



REPUBLIC OF KENYA



**Hebatullah & another v Tumpei & 2 others (Environment & Land Case E36 of 2022) [2022] KEELC 13344 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13344 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E36 OF 2022  
LA OMOLLO, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**MOHAMED UL BAQIR SAIFUDIN HEBATULLAH ..... 1<sup>ST</sup> PLAINTIFF**

**ZOEB HUSSEINBHAI HEBATULLAH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PHILIP SAIYUAH TUMPEI ..... 1<sup>ST</sup> DEFENDANT**

**HASSAN ALIOW ROBA ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect to the plaintiffs'/applicants' notice of motion dated June 24, 2022.
2. The application seeks the following orders:
  1. Spent.
  2. Spent.
  3. That pending hearing and determination of this suit this court be pleased to issue a prohibitory order and/or order of inhibition prohibiting any dealings with land parcel number Nkuru Municipality Block18/73 other than those done at the instance of the plaintiffs/applicants.
  4. That this honourable court be pleased to issue such conservatory orders as to preserve the subject matter of the suit herein being land parcel number Nakuru Municipality Block18/73 pending the hearing and determination of this suit.



5. That pending hearing and determination of this suit, this honourable court be pleased to issue a temporary injunctive order restraining the 1<sup>st</sup> and/or 2<sup>nd</sup> defendants/respondents by themselves, representatives, servants, agents and/or any other persons acting under their instructions or interests from entering, occupying, possessing, dealing, remaining, trespassing onto, constructing or in any other manner interfering with all that parcel of land known as Nakuru Municipality Block 18/73.
6. That costs hereof be borne by the defendants/respondents in any event.
3. The application is based on the grounds on its face and supported by the affidavit sworn on June 24, 2022 by one Mohammed Ul Baqir Saifudin Hebatullah.

**plaintiffs'/applicants' Contention.**

4. The plaintiffs/applicants contend that together with Zoeb Husseinbhai Hebatullah they are the lawful and registered proprietors of Nakuru Municipality Block 18/73 the suit property herein. He further contends that they acquired the property through leasehold and were issued with a certificate of lease on July 26, 1994.
5. It is his contention that they have been in use and/or occupation of the suit property since September 1, 1985.
6. He further contends that the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondent have illegally and unlawfully trespassed into the suit property and erected a perimeter wall around it.
7. He contends that on May 25, 2021 the Land Registrar Nakuru issued them with a certified copy of the green card which affirmed that they are the true registered proprietors off the suit property.
8. He further contends that the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondents have colluded with the 3<sup>rd</sup> defendant/respondent to change the ownership of the suit property to that of the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondent and have been consequently issued with certificates of lease dated August 9, 2019 and November 5, 2013 respectively.
9. The plaintiffs/applicants contend that they have since been paying the land rate and rent in respect of the suit property while the defendants/respondents are strangers to such lawful obligations.
10. He contends that they are exposed to the risk of being vacated from the suit parcel by the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondent who have since threatened to enter, trespass, put up permanent structures, sub-divide, sell and/or interfere with their quiet and peaceful enjoyment of the suit property.
11. He ends his deposition by stating that unless the court intervenes to prohibit further dealings with the suit property, they might try to dispose of the parcel to third parties. He urges the court to grant them the orders as sought in their application.

**Respondent's Response.**

12. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondents did not file any response to the application.
13. On September 19, 2022 the matter came up for hearing of the application and the 3<sup>rd</sup> defendant/respondent's counsel stated that the 3<sup>rd</sup> defendant would not be opposing the application



## Analysis and Determination.

14. I have considered the application, the supporting affidavit together with the material on the court record and the only issue for determination is whether the plaintiffs/applicants are entitled to the orders as sought in the application.
15. Though this application is unopposed, the court must be satisfied that the plaintiffs/applicants have met the threshold for grant of the orders for temporary injunction.
16. On September 19, 2022 when the application came up for hearing, Counsel for the plaintiffs/applicants stated that they are seeking orders in terms of prayer 3 and 5 on the face of the application. Essentially abandoning prayer 3 and prayer 2 having been overtaken by events.
17. A summary of the two prayers are that the plaintiffs/applicants seek:
  - a. Temporary injunctive orders against the 1 and 2<sup>nd</sup> defendants/respondents to restrain them from dealing in any way with the suit parcel of land pending determination of the suit.
  - b. Prohibitory order and/or order of inhibition prohibiting any dealings with the suit parcel other than those done at the instance of the plaintiffs/applicants.
18. The law governing the grant of temporary injunction is order 40 rule (1) (a) and (b) of the [Civil Procedure Rules 2010](#). Further, there are principles set out for grant of a temporary injunction which were spelt out in the case of [Giella v Cassman Brown](#) (1973) EA 358. The principles were reiterated in the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) CA No 77 of 2012 (2014) eKLR where the Court of Appeal held as follows:

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”
19. On the issue of prima facie case the decision of [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] KLR 125 is instructive. A *prima facie* case was defined as follows:

“In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
20. It is plaintiffs/applicants case that they are the lawful and registered proprietors of Nakuru Municipality Block 18/73 which they acquired through leasehold and were issued with a certificate of lease on July 26, 1994. It is also their contention that they have been in occupation of the suit property from September 1, 1985 and that the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondent have illegally and unlawfully trespassed onto it. The plaintiffs/applicants have attached copies of the certificate of lease and green



- card. Both show that the suit property is registered in their name. to this end, they have established a prima facie case.
21. Annexure UBS2 is an enforcement notice. It shows that the 1<sup>st</sup> and 2<sup>nd</sup> defendant applied for a permit from the county government of Nakuru to construct a perimeter wall around the suit property. Also annexed to the application are photographs showing the ongoing construction and part construction of the perimeter wall. There is no doubt that the plaintiffs/ applicants are bound to suffer irreparable loss if the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendant are not prohibited and the construction continues and/ or is completed.
  22. In view of the foregoing, I find that the plaintiffs/applicants have indeed met the threshold for grant of orders of temporary injunction.
  23. The second prayer is that the court issues an order of orders of prohibition and/or order of inhibition prohibiting any dealings with the suit parcel other than those done at the instance of the plaintiffs/ applicants.
  24. Section 68(1) of the *Land Registration Act* provides as follows:

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
  25. In *Japhet Kaimenyi M’ndatho v M’ndatho M’mbwiria* (2012) eKLR, the court held that; -

“In an application for orders of inhibition in my understanding, the applicant has to satisfy the following conditions; -

    - a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.
    - b. That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.
    - c. That the applicant has an arguable case”.
  26. It is evident that the power to grant the prohibitory order is discretionary. The provisions are designed to preserve property from acts that would otherwise render a court order incapable of being executed and to preserve the suit property from being wasted pending hearing and determination of a suit.
  27. From the evidence availed, the suit property is in danger arising from the activities of the 1<sup>st</sup> and 2<sup>nd</sup> defendant and it is in the interest of justice that the suit property be preserved.
  28. In *Philip Mwangi Gitinji v Grace Wakarima Gitinji* (2004) eKLR, the Learned Judge held that: -

“An order of inhibition issued under section 128 of the Registered *land Act* is akin to an order of prohibitory injunction for it instructs the registered owner and any other person from having their transactions regarding the land in question registered against the title. Before the court can issue such an order, it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition. Such grounds would normally be in the form of a sustainable claim over the suit land”.



29. I note that the green card as annexed as MBS5, entry number 3 shows that the 3<sup>rd</sup> defendant/respondent has already put a restriction in respect of the title held by the 1<sup>st</sup> defendant.

**Disposition.**

30. In the upshot, I find that the plaintiffs/applicants application dated June 24, 2022 is merited and the same is allowed in the following terms:

- a. Pending the hearing and determination of this suit an order of inhibition is hereby issued prohibiting any dealings in land parcel number Nakuru Municipality Block 18/73 other than those done at the instance of the plaintiffs/applicants.
- b. Pending the hearing and determination of this suit, an order of temporary injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents by themselves, their representatives, servants, agents and/or any other persons acting under their instructions or interests from entering, occupying, possessing, dealing, remaining, trespassing onto, constructing or in any other manner interfering with all that parcel of land known as Nakuru Municipality Block 18/73.
- c. The costs of the application shall abide the outcome of the suit.

31. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

Mr. Kisilah for the plaintiffs/applicants.

No appearance for the 1<sup>st</sup> defendant/ respondent.

No appearance for the 2<sup>nd</sup> defendant/ respondent.

No appearance for the 3<sup>rd</sup> defendant/ respondent.

Court Assistant; Ms. Monica Wanjohi

