



**Amutabi & another v Willy (Environment & Land Case E005 of 2022)
[2022] KEELC 14959 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E005 OF 2022
DO OHUNGO, J
NOVEMBER 22, 2022**

BETWEEN

KENNETH SHADRACK AMUTABI 1ST PLAINTIFF

JOHN MACHAGE MATIKO T/A MUITA PAUL DANIEL 2ND PLAINTIFF

AND

MOHAMMED WILLY DEFENDANT

RULING

1. Proceedings in this matter commenced on April 4, 2022, when the plaintiffs filed plaint dated March 30, 2022. Subsequently, the first plaintiff's case was withdrawn with no order as to costs on April 26, 2022. Consequently, there is now only one plaintiff, John Machage Matiko. Nevertheless, and considering that the subject application was filed at a time when there were two plaintiffs in the matter, I will refer to both plaintiffs, for the avoidance of doubt.
2. Together with the plaint, the plaintiffs filed Notice of Motion dated March 30, 2022, which is the subject of this ruling. The following orders are sought in the application:
 1. [Spent]
 2. [Spent]
 3. That this Honourable Court do grant an order restraining, stopping, prohibiting and or baring defendant/ respondent and or his agents, employees and or servants from carrying on any operations and/or activities on the 2nd applicant's mining site situate in Title Number Kakamega/Shitochi/3068 in Kakamega County until the hearing and determination of the main suit herein.
 4. That the costs of this application be in the cause.



3. The application is supported by an affidavit sworn by the second plaintiff John Machage Matiko who deposed that the first plaintiff is the registered proprietor of Kakamega/Shitochi/3068 (the suit property) and that the second plaintiff has an interest in a goldmine situated in the suit property. The second plaintiff deposed that by an agreement dated August 3, 2020, he obtained consent from the first plaintiff allowing him to prospect for minerals and rare earth in the suit property and that pursuant thereto, a temporary permit from the mining department was issued but the defendant has been frustrating the operations since the permit was obtained. That on March 7, 2022 the defendant took over the site without permission of either the first or second plaintiffs and started extracting gold deposits from the said site. He further deposed that the defendant claims to have legal authorization from the mining department which supersedes the first plaintiff's interests or rights and yet no claim has been made for imminent domain nor were notices issued to this effect and that despite several pleas by the plaintiffs to stop further operations, the defendant refused to comply with the demands. He therefore prayed that the orders sought be granted.
4. In response to the application, a replying affidavit sworn by the first plaintiff was filed. He deposed that he is the registered owner of the suit property and that he has not sued the defendant herein as he has no claim against the defendant and that his name and documents have been used in the matter herein without his knowledge and or consent. That sometime on or about August 2020, he entered into an agreement with the second plaintiff herein to carry the dumpsite soil in the suit property and that the second plaintiff carried all the dumpsite soil from the suit property as was agreed and that after carrying the soil, the second plaintiff invaded the neighbours land adjacent to the suit property known as Kakamega/Shitochi/3070 which belong to one Sylvester Ivala Likabo and started carrying soil but he was stopped. He further deposed that he has no claim whatsoever against the defendant as he is carrying soil from a neighbouring land and added that he therefore wished to withdraw the case against the defendant as he had no claim against him.
5. In further opposing the application, the defendant filed a replying affidavit and stated that he has not carried any dumpsite soil from the suit property and neither has he frustrated any operations at all on the suit property. That he is carrying dumpsite soil in land parcel number Kakamega/Shitochi/3070 which belongs to Sylvester Ivala Likabo who had sold the said property to him and authorised him to enter it. He further deposed that he has all the permits from the Ministry of Mining authorising him to carry out mining activities therein and that he has no claim and or interest whatsoever on the suit property as he is carrying soil from a different parcel. That the suit is in bad faith and that the second plaintiff should give security for his costs as he is incurring huge expenses in defending the matter.
6. It was ordered that parties do file submissions which the defendant duly filed. The second plaintiff did not file any submissions.
7. The defendant submitted that the second plaintiff in seeking injunctive orders must sufficiently demonstrate to the court that the principles applicable in applications for injunctions are met. Reliance was placed on *Kenya Commercial Finance Co. Ltd V Afraba Education Society* (2001) EA 86 as cited with approval in *Hassan Huri & Another v Japhet Mwakala* [2015] eKLR. The defendant further submitted that from the replying affidavit filed by the first plaintiff, it is clear that the first plaintiff is the registered owner of the suit property and that the first plaintiff and the second plaintiff entered in to a contract where the second plaintiff was to carry dumpsite soil from the suit property which the second plaintiff did and thereafter invaded the neighbour's adjacent land. That as such, there was no basis for the injunction sought.
8. The defendant further submitted that the second plaintiff is not the registered owner of the suit property and the owner who is the first plaintiff has clearly stated that he has no claim against the



- defendant. In further submitting that the second plaintiff has failed to demonstrate before this court that he has a genuine and arguable case to warrant the injunction sought, the defendant relied on *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR.
9. On the aspect of whether the second plaintiff will suffer irreparable harm, the defendant submitted that the second plaintiff will not suffer any irreparable loss as he has not proved that he has any claim in the mining site situate. The defendant further relied on *Sabibi Housing Ltd v Ferdinand Ndungu Waititu & 4 others* [2012] eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and submitted that this court is being asked to make an order in vain. The defendant therefore prayed that the application be dismissed with costs.
 10. I have considered the application, the affidavits, and the submissions. The issue for determination is whether the orders sought should issue.
 11. The principles that guide the court when considering an application for an interlocutory injunction are settled. They were enunciated in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] E.A 358 and reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra). In short, the applicant must establish a *prima facie* case with a probability of success, failing which the application cannot succeed.
 12. Explaining the meaning of prima facie case, the Court of Appeal stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra) defined it as:

... 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 as to call for an explanation or rebuttal from the latter... [it] is more than an arguable case. It is not sufficient to raise issues. 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.
 13. The Court of Appeal adopt that definition in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra) and added that 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.
 14. Based on the evidence put before the court, there is no connection established between the defendant and the suit property. The second plaintiff not the registered owner of the suit property and the first plaintiff who is the owner of the suit property has made it abundantly clear that he no claim whatsoever against the defendant. The second plaintiff has failed to adduce evidence to demonstrate he has any claim in the mining site situated in the suit property. He has also not proved how the defendant has infringed his rights in connection with the suit property. The second plaintiff has failed to establish a *prima facie* with a probability of success. The limbs of irreparable injury and balance of convenience need no consideration. That being so, the second plaintiff does not deserve the injunction sought.
 15. In the result, I find no merit in Notice of Motion dated March 30, 2022. The application is dismissed with costs to the defendant.

Dated, signed, and delivered at Kakamega this 22nd day of November 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



No appearance for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma

ELCC No. E005 of 2022 (Kakamega) Page 2 of 2

