



**Mohamed v Ogero & another (Environment & Land Case
E337 of 2022) [2023] KEELC 15878 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E337 OF 2022**

AA OMOLLO, J

FEBRUARY 6, 2023

BETWEEN

NASTEHO ABDI MOHAMED PLAINTIFF

AND

WILSON KAISOGO OGERO 1ST DEFENDANT

JOSEPH MOSOTI OMAMBIA 2ND DEFENDANT

RULING

1. The plaintiff/applicant filed her application dated October 6, 2022 and brought under the provisions of sections 1, 1A, 3, 3A 63(e) of the Civil Procedure Act and order 40 and 51 of the Civil Procedure Rules. The applicant prayed to be granted the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. The defendants whether by themselves, their employees, servants, agents, proxies, associates, persons acting at their behest or otherwise howsoever be restrained from entering upon, remaining upon, trespassing, constructing, offering security or otherwise interfering with the plaintiff's quiet possession of parcel of land known as LR No 36/163/VII (Orig No 7/6) pending the hearing and determination of this application.
 5. An order do issue directing the court bailiff and/or the county police commander Nairobi county, OCS Parklands station Nairobi, to assist in compliance and enforcement of this court's orders.
 6. To make such other interlocutory orders as may appear to the court to be just and convenient.



7. The costs of this application be provided for.
2. The application was supported by 14 grounds listed on its face *inter alia*:
 1. The plaintiff is the registered proprietor of all that parcel of land known as LR No 36/163/VII (Orig No 7/6) situate in the city of Nairobi in the Nairobi area (hereinafter “the suit property”).
 2. The plaintiff took possession and occupation of the suit property and has been in quiet possession of the same.
 3. The defendants by themselves, and through third parties acting at their behest have demolished and have begun excavations on the suit property, which is destroying the substratum of the suit property.
 4. The defendants are intent on dispossessing the plaintiff of her legally acquired property.
 5. The plaintiff is ready, able and willing to furnish a suitable undertaking as to the damages, if any, which may be suffered by the defendants as a condition for the grant of the orders sought herein.
3. The applicant further swore an affidavit in support of the motion on dated October 6, 2022. She deposes as the registered owner of the suit land known as LR No 36/163/VII (Orig No 7/6). That she recently conducted a search at the lands office which still reveal her as the registered owner. She continued that on January 6, 2020, the defendants invaded her property and threatened to take possession over the suit property which action necessitated her filing Milimani MCELC 211 of 2022 where the magistrate’s court issued temporary orders of injunction.
4. The applicant deposes that on August 31, 2020, the court in MCELC 211 of 2020 delivered a ruling and issued orders setting aside the earlier orders of January 2020 which according to her meant that the suit property was to be maintained in the previous state of affairs without any alterations and whichever party in possession was to remain in possession. The applicant stated that the defendants and or their authorized agents proceeded to the suit property and began demolitions of buildings erected on the suit property inspite of the existence of the court order. Therefore, following the wanton destruction by the defendants, she instructed her advocates to file another application and where they obtained orders.
5. The applicant continued that on April 2022, the defendants again descended on the suit property and began excavations therein. That a fresh order was issued restraining them from the interference which orders remained in force until September 2022 when the entire suit MCELC 211 of 2020 was struck out for want of pecuniary jurisdiction of the Magistrate’s Court. The applicant deposes that the defendants attempt to evict her from the suit property without following due process should be out-rightly rejected by this court.
6. The applicant pleaded that despite notice to vacate served on the defendants, they have wrongfully interfered with possession and intend to continue to do so unless restrained by this court. That the property will also be exposed to wastage, damage and alienation unless the defendants are ordered to cease in their trespass. She urged that this is a clear case in which an injunction ought to issue and prayed that the orders sought be granted.
7. In opposing the application, the defendants filed a replying affidavit dated November 14, 2022 and sworn by the 1st defendant Wilson Karsongo Ogero. He deposed that they have always been the proprietors of LR No 36/VII/163 (Orig No 7/6) Eastleigh Nairobi and that they have wrongly been



