Mbugua v County Government of Nakuru & another (Environment & Land Case 111 of 2024) [2024] KEELC 5125 (KLR) (Environment and Land) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5125 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT & LAND CASE 111 OF 2024

MC OUNDO, J

JULY 11, 2024

BETWEEN

FRANCIS MACHARIA MBUGUA .... PLAINTIFF

AND

COUNTY GOVERNMENT OF NAKURU .... 1ST DEFENDANT

THE LAND REGISTRAR, NAIVASHA .... 2ND DEFENDANT

RULING

1. Vide a Notice of Motion dated 17th January, 2024, brought pursuant to the provisions of Order 40 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicant sought that an order of injunction to issue restraining the Defendants from interfering with his title, possession and use of all that parcel of land known as Naivasha/Municipality Block 5/227, pending the hearing and determination of the instant suit. He also sought that the costs of the application be provided for.

2. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by Francis Macharia Mbugua, the Plaintiff/Applicant herein who deponed that he was the registered proprietor of all that parcel of land known as Naivasha/Municipality Block 5/227 (the suit land) since 29th October, 1997 and had been in occupation and use of the same since then, wherein he had even used the title as security to acquire a loan facility from NIC Bank. That as late as September 2023, no restriction had been registered against the title apart from the Charge to NIC Bank.

3. That when he had applied for sub-division of the title to enable him repay the loan facility, the 1st Defendant had not objected to the same. That subsequently, upon the completion of the sub-division and change of user in late 2023, his surveyor had proceeded to lodge the documents to finalize the process wherein they had discovered that on 8th January, 2024 the Defendants had placed a restriction

on the suit land title despite the 1st Defendant having been issued a Certificate of compliance and Notification of the approval of sub-division and change of user.

4. That he had neither been consulted, notified nor given a chance to be heard before the aforementioned restriction was placed against his title. That the actions therein were unlawful and a blatant interference with his constitutional right to own and use his private property. That subsequently, he could not finalize the sub-division to enable him sell parts of the suit land and settle his loan with NCBA Bank amounting to over Kshs. 85,000,000/=.

5. That he stood the risk of his property being sold by the bank as his loan continued accruing interest and penalties That unless the prayers sought herein were granted, the Defendants/Respondents would proceed to deal with his title and deny him possession to complete the sub-division which would occasion him irreparable damage.

6. The Defendants did not put in any reply.

7. The instant application was canvassed by way of written submissions wherein the plaintiff/applicant, had after summarizing the factual background of the matter framed one issue for determination to wit; whether he had satisfied the conditions for the grant of orders of injunction.

8. He placed reliance on a combination of decisions in the case of *Giella v Cassman Brown* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen and 2 Others* [2014] e KLR on the conditions for the grant of interlocutory injunction as well the case of *Mrao Limited v First American Bank of Kenya* (2003) KLR 125 on the definition of a prima facie case to reiterate that he was the registered owner of the suit land for which he held a certificate of lease which had been registered in the year 1997 hence by virtue of the provisions of Section 26(1) of the *Land Registration Act*, the said Certificate of Lease was a prima facie evidence of his absolute and indefeasible ownership. That upon acquitting ownership of the suit land, he had taken possession of the same with intention to develop and use it as he deemed fit and without undue interference from any other person, thus the Respondents' action of placing a restriction on the suit land without either notifying him or stating their interest on the suit land was an infringement of his proprietary rights which would call for an explanation from the Respondents.

9. On irreparable injury, he reiterated the content of his supporting affidavit on how he had applied for sub-division of the suit land which had been completed in late 2023 but before the same could be finalized, he discovered that the Respondent had placed a restriction on the suit land. He placed reliance on the provisions of Section 76 of the *Land Registration Act* to submit that the Respondents had contravened the said provisions by failing to issue the him with a notice before placing the restriction and stating the period for which the same was to last.

10. His submission was that he was bound to suffer losses, including the risk of having the suit land sold in effecting the chargee bank's statutory right of sale due to the accrual of interests that had arisen from his inability to complete the subdivision which would lead to stalled projects thereby having a ripple effect on the service of the said loan. That further, the said restriction that had been placed on the suit land could not and should not be allowed to run for an indefinite period in light of the fact that the Respondents had not taken any appropriate steps to confirm their interest on the suit land, if any at all.

