ought to be stopped.
14. The applicant further submits that she has met the 2nd condition on demonstrating that unless the orders sought are granted she will suffer irreparable harm. The applicant submits that the leakages and seepage into her property will cause her to suffer irreparable loss, which loss cannot be compensated by way of damages. That the storm water renders the property unusable. Further that the effluent leaking to her property prevents her from using the affected areas. The leaking also exposes her and her family to unclean environment with a risk of contaminating diseases.
15. On the last condition as to whether the balance of convenience tilts in her favour, the applicant submits in the affirmative. She asserts that she stands to suffer irreparable loss. That her property will continue degrading due to the commissions/omissions by the respondents. She submits that having proved ownership of the property and the breach of her constitutional rights, she is entitled to an injunction.
16. The second issue for determination as per the applicant is whether NECC report should be considered, she submits that it should. The committee carried out its inspection as an independent entity. That being such an entity anyone authorized by the entity to sign the report can do so. Therefore, the issue that the officer who executed the report having not visited the site is a non-issue. In any event, the report was done pursuant to the court's directions. The findings of the report are therefore binding on both parties.



1st, 2nd and 3rd Defendant's Written submissions

17. The respondents on their part submit that the issue for determination is whether the plaintiff is entitled to the reliefs she seeks from the court in the application. The respondents submit that the application seeks final orders at an interim stage. Their case is that the prayers sought in the plaint are similar to those in the application. They further submit that the orders sought will effectively determine the suit without testing the veracity of facts and the circumstances at the hearing. The respondents cite the case of *Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola* (2009) eKLR.
18. It is the respondents' submission that the applicant is guilty of non-disclosure of material facts yet what she is essentially seeking from the court is an equitable relief. Have encroached on a road reserve therefore, the respondents are of the view that she has dirtied her hands and is not entitled to the orders sought. She came to court with unclean hands.
19. The respondents submit that the 3rd respondent has constructed a proper drainage as part of the cabro works in the estate. That in fact the said drainage passes through the property of the 1st defendant.
20. The respondents' case is that the applicant has attempted to misled the court with the false allegation that the sewer water from the 1st and 2nd defendants properties is leaking into her property.
21. The respondents argues that the court should not rely on the NECC report as the maker did not visit the site. The contents of the report therefore amount to hearsay. That in any event, the issues raised in the report have not been verified through cross-examination hence should not be relied on. No probative value should be placed on it.
22. On the threshold for grant of the interim reliefs sought, the respondents submit that the applicant has not established a *prima facie* case to warrant the grant of the same. The allegations of storm water and drainage leaking into the applicant's property have not been substantiated. The respondents further argue that there is no harm to be suffered by the applicant and if any, the same could be compensated by way of damages. Finally, that the balance of convenience tilts in favour of not granting the relief sought. The respondents contend that the orders sought are final in nature hence will render the suit an academic exercise if granted at this stage. The application should therefore be dismissed with costs.

Issues for Determination

23. I have considered the application, the affidavits both in support and in opposition of the application, as well as the rival submissions thereof. The only issue for determination in this matter is whether the plaintiff has made the case for the grant of an interlocutory injunction.

Analysis and Determination

24. The applicant seeks a temporary injunction. The principles to be considered in determining an application for an order of temporary injunction were pronounced in the case of *Giella v Cassman Brown* [1973] EA 358, where it was held that in order to qualify for an injunction: -

“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”



25. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR the Court of Appeal elaborated the meaning of a prima facie case and stated as follows:
- “ a prima facie case in a civil application includes but is 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 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.”
26. The Court of Appeal in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* (2014), while upholding the 3 conditions pronounced in the Giella case stated that, ‘the 3 conditions and stages are to be applied as separate distinct and logical hurdles which an applicant is expected to surmount sequentially.’
27. This court in the case of *Nicholas Njeru Muturi v Thome Dynamics Limited & another* [2022] eKLR stated that the essence of the holding in the Nguruman case is that ‘...if a prima facie case is not established, the court need not go farther to consider if the applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.’
28. The applicant herein seeks a temporary injunction. She alleges that there are sewer leakages from the 1st respondent’s property, who has caused her bathroom water/drainage water/storm water to leak to the applicant’s property by constructing a perimeter fence intentionally leaving spaces for the leakages to flow. The 2nd respondent on his part is accused of causing the drainage water and waste water from the property he is occupying to leak into the applicant’s property.
29. The applicant also claims that the leakages from the two properties are posing environmental risks and placing her at the risk of contaminating diseases from the raw sewer. Consequently, her property risks depreciating in value. She additionally accuses the 3rd respondent of failing to set -up an appropriate drainage system before undertaking the constructions of the estate road.
30. The respondents on their part denied the allegations raised by the applicant. They accuse the applicant of misleading the court. They deny any spillage or leakage of bathroom water, drainage water or storm water from their properties to the plaintiff’s property. The 3rd respondent in deed built a drainage to which it has directed all the estate’s storm water to. Worth noting is that the drainage ways pass through the 1st and 2nd respondent’s properties. The respondents alleged that the wetness on the plaintiff’s walls is as a result of the applicant’s own irrigation activities in her property. Regarding the sewage, the respondents aver that the seepage could be from the applicant’s open pit latrine.
31. The respondents contend that the real dispute between the applicant and the 1st and 2nd respondent is a boundary related dispute. They assert that the applicant has actually encroached on the road reserve and she is merely trying to divert attention from that issue. That matter is pending before the necessary government agencies for resolution.
32. This court directed the applicant to report the complaint to the National Environmental Complaints Committee for investigation. The NECC upon receipt of the complaint conducted an enquiry and duly filed a report dated April 25, 2022. The NECC is a legally established institution, and any officer duly authorized to execute documents on behalf of the institution can do so. Although the maker of the report did not visit the site, the institution’s agent did attend. Their findings have been captured and incorporated in the report. I am of the view that the report and the contents therein are admissible and I will consider them as I make this ruling.
33. The NECC report, part B at page 3, shows that there was a consultative meeting at Cedar Groove Estate with the local administration, a representative of the complainant, the 1st and 2nd respondents together with their advocate and surveyors as well as other residents. The applicant’s representative