- sued in respect to parcel No LR No 36/163/VII which they are strangers to and which is totally different from their land.
8. The defendants proceeded to explain how their land was acquired stating that their late father Stanley Omambia Ogero purchased land LR No 36/VII/163 (Orig 7/6) from Maria Josefina Rosa Emerciana De Souza in 1973. That Emerciana De Souza had also purchased it through an indenture dated March 15, 1956. The respondents proceeded to annex copies of the indentures as “Wo1”. The defendants stated that they have enjoyed quiet possession of the land from 1973 when it was purchased and some of their siblings are residing on the property.
 9. The 1st defendant deposes further that their land was developed with rental flats with tenants some of whom have been in occupation for a period in excess of 20 years and paying rent directly to them. He contends that as a family they decided to develop their parcel further and so signed a joint venture on May 17, 2021 with a team of developers to have the old slab demolished to pave way for modern apartment blocks.
 10. That it is at this point in the year 2020 they encountered the plaintiff who they were informed by the tenants had visited their property and alleged to have purchased it from individuals unknown to them. The defendants added that it is also when they learnt the plaintiff had sued them at Milimani Chief Magistrates Court ELC case No 211 of 2020. The 1st defendant deposed that they continue to suffer immeasurable losses and agony as they are held ransom in their own parcel of land LR No 36/VII/163 (Orig No 7/6) which is totally different from the plaintiff’s parcel No 36/VII/163 (Orig No 7/6). They urged the court to dismiss the suit.
 11. The defendants filed a counter-application dated November 14, 2022 brought under order 1(9) & 45(1) of the Civil Procedure Rules seeking the following orders:
 1. Spent
 2. That the orders issued by the Honourable Lady Justice A Omollo on the November 1, 2022 be set aside.
 3. Spent
 4. That a temporary injunction be issued as against the plaintiff herein either by herself, her servants, assigns and anyone claiming through her, or her agents be restraining and/or stopping the plaintiff from entering into, and in any way interfering with the defendant’s quiet possession of their property known as LR No 36/VII/163 (Orig No 7/6) situate in Eastleigh, within Nairobi county, pending the hearing and determination of this suit.
 5. That the suit as against the defendant/applicants herein namely Wilson Kaisongo Ogero and Joseph Mosoti Omambia be struck out.
 6. That the honourable court grants such orders it deems fit to grant in the circumstances.
 12. The application was premised on the grounds *inter alia*:
 1. That the defendants’ parcel No LR No 36/VII/163 (Orig No 36/7/6) is a totally different parcel of land from that of the plaintiff’s LR No 36/VII/163 (Orig No 7/6).
 2. That the defendants have spent the last two years in the Chief Magistrates Court under CMCC No 211 of 2021, trying to prove the fact that the plaintiff’s herein are not the proprietors of the defendants’ parcel of land.
 3. That the defendants are running into huge losses in terms of loss of monthly rental income.



