



Novirella Company Limited v Comfort Homes & another (Environment & Land Case E062 of 2022) [2023] KEELC 408 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E062 OF 2022
CA OCHIENG, J
FEBRUARY 1, 2023**

BETWEEN

NOVIRELLA COMPANY LIMITED PLAINTIFF

AND

COMFORT HOMES 1ST DEFENDANT

HEZEKIA MWANGI KARIUKI 2ND DEFENDANT

RULING

1. What is before court for determination are the plaintiff's notice of motion applications dated the August 8, 2022 and October 5, 2022 where they seek similar orders as follows:
 1. Spent.
 2. That pending the hearing and determination of this application, this honourable court be pleased to issue a temporary injunction restraining the defendants/respondents whether by themselves or their servants, agents, employees, nominees, hirelings, goons or anybody claiming under them, or otherwise howsoever, from in any way invading, entering upon, trespassing or continuing to trespass thereupon, settling on, occupying, utilizing, alienating, dispossessing the plaintiff, destroying boundary marks, erecting illegal structures, selling, leasing, subletting, wasting or purporting and holding themselves out as owners thereof, or otherwise in any manner interfering with the plaintiff's exclusive possession, occupation, use and enjoyment of the parcel of land known as LR No 13669 (original number 12610/2/4) measuring 39.33 hectares situated in Athi River sub county within Machakos county.
 3. That pending the hearing and determination of the main suit, this honourable court be pleased to issue a temporary injunction restraining the defendants/respondents whether by themselves or their servants, agents, employees, nominees, hirelings, goons or anybody claiming under them, or otherwise howsoever, from in any way invading, entering upon, trespassing or



continuing to trespass thereupon, settling on, occupying, utilizing, alienating, dispossessing the plaintiff, destroying boundary marks, erecting illegal structures, selling, leasing, subletting, wasting or purporting and holding themselves out as owners thereof, or otherwise in any manner interfering with the plaintiff's exclusive possession, occupation, use and enjoyment of the parcel of land known as LR No 13669 (original number 12610/2/4) measuring 39.33 hectares situated in Athi River sub county within Machakos county.

4. That an order directing the OCPD Athi River Police Station and officers working under them at police posts to ensure that the defendants/ applicants do not engage in lawlessness or any manner of breach of peace and to comply with orders in (2) and (3) above, and or any other orders issued by this honourable court.
5. That the cost of this application be borne by the defendants/respondents.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Anne Ndinda Ngoka, the Plaintiff's Director where she confirms the plaintiff is the proprietor of land parcel number 13669 (original number 12610/2/4) hereinafter referred to as the 'suit land'. she avers that the defendants or their agents have illegally encroached on the suit land and put up structures thereon. she explains that when she went to the suit land, she was accosted by goons armed with bows and arrows who warned her against setting foot on the said land. She states that she made a report to OCPD Athi River and Director of Criminal Investigations. Further, the police informed her that they cannot intervene in the absence of a court order specifically directing them to do so.
3. The 1st defendant opposed the application by filing a replying affidavit sworn by Ferdinand Mutua, its Operational Manager who deposes that the said application is incompetent, frivolous as well as vexatious and ought to be dismissed. He avers that the 1st defendant has been undertaking business and living peacefully on their portion of the suit land for more than 20 years. He states that the suit land has never been subdivided as claimed by the plaintiff. He insists that during the lifetime of the plaintiff's husband Wilson Mwonga Nguti, there was no dispute over the suit land. He explains that the disputes arose in June and July, 2022 and the matter was referred to the Land Fraud Department at the Directorate of Criminal Investigation and after several discussions, parties who were in possession thereon were advised to stay on their portions. He insists that LR No 13669 which is the title allegedly acquired from LR number 12610/2/4 is not a proper title as it was obtained through deceitful and corrupt means. He claims there have been disputes concerning the suit land and the National Land Commission called for a consultative meeting with all parties who were in possession thereon. He denies that they invaded the suit land and insists it is the plaintiff who came with police and attempted to demolish their houses and yet they had been on the suit land for more than 20 years. He avers that there are several cases challenging the validity of the plaintiff's title. He made reference to two Taskforces set up by George Saitoti and Hon Farida Karoney in respect to the suit land. Further, that the taskforces recommended that land experts and surveyors be called to guide the courts in shedding light on verification of land documents.
4. The 2nd defendant did not file a replying affidavit to oppose the instant application as had been directed by the court.

