



Riech & 2 others v Maloba & 3 others (Environment and Land Case Civil Suit E003 of 2021) [2022] KEELC 15121 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E003 OF 2021**

JA MOGENI, J

NOVEMBER 16, 2022

BETWEEN

**EDNA KWAMBOKA RIECH 1ST PLAINTIFF
GEORGE AMBUCHE 2ND PLAINTIFF
ANTONY MAINA 3RD PLAINTIFF**

AND

**BRENEEN ELISHA MALOBA 1ST DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
DEFENDANT
NATIONAL CONSTRUCTION AUTHORITY 3RD DEFENDANT
NAIROBI METROPOLITAN SERVICE 4TH DEFENDANT**

RULING

1. This Application relates to the Plaintiff's/Applicant's Notice of Motion dated January 12, 2022. It is brought under Order 40 Rule 1(a),2(1) (2) of the *Civil Procedure Rules*, the *Constitution of Kenya* and all other enabling provisions of Law. In it, the Applicant seeks for the following Orders;
 - i. Spent
 - ii. That pending interpartes hearing and determination of this Application, this Court be pleased to issue an Order of Temporary Injunction restraining the Defendants by themselves, their directors, their agents, their servants or anybody claiming under them from constructing, developing, building or in any way dealing with in whatsoever manner with the all that piece of Land known as Plot No 376, Harambee Sacco Estate.



- iii. That Pending *interpartes* hearing and determination of this application, this court be pleased to issue an order to the 3rd Defendant suspending any further construction and development on all that piece of land known as Plot No 376, Harambee Sacco Estate.
 - iv. That pending the hearing and determination of this application, this court be pleased to issue an order to the 4th Defendant suspending any further constructions and development on all that piece of land known as Plot No 376, Harambee Sacco Estate.
 - v. That pending the hearing and determination of the Plaintiff's main case against the Defendants, this Honourable Court be pleased to issue an Order of Temporary Injunction restraining the 1st Defendant by himself, his agents, his servants or anybody claiming under him from building, constructing, developing or in any way interfering in whatsoever the manner with tall that land known as Plot No 376, Harambee Sacco Estate.
 - vi. That pending the hearing and determination of the Plaintiff's main case, this Court be pleased to issue an order to the 3rd Defendant suspending any further construction and development on all that piece of land known as Plot No 376, Harambee Sacco Estate.
 - vii. That pending the hearing and determination of Plaintiff's main case, this Court be pleased to issue an order to the 4th Defendant suspending any further construction and development on all that piece of land known as Plot No 376, Harambee Sacco.
 - viii. That for effective implementation of this Order, the same be executed through the OCS Donholm Police station.
 - ix. That costs of this Application be borne by the Defendants/Respondents.
2. The Application is supported by an affidavit sworn by Edna Kwamboka Riech dated January 12, 2022 on behalf of the other plaintiffs through the authority signed by the plaintiff on even date.
 3. The 1st Plaintiff/Applicant contends that, the 1st Defendant/Respondent purchased a piece of that Land known as Plot 376, Harambee Sacco Estate. Further, immediately after construction, the 1st Defendant/Respondent moved in with earth movers and began excavations. Upon the Plaintiff's enquiry, he intimated that he was in the process of constructing multiple housing units on the said property.
 4. It is the 1st Plaintiff's/Applicant's case that, together with his fellow neighbors, they moved to petition the 2nd, 3rd and 4th Defendants/Respondents requesting them to take the necessary action and stop the construction of the said apartments.
 5. The 1st Plaintiff avers that the Petition bore no fruit as the 1st Defendant/applicant is still on site with the on -going construction and has resulted to unscrupulous means of barring him from the property.
 6. The 1st Plaintiff/Applicant asserts that the completion and subsequent occupation of the 1st Defendant/Applicant's premises shall result to difficulties in enjoying the resources such as water, garbage collection, parking spaces and sewer services.