4. That the defendants entered into a joint venture agreement to have their parcel developed further into modern apartments. The same has been stalled and continuously frustrated by the plaintiff's filing the lower court matter and now this suit. The defendants, the legitimate owners of the said property, are very apprehensive that the continuous interference of the quiet possession by the plaintiff, who owns another parcel of land will result in them running into losses worth millions of shillings.
13. The defendants/applicants swore an affidavit in support of their motion whose content is more or less similar to their replying affidavit sworn in opposition to the plaintiff's application. At paragraph 21, the defendants deposed that the two parcels are different as they have applied for gazettement of their land due to the ongoing conversion and migration of all the Nairobi block titles. That under the schedule for Nbi/Block/49 under gazette notice No 1766 Vol CXX III – No 36 dated 21/2/2021 the sequence of parcels gazetted are 36/I/2, 36/I/3, 36/III/4 etc and there is no sequence with properties in the Eastleigh South area gazette in the sequence of the plaintiff's No 36/163/VII.
14. The plaintiff filed a replying affidavit dated December 9, 2022 in opposition to the orders sought by the defendants. The plaintiff deposed that he has invested heavily in terms of finances resources and personnel to ensure the sustainability of the suit property and have been in quiet possession of the premises until the defendants' trespass and continued trespass. That the defendants application has no legs, is an academic exercise and unrelated to the provisions of law it is brought under.
15. The plaintiff averred that as the registered owner, he is the one likely to be prejudiced if the orders sought by the defendants' are granted and the character of the suit property has since changed owing to the callous and illegal acts of the defendants.
16. According to the plaintiff, the defendants are the owners of their own misfortune since being aware of the orders of Hon Mnasi made on August 31, 2020, directing the parties to maintain status quo on the property, they still went ahead to commence negotiations and engage a developer that culminated into the joint venture agreement dated May 17, 2021. The plaintiff urged that this suit should be allowed to proceed to hearing since during the site visit done by Hon Nyaga CM, both parties pointed to the same property.
17. The plaintiff asserted that the defendants' application does not meet the threshold set in *Giella v Cassman Brown* hence it should be dismissed with costs.
18. Parties agreed to prosecute the application by filing of written submissions. The plaintiff filed her submissions dated November 21, 2022 and December 16, 2022 respectively. The defendants submissions are dated December 1, 2022.
19. The plaintiff submitted that she is the registered owner of the suit plot. That a look at the documents annexed by the defendants makes reference to a separate property. The plaintiff cited the case of *Franco Nderitu Kanyari & 6 others v County Government of Nyandarua* (2018) eKLR where the court made a finding that at an interlocutory stage, the court need not determine the merits of the case.
20. The plaintiff argued that the defendants have not controverted that they have trespassed on the suit property instead alleging that they have been wrongly sued. Further, the plaintiff submits that he will suffer irreparable harm since the defendants have confirmed occupation and through various averments



have proved that their acts are injurious to the plaintiff. He cited the case of *James Njoroge & Ano v Francis Njuguna & Ano* (2012) eKLR where the court held thus:

“...damages (are) not and cannot be a substitute for loss which is occasioned by a clear breach of the law.”

21. In respect to the defendants application, the plaintiff submitted that the principle to be considered for granting orders of injunction were laid out in the case of *Giella v Cassman Brown* and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR. That the defendants have sensationally given a story of how they came to allegedly acquire the suit property through their submissions. She argued that their submissions should be taken with a pinch of salt because it is trying to make the court delve into the merits of the case. Further that the defendants are laying a claim to a separate title. The plaintiff urged the court to allow her application and dismiss the application by the defendants.
22. The defendants submitted that the plaintiff has not established a *prima facie* case because she has not demonstrated by way of reliable and genuine evidence that she is the registered owner of LR No 36/163/VII. The defendants critiqued the survey report filed by the plaintiff submitting that the instructions was to identify LR No 36/163/VII (Orig No 7/6) but the surveyor ended writing about LR No 36/VII/163 (Orig No 7/6).
23. The defendants wondered why the initiated search dated February 14, 2018 referred to the plaintiff's property as LR No 36/163/VII while the subsequent search annexed to the supplementary affidavit dated October 2020 now shows she is the registered owner of LR 36/VII/163 showing contradictions in the plaintiff's claim. The defendants reiterated the details of their ownership of the suit land as continued in the replying affidavit.
24. The defendants submitted that a party in possession of a property who has demonstrated ownership by way of documents should not be inconvenienced by issuing an order of injunction. They referred this court to the case of *Samuel Njoroge (suing on behalf of the estate of Geoffrey Gikaru Njoroge v Wanjie Holding Limited)*, Civ Appeal No 6 of 2018 where the Court of Appeal held thus;

