



**Wissanji & another (Suing as administrators of the Estate of the Late Shahnawaz M W Murj)
v Dida & Nyaga (Sued as officials of Kibarage Slums Association) & another (Environment and
Land Case Civil Suit E251 of 2021) [2022] KEELC 13291 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E251 OF 2021
SO OKONG'O, J
SEPTEMBER 22, 2022**

BETWEEN

**GOOLBANU SHAHNAWAZ WISSANJI 1ST PLAINTIFF
SHAHID WISSANJI 2ND PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE SHAHNAWAZ
M W MURJ**

AND

**ABDI GODANA DIDA & DAVID M NYAGA (SUED AS OFFICIALS OF
KIBARAGE SLUMS ASSOCIATION) 1ST DEFENDANT
ORESTUS NIWE CHWEYA 2ND DEFENDANT**

RULING

1. I have before me two applications which were heard together; one by the plaintiffs dated July 8, 2021 and the other by the defendants dated August 4, 2021.

The Plaintiffs' Application:

2. In their notice of motion application dated July 8, 2021, the plaintiffs have sought the following orders;
 1. Pending the hearing and determination of this suit there be an order of injunction restraining the defendants from entering, encroaching on, selling, transferring, alienating, developing or whatsoever dealing with all that property known as LR No 209/8998 (hereinafter referred to as "the suit property").
 2. Pending the hearing and determination of this suit, a mandatory injunction be issued to compel the defendants to pull down all the structures they have put up on the suit property



and remove the building materials or anything that they have deposited or caused to be placed on the property.

3. The costs of the application to be awarded to the plaintiffs.
3. The application is brought on the grounds set out on the face thereof and on the supporting affidavit of Shahid Wissanji sworn on July 9, 2021. The plaintiffs have averred that Shahnawaz M W Murji, deceased (hereinafter referred to only as “the deceased”) is and was at all material times the registered owner of the suit property. The plaintiffs have averred that the deceased died on July 12, 2019 and they were issued with a grant of letters of administration in respect of his estate on December 13, 2019. The plaintiffs have averred that the defendants have from time to time invaded the suit property and put up temporary structures thereon and that on June 30, 2021 they deposited building materials on the suit property. The plaintiffs have averred that their attempts to prevent the invasion, trespass and waste on the suit property by the members of the 1st defendant have been met with threats of violence and intimidation.
4. The plaintiffs have averred that the 2nd defendant has attempted to tamper with the records at the land registry relating to suit property with a view to causing the property to be registered in his name. The plaintiffs have averred that the deceased has never transferred the suit property to the 2nd defendant. The plaintiffs have averred that the acts of the defendants complained of are illegal and detrimental to the interest of the estate of the deceased in the suit property. The plaintiffs have averred that the 1st defendant has claimed that its members have acquired the suit property by adverse possession and have filed a suit before this court by way of originating summons in Nairobi ELC suit No E011 of 2020(OS) (hereinafter referred to only as “the OS”) to be registered as the owners of the property. The plaintiffs have averred that in the OS, the 1st defendant has only sued the 2nd defendant and that since they are not parties to the suit they are unable to seek the reliefs that they have sought before this court in that suit. The plaintiffs have averred that the 1st defendant has sought orders in the OS to restrain the 2nd defendant from interfering with the suit property pending the hearing of the OS but on the other hand, its members are carrying out construction on the suit property.
5. The plaintiffs have averred that they will seek to have this suit heard together with the OS so that the question as to who amongst the parties is entitled to the suit property can be determined with finality. The plaintiffs have averred that it is necessary for the court to issue an injunction to prevent the activities of the defendants on the suit property pending the hearing of the claims relating to the suit property.
6. The 1st defendant’s application and response to the plaintiffs’ application:
7. The 1st defendant has responded to the plaintiffs’ application through its notice of motion application dated August 4, 2021. In the application, the 1st defendant has sought the following orders;
 1. The *ex-parte* orders of injunction given by this honourable court on July 22, 2021 be forthwith reviewed, discharged and set aside.
 2. This suit be struck out.
 3. The costs of the application and the suit be borne by the plaintiffs.
8. The 1st defendant’s application is brought on the grounds set out on the face thereof and on the supporting affidavit of the 1st defendant’s chairman, John Mwangi Kamau sworn on August 4, 2021. The 1st defendant has contended that the said *ex parte* orders were obtained through lies and non-disclosure of material facts. The 1st defendant has averred that the plaintiffs did not disclose that there were crops on the suit property which requires tending and harvesting for at least a year. The



