



**Flashdial Connections Limited v County Government of Laikipia (Environment & Land Case E002 of 2022) [2022] KEELC 13497 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13497 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE E002 OF 2022**

**YM ANGIMA, J  
OCTOBER 6, 2022**

**BETWEEN**

**FLASHDIAL CONNECTIONS LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF LAIKIPIA ..... DEFENDANT**

**RULING**

**A. The Plaintiff's Application**

1. By a notice of motion dated January 24, 2022 brought under order 40 rules 1 & 2 of the Civil Procedure Rules 2010 (the rules) and section 3A *Civil Procedure Act* (cap 21) the plaintiff sought an interim injunction to restrain the defendant by itself, its agents or servants from selling, transferring, leasing or in any manner dealing with or interfering with its possession of the suit property known as un-surveyed BCR Plot no 19 Rumuruti (the suit property) measuring 4.047 ha.
2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Peter Karanja Kuria on January 24, 2022 and the exhibits annexed thereto. The plaintiff contended that it was the rightful owner of the suit property and had been in possession thereof at all material times until November 08, 2021 when the defendant wrongfully and illegally dispossessed it of the property.
3. The plaintiff further contended that the defendant had unlawfully removed some of the plaintiff's goods such as treated fencing poles, quarry dust, and ballast from the suit property thus occasioning it financial loss. The plaintiff further contended that it had been issued with an allotment letter for the suit property on January 07, 2013 and that it shall suffer irreparable loss if the same was allocated or transferred to third parties hence the suit.



## **B. The defendant's Response**

4. The defendant filed a replying affidavit sworn by its county attorney, Alexander Muchemi, on April 15, 2022 in opposition to the application. The defendant stated that the suit property as described by the plaintiff, that is, plot no 19 Rumuruti measuring 4.047 ha did not exist in the records of the defendant as borne out by the relevant approved Part Development Plan (PDP). It was denied that the plaintiff was ever allocated such a plot as alleged or at all. The defendant further contended that the property claimed by the plaintiff was public land within the meaning of article 62 of the *Constitution* of Kenya, 2010 and that the town clerk of the defunct Town Council of Rumuruti had no legal authority to issue a letter of allotment for it.
5. The defendant further pleaded that, in any event, due process of allocation of public land was never followed in this case because:
  - a. There was no approved PDP for the purported allocation of the suit property to the plaintiff.
  - b. There was no evidence that any letter of allotment was issued by the authorized government agency.
  - c. There was no evidence of acceptance of the terms of offer and fulfilment of those terms.
  - d. There was no evidence that the suit property was ever surveyed and a lease issued.
6. The defendant contended that since the promulgation of the *Constitution* of Kenya, 2010 all revenues within the county are collected by the County Government of Laikipia and rates made payable to the County Revenue Board by way of cashless transactions without issuance of manual receipts. The defendant consequently doubted the genuineness of the manual receipts exhibited by the plaintiff.
7. It was the defendant's contention that the plaintiff had failed to satisfy the requirements for the grant of a temporary injunction as set out in the case *Giella vs Cassman & Co Ltd* [1973] EA 358. It was emphasized that the Plaintiff had failed to demonstrate a *prima facie* case with a probability of success at the trial and to prove that it shall suffer irreparable loss which cannot be adequately compensated for by an award of damages. The court was consequently urged to dismiss the application with costs.

## **C. The plaintiff's rejoinder**

8. The plaintiff filed a supplementary affidavit sworn by Peter Karanja Kuria on April 26, 2022 in response to the defendant's replying affidavit. The plaintiff reiterated that it was the rightful allottee and owner of the suit property. The plaintiff disputed that due process was not followed in the allocation of the suit property and it reiterated that it followed due process. It contended that it made the required payments and paid the survey fee. The plaintiff further stated that it was the defendant which was in breach of its obligations by failing to "confer" it with a certificate of lease for the suit property.
9. The plaintiff contended that it had satisfied the legal requirements for the grant of an interim injunction since it stood to suffer from loss of income and assets due to the defendant's aforesaid actions. The court was consequently urged to grant the application as prayed.

## **D. The defendant's preliminary objection**

10. By a notice of preliminary objection dated March 04, 2022 the defendant asserted that the plaintiff's suit was incompetent and incurably defective for offending the mandatory provisions of order 4 rule 1(4) of the rules. The defendant consequently urged the court to strike out the suit with costs. The plaintiff filed grounds of opposition dated March 04, 2022 in response to the preliminary objection.



## **E. Directions on submissions**

11. When the application was listed for *inter partes* hearing it was directed that both the plaintiff's application and the defendant's preliminary objection shall be canvassed together through written submissions. The material on record shows that the plaintiff filed its submissions on May 25, 2022 whereas the defendant filed its submissions on June 20, 2022.

## **F. The issues for determination**

12. The court has considered the plaintiff's application, the defendant's replying affidavit in opposition thereto, the plaintiff's supplementary affidavit as well as the defendant's notice of preliminary objection. The court is of the opinion that the following issues arise for determination herein:
  - a. Whether the suit is incompetent and incurably defective.
  - b. Whether the plaintiff has satisfied the requirements for the grant of a temporary injunction.
  - c. Who shall bear costs of the application.

