



REPUBLIC OF KENYA



KENYA LAW
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Kinungi v Kariuki & 10 others (Environment and Land Case Civil Suit E094 of 2021) [2022] KEELC 13786 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13786 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E094 OF 2021
SO OKONG'O, J
OCTOBER 27, 2022

BETWEEN

SAMUEL KINUNGI PLAINTIFF

AND

SPENCER KARINGA KARIUKI 1ST DEFENDANT

SALOME NJOKI KARINGA 2ND DEFENDANT

KAMITI FARMERS CO. LTD 3RD DEFENDANT

BONIFACE KIHIA MUNDERU 4TH DEFENDANT

ROBERT MWANGI GIKUNGU 5TH DEFENDANT

BENJAMIN MUCHEMI KIMANI 6TH DEFENDANT

AGNES MUGURE NGUGI 7TH DEFENDANT

CHARLES WERU KARIUKI 8TH DEFENDANT

BETTY NGENDO MUGO 9TH DEFENDANT

REGISTRAR OF LAND NAIROBI 10TH DEFENDANT

ATTORNEY GENERAL 11TH DEFENDANT

RULING

1. I have before me what I would call two applications because the applications brought by the defendants should have been filed as a single application. The first application has been brought by the plaintiff by way of Notice of Motion dated March 15, 2021. The second set of applications (eight in number by the same firm of advocates representing all the applicants and seeking similar orders) have been brought by the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and 9th defendants by way of various Notice of Motion applications mostly



dated February 1, 2022. In his application, the plaintiff has sought a temporary injunction restraining the defendants from illegally entering land parcel number Nairobi/Block 117(now subdivided into Nairobi/Block 117/860-865) (hereinafter referred to only as “the suit property”) pending the hearing and determination of the suit and an order for the OCS Kahawa West Police Station to assist in the execution of the order.

2. The plaintiff’s application has been brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the Plaintiff on March 15, 2021. The plaintiff has contended that one, Eston Njuguna Ng’ang’a alias Eston N Ng’ang’a, deceased (hereinafter referred to only as “the deceased”) was at all material times the registered owner of the suit property. The plaintiff has averred that he is the administrator and one of the beneficiaries of the estate of the deceased of which the suit property forms part. The plaintiff has averred that the deceased acquired the suit property from the 3rd defendant, Kamiti Farmers Co Ltd. The plaintiff has averred that “sometimes back” the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants (hereinafter referred to only as “defendants” where the context permits) entered the suit property illegally after the death of the deceased. The plaintiff has averred that some of the defendants have started putting up illegal structures on the suit property. The plaintiff has averred that the defendants are trespassers on the suit property.
3. The plaintiff’s application is opposed by the defendants through separate replying affidavits sworn on various dates. The 1st, 2nd, 6th, 7th defendants have sworn replying affidavits dated October 1, 2021. The 8th and 9th defendants have sworn replying affidavits dated January 14, 2022 while the 4th and 5th defendants have sworn replying affidavits dated January 26, 2022 and January 18, 2022 respectively. All the defendants have denied that they are trespassers on the suit property. The defendants have denied that the suit property was at all material times owned by Eston Njuguna Ng’ang’a alias Eston N Ng’ang’a, deceased (“the deceased”). The defendants have averred that the suit property was owned by one, Nelson Njagi Tanu (hereinafter referred to only as “Tanu”). The defendants have averred that Tanu was registered on January 6, 2015 as the leasehold proprietor of the suit property for a term of 99 years with effect from September 1, 1995. The defendants have averred that Tanu subdivided the suit property into six (6) portions namely; Nairobi/Block 117/860-865 and sold the same to the defendants. The 1st and 2nd defendant have averred that they are the registered proprietors of Nairobi/Block 117/863 which they acquired lawfully from Tanu. The 4th and 5th defendants have averred that they are the registered proprietors of Nairobi/Block 117/861 and Nairobi/Block 117/860 respectively. The 6th and 7th defendants have averred that they are the registered owners of Nairobi/Block 117/864 and Nairobi/Block 117/862 respectively while the 8th and 9th defendants have averred that they are the registered owners of Nairobi/Block 117/865. The defendants have exhibited a lease and certificate of lease that was issued to Tanu in respect of the suit property. The said lease and certificate of lease show that Tanu was a lessee of the Nairobi County Government in respect of the suit property. The defendants have also exhibited certificates of leases that were issued to them in respect of the subdivisions of the suit property showing that they acquired the said portions of the suit property from Tanu on various dates. The defendants have averred that they are strangers to the plaintiff’s claim over the suit property. The defendants have averred further that the orders sought by the plaintiff cannot be granted since they have already taken possession of their parcels of land.
4. The plaintiff has filed a further affidavit sworn on January 24, 2022 in which he has reiterated that he was one of the beneficiaries of the estate of the deceased who was the owner of the suit property. The plaintiff has contended that the suit property was registered in the name of the deceased as at the date of his death. The plaintiff has averred that Tanu who subdivided the suit property and sold portions thereof has admitted in his witness statement filed herein that the suit property was owned by the