raised his complaints. It emerged from the meeting that the general area is swampy and has issues of flooding during the rainy seasons. The applicant had been requested to provide a wayleave for the construction of a culvert to drain off the storm water but she declined. It was further observed in the said meeting that the applicant never attends meetings making it difficult to come up with a permanent solution.

34. Further, at part D, page 5, from the meeting held with the Public Health Officer, Kasarani Ward, NECC team learnt that the area had received rains and it was difficult to ascertain if the seepage at the complainant's premises were groundwater or waste water.
35. There was another meeting with the 3rd respondent as indicated in the report at page 6. The 3rd respondent informed the NECC team that it had started the installation works and fitting of the cabros on the road. However, the work had stalled due to a boundary dispute between two neighbours on a wayleave for putting up a storm water drainage channel. Although one resident had provided a wayleave to channel storm water from the estate, it had a low capacity and was not adequate. It was observed from the said meeting that the complainant's compound is on a lower gradient as compared to the respondents' compounds which are separated by concrete perimeter wall. It was observed that there was effluent seeping from the ground near the respondents' septic tanks through the perimeter walls and into the applicant's compound. There were several soak pits and septic tanks in the area as the area does not have a sewer line.
36. There is no dispute in this matter that the applicant, the 1st and the 2nd respondents are distinct registered proprietors of their respective properties.
37. From the material before this court, the applicant has not established a *prima facie* case with a probability of success against the respondents. I say so because it is evident that the applicant's property is on the lower gradient and the estate lacks a drainage channel. The storm water flowing into the applicant's parcel cannot therefore be solely blamed on the respondents. The 2nd respondent has in fact provided a wayleave to channel storm water from the estate though it has a low capacity. Requests to the applicant to provide a wayleave for a permanent solution have not been successful. The respondents are therefore not to blame for the woes, if any, that the applicant is complaining of.
38. Regarding the effluent seeping to the applicants property, the 1st and 2nd respondents have denied the allegation by the applicant. The Public Health Officer for the area stated that it is not clear whether the seepage was groundwater or waste water. It is further evident that the seepage was from the ground near the respondents' septic tanks. It has however not been shown that in deed the leakage is from the respondents' septic tanks considering that there were several soak pits and septic tanks in the area. The issue seems bigger than the applicant perceives it and will require concerted action by concerned state agencies for a permanent solution to be found. I do hope that the plaintiff/applicant will consider taking appropriate legal action to compel the said state agencies undertake their responsibilities to guarantee her and other residents a clean and healthy environment.
39. It is my finding therefore that the applicant has not established a *prima facie* case against the respondents.
40. In any event, it is indicated in the report that the 3rd respondent has since stopped the construction of the road at the estate until the arising issues are resolved. The applicant has not disputed this position. Therefore, the temporary injunction sought against the 3rd respondent is overtaken by events.
41. Since a *prima facie* case has not been established against the respondents, and going by the holding in the Nguruman Ltd case (supra), it is not necessary for this court to consider whether the applicant will suffer irreparable harm unless the orders sought are granted.



Conclusion and disposal

42. The upshot from the foregoing is that the court finds that the plaintiff has failed to satisfy the requirements for the grant of the interim injunction. Accordingly, the plaintiff's notice of motion application dated March 14, 2022 is hereby dismissed with costs to the defendants.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Muriuki for the Defendants/Respondents.

No appearance for Plaintiff/Applicant

Court Assistant – Hilda.

M.D. MWANGI

JUDGE