“Taking into account the foregoing, we, like the learned judge, are not convinced that the appellant had demonstrated a *prima facie* case with a probability of success against the respondent who is the registered proprietor of the suit premises. Even assuming the appellant had demonstrated a *prima facie* case, it has not been shown that any loss which may be suffered by the appellant is incapable of being compensated by damages.”
25. According to the defendants, the plaintiff has not demonstrated that her claim has a probability of succeeding. That the demolition and excavations took place when there was no order in place. They argue they are non-suited and the court should not allow the plaintiff to waste another two years or more of the defendants but proceed to dismiss the plaintiff's application and strike out the entire suit.

Determination

26. It is an established principle of law that any party who wishes to be granted orders of a temporary injunction must show either that he/she has a *prima facie* case, or that he/she will suffer irreparable loss or that the balance of convenience tilts in their favour. Further, the purpose of an order of temporary injunction is laid out in order 40 rule 1(a) & (b) of the *Civil Procedure Rules* thus;

“(1)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.”

27. The plaintiff has sued the two defendants laying claim over land parcel No 36/VII/163 which she pleads she has been in occupation and quiet possession of. From the copy of sale agreement annexed to the affidavit in support, on the face of the document it is undated save for the dates of the land registry stamp which shows it was presented on July 9, 1999. The plaintiff does not point out in the plaint or the affidavit in support of the motion when she took possession. She however pleaded that on diverse dates in the year 2020, the defendants wrongly entered the land and illegally took possession. The only document showing her intent of possession is a notice addressed to tenants dated May 4, 2020 directing the tenants to pay rents to her agent.
28. The plaintiff is specifically asking this court for orders of temporary injunction restraining the defendants or their agents from entering upon, remaining on or trespassing on the suit land. If the defendants already entered the land, albeit wrongly, then the orders seeking to restrain them from entering or remaining on cannot issue ante unless the court was moved for orders of mandatory injunction. While contesting the plaintiff’s claim, the defendants pleaded that they have always been in possession from 1973. As part of their evidence of possession, they annexed copies of rates receipts issued to them dated 1992, 1993, 2007.
29. When the plaintiff took possession was paramount to establish she had a *prima facie* case. Instead of pursuing this line, the applicant took this court to the events and proceedings before the Magistrate Court in MCELC No 211 of 2020 while aware that the former suit was struck off. Once the suit was struck out, the proceedings became of no use to the parties as they were returned to their previous positions before the filing of the suit.
30. Further, the applicant referred this court to an order of status quo which then required parties to maintain a status quo of the suit property. That order dated August 31, 2020 by Hon G. A Mnasi SPM was issued before the suit was eventually struck out. However, the status quo at paragraph 3 specified that “the order of status quo ante is hereby issued on the suit property pending hearing and determination of the suit.” My understanding of the order is that it granted parties liberty to deal with the property as they were before the filing of the suit. The same order in paragraph (1) had set aside the injunction orders that had been granted to the plaintiff and in paragraph (2) issued orders of temporary injunction against the plaintiff restraining her from trespassing on LR 36/VII/163.
31. The 2nd limb of the order sought herein by the applicant wants the defendants restrained from constructing, offering for security or otherwise interfering with the plaintiff’s quiet possession of LR No 36/163/VII. As already discussed, the plaintiff did not establish if and when she took physical possession that is likely to be disrupted. The defendants argue that the plaintiff’s property is different from theirs. However, on the basis that the defendants are aware from the letter issued to their tenants dated May 2020, and the certificate of search annexed to the plaintiff’s supplementary affidavit that



