Kiarie v Kihiko & 2 others (Environment & Land Case E003 of 2024) [2024] KEELC 5051 (KLR) (3 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5051 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E003 OF 2024

SM KIBUNJA, J

JULY 3, 2024

BETWEEN

JOYCE WARIARA KIARIE ..... PLAINTIFF

AND

DANIEL NJOROGE KIHIKO ..... 1ST DEFENDANT

THE REGISTRAR OF TITLES MOMBASA ..... 2ND DEFENDANT

THE HON ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

1. Before this court is the plaintiff's notice of motion application dated 29th January 2024 seeking for inter alia:

    a. That pending the hearing and determination of the suit a temporary injunction is issued against the 1st Defendant by himself, his agents, servants or otherwise howsoever from encroaching or remaining on the properties Title No. CR 11673 subdivision 1270/I/MN.

    b. That pending the hearing and determination of the Application herein this Honourable Court be pleased to grant an order compelling the 1st Defendant to forthwith remove all structures and such construction and remove all alien matters; demolish and remove all debris form the parcels of land Title Number C.R 11673 subdivision 1270/I/MN.

    c. That the costs herein be in the cause.

    The application is premised on the twelve (12) grounds on its face marked (1) to (12) and supported by the affidavit of Joyce Wariara Kiarie, the plaintiff, sworn on the 25th January 2024. It is the plaintiff's case that she is the registered owner of land known as C.R 11673, L.R No. 1270/I/MN situated in Nyali, the suit property, as declared in Mombasa ELCMISC 58 of 2008, and certificate of postal search dated 2nd March 2022; that she was recently informed by her agent that there was ongoing construction

by a developer with a signage of Summertimes Homes Limited; that she obtained a search from the Lands office dated 9th January 2024, and transfer document dated 8th July 2013 registered on 30th May 2022 that indicated that she allegedly transferred the land to 1st defendant; that the said transfer was fraudulent and she has not received the alleged consideration of Kshs 35,000,000 from the 1st defendant; that the 1st defendant was her witness in ELCMISC 58 of 2008, and she had never entered into any sale agreement with him with respect to the suit property.

2. The 1st defendant opposed the application through the replying affidavit sworn on 28th February 2024 deposing inter alia that he is the registered proprietor of the suit property, and the plaintiff has not come to court with clean hands, is guilty of material non-disclosure and the applications is full of misrepresentations; that sometime in 2008, he advanced the plaintiff Kshs. 3.5 million when her late husband was ailing, and Kshs. 4 million to refund Samuel Varghese who had registered a caveat against the suit property's title claiming purchaser's interest against the suit property; that he instructed his advocates, Muthee Kihiko & Associates LLP, to provide an undertaking to pay 6 million to Swaleh and Company Advocates to lift caveat against the said land registered by one Thraya Saary; that during the pendency of ELCMISC 58 of 2008, the plaintiff transferred the suit property to Knightbridge Apartments Limited where she was a director and shareholder despite the above mentioned caveats; that upon advising her on the illegality of the above transfer, she requested him for Kshs. 4 million to facilitate her advocates to have the irregular transfer rectified, which he advanced to her; that the plaintiff surrendered the original title of the suit property to him in exchange for all the monies he had advanced to her; that after the hearing of ELC Misc. Cause No. 58 of 2008 in 2013, he advanced the plaintiff Kshs. 5 million, as she needed to travel back to the United Kingdom; that before she left for United Kingdom, they went to Musinga and Company Advocates where a transfer document was prepared and the plaintiff executed it in his favour, and acknowledged receipt of consideration of Kshs. 35 million, being the total of loan advancements, interests, penalties, outstanding rates and legal fees paid on her behalf in ELC MISC No. 58 of 2008 and other 'favours' he had extended to her regarding the suit land over the years; that he could not register the transfer in his favour due to ongoing court case that was determined on 21st June 2019, and caveats registered against the title; that he entered into a joint venture with Summertime Homes Limited to construct residential flats, which is still ongoing and further that there are already buyers who have paid deposits for the flats in an off plan; that the plaintiff has neither established a prima facie case nor shown what irreparable injury she will suffer; that the balance of convenience tilts in his favour as he has already sold off some of the flats in the ongoing construction.