- 1st defendant has averred further that the plaintiffs failed to disclose that they had opposed a similar injunction application in the OS. The 1st defendant has contended further that the plaintiff failed to disclose that they were not in possession of the suit property and that it was the members of the 1st defendant who were in possession. The 1st defendant has contended that the said orders are oppressive and are causing hardship to the 1st defendant's members who are unable to tend their crops and livestock on the property or to access the house that they have on the property.
9. The 1st defendant has contended further that the said orders have lapsed by effluxion of time the same having not been served within the time prescribed under order 40 rule 4(3) of the Civil Procedure Rules. The 1st defendant has contended further that the said order could only be extended once for a period not exceeding 14 days.
 10. The 1st defendant has contended further that this suit is sub-judice in that the issues raised in the plaint and the application before the court are already in issue in the OS between the 1st defendant and the 2nd defendant. The 1st defendant has contended that in the OS, the suit against the 2nd defendant was withdrawn to enable the joinder of the plaintiffs herein in the OS when the 1st defendant realized that the deceased had died as at the time the OS was filed. The 1st defendant has contended that save that the plaintiffs herein have not been added to the OS, the parties in this suit and the OS are the same; they are litigating over the same subject matter, the facts are the same and the orders sought are at cross-purposes. The 1st defendant has contended that the plaintiffs were aware of the OS when they filed this suit. The 1st defendant has averred that the plaintiffs' suit is duplicitous and an abuse of the process of the court. The 1st defendant has averred that the issues raised in the present suit could be determined in the OS. The 1st defendant has averred that the plaintiffs' suit is frivolous, vexatious and an abuse of the process of the court.
 11. The plaintiffs filed an affidavit sworn by Shahid Wissanji on October 26, 2021 in opposition to the 1st defendant's application in which the plaintiffs have denied all the allegations contained in the application. The plaintiffs have denied that the 1st defendant's members were in occupation of the suit property. The plaintiffs have averred that there was no one living on the suit property and that the only structure on the suit property was a house which the 1st defendant had claimed to be its office.

Submissions:

12. The plaintiffs' and the 1st defendant's applications were heard together by way of written submissions. The plaintiffs filed submissions dated June 24, 2022. The plaintiffs have submitted that they have satisfied the conditions for grant of the temporary injunction sought. The plaintiffs have submitted further that the defendants have not shown cause for setting aside of the orders made by the court on July 22, 2021. The plaintiffs have submitted that the said orders were neither made *ex parte* nor obtained through non-disclosure of material facts. The plaintiffs have submitted further that this suit is not sub-judice. The plaintiffs have submitted that the OS was filed against the deceased after her death and as such the same is a nullity. The plaintiffs have contended further that the issues raised herein cannot be determined in the OS as the procedure of originating summons is meant for simple questions that do not involve a lot of controversy. The plaintiffs have submitted that this suit was properly filed and that the same is not an abuse of the court process.
13. In its submissions dated August 12, 2022, the 1st defendant reiterated the grounds set out on the face of its application and the affidavit in support thereof. The 1st defendant has submitted that its members have been in occupation of among others the suit property for 61 years and that the plaintiffs moved this court for injunction that was issued *ex parte* with the result that they have been denied access and use of the suit property. The 1st defendant has reiterated that the plaintiffs failed to disclose to the



court that they were in occupation and were using the suit property and that they had filed the OS seeking an order that they have acquired the suit property by adverse possession. The 1st defendant has submitted that the *ex parte* orders issued on July 22, 2021 are prejudicial and unjust and that this suit should be struck out for being defective, frivolous, duplicitous and a violation of the sub-judice rule.

Determination:

14. I have considered the two applications before me together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the plaintiffs in opposition to the 1st defendant's application. Finally, I have considered the written submissions by the advocates for the parties and the authorities cited in support hereof. The plaintiffs have sought a temporary prohibitory and mandatory injunction. The 1st defendant's application is opposing the plaintiff's application and seeking to have it and the entire suit by the plaintiffs in which it is based struck out. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v Cassman Brown & Co Ltd* [1973] EA 358, it was held that an applicant for a temporary injunction must establish a *prima facie* case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.
15. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal adopted the definition of a *prima facie* case that was given in *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] KLR 125 and went further to state as follows:

“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. ...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 threatened with violation... 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. For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in *Locabail International Finance Limited v Agro-Export* [1988] 1 All ER 901, where the court stated that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction



had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.”