## **G. Analysis and determination**

### **a. Whether the suit is incompetent and incurably defective**

13. This issue was raised by the defendant in its notice of preliminary objection dated March 04, 2022. The defendant contended that the suit was incompetent and defective for violating the requirements of order 4 rule 1(4) of the rules which requires that the verifying affidavit of a suit filed by a corporation should be sworn by an officer thereof authorized under the seal of the corporation.
14. The court has noted that the defendant did not prosecute the preliminary objection in its written submissions filed on June 20, 2022 even though the plaintiff submitted thereon. The court is of the opinion that a preliminary objection which is not prosecuted is deemed to have been abandoned since such a preliminary objection remains unsubstantiated. Accordingly, the preliminary objection shall be overruled by the court.

### **b. Whether the plaintiff has satisfied the requirements for the grant of a temporary injunction**

15. The court has considered the material and submissions on record on this issue. Whereas the plaintiff submitted that it had satisfied the principles for the grant of an interim injunction, the defendant contended otherwise. The principles for the grant of an interim injunction were enunciated in the case of *Giella -vs- Cassman Brown & Co Ltd (Supra)* as follows:
  - a. An applicant must demonstrate a *prima facie* case with a probability of success at the trial.
  - b. An injunction will not normally be granted unless the applicant demonstrates that he shall suffer irreparable damage which cannot be adequately compensated by an award of damages.
  - c. If the court is of doubt on (b) above, it shall decide the application on a balance of convenience.
16. The gist of the plaintiff's case was it was the legitimate owner of the suit property by virtue of a letter of allotment issued by the town clerk of the defunct town council of Rumuruti on January 07, 2013. The defendant disputed the said allocation and contended that the site claimed by the plaintiff was still public land. It was further contended that the town clerk who purported to make the allotment had no legal authority to do so and that, in any event, the applicable legal procedures were not followed



in the purported allocation. It was pointed out in particular that there was no duly approved Part Development Plan in support of the said allocation.

17. The court is aware that at this interlocutory stage, it is not required to make any definitive findings on the issues for determination in the main suit for that is the function of the trial court. However, the court is required to satisfy itself on a *prima facie* basis that the plaintiff has demonstrated a serious case with a probability of success at the trial. The plaintiff has not exhibited a copy of any approved PDP upon which the said allocation was based. The court is not satisfied that a town clerk of the defunct town council of Rumuruti had any legal authority to allocate public land under the law. Neither the *Constitution* of Kenya, 2010 nor the *Land Act*, 2012 empowered him to allocate public land in 2013. The court is of the opinion that it was the business of the National Land Commission to manage public land on behalf of the national and county governments upon the promulgation of the *Constitution* of Kenya, 2010. The court is thus not satisfied that the plaintiff has demonstrated a *prima facie* case with a probability of success as required by law.
18. The court shall consider the second principle on irreparable loss in case it is wrong on the first principle. The plaintiff contended that since the defendant had already dispossessed it of the suit property it shall suffer irreparable loss if the property was allocated to a third party. The issue of irreparable loss was considered by the Court of Appeal in the case of *Nguruman Ltd vs Jan Bonde Nielsen & 2 Others* [2014] eKLR as follows:

“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 facie*, 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 of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

19. The court is not satisfied that the apprehended loss of the suit property measuring 4.047 ha in Rumuruti can constitute irreparable damage within the meaning of the law. There is no evidence on record to demonstrate that the suit property is incapable of monetary valuation should the plaintiff ultimately succeed at the trial. There is also evidence to demonstrate that monetary compensation, of whatever amount, shall not be adequate compensation because of some unique or peculiar characteristics of the suit property. Accordingly, the court is not satisfied that the plaintiff has demonstrated the second requirement for the grant of an interim injunction. In the premises, there is no need of considering the third principle on balance of convenience.

### **c. Who shall bear costs of the application**

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. In the case of *Giella vs Cassman Brown & Co Ltd (Supra)* it was held that the appropriate order to make on costs on such an application is for costs in the cause where the application is allowed and



costs against the applicant where it is dismissed. Accordingly, the instant application shall be dismissed with costs to the defendant.

#### **H. Conclusion and disposal**

21. The upshot of the foregoing is that the court finds no merit in the plaintiff's application for interim orders. The court also finds that the defendant's preliminary objection was not prosecuted and substantiated. Accordingly, the court makes the following orders for disposal of the application and the preliminary objection:

- a. The defendant's notice of preliminary objection dated March 04, 2022 is hereby overruled.
- b. The plaintiff's notice of motion dated January 24, 2022 is hereby dismissed with costs to the defendant.
- c. The suit shall be mentioned for pre-trial directions on November 21, 2022.

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

**N/A for the plaintiff**

**Mr Chiuri for the defendant**

**C/A - Carol**

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**Y M ANGIMA**

**JUDGE**

