



Watamu Association (Suing through its Elected Officials - Clare Taylor, Bea Anderson & Damian Davies) v Wood & 3 others (Environment & Land Petition E003 of 2023) [2024] KEELC 1236 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E003 OF 2023
FM NJOROGE, J
MARCH 6, 2024**

BETWEEN

WATAMU ASSOCIATION (SUING THROUGH ITS ELECTED OFFICIALS - CLARE TAYLOR, BEA ANDERSON & DAMIAN DAVIES) PETITIONER

AND

TARA WOOD 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND RESPONDENT

COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The Petitioners filed this petition on 2nd February 2023 seeking orders inter alia that a declaration be issued that the land lying between the property L.R. No. 8594/13 and the shores of the Indian Ocean is a riparian zone and that construction on the said zone by the 1st Respondent is illegal. They also sought a permanent injunction against the 1st Respondent stopping the said construction and development. Along side the Petition, the Petitioners filed a notice of motion application dated 30th January 2023 seeking the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of this application, the honourable court be pleased to issue a temporary injunction against the 1st Respondent whether by herself, agents, servants and whomsoever acting under her authority or instruction stopping construction or



further construction of the permanent multi storey building on property L.R No. 8594/13 and the adjacent riparian land.

- c. That pending the hearing and determination of the Petition, the Honourable Court be pleased to issue a temporary injunction against the 1st and 2nd Respondents whether by themselves, agents, servants and whomsoever acting under their authority or instruction stopping construction or further constructions the permanent multi storey building on property L.R No. 8594/13 and the adjacent riparian land.
 - d. That pending the hearing and determination of the petition, the honourable court be pleased to issue an order directing the director of surveys (Kilifi County) or such relevant body to re survey the property L.R No. 8594/13 to establish the boundaries of the said property and file in court a report on the location of the multi-storey construction being undertaken by the 1st and 2nd Respondents vis-à-vis the boundaries of the property L.R. No. 8594/13.
 - e. That costs be provided for.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit sworn by Damian Davies on 30th January 2023. Mr. Damian deposed that the Petitioner was registered on 3rd August 1994 under the Societies Act to protect the ecosystem of Watamu area; sometime in January 2023, the Petitioners discovered that the 1st Respondent had begun construction on her late mother's property identified as L.R No. 8594/9, which is adjacent to L.R No. 8594/13 (the suit property; that the construction was being carried beyond the borders of the suit property and most likely on the riparian zone; that the Environmental Impact Assessment Report (EIA) produced by the 1st Respondent upon enquiry indicates that the report was in support of an application to construct a swimming pool and not the construction of a multi-storey building; that alongside the EIA report was the 2nd Respondent's approval apparently granted upon an application made on 8th June 2022 by the 1st Respondent's mother, long after her death; that the said approval is inconsistent with the EIA report, and that no known residents of the disputed area were consulted prior to issuing the report and approval. He also contended that the EIA report was never published as required.
 3. On 13th February 2023, when the matter was mentioned before Odeny J, a government survey to determine the boundaries was ordered to be conducted within 7 days, and prayer no. 2 was granted pending the survey report. These interim orders were subsequently extended by the court on 21st February 2023. As a result of the said interim orders and before substantive determination of the Petitioner's application, the 1st Respondent filed another application dated 15th September 2023, under Order 40 rule 7 for orders that: -
 - a. Spent.
 - b. That this Honourable court be pleased to discharge the temporary injunction issued on 13th February 2023.
 - c. That the costs of this application be provided for.
 4. The basis of that application as seen on the face of the motion and the supporting affidavit sworn by the 1st Respondent is as follows: the petitioners claiming to be officials of Watamu Association lack locus standi to sustain this suit as they have no such authority and their alleged status is unknown to the Registrar of Societies; the Petitioners misled the court into issuing the interim orders; the said construction is well outside the riparian zone and in any case, there is no evidence that the 1st Respondent is constructing a multi storey building on L.R No. 8594/13 which she referred to as her mother's land; that her family has been running a hotel business under the name "Baraka House",



constructed on the said land L.R No. 8594/13 and that the construction is only an extension facility of Baraka House, on the suit property. She added that the construction is of semi-permanent structures.

5. The above two applications have come before me for contemporaneous determination.

1st Respondent's Responses.

6. In response to the petitioners' application, the 1st Respondent filed a Replying Affidavit on 15th September 2023 largely reiterating the contents of her supporting affidavit to her application. On its part, the 3rd Respondent filed grounds of opposition dated 9th March 2023 stating that the application fails to meet the threshold for granting injunctive orders, is unfounded and ought to be dismissed. There was no response from the other Respondents.
7. Similarly, only the Petitioners responded to the 1st Respondent's application. They filed a Replying Affidavit sworn by Damian Davies on 8th November 2023. In that affidavit, Mr. Davies stated as follows: the issue of the Petitioners' capacity is *res judicata* having been addressed in this court's ruling delivered in 13th July 2023; this court has no jurisdiction to determine the application considering that the 1st Respondent has since filed a notice of appeal to challenge the said ruling and that the petitioners were elected as officials on 27th December 2022 as per some minutes he annexed, but the changes were yet to be captured in the Societies Registry's records.
8. Mr. Damian added that there is filed a survey report as per the interim orders, which report establishes that the construction has encroached on the riparian zone and that the development is a multi-storey building.
9. The applications were canvassed by way of written submissions.