7. The 1st Plaintiff states that, unless the injunction orders are granted, the 1st Defendant and persons claiming under him shall interfere with the Plaintiffs/Applicant's quiet and peaceful possession of the land and will continue to suffer irreparably.
8. The Application was opposed by the 2nd Defendant who filed a Replying Affidavit dated June 30, 2022. The 2nd Defendant opposed the application on the grounds that the Plaintiffs had failed to disclose to the Honorable Court that they were sued by the 2nd and 3rd Defendants on April 12, 2022 in Milimani CMC ELC No 139 of 2022.
9. The 2nd Defendant postulates that the Applicants have failed to disclose to the Honorable Court that on April 20, 2022 they were subject to a Temporary Injunction issued by the Court on April 11, 2022 which restrained them from interfering with the ongoing 3rd Defendant's construction site issued in Milimani CMC ELC 139 of 2022 Breenen Elisha Maloba &anor v Nairobi City County Government & 2 others. Hence this application is an abuse of Court process, as the Applicants/Plaintiffs have rushed to the Superior Court to obtain parallel orders to defeat the earlier Temporary injunction granted by a competent land court on April 20, 2022 and to defeat the earlier suit in Milimani CMC ELC No 139 of 2022.
10. The 2nd Defendant affirms that, the Applicants/Plaintiffs suit is an abuse of Court process to file another suit in the Superior ELC Court as the subject matter of this suit namely Title No. Nairobi/Block 82/5085 and the erected structure thereof not exceeded 20 million which is within the Jurisdiction of the Chief Magistrate Court in Milimani CMC ELC E No 139 of 2022.
11. The 2nd Defendant posits that, the 2nd and 3rd Respondent obtained and paid for all the Approval Plans and Construction Permits as on February 7, 2022. They have also complied with the approval process as provided under the Physical Planning and Land Use Act which gives the investor the right to proceed with construction provided that no letter of rejection had been issued by the 4th, 5th, 6th and 7th Respondent. Hence the application is immature, overtaken by events and should be dismissed with costs.
12. The 2nd Defendant asserts that the 1st Defendant has been wrongly sued as she is no longer the owner the suit premises to the 2nd and 3rd Respondents. Hence this application is incurably defective as they have no cause of action against the former owner who is the 1st Respondent.
13. The application was canvassed by way of written submissions.

The Applicant's/Plaintiff's submissions

14. Counsel for the Applicant filed submissions dated July 12, 2022, where they itemized seven issues as being those requiring address.
15. To establish when the present suit Land Environment ELC No 003 was filed, and whether the present suit was filed to defeat Milimani CMCC ELC No E139 of 2022 and the jurisdiction of the Court, Counsel for the applicant submitted that, certain Magistrates Courts have the jurisdiction to hear and determine planning, land use and environmental matters pursuant to section 26(3) and (4) of the *Environment and Land Court Act, 2011*, as well as section 7 read with section 9(a) of the *Magistrates' Courts Act, 2015*, as the jurisdiction is subject to the pecuniary jurisdiction.
16. To determine matters of civil nature involving occupation, title of land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Court Act, Counsel for the Applicant relied the decision in *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another* [2020]eKLR, and submitted that, whereas there are specific magistrates granted jurisdiction



to hear land use and environment matters such jurisdiction is subject to pecuniary jurisdiction of the said magistrate.

17. Equally, counsel submitted that the matter affects over 50 plots which are located within Delta Drive Court plus water, sewerage and road infrastructure which are affected by the illegal construction of 1st, 2nd and 3rd Defendant. The value of the development at stake will exceed the value of Ksh 20 Million. This pushes the value of the matter to beyond jurisdiction of any magistrate in Kenya.
18. To establish the necessary parties to the proceedings, Counsel for the Applicant anchored his assertion on the decision in *Scorpion Properties Limited Vs PIMody* [2021] eKLR and submitted that, the 6th and 7th defendants are necessary parties in the proceedings. Further, there is no evidence of any prejudice which may be suffered by any of the parties as a result of the 6th and 7th Defendants participating in the proceedings.
19. On the Conditions for Grant of Temporary Injunction, an whether there is a Prima facie case with probability of success, Counsel for the Applicants relied on the Landmark decision in *Giella v Cassman Brown, East African Development Bank v Hyundai Motors Kenya Limited* [2006] and submitted that, that the Plaintiffs have provided evidence that there is impunity in illegal construction being undertaking at Harambee Sacco which unless tamed could result to chaos and defeat the very status of the estate.
20. To determine whether a Mandatory injunction, should be granted, Counsel for the Applicant relied on the decision in *Kenya Power and Lighting Co Ltd v Samwel Mandere Ogeto* [2017]eKLR, *Kenya Breweries Ltd & Another v Washington O Okeya* [2022]eKLR, and submitted that the circumstances are clear that the 1st, 2nd and /or 3rd Defendants are acting with impunity and thus deserves the grant of mandatory injunction by demolition of the illegal development.