The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the two notice of motion applications dated the August 8, 2022 and October 5, 2022 including the respective affidavits as well as the rivalling submissions, the only issue for



determination is whether the plaintiff is entitled to orders of temporary injunction in respect to the suit land pending the outcome of the suit.

6. The plaintiff in its submissions contend that it has established a *prima facie* case to warrant the orders of injunction as it owns the suit land. To support its arguments, it relied on section 24 (a) of the [Land Registration Act](#) as well as the following decisions: *Giella v Cassman Brown* [1973] EA 358; *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 and *Central Bank of Kenya & another v Uburu Highway Development Ltd & 4 others*.
7. The 1st defendant in its submissions reiterated its averments as per the replying affidavit and avers that it has not put up any new structures on the suit land but insists the ones thereon, are old ones. It further submitted that if titles were issued regularly, then it ought to have been given priority.
8. The 2nd defendant further failed to file written submissions within the timelines that had been issued by the court.
9. The plaintiff has sought for orders of injunction against the defendants and contend that the defendants should be restrained from dealing with the suit land. As to whether the plaintiff has established a *prima facie* case with a probability of success at the trial, I will rely on the principles established in the case of *Giella v Cassman Brown & Company* [1973] EA 358 as well as the definition of a *prima facie* case as stated in the case of *Mrao Ltd v First American Bank of Kenya & 2 others* [2003]KLR 125. The plaintiff claims the 1st and 2nd defendants have trespassed on its land, interfered with it and put up structures thereon. The 1st defendant in response avers that the plaintiff does not hold a proper title and claims to have been on the suit land for over 20 years. On perusal of the documents presented by the plaintiff, I note it produced a certificate of title to the suit land and photographs of houses being constructed thereon. The 1st defendant despite alleging there were meetings convened by the National Land Commission, George Saitoti and Farida Karoney taskforces, did not produce an iota of documents to support these averments. Further, it claims to have been in possession of the suit land for over 20 years but never furnished the court with any photographs to support its averment. In the circumstances, I opine that since the plaintiff holds a valid title to the suit land, its claim is not baseless. In the foregoing, I find that the plaintiff has established a *prima facie* case to warrant the orders of injunction as sought.
10. On the second principle as to whether the plaintiff will suffer irreparable loss which cannot be compensated by way of damages. Both the plaintiff and 1st defendant claim ownership of the suit lands .However, it is only the plaintiff that has produced its certificate of title to the suit land. Further, the 1st defendant did not properly demonstrate which portion of the suit land it occupies. In the case of Case of *Nguruman Ltd v Jan Bonde Nielsen* CA No 77 of 2012, it was held that ‘ ...the applicant must establish that he ‘might otherwise’ suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this 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. ‘
11. In relying on the decision cited above and based on the circumstances at hand, I find that the plaintiff’s alleged injuries are not speculative as it has demonstrated ownership of the suit land and the loss it stands to suffer if the orders sought are not granted.



12. On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the same tilts in favour of the plaintiff and on preservation of the suit land.
13. In the foregoing, I find that the plaintiff's notice of motion applications dated the October 5, 2022 which is similar to its application dated the August 8, 2022 merited and will allow it. I will proceed to make the following orders:
 - a. That pending the hearing and determination of this suit, an order of temporary injunction be and is hereby issued against the defendants/respondents whether by themselves or their servants, agents, employees, nominees, hirelings, goons or anybody claiming under them, or otherwise howsoever, from in any way invading, entering upon, trespassing or continuing to trespass thereupon, settling on, occupying, utilizing, alienating, dispossessing the plaintiff, destroying boundary marks, erecting illegal structures, selling, leasing, subletting, wasting or purporting and holding themselves out as owners thereof, or otherwise in any manner interfering with the plaintiff's exclusive possession, occupation, use and enjoyment of the parcel of land known as LR No 13669 (original number 12610/2/4) measuring 39.33 hectares situated in Athi River sub county within Machakos county.
 - b. The OCPD Athi River Police Station and officers working under them at police posts be and are hereby directed to ensure that the defendants/ applicants do not engage in lawlessness or any manner of breach of peace and to comply with orders in (2) and (3) above, and or any other orders issued by this honourable court.
 - c. The costs of this application be in the cause.

Dated signed and delivered virtually at Machakos this 1st Day of February, 2023

CHRISTINE OCHIENG

JUDGE