3. The plaintiff responded by filing the supplementary affidavit sworn on 12th February 2024 deposing among others that she did not receive any financial aid from the 1st defendant in 2008, but acknowledged that he gave her Kshs. 4 million in 2011 through his advocates, Magnan Advocates; that she deposited her title with the said advocates as a pledge to pay back the amount, and the said debt had no terms for interest; that the 1st defendant frustrated her efforts to repay the debt; that the court in ELCMISC 58 of 2008 clearly stated that the purchase price by Samuel Vargese was still being held by the firm of Omondi and Waweru Advocates, and the 1st defendant could not have given her the Kshs. 4 million as he claimed; that on 13th December 2007 she entered into an agreement with Thraya Saary which gave birth to HCC 477 OF 2009, which was determined by consent where the plaintiff was required to pay Kshs. 2 million and not Kshs. 6 million; that she never instructed the firm of Muthee Kihiko Soni Associates Advocates LLP to issue any undertaking to Swaleh & Company Advocates; that the alleged undertaking clearly stated that it is on the instructions of the 1st defendant, and not the plaintiff, and it was for Kshs. 3 million, and not Kshs. 6 million; that the cancellation of the transfer to Knightbridge Apartments Limited was done by the Registrar under section 60 of the Registration of Titles Act (repealed) and she denied being given Kshs. 4 million for that purpose;

that she did not receive Kshs. 5 million for travelling back to the United Kingdom; that she neither executed any transfer in favour of 1st defendant, nor received Kshs. 35 million; that she only owes Kshs. 4 million to the 1st defendant, and that the proper procedure was for the 1st defendant to institute civil proceedings against her, get judgment and finally execute against the property; that Musinga and Company Advocates ought to have protected her title, instead of guiding the 1st defendant to extract the decree and lift the subsisting caveats.

4. The learned counsel for the plaintiff and 1st defendant filed their submissions dated the 18th March 2024 and 26th March 2024 respectively, which the court has considered.

5. The following are the issues for the court's determinations:

   a. Whether the plaintiff has met the threshold for temporary injunction to issue at this interlocutory stage.

   b. Who bears the costs?

6. The court has carefully considered the grounds on the notice of motion, parties affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following findings:

   a. Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 provides for instances when a temporary injunction may be issued. It 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."

   In the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 Others* CA No.77 of 2012 (2014) eKLR the Court of Appeal held that;

> " in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

b. The Court of Appeal in the case of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) eKLR stated as follows about a prima facie case:

> "... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

Though the 1st defendant has in response to the plaintiff's application alleged to have given the plaintiff loans over the years, leading to the plaintiff giving him the suit property's title documents, and executing the transfer of the same in his favour, the plaintiff has disputed all the alleged loans, except one of Kshs.4 millions, that she stated was based on an oral agreement. The defendant has failed to provide documentary proof of the disputed loans or the loan agreements and agreement for sale of the suit property. The failure to have the alleged loan and sale agreements reduced into writing appear to suggest a contravention of section 3 of the *Law of Contract Act*, Chapter 23 of Laws of Kenya. That will be resolved after parties adduce their evidence in the hearing of the main suit.

c. The 1st defendant is the current registered owner of the suit property, but the validity of that title has been challenged by the plaintiff in accordance with section 26 of the *Land Registration Act*, No. 3 of 2012. Of course, the court is not expected to make any definitive or final determination of any issue of law or fact at this interlocutory stage, but must wait for parties to present their evidence before that. It could possibly be that the parties have other documents and or evidence that is yet to be presented, that will boost the weight of each parties' case against the other. From the factual materials presented so far, I find the plaintiff has established a prima facie case with a probability of success, and a temporary injunction should issue in her favour as prayed.