Petitioners' Submissions

10. In the submissions filed on 8th November 2023, counsel for the Petitioners identified two issues for determination. First, whether on the evidence and material placed before the court is sufficient to grant a temporary injunction. Counsel relied on the case of *Giella v Cassman Brown* [1973] EA 358 where the conditions for granting interlocutory injunctions were set out. He urged that the Petitioners have established a prima facie case as described in the case of *Mrao Ltd v First American Bank of Kenya & 2 others* [2003], having demonstrated that the construction has encroached on riparian land and that the 1st Respondent's actions are a threat to the Petitioners' rights.
11. On the likelihood of suffering irreparable loss, counsel relied on the cases of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR and *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR. He submitted that if the injunction sought is not granted the Petitioners shall suffer irreparable loss which would not be adequately compensated by an award of damages. Counsel added that the balance of convenience tilts in favour of the Petitioners' case since failure to grant an injunction would amount to authorizing construction on public land.
12. The second issue was whether the 1st Respondent's application can be granted. Counsel argued that the issues in the said application are *res judicata* having been determined by this court. Counsel relied on the case of *Diocese of Eldoret Trustees (registered) v Attorney General (on behalf of the PS Treasury) & another* [2020] eKLR.

1st Respondent's Submissions

13. Counsel for the 1st Respondent submitted that an injunction is an equitable remedy and as such the Petitioners are not deserving of such orders considering that they have failed to comply with Section



17, 24 and 30 of the Societies Act. To counsel, in the event that the petition is determined in favour of the Respondents, there will be no entity to which the decree will be enforced. Counsel added that overlooking the Petitioners' violations of the law would be in violation of the equitable principles: - equity follows the law; he who comes to equity must come with clean hands; equity will not permit statute or common law to be used as an engine of fraud and that courts of equity never allow a party to derive an advantage from his own wrong. Counsel cited the case of Yiapas Ole Seese & 4 others v Sakita Ole Narok & 2 Others [2008] eKLR.

14. Having carefully considered the two applications, affidavits filed in support of each motion, replying affidavits, submissions and authorities relied upon by both parties, I find that there are only two issues for determination as follows: -
- a. Whether the Petitioner has met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit.
 - b. Whether the interim orders issued on 13th February 2023 should be discharged.

Analysis And Determination

Issue (a)

15. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (supra). This position has been reiterated in numerous decisions within our Kenyan courts and more particularly in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others CA No.77 of 2012 [2014] eKLR where the Court of Appeal held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a *prima facie* level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

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. Afraba 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.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the



applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

16. The same court in the Nguruman case while adopting the definition of a prima facie case given in of *Mrao Ltd v First American Bank of Kenya & 2 others* [supra], stated: -

“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. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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.”

17. Further, the decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:

“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.”

18. The Petitioners’ case is largely premised on an allegation that the 1st Respondent is erecting an illegal building on public land, a riparian zone. Following this court’s interim orders, a survey report of the disputed area was done by the Ministry of Lands & Physical Planning and it observes that the 1st Respondent’s construction is 9 meters within the riparian zone reserved for government purpose. The Petitioners relied on this report in their Replying Affidavit. For this reason, I am convinced that the Petitioners have established a *prima facie* case.
19. The second hurdle is whether the Petitioners established that they will suffer irreparable loss if an order of injunction is not issued. The Petitioners’ argument is that if an injunction is not issued, their rights and those of the greater public to a clean and healthy environment will be violated and the biological ecosystem within the riparian zone will be destroyed.
20. The importance of the environment to the people of Kenya is demonstrated by the fact that respect for the environment as our heritage forms part of the preamble to our Constitution. Chapter 5 of our *Constitution* is dedicated to land and the environment. The *Constitution* states that land in Kenya must be held and used in a manner that is equitable, efficient, productive and sustainable in line with the principles that land as a resource, must be managed in a sustainable and productive way, and that sound conservation mechanisms must be employed. Sound conservation for the riparian reserves would entail the protection of wetlands. Such waste in my view, would amount to irreparable loss that cannot be compensated by way of damages.



21. Given the above, I have no doubts that a temporary injunction must be issued pending the hearing and determination of this petition.

Issue (b)

22. Regarding the 1st Respondent's application I find no merit in the same, having arrived at the above conclusion. In any event, the issue of *locus standi* was adequately addressed by Odeny J in her ruling delivered on 13th July 2023. It is improper to bring up the same issue again.
23. The upshot is that the notice of motion dated 30th January 2023 is hereby allowed. The 1st Respondent's motion dated 15th September 2023 is dismissed. The costs of the two motions shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