deceased. The plaintiff has averred that the deceased did not sell the suit property to Tanu before his death. The plaintiff has maintained that the defendants are trespassers on the suit property.

5. After responding to the plaintiff's application, the defendants have filed individual applications mostly dated February 1, 2022 seeking same prayers namely; that the plaintiff be ordered to furnish security for costs for each defendant in the sum of Kshs 300,000/- to be paid in a joint bank account in the names of the advocates for the plaintiff and the advocates for the defendants within 30 days of the order. The applications that are supported by the affidavits of the defendants are brought on the grounds that the defendants have never interacted with the plaintiff and that there was no communication between the plaintiff and the defendants prior to the filing of this suit. The defendants have averred that they have filed bona fide defences to the plaintiff's claim which have very high chances of succeeding. The defendants have averred that they are the registered owners of portions of the suit property which they purchased from Tanu in good faith without notice of any defect in the title that was held by Tanu in respect of the suit property.
6. The defendants have averred that the plaintiff has no known assets that can satisfy any order for costs made against the plaintiff. The defendants have averred further that the plaintiff has no known source of income which he can use to satisfy an order for payment of costs that may be made in favour of the defendants in the suit. The defendants have averred that if the orders sought are not granted, they will be left without any recompense for costs that may be awarded to them by the court. The defendants have averred that it is necessary for the court to order the plaintiff to furnish security for costs in the sum of Kshs 300,000/- for each defendant.
7. The defendants' applications for security for costs is opposed by the plaintiff through a replying affidavit sworn on March 3, 2022. The plaintiff has contended that the applications are frivolous and amount to an abuse of the court process. The plaintiff has averred that the applications are aimed at delaying the cause of justice. The plaintiff has averred that the applications have been brought in bad faith in an attempt to intimidate and deny him his right to seek justice. The plaintiff has averred that the applications have no basis since his suit is meritorious and has very high chances of success.

Determination:

8. On February 9, 2022, the court ordered that the applications shall be heard together by way of written submissions. The parties filed submissions in respect of the plaintiff's and the defendants' applications and the same are on record. I will consider the plaintiff's injunction application first before the defendants' applications for security for costs. I have considered the plaintiff's application together with the supporting affidavits. I have also considered the replying affidavits filed by the defendants in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties and the authorities cited in support hereof.
9. The plaintiff has sought a temporary prohibitory injunction. The principles upon which this court exercises its discretion in applications for temporary injunction are 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.



10. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*, the Court of Appeal stated 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.”

11. From the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. The plaintiff has demonstrated that he is the administrator of the estate of the deceased. The plaintiff has shown that the deceased died on October 3, 2002. The plaintiff has contended and it has been admitted in the documents presented to court by the defendants that the suit property was owned by the deceased as at the time of his death. This means that the suit property formed part of the deceased’s estate. From the material before the court, the suit property was sold to Tanu on June 22, 2011 by one, Simon Mbugua Njuguna who was said to be a son of the deceased with his wife Lucy Wanjiru Njuguna who was also deceased at the material time. There is no evidence that the said Simon Mbugua was an administrator of the estate of the deceased or that of his wife Lucy Wanjiru Njuguna. In the absence of evidence that Simon Mbugua Njuguna had the legal capacity to sell the suit property to Tanu, the plaintiff’s contention that the transfer of the suit property to Tanu and subsequently to the defendants was a nullity is not far-fetched.
12. I have also noted a lot of discrepancies in the title that was held by Tanu for the suit property and the titles for the portions of the suit property that were transferred to the defendants. I have noted that the lease that was held by Tanu for the suit property was from Nairobi County Government. The lease was for a term of 99 years with effect from 1st September 1995. Strangely, the leases that were transferred by Tanu to the defendants were from the National Government and some of them had a commencement date of September 1, 2018. How a Nairobi County Government Lease changed to a National Government Lease needs some interrogation at the trial. I have said enough to demonstrate that the plaintiff has established a prima facie case with a probability of success.
13. On whether the plaintiff stands to suffer irreparable harm if the order sought is not granted, I am persuaded that that would be the case. However, the plaintiff has only sought an order to restrain the defendants from entering the suit property. The plaintiff has admitted in paragraph 7 of his supporting affidavit that the defendants have already entered the suit property and that some of them have even put up structures thereon. I am in agreement with the defendants that the court cannot restrain an act that has already taken place. That however does not stop the court from making an order for the preservation of the property in dispute pending the hearing of the suit. I will therefore order that a prohibitory order be registered against the titles of the portions of the suit property in the names of the defendants to restrict any further dealings with the properties pending the hearing of the suit.