11. Finally, he submitted that the balance of convenience tilted in his favour since he stood to suffer the greatest inconvenience were the orders sought not granted in comparison to the Respondents who were yet to declare the interest that they might have on the suit land. He thus urged the court to grant the Application as prayed since he has satisfied all the requirements for the grant of injunction.

Determination.

12. The celebrated case of *Giella v Cassman Brown* [1973] EA 358 sets out conditions for the grant of an interlocutory injunction as follows:-

    i. Is there a serious issue to be tried(prima facie case)

    ii. Will the Applicant(s) suffer irreparable harm if the injunction is not granted;

    iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

13. On the first issue as to whether the Plaintiff/Applicant in this matter have made out a prima facie case with a probability of success, I am guided by the case of *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125, where a *prima facie* case was described as follows:

> " a *prima facie* case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case 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."

14. The Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the 1st and 2nd Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of whether the Applicant herein has demonstrated he has a genuine and arguable case or not.

15. The Plaintiff's Application was premised on the basis that he holds title to the suit land and which land he has also used as security to acquire a loan facility from NIC Bank. That subsequently he decided to sub divide the same to enable him repay the loan facility, wherein the 1st Defendant had not objected. Upon the completion of the sub-division and change of user in late 2023, when his surveyor attempted to lodge the documents to finalize the process, it had been discovered that the Defendants had placed a restriction on the suit land title on the 8th January, 2024 despite the 1st Defendant having been issued a Certificate of compliance and Notification of the approval of sub-division and change of user.

16. That he had neither been consulted, notified nor given a chance to be heard before the aforementioned restriction was placed against his title. That the actions therein were unlawful and a blatant interference with his constitutional right to own and use his private property. That subsequently, he could not finalize the sub-division to enable him sell parts of the suit land and settle his loan with NIC Bank amounting to Kshs. 17,200,000/=.

17. That he stood the risk of his property being sold by the bank as his loan continued accruing interest and penalties. He sought that unless the prayers sought herein were granted, the Defendants/Respondents would proceed to deal with his title and deny him possession to complete the sub-division which would occasion him irreparable damage.

18. The application was not opposed despite the County Attorney having entered appearance for the 1st Defendant on 15th February 2024 and notices having been served upon the office of the Hon. Attorney General- Nakuru County.

19. Has the Plaintiff/Applicant herein demonstrated that he has a genuine and arguable case? In asserting his ownership rights over the suit property, the Applicant has annexed a copy of title to land parcel Naivasha/Municipality Block 5/227, which title he had been issued on the 28th October 1997 to show

that he is the registered proprietor of the suit property. The law is very clear on the position of a holder of a title deed in respect of land.

20. Section 26(1) of the *Land Registration Act* provides as follows:

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer … shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner …..and the title of that proprietor shall not be subject to challenge…"

21. In light of the above, this court finds that the Plaintiff/Applicant has established prima facie that he is entitled to all the rights appurtenant thereto unless otherwise proved during the hearing of the main suit.

22. On the second issue as to whether the Applicant would suffer irreparable harm if the injunction is not granted, I have noted the encumbrance placed on the land by the bank wherein the land was given as security to secure a loan and therefore it is normal that the Applicant is apprehensive that he would suffer irreparable harm if the injunction was not granted.

23. Given such a scenario the court has a duty to consider whether or not to grant or deny the conservatory relief so as to enhance the Constitutional values and objects of the specific right in the Bill of Rights. Based on the above findings, I am convinced that the Plaintiff/Applicant has shown that he has have beneficial interest in the suit land which is capable of being preserved and/or protected by means of an interlocutory injunction as we await the conclusion of this case. I find that the Applicant will suffer the greater harm from refusing the remedy pending a decision on the merit

24. Accordingly, I do proceed to grant the order of injunction sought, with the result that the Applicant's Notice of Motion dated17th January, 2024 succeeds with costs at a lower scale since it was undefended.

25. I now direct parties to comply with the provisions of Order 11 of the *Civil Procedure Rules* within 21 days from today so that the matter can be set down for hearing.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 11TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE