



Coldstone Investment Limited v Khaleej Towers Limited (Environment and Land Appeal E029 of 2023) [2024] KEELC 5216 (KLR) (8 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E029 OF 2023**

JA MOGENI, J

JULY 8, 2024

BETWEEN

COLDSTONE INVESTMENT LIMITED APPELLANT

AND

KHALEEJ TOWERS LIMITED RESPONDENT

(Being an Appeal against the entire Ruling of the Senior Principal Magistrate the Hon Paul Rotich delivered on 06/06/2023 in NAIROBI CMELC NO. E444 of 2022)

JUDGMENT

1. This is an appeal arising from the ruling of Hon. SPM Paul Rotich delivered on 06/06/2023 in respect to Nairobi CMELC No. E444 of 2022. In the said ruling the Learned Magistrate dismissed the appellant’s application dated 21/02/2022 and the respondent’s application dated 13/02/2023 filed in response to the appellant’s application and declined to grant a temporary injunction against the impugned construction adjacent to the applicant’s property Land Reference Number LR 36/VII/235. The Honorable SPM stated that in his ruling thus “...it is therefore my finding that the parties have not established prima facie case and that they will suffer irreparable loss and damage to warrant the orders of injunction sought.”
2. Dissatisfied with the outcome, the Appellant filed this appeal through Memorandum of Appeal dated 11/10/2023. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:-
 1. That the learned magistrate erred in fact and in law in totally disregarding the evidence on record submitted by the Appellant in their Supporting Affidavit as well as Further Affidavit and Replying Affidavit together with the annexures thereby occasioning a miscarriage of justice;



2. That the learned magistrate erred in fact and in law when he found that the evidence of the Appellant was insufficient to grant to grant interim injunction but still went ahead to find that the Appellant will not suffer irreparable loss and damage;
 3. That the learned magistrate erred in fact and in law in finding that the Appellant will not suffer irreparable loss and damage implying that he had sufficient evidence on record which he stated was not the case;
 4. That the learned magistrate erred in fact and in law by finding that the Appellant failed to engage the National Construction Authority, National Management Authority and Nairobi City County Government which was not the case;
 5. That the learned magistrate erred in both fact and in law in failing to evaluate correctly the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis;
 6. That the learned magistrate erred in fact and in law in failing to consider the written submissions of the Appellant in arriving at its ruling;
 7. That the learned magistrate totally misdirected himself in delivering the Ruling by failing to consider and appreciate the evidence on record tendered on behalf of the Appellant;
3. On the basis of those grounds, the Appellant sought the following orders:
- a. Spent
 - b. That the Ruling of the Magistrate's Court delivered on 6/06/2023 be set aside
 - c. That a temporary injunction restraining the respondents by themselves, their servants, agents, employees or any person or entity working under its authority from continuing or howsoever carrying on with impugned construction adjacent to the Appellants property LR 36/VII/235 be issued
 - d. That costs of the Appeal be granted to the Appellant against the Respondent.
4. The Appeal was canvassed through written submissions. The Appellant filed written submissions dated 31/05/2024 through Abdullahi Gitari & Odhiambo Advocates. The respondent filed their submissions dated 19/06/2024.

Analysis and Determination

5. I have had the opportunity to consider the memorandum of appeal, record of appeal and the annexures. In my humble view, the following issues stand out as key issues for determination by this court which can dispel the Appeal. These are:
- i. Whether the trial court erred in the exercise of its discretion in not granting the interlocutory reliefs sought?.
 - ii. What are the appropriate reliefs to issues herein?

Whether the trial court erred in the exercise of its discretion by not granting the interlocutory reliefs sought?

6. In its application before the subordinate court, the appellant sought a temporary injunction restraining the respondent from engaging in certain activities pending the hearing and determination of the suit.



The principles upon which this court exercises its discretion in applications for a temporary injunction are now settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] EA 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer an irreparable injury that cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

7. As stated above, for an applicant for a temporary injunction to succeed, he must demonstrate that he has a prima facie case against the respondent and that he stands to suffer irreparable harm unless the injunction is granted.
8. In the case of *Mbogo v Shah* [1968] EA 93 with regard to when an appellate court can disturb the exercise of discretion of a lower court. It was said in the said case that the appellate court ought not to interfere with the exercise of such discretion unless the appellate court is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.
9. In the instant case, the Appellants contend that the respondent has disobeyed the National Construction Authority condemning the construction and halting it. That instead the respondent has continued with construction work. Further that the respondent lacks the requisite approvals from the County Council.
10. I have perused the record of appeal and noted that the defendant/respondent produced evidence of approvals sought from Nairobi City Water Sewerage for construction of sewer connection on the respondent's suit property Land Reference Number 36/VII/234 including the approved plan all marked as A3 in the bundle.
11. I note that the construction was made on a space that was preserved for the construction as evidenced through the bundle marked as A5 that was produced at in the trial court. Now both the appellant and respondent own their respective suit properties and there is no contest about the ownership of the suit land.
12. It is trite that a Certificate of title is conclusive evidence of ownership unless the contrary is proven through calling of evidence. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:

“24. Subject to this Act(a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
13. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. In the instant case it is not in doubt that the appellant is the registered owner of LR Number 36/VII/235 and the respondent is the registered owner of LR Number 36/VII/234 and they are neighbours. Each owner does have a beneficial interest over their respective parcels of land.
14. It is the appellant contention that the respondent is erecting a residential building on all that property known as Land Reference Number 36/VII/234 adjacent to its property. That on or about January 2022 the respondent commenced construction works on its parcel of land through excavations by heavy machinery which damaged a boundary wall securing the appellant's property causing it to fall.