14. I will now turn to the defendants’ applications for security for costs. The defendants’ applications were brought principally under Order 26 Rules 1 of the [Civil Procedure Rules](#). Order 26 rule 1 of the [Civil Procedure Rules](#) provides that:

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.”

15. It is common ground that an order for security for costs is discretionary and that the discretion must be exercised reasonably and judiciously having regard to the circumstances of each case. In [Jayesh Hasmukh Shah v Navin Haria & Another \[2015\] eKLR](#) the court set out the principles applied on applications for security for costs as follows:

“The law is settled that an order for security for costs is a discretionary one under Order 26 of the [Civil Procedure Rules](#). The discretion is, however, to be exercised reasonably and judicially by making reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of the court; absence of an office within the jurisdiction of the court; inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff’s claim; or any other relevant circumstance or conduct of the plaintiff or the defendant. The conduct by the plaintiff will include activities which may hinder recovery of costs, for instance, recent closure or transfer of bank accounts and disposal of assets. And the conduct of the defendant includes, filing of application for security for costs as a way of oppressing or obstructing the plaintiff’s claim, for instance, where the defence is mere sham, or there is an admission by the defendant of money owing or that there is a deliberate refusal or delay to pay money owing or refusal to perform its parts of the bargain.”

16. In [Patrick Ngete Kimanzi v Marcus Mutua Muluvi and 2 others, High Court Election Petition No 8 of 2013](#) it was held that:

“Security for costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of court is therefore to create a level ground for all parties involved. That is the proportionality of the right of petitioner to access justice vis-à-vis the respondent’s right to have security for any costs that may be owed to him and not have vexatious proceedings brought against him.”

17. In [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Court of Appeal Civil Appeal\(Application\) No 38 of 2013, \[2014\] eKLR](#), the court stated as follows:

“In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. See *Hall v Snowdon Hubbard & Co (I)*, (1899) 1 QB 593, the learned Judge at page 594 stated:- “The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.” In [Marco Tool & Explosives Ltd v Mamujee Brothers Ltd](#). (supra), this Court expressed itself thus:- “The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable.”



18. From the material before me, I am not satisfied that the defendants have discharged this burden of proof. The defendants placed no evidence before the court of the plaintiff's inability to pay their costs in the event that the suit is dismissed at the trial. The defendants have stated in their affidavits in support of their applications for security that the plaintiff is unknown to them and that they have never had any interaction. This then begs the question as to how they got to know that the plaintiff would be unable to pay costs in the event that his suit fails. Contrary to the contention by the defendants, the onus was not on the plaintiff to demonstrate his ability to meet the defendants' costs. In the absence of any evidence that the plaintiff would be unable to pay the defendants' costs in the event that he fails in his claim at the trial, I find no merit in the defendants' applications. In any event, I have found earlier in the ruling that the plaintiff has a prima facie case with a probability of success. I am of the view that even if the defendants had demonstrated that the plaintiff would be unable to pay their costs, now that the plaintiff had established that he has a bona fide claim, the plaintiff is entitled to be heard without any restriction being put on his way.

Conclusion:

19. In conclusion I hereby make the following orders;
1. An order of inhibition is issued inhibiting the registration of any other or further dealings with all those parcels of land known as Nairobi/Block 117/860, Nairobi/Block 117/861, Nairobi/Block 117/862, Nairobi/Block 117/863, Nairobi/Block 117/864, Nairobi/Block 117/865 pending the hearing and determination of this suit or further orders by the court.
 2. All the applications for security for costs brought by the defendants are dismissed.
 3. The costs of plaintiff's application shall be in the cause while the defendants shall bear the costs of their various applications as there was no justification for filing eight applications and eight sets of submissions.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER 2022

S OKONG'O

JUDGE

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

Ms Thuo for the Plaintiff

Mr Njenga for the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and 9th Defendants

N/A for the 3rd Defendant

Ms Adomeyon for 10th and 11th Defendants

Ms J Omondi-Court Assistant