17. In *Shepherd Homes Ltd v Shandabu* [1971] 1 Ch 304, Meggry J stated as follows:

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

18. It is on the foregoing principles that the plaintiffs’ application falls for consideration. From the material before me, I am satisfied that the plaintiffs have established a *prima facie* case with a probability of success against the defendants. The plaintiffs have established that the deceased is the registered owner of the suit property. The plaintiffs have also established on a *prima facie* basis that the 1st defendant’s members have without any lawful cause entered the suit property and commenced construction of structures thereon. Although the 1st defendant has claimed that its members have occupied among others the suit property since 1959, it did not place evidence before the court showing actual occupation of the suit property. The only structure on the suit property from the evidence before the court is what is claimed to be the 1st defendant’s office. According to the affidavit in support of the 1st defendant’s OS, the said structure was put up recently. The 1st defendant itself was formed in 2016 and as such it could not have had an office before then. In the absence of evidence that the 1st defendant’s members have been in occupation of the suit property for 12 years, their entry into the suit property and the activities being carried out thereon are unlawful.

19. I am also satisfied that the plaintiffs are likely to suffer irreparable harm if the prohibitory injunction sought is not granted. As I have stated earlier, the deceased is the registered owner of the suit property. The evidence before the court shows that members of the 1st defendant have encroached on the suit property and are planning to put up more structures thereon unless stopped by the court. There is no doubt that the plaintiffs would find it difficult to remove members of the 1st defendant from the suit property once they settle on the property in large numbers. The plaintiffs therefore stand the risk of being dispossessed of the suit property.

20. That said, I am not satisfied that a case has been made out by the plaintiffs that would justify granting an order of a temporary mandatory injunction. As I have stated above, so far, there is only one structure on the suit property. The court issued a temporary order restraining the 1st defendant from entering the suit property. This means that the said structure that the 1st defendant claimed to be its office is not in use. I am not satisfied that the plaintiffs would suffer any prejudice if that status quo remains pending the hearing of the plaintiffs’ suit and the 1st defendant’s OS. I can see no justification for the demolition of the said structure or any other structure on the suit property before the hearing of the two suits.

21. The 1st defendant has opposed the plaintiffs’ suit and application on several grounds that I have highlighted above. Some of the grounds such as the allegation that the order of July 22, 2021 lapsed and that it could not be extended because it was made *ex parte* were raised and determined in my ruling of February 8, 2022. It is not necessary to consider those issues once again. The objection to the application based on the same are overruled. I find no merit in the other objections taken by the 1st defendant. The 1st defendant has also claimed that the orders of July 22, 2021 were obtained through non-disclosure of material facts. There is no material fact disclosed in the 1st defendant’s application that can be said to have been concealed to the court by the plaintiffs. The existence of the OS was



disclosed. The fact that the 1st defendant had a structure on the suit property that it was using as an office was also disclosed. The 1st defendant's allegation that the plaintiffs are guilty of material non-disclosure is therefore not correct. I am also in agreement with the plaintiffs that before the said orders were granted, the 1st defendant was served and if it was of the view that any material was not disclosed to the court, it should have attended court and disclosed the same before the orders were granted.

22. The other objection raised by the 1st defendant is that this suit is sub-judice. It is admitted that the plaintiffs herein are not parties to the OS. The OS was filed against the deceased after his death. The suit against the deceased was therefore a nullity. Until the OS is amended and the plaintiffs herein made parties, the issue of the suit herein being sub-judice or duplicitous does not arise. In any event, I am unable to see anything wrong with the plaintiffs' suit that has been brought to assert the deceased's title to the suit property. I am in agreement with the plaintiffs that the reliefs sought in this suit cannot be granted in the 1st defendant's OS even if the plaintiffs were parties to it. The plaintiffs have indicated that they would seek to have this suit consolidated with the OS a suggestion that the 1st defendant has not taken issue with. The plaintiffs' suit is in the circumstances properly before the court.
23. Due to the foregoing, no valid reason has been put forward to warrant the striking out of this suit or the discharge of the interim order of injunction that was granted herein on July 22, 2021.
24. The upshot of the foregoing is that the plaintiffs' notice of motion application dated July 8, 2021 succeeds in part while the 1st defendant's notice of motion dated August 4, 2021 fails wholly. The plaintiffs' application is allowed in terms of prayers 3 and 5 thereof. The injunctive order shall be enforced by the OCS Spring Valley police station. The 1st defendant's application on the other hand is dismissed with costs to the plaintiffs.

DELIVERED AND DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ochieng' for the Plaintiffs

Mr. Waigwa for the 1st defendant

N/A for the 2nd defendant

Ms. C. Nyokabi - Court Assistant