d. In the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR the court provided an explanation for what is meant by irreparable injury and 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."
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> The court finds from the parties' evidence the suit property has already been registered in the name of the 1st defendant, and that construction has already began. The construction on its own has changed the character of the property, and amounts to some damage. The question that arises then is whether the damage is irreparable. There is nothing presented to the court to suggest that the value of the suit property, or the damage thereof is incapable of being ascertained, and appropriate awards made. There is also no suggestion that the 1st defendant is a man of straw who would be unable to meet such awards.

e. In the case of *Pius Kipchirchir Kogo* case the court defined the concept of balance of convenience as follows:

'The meaning of balance of convenience in favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience

caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

In the case of *Paul Gitonga Wanjau versus Gathuthis Tea Factor Company Ltd & 2 Others* (2016) eKLR, the court was dealing with the issue of balance of convenience and expressed itself thus:

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

In this case, the harm that the 1st defendant would suffer is related to stoppage of the construction on the suit property, which he claims is a joint venture with a developer, and might result in other civil suits by the developer cropping up in this court. On the other hand, the plaintiff argues that if the application is not allowed, then it would mean that the construction would proceed, and more buyers would continue to buy the premises thereon, and consequently would sue to recover their monies if the court finds that the 1st defendant did not have good title, to the suit property.

f. I have weighed the likely inconveniences to be suffered, and while I agree with the 1st defendant that the buyers of the flats who have paid deposits for their units have an expectation to receive their flats within the time agreed, the court also owes a duty of care to the plaintiff, and to other potential buyers, who may want to invest in the ongoing construction, while the 1st defendant's title to the suit property is under a serious legal challenge. I find the balance of convenience tilts towards granting the temporary injunction order against the 1st defendant, pending the hearing and determination of the suit.

g. In respect of prayer 5, for 1st defendant to be compelled "to forthwith remove all structures and such construction and remove all alien matters; demolish and remove all debris from the parcel of land title number No. CR. 11673 subdivision 1270/1/MN", the question that arises is whether a mandatory injunction can be issued at an interlocutory stage in this case. In the case of *Joseph Kaloki t/a Royal Family Assembly versus Nancy Atieno Ouma* [2020] eKLR the Court

of Appeal reaffirmed its decision in *Kenya Breweries Limited & Another versus Washington O. Okeyo* [2002] eKLR and stated that:

> "a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application."

The Court also reaffirmed its decision in *Shariff Abdi Hassan Vs Nadhif Jama Adan* [2006] eKLR where it stated that:

> " The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case."

From the parties' pleadings and affidavit evidence presented so far, and in view of dictates in the above precedents, the court finds this case is not appropriate one for mandatory injunction to issue at this interlocutory stage. This suit appear to have some facets or allegations of fraud, and shrouds of deceit, which are matters that must be dealt with through hearing of the main suit before the court can effectually and completely pronounce itself on the issue of ownership of the suit property. In conclusion, the plaintiff has established a prima facie case, even though she has not shown that she would suffer irreparable damage if injunction sought is not granted. The court has found the balance of inconvenience tilts in favour of the Plaintiff, as she may have to deal with a litany of suits against her, should she emerge successful after the suit is heard and determined. That would be so if the 1st defendant continued with the construction, and sale of flats to other buyers, while his title is under challenge.

h. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs generally follow the event unless where there is good reason to depart from the rule. In this matter, I find the justice of the case will better be served with an order that costs abide the outcome of the main suit.

7. In view of the above conclusions, the court find and order as follows:

a. That the notice of motion dated 29th January 2024 has merit and is allowed in terms of prayers 3 and 4 only.

b. The costs to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 3RD DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : M/s Nabwana

Defendants : Mr. Mutugi for 1st Defendant, M/s Salu holding for Penda for 2nd and 3rd Defendant.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.