- the claim is over the property the defendants are intent on developing. The question of who holds a valid title documents to the property shall be determined during the trial hence the request to strike out the suit is premature.
32. Both parties are seeking orders of temporary injunction restraining either from interfering with the suit property. Both of them are holding some documents of title. Although the defendants alleged the plaintiff did not annex a copy of title. However, they acknowledge that the plaintiff had annexed a copy of search dated February 2018 showing she is the registered owner of LR No 36/163/VII and a subsequent one dated October 2020 showing she is registered as the owner of LR No 36/VII/163. Before filing of this suit, a site visit had been done by the Chief Magistrate, Milimani and the applicant deposed they pointed to the same property during the said site visit.
 33. Therefore, on the basis that both are claiming the same parcel of land, the issue for determination is in whose favour the balance of convenience tilts. The plaintiff's documents of ownership run from 1999 (as per the registry stamp on the sale agreement). Unfortunately, the searches exhibited does not disclose the date of registration of the plaintiff. The certificate of search annexed gave the status of ownership as of the date the search is conducted. Besides the sale agreement and the copies of searches, the other document annexed by the plaintiff was the survey report which document has nothing to do with proof of ownership.
 34. On their part, the defendants' produced documents of ownership dating as far back as 1956 and 1973. They also produced payment of rates which is document in their father's name as the registered owner. The documents presented by the defendants present a more detailed history of how they acquired their property on the face of those documents and from their dates, they are the first in time. One of the doctrines of equity is that where there are two competing equities the first in time prevails would then guide this court to find in whose favour the balance of convenience tilts. In the case of *Wreck Motors Enterprises v The Commissioner of Lands* (1997) eKLR the Court of Appeal held that; "where there are two competing titles, the one registered earlier is the one that takes priority."
 35. I am alive to the fact that at this interlocutory stage the court does not investigate the merits of the case. Therefore, the dates of acquisition of ownership is only being used to determine in whose favour the convenience tilts and no more. In the instant, convenience tilts in favour of the defendants who are in possession and whose titles documents bear an earlier date.
 36. There is no requirement for the court to consider all the three principles. However, taking into account that the plaintiff came to court because the character of the property is likely to change unless restraining orders are granted hence the need to consider the question of irreparable loss. She sought orders which included restraining the defendants from undertaking construction. The plaintiff cited the case of *James Njoroge Kamau & Ano* supra which stated inter alia that damages are not a substitute for loss occasioned by a clear breach of the law.
 37. Both parties undertook a valuation of the property and there is a valuation report filed on record. The defendants annexed a valuation report to their application at page 136-159 of their bundle which gives the monetary value of the suit property. Thus the value of the suit property is ascertainable. The plaintiff did not submit that the damages in this case cannot be compensated vide a monetary award. Her argument on damages was that a court cannot permit a breach of the law merely because compensation is sufficient.
 38. Based on the documents filed and on record, the court cannot come to a conclusion at this stage of the proceedings that the defendants actions are illegal or are a breach of the law. After analyzing the grounds in support of the application dated October 6, 2022, I am not satisfied that the plaintiff has made out



a case that should she be successful at the end of this case, she cannot be sufficiently compensated by an award of damages.

39. In conclusion, I hold that the plaintiff's application dated October 6, 2022 is without merit and it is dismissed. The defendant's application dated November 14, 2022 is allowed in terms of prayer 2 and 4 of the motion thus;
- a. That the orders issued by the honourable Lady Justice A. Omollo on the November 1, 2022 be set aside.
 - b. That a temporary injunction be issued as against the plaintiff herein either by herself, her servants, assigns and anyone claiming through her, or her agents be restraining and/or stopping the plaintiff from entering into, and in any way interfering with the defendant's quiet possession of their property known as LR No 36/VII/163 (Orig No 7/6) situate in Eastleigh, within Nairobi county, pending the hearing and determination of this suit.
 - c. The costs of both applications shall abide the winner of this suit.

DATED, SIGNED & DELIVERED AT MILIMANI THIS 6TH OF FEBRUARY 2023.

A. OMOLLO

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Shaunda holding brief for Osundwa for Plaintiff

Ms. Nyamolo holding brief for Owaga for Defendants

Ms. C. Nyokabi - Court Assistant

