



**Ngigi v Omar & 2 others (Environment & Land Case
E002 of 2023) [2023] KEELC 17197 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E002 OF 2023**

MD MWANGI, J

MAY 3, 2023

BETWEEN

LUCY NJERI NGIGI PLAINTIFF

AND

AKRAM OMAR 1ST DEFENDANT

MBUKONI HOLDINGS LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

1. The application for determination before this court is the plaintiff's application dated the January 5, 2023. The plaintiff/applicant prays for orders that during the pendency of this suit;
 - a. An order of injunction be issued restraining the 1st defendant by himself, his agents, servants and or any other persons whