Njiru v Nyaga (Environment & Land Case E009 of 2020)
[2022] KEELC 15536 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15536 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE E009 OF 2020

A KANIARU, J

NOVEMBER 23, 2022

BETWEEN

MARAI ANGELA NJERI NJIRU ..... APPLICANT

AND

SALESION NGARI NYAGA ..... RESPONDENT

RULING

1. This is a ruling on a notice of motion dated October 4, 2021 filed by the Plaintiff on October 6, 2021. The motion is expressed to be brought under Section 1A, 1B, 3A of the *Civil Procedure Act* Cap 21 laws of Kenya, Order 40 Rule 1 & Order 51 Rule 1 of the *Civil Procedure Rules* 2010.

Application

2. The parties in the application are Marai Angela Njeri Njiru, the plaintiff in the suit and Applicant in the application while Salesion Ngari Nyaga is the defendant in the suit and respondent in the application.

3. The motion came with four (4) prayers but prayers 1 and 2 are spent. The prayers for consideration are therefore two (2) – prayers 3 and 4 – and they are as follows:

> Prayer 3: That this honourable court be pleased to restrain the respondent by way of temporary injunction from constructing permanent structures on land parcel No Nthawa/ Gitiburi/1209 belonging to the applicant pending the hearing of this suit.
>
> Prayer 4: Costs of this application be provided for.

4. The application is premised on grounds inter alia, that the applicant has filed a suit seeking eviction orders against the respondent who is said to have trespassed on the applicant's parcel of land Nthawa/ Gitiburi/1209 in the year 2019 on the pretext that he had purchased the land from the applicant's husband. The applicant decried that the respondent has been putting up permanent structures on the

suit parcel of land with the aim of defeating justice and in that respect the court ought to restrain the respondent from constructing permanent structures pending determination of the suit.

5. In a supporting affidavit that she swore, she reiterated the averments in the application and annexed photos as evidence of the structures put up by the respondent.

Response

6. The Respondent filed a replying affidavit in response to the application. The affidavit is dated March 14, 2022. The respondent denied the allegations that he was constructing a permanent structure. He averred that he was not engaged in construction of any permanent structure or a house at all. He also denied trespassing on the land but instead stated that he had settled there in the year 1978 when he bought it from Sebastian Mbogo Nyaga (deceased). With regard to the developments, he stated that they were his and that the applicant has never settled or interfered with his occupation.

7. He also alleged to be in the process of filing a claim in order to acquire title to the land. He was further of the view that the application had no legal basis and alleged that the applicant had not provided evidence of new constructions apart from what had already been built. It was deposed that the application is an abuse of the court process and ought to be dismissed with costs.

8. The application was canvassed by way of written submissions. Only the applicant filed her submissions. The respondent on his part sought reliance on the replying affidavit filed. The applicant gave a synopsis of the case as presented by the two parties and identified three issues for determination by the court. The first was whether the respondent was a trespasser on land parcel Nthawa/Gitiburu/1209. The applicant submitted in the affirmative and averred that the respondent had failed to produce any evidence of payment, a sale agreement entered for sale of the land with the registered owner, or evidence of obtaining a land consent from the land control board as required under the provisions of Section 6 (1) (a) of the Land Control Board. Equally, it was argued that no transmission documents were prepared, executed, attested or lodged for purposes of registration.

9. The applicant further submitted that in accordance with section 6(1) of the *Land Control Act*, a party ought to obtain consent of court within 6 months of the agreement or seek extension from the court after lapse of the six months where there are sufficient reasons to do so as provided for under Section 8(1) of the *Land Control Act*. She decried that no such extension had been sought and the sale agreement had been voided in the circumstances.

10. On the second issue of whether the respondent has any proprietary interest over the suit property, it was submitted that the respondent would have had a valid right if he entered pursuant to consent or permission granted by the registered owner. It was averred that however the respondent's actions contravened the provisions of Article 40 of the *constitution* and amounted to nuisance, annoyance and trespass on the applicant's property.

11. The last issue was whether the applicant was entitled to the prayers sought in the application. The applicant submitted that the law protects the proprietary rights of owners. She asserted that she had proven without reasonable doubt that the land is registered in the name of her deceased husband and that the said land had never been sold nor registered in the name of the respondent, whom she contended needed be evicted from the suit land in order to allow her to occupy it peacefully and to hold it in trust for her children. She urged the court to rely on the provisions of Article 40 on protection of right to property and Article 65 of the *constitution*. Ultimately, she asserted that she had proven her case and that the court should grant her the prayers for eviction as sought in her application.

Analysis

12. I have considered the application, the response made, and submissions by the plaintiff. I find that only one issue commends itself for determination before the court, which is whether the court should grant orders of temporary injunction pending hearing and determination of this suit.