15. Further that during the excavation, the defendant damaged the sewer line leading to discharge /release of raw sewerage to the plaintiff's property. The Respondent on the other hand contends that he is the duly registered owner of the suit land and being the duly registered owner, he had exclusive and absolute rights to utilize the suit land and such right should at all times be protected by this Court. That the Appellants are not deserving of the orders.
16. On whether the Respondent's activities have caused damage to the plaintiff's boundary wall, leakage of sewerage yet the works being undertaken have not received approval from the approving authorities, this will be a matter of examination of evidence before the trial court. These issues cannot be determined in the interim the determination will have to await the calling of evidence, testing of the same in cross examination and evaluation of the tendered evidence. At the interim stage, the trial court was only mandated to arrive at a finding of whether the appellant had met the threshold for grant of injunctive orders as was set out in the case of *Giella v Cassman Brown & Co. Ltd* 1973 (*supra*)
17. The court in the case of *Edwin Kamau Muriu v Barclays Bank of Kenya Ltd* Nairobi HCCC No. 1118 of 2002, held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria”
18. Based on the above, the question that begs an answer is whether the Appellants had satisfied the criteria established for grant of a temporary injunction. To answer this question, the Court has analyzed the evidence available and finds that both the appellant and respondent own their respective suit properties adjacent to each other. Infact this issue is not in dispute.
19. As a proprietor of a suit property, the owner enjoys the rights of a proprietor as provided by Sections 24 and 25 of the [Land Registration Act](#).
20. While the appellants claimed that the respondent had constructed on its land and caused damage to a wall on the appellant's suit property leading to the collapse of the wall and thus sought interlocutory orders, this Court finds and holds that this Order if granted on the interim, would have the effect of limiting the absolute rights of the registered owner of land contrary to the provisions of Article 40 of the [Constitution](#). The Onus was on the appellant to show and prove to the Court that the suit land was in danger of misuse, disposal and/or alienation which they failed to do.
21. Based on the foregoing it follows therefore that the appellant on a balance of probability did not prove the existence of prima facie case to warrant the grant of a temporary injunction. In the case of *Kenya Commercial Finance Company Limited Versus Afraba Education Society & Others*, Civil Appeal No 142 of 1999 (2001) IEA86 the Court held that:-

“The judge should address himself sequentially on the conditions for granting of an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title's dispute and therefore has not demonstrated that it has a prima facie case with probability of success, no interlocutory injunction would be available”
22. The second limb for determination in the grant of a temporary injunction is whether the appellant had established that they would suffer irreparable loss which cannot be adequately compensated by an



award of damages. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal held that:

“If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant 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. 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.”

23. The said Court went on to state that:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be 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 such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

24. In the instant Appeal, even though the appellant had established a prima facie case which they have not, the Court is of the considered view that any loss suffered by the appellant can be compensated by way of damages.

25. Guided by the definition of irreparable damage in the *Nguruman Limited* case cited above, the Court finds that the appellant has failed to establish the element of irreparable damage necessary for the granting of a temporary injunction. The collapsed wall can be quantified and costed for payment. The one which may not be quantifiable is the leakage of the sewerage which the appellant could not prove at this interlocutory stage. The appellant failed to produce any information or report from an expert that could support the averment of the leaked sewage which is a blot to a clean and healthy environment. No information or report was attached to the application or affidavit from the tenants to attest to the leaked sewage.

26. See the case of *Wairimu Mureithi..v..City Council of Nairobi*, Civil Appeal No. 5 of 1979 (1981) KLR 322, where the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them” .

27. Pollution of the environment is not quantified through payment and this needs to be stopped immediately it need not be proved conclusively. I however note that despite alluding to this serious violation of rights of citizens to a clean and healthy environment, the appellant only presented a survey report and none for the environment.



- 28. Therefore on the balance of convenience, the Court is not in doubt that the appellant has also failed to make a case for irreparable loss in any case the appellant can be adequately compensated by way of damages if the trial Court finds in their favour after the substantive hearing.
- 29. The upshot of the above is that the appellant has failed on a balance of probability to establish all the elements necessary for the grant of a temporary injunction as outlined in the case of *Giella v Cassman Brown (supra)*. Consequently the Court finds and holds that Appellants' Appeal Vide the Memorandum of Appeal dated 11/10/2024 is found not merited and the said Appeal is dismissed entirely with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF JULY 2024

MOGENI J

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Ms. Mukobi Appellant

Ms. Shabana Respondent

Caroline Sagina Court Assistant