The Respondents/Defendant's submissions

21. Counsel for the Respondents filed submissions dated July 15, 2022.
22. To determine whether the Court should grant Temporary Orders, Counsel for the Respondents relied on the case of *Giella vs Cassman Brown* and *James Irungu Mwangi & 2 Others v Laban Macharia Muiruri & Anor* [2018] eKLR and submitted that, first, the Applicant should first establish that they have a prima facie case with probability of success. Counsel asserted that, the 2nd and 3rd Defendants/ Respondents are the legal owners of the suit property which they intend to construct a matrimonial home and have obtained the requisite approvals and consent to commence the construction of their house.
23. Again, Counsel for the Respondents stated that ,the Applicants/Plaintiffs have not demonstrated how they will suffer irreparable damage unless the orders sought are granted, in fact the Applicants/ Plaintiffs are a subject of Temporary injunction issued on April 11, 2022 which restrained them from interfering with the ongoing 3rd Defendant's construction issued in Milimani CMC ELC No 139 of 2022 Breen Elisha Maloba & Anor Vs Nairobi City County Government& 2others .Further, Counsel submitted that, the 2nd and 3rd Defendants stands to suffer irreparable loss as the construction of their house has been stalled and risks dilapidating.
24. To establish the application of balance of convenience, Counsel for the Respondent relied on the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* [2018] eKLR, and submitted that the Application is unmerited for lack of any cause of action against all the Respondents, and the entire suit be struck out with costs to all Defendants/Respondents.



Analysis and findings:

25. The Court has considered the application, the Replying Affidavits, the Written Submissions as well as the authorities relied upon. The key question to be determined in this application dated January 12, 2022 is whether the Applicant has satisfied the criteria upon which the Courts exercise the discretionary and equitable jurisdiction to grant the prayers in the application.
26. It is evident that the Applicants have brought this application under Order 40 Rule 1 which provides that:-
- "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".
27. Since the Applicants' application is anchored under the above Order 40 of the *Civil Procedure Rules*, it is incumbent upon the said Applicants to establish that their properties are in danger of being wasted, damaged or alienated by the Defendants/Respondents. Upon such prove, then the Court would proceed to issue any necessary order to prevent such wastage, damage, alienation, sale or disposal for the end of justice to be met. See the case of *Noormohammed Jan Mohammed Vs Kassam Ali Virji* (1953) 20 LRK 8, where the Court held that:-
- "To justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition."
28. In the instant suit, there is no doubt that the Applicants/Plaintiffs are residents within Delta Drive Court located within Harambee Sacco Estate, Donholm and the owner of Plot 377 Harambee Sacco Estate. The 1st Defendant is the owner of Plot 376 Harambee Sacco Estate and the two plots border each other in the Delta Drive Court. The Applicants' contention is that the 1st Defendant is constructing multiple dwelling housing units on their piece of land in some areas whose zoning policies only allow for single dwelling housing units. That the 1st defendant has failed to heed any advice. That the applicants petitioned the 2nd, 3rd and 4th defendants but they did not stop the construction.
29. The construction is going on and the applicants contend that the subsequent occupation of the units will lead to difficulties in enjoying the resources such as water, garbage collection parking space and sewer services which shall be constrained.
30. The defendants in their grounds of opposition contend that the plaintiffs failed to disclose that the Chief Magistrate Court had issued an injunction, injunctioning the applicants from interfering with the construction on April 20, 2022. The said court order was however not attached.



31. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co vs Ethicon Limited* (1975) A AER 504 case in which the court provided that for an injunction to issue, the Applicant must satisfy three (3) elements, namely:
- i. There must be a serious/fair issue to be tried;
 - ii. Damages are not an adequate remedy;
 - iii. The balance of convenience lies in favour of granting or refusing the application.
32. These are the same grounds that had been postulated earlier on in the case of *Giella vs Cassman Brown* (1973) EA 358 as follows: The Applicant has to show a prima facie case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.
33. What amounts to a prima facie case was explained in *Mrao vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 as follows:
- “So what is a *prima facie* case? I would say that 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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
34. In *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:
- “...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages 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, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of 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 crossing the other hurdles in between.”
35. The question then would be whether the Plaintiffs/Applicants have a right that was apparently infringed upon that would then be called for a rebuttal. The Plaintiffs/Applicants have averred that being the 1st defendant has violated the zoning and construction rules allowed by constructing multiple dwelling units on their parcel Plot No 376, Harambee Sacco Estate. The 1st defendant has however objected to the filing of this suit stating that there was an order already issued injunctioning the plaintiffs. Further that they have the requisite approvals for construction and therefore the plaintiffs/ applicants are interfering with their quiet possession and enjoyment of their property.



36. On whether the plaintiffs/applicants will suffer irreparable loss that cannot be compensated by way of damages. The Plaintiffs/ Applicants have averred that the construction will constrain the provision of water, parking, sewerage and garbage collection since the area was zoned for single dwelling and not multiple dwelling. On the overall they would that the 1st defendant adheres to the construction guidelines for single dwelling.
37. It is not in doubt that the 1st defendant had commenced construction on the suit property and that stopping the said construction would cost money and time. However, the Court notes that the amount of time that it would require the 1st defendant to bring down the building would also take time and money if the Court is to rule in favour of the Plaintiffs/Applicants. Furthermore, a party cannot be condemned to take damages if his right can be protected by way of an injunction. See the case *Olympic Sports House Ltd Vs School Equipment Centre Ltd* (2012) eKLR, wherein the Court held that:-
- “a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.
38. It is trite that a crystalized right which is violated cannot be equated to compensation by damages. This was what the court stated in the Case of *Niaz Mohammed Janmohammed Vs Commissioner for Lands & 4 Others* (1996) eKLR, the Court held that:-
- “It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”
39. Equally in this case, the Court finds that if the Applicants’ rights have been infringed, no amount of money can compensate such infringement. Therefore, the Court finds that the Applicants have established that they are likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages. This is so because the 1st defendant is embarking on building multiple dwelling units which may or may not be a burden on the shared facilities of water, sewerage, parking and garbage collection, the evidence of which needs to be provided at the hearing of the main suit.
40. On the third limb, the Court is not in doubt. However, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining the status quo and the status quo herein is directing the 1st defendant to desist from engaging in further construction until the suit is heard and determined. Thus the status quo herein should remain what was in existence before the 1st defendant’s alleged unlawful actions.
41. In the case of *Agnes Adhiambo Ojwang Vs Wycliffe Odhiambo Ojijo*, Kisumu HCCC No 205 of 2000, the Court held that:-
- “the purpose of injunction is to preserve the *status quo* and the *status quo* to be preserved is the one that existed before the wrongful act”.
42. Having held that the Plaintiffs/Applicants have established the threshold for grant of the Interlocutory orders, the Court then is satisfied that the Plaintiffs/ Applicants are entitled to the orders of temporary injunction.



43. The Upshot of the foregoing is that the Court finds that the Plaintiffs/Applicants' Application dated January 12, 2022, is merited and the same is allowed in terms of prayer Nos 2, 3,4,5,6,7,8 of the said Application with costs.

44 It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF NOVEMBER 2022.

MOGENI J

JUDGE

In the virtual presence of:

Mr Njuguna for the 1st, 2nd and 3rd Defendant/Respondent

Ms Mwau for Plaintiffs

Ms.Mwangi holding brief Mr Ngora for the 4th Respondent

Ms Adomeyan for the 6th Defendant

Ms. Caroline Sagina : Court Assistant