13. The applicant has filed a suit by way of originating Summons seeking, amongst other orders, an order for the respondent to vacate suit parcel of land Nthawa/Gitiburi/1209 which she alleges he has trespassed on the pretex of having a purchaser's interest. She has contended that the property is registered in her late husband's name and the respondent trespassed on the land in the year 2019 and has commenced to put up structures on it. In the present application, the applicant has sought a temporary injunction for the reason that the respondent has trespassed on her late husband's land and put up permanent structures with the aim of defeating justice. The respondent on his part has duly acknowledged being on the suit parcel of land but has denied being a trespasser. Instead, he claims to have purchased the land from the respondent's husband in the year 1978 and settled there at the time. He averred that he already has structures on the property. He stated that the applicant had failed to give evidence of new structures as alleged and was therefore of the view that the application has no legal basis.

14. In the submissions, the applicant has submitted extensively on the merits of the suit and given justification as to why the respondent ought to be evicted from the land. It needs to be appreciated that the application before the court is one for a temporary injunction and the court ought to refrain from determining the merits of the suit. It will only limit itself to the prayers sought on whether or not a temporary injunction ought to be issued.

15. The applicant has moved the court under the provisions of Order 40 Rule 1 of the *Civil Procedure Rules* 2010, which states as follows;

> " Where in any suit it is proved by affidavit or otherwise—
>
> (a)That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> (b)That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

16. The locus classicus case on temporary injunction is that of *Giella v Cassman Brown* [1973] EA 360 where the court set out three conditions that ought to be met for grant of a temporary injunction. It was stated:

> " 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (*EA Industries v Trufoods*[1972] EA 420.)"

17. The court, in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002, described a *prima facie* case as:

> " in civil cases, it 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

18. The Applicant has submitted that the respondent has recently trespassed on the suit parcel of land, which she alleges to belong to her late husband. She has annexed a copy of the search as evidence of ownership of the land by her late husband. Also annexed in support of the application are photographs of structures and developments on the suit property. The respondent has not denied such occupation on the land. He however claims to have purchased the land from the applicant's late husband. He has annexed a copy of sale agreement written in what I believe would be the Kiembu language and an application for caution dated October 24, 2019 made by Area Chief of Nthawa and addressed to the land registrar. The chief avers that the respondent purchased the land from the respondent's husband.

19. I wish to appreciate that I am not called upon to determine the contention on ownership or the issue of eviction at this stage. Having brought out the background above, I am of the considered view that the applicant has established a prima facie case with high chances of success based on the fact that the land is still registered in her late husband's name and the issue of occupation by the respondent is not denied. The rest of the issues on whether such occupation is legitimate or not will be best be determined at the trial stage.

20. Having come to the conclusion that the applicant has a prima facie case, this court now has a duty to establish whether the applicant will suffer irreparable loss and damage if the orders for an injunction are not granted. What amounts to irreparably injury was well described and defined by the court in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where it was stated that "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury".

21. The applicant has averred that the property has been trespassed into by the respondent. As already stated, the issue of occupation has not been denied. However, from the evidence before the court there seems not to be any danger of alienation of the land. The respondent has not been said to be in the process of disposing of the land or wasting it. There is no injury that will be said to occur in the interim that cannot be compensated by way of damages. I find that the applicant has not satisfied the second condition for grant of an injunction.

22. I think I need to say more on the issue of sufficiency of damages as a remedy in an application for temporary restraining orders. In *Helga v Charles Mumba Mwagandi* [2008] eKLR, Justice L Njage (as he then was) cited with approval the reasoning of the court of appeal in *Mureithi v City Council Of Nairobi*[1976-1985] EA 331. In Mureithi's case Madan JA (as he then was) had observed as follows:

> " The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial ..."if damages in the measure recover at the common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiffs claim appeared to be at that stage."

23. Further, I bear in mind the instructive words of the court in*Nguruman Ltd v Jan Bonde Nelson& 2 others*: Civil Appeal No 21 of 2014 UR where, while making reference to Giela's case (supra) it was observed as follows:

> "It is established that all the above three conditions are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction; the court must further be satisfied that the injury the respondent will suffer if the injunction is not granted will be irreparable.
>
> In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "Leap-frogging" by the applicant to injunction directly without hurdles in between."

24. It was incumbent on the applicant in this case to demonstrate well that she will suffer injury which is not sufficiently compensable in damages. She failed to do so. This is a hurdle she failed to surmount successfully as envisaged in Nguruman'scase (*supra*). She did not therefore demonstrate well that she is deserving of an order of temporary injunction.

25. In the circumstances, I do not find that the applicant has proven a case for grant of a temporary injunction pending hearing and determination of the suit. I therefore dismiss this application with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF NOVEMBER, 2022.

M/s Mugo for applicant and Muthoni Ndeke (absent) for respondent

Court assistant: Leadys

A.K. KANIARU

JUDGE