



REPUBLIC OF KENYA



KENYA LAW
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Muturi & 2 others v Morjaria & 2 others (Environment & Land Case 1553 of 2013 & Civil Suit 375 of 2018 (Consolidated)) [2023] KEELC 16079 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16079 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1553 OF 2013
& CIVIL SUIT 375 OF 2018 (CONSOLIDATED)

AA OMOLLO, J

FEBRUARY 9, 2023

BETWEEN

FRANCIS KIONGO MUTURI 1ST PLAINTIFF
KENNEDY NG'ANG'A MARANGA 2ND PLAINTIFF
CATHERINE NJERI 3RD PLAINTIFF

AND

HATESH MORJARIA 1ST DEFENDANT
VIJAY MORJARIA 2ND DEFENDANT
SEMA HEALTH PRODUCTS LTD 3RD DEFENDANT

RULING

1. The Applicant filed a notice of motion dated September 5, 2022 seeking for the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Spent
 6. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue orders restraining the Respondents herein whether by themselves their servants' agents assigns or anybody working under their instructions from proceeding with the construction activities at the property known as Land Reference No 24392.



7. That pending the hearing and determination of the main suit the Respondents herein whether by themselves, their agents, assigns and or servants be ousted from the parcel of land known as Land Reference No 24392.
 8. That pending the hearing and determination of the main suit, this Honourable be pleased to issue orders authorizing the OCS, nearest police station to provide police escort to the 3rd Defendant/Applicant herein for purposes of peace and order during the said ousting process.
 9. That this Honourable Court do issue any other order that it may deem just and fit in the interest of justice.
 10. That cost of this Application be provided for.
2. The Applicant outlined the grounds in support of the motion and reiterated in the affidavit in support thereof which grounds include the following;
- a. That it has come to the 3rd Defendant/Applicant's attention that there are ongoing construction activities at the suit property.
 - b. That currently a perimeter wall has been erected around the said property and a gate has been put up.
 - c. That one of the Directors of the 3rd Defendant/Applicant sought to know under whose instructions the contractor and supervisor were working under and she was informed that they are working pursuant to the instructions of "the owner of the property" and that they had "strict working timelines to complete "the project."
 - d. That the 3rd Defendant/Applicant is thus apprehensive that there may be fraudulent attempts to take over the said property or worse still, the property may have been fraudulently sold to an unsuspecting third party.
3. The Applicant deposed further that there is ongoing construction on LR No 24392 herein-after referred to as the "suit property" and the same is subject to a matter actively in court contesting the title held by the 3rd Plaintiff/Respondent and the court is yet to render itself on the true proprietor of the suit property. That unless the Court intervenes and grants the orders sought, there is imminent risk of the property being transferred or extensively interfered with rendering the suit an exercise in futility.
4. The 3rd Plaintiff/Respondent opposed the Applicant's' motion via a replying affidavit sworn by Catherine Njeri Ng'ang'a on October 17, 2022 stating she is the registered owner of the suit property and is in lawful and exclusive possession of the same and therefore the application should be dismissed with costs.
5. On October 19, 2022 this court directed that the application be dispensed by way of written submissions. Accordingly, the 3rd Defendant/Applicant and 3rd Plaintiff/Respondent filed submissions dated November 11, 2022 and November 15, 2022 respectively. The Applicant submitted that they have established a *prima facie* case with a probability of success citing the case of Jared Sigini Keegwa vs Walter Onchwari and another [2014] where the trial court defined a prima face case to include a genuine and arguable case. The Applicant has contested the title to the suit property held by the 3rd Plaintiff/Respondent yet it is on the strength of the impugned title that they are undertaking the construction. The Applicant submitted that the National Land Commission had found that the



- title issued to the 1st and 2nd Plaintiffs/Respondents was to be revoked hence they had no good title to be passed to any other party including the 3rd Plaintiff/Respondent.
6. Further the Applicant stated that they cannot be adequately be compensated in damages citing the case of *Joseph Sire Oromo vs Housing Finance Company of Kenya* [2008] eKLR and *Niaz Mohamm Jammohammed vs Commissioner for lands & 4 Others* (1996) eKLR that damages are not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law and that a crystallized right if violated cannot be equated to compensation by damages.
 7. The Applicant submits that the balance of convenience tilts in favour of maintaining the *status quo* and therefore the temporary injunction ought to be granted to preserve and to protect the suit property.
 8. On her part, the 3rd Plaintiff/Respondent submitted that she produced a title which is a prima face evidence of their ownership of the suit property and that the Applicant has no title or grant to its favour and has failed to meet all the three conditions for the grant of interlocutory injunction as set out in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014]eKLR and therefore their motion should be dismissed with cost.
 9. I have read and analyzed all the pleadings filed in support of the application as well as the replying affidavit sworn in opposition thereto. The core issue for determination at this stage is whether the Applicant has met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit. I have also considered and weighed in on the rival submissions from both parties as regards the grant of orders sought and also taken into consideration the judicial decisions cited and attached.
 10. The guiding principles for the grant of orders of temporary injunction are well settled as set out in the case of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions in Kenyan courts *inter alia* the Court of Appeal in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR which laid out the three pillars on which rest the foundation of any order of injunction interlocutory or permanent and have to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
 11. Consequently, the Applicant ought to, first, establish a *prima facie* case. The Applicant submitted that they have established a *prima facie* case of successfully contesting the title held by the 3rd Plaintiffs/ Respondents stating that the same was directed to be revoked after investigation by the National Land Commission. The 3rd Defendant/Applicant has taken out a counter-claim against the Plaintiffs/ Respondents.
 12. Secondly, the Applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury as;

“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.”
 13. The Applicant has submitted that it is apprehensive that the 3rd Plaintiff/Respondent may dispose of the suit property to unsuspecting third party as she holds the contested title and therefore the court should issue an interlocutory injunction to the same.



14. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in its favour. In the case of *Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience 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.”

15. The Applicants contends that the balance of convenience tilts in its favour of having the suit property preserved in its current status until the suit is conclusively determined. In the case of *Amir Suleiman Vs Amboseli Resort Limited* [2004] eKLR the court offered further elaboration on what is meant by “balance of convenience” as follows;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

16. Bearing this in mind that the 3rd Plaintiff has not denied that there are ongoing construction works on the suit property and the fact that there is a counter-claim on record challenging the Plaintiffs’ title, I am of the view that there is a lower risk in granting orders of temporary injunction than not granting them, pending determination of the suit on its merits. This is because both parties are claiming ownership to the suit property. The 3rd Plaintiff/Respondent’s argument that as the holder of the title, she has a right to deal with property with the property like any other titleholder goes against the doctrine of *lis pendens*.

17. I am persuaded that if orders sought are not granted, the suit property might be in danger of being dealt in the manner set out in the application and apprehended by the 3rd Defendants/Applicant. Therefore, the application is granted in terms of prayer number 6 of the motion thus;

a. That pending the hearing and determination of the main suit, this Honourable Court does issue orders of temporary injunction restraining the Plaintiffs/Respondents herein whether by themselves their servants’ agents assigns or anybody working under their instructions from proceeding with the construction activities at the suit property known as Land Reference No.24392

b. Costs of the application to the 3rd Defendant/Applicant in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

A. OMOLLO

JUDGE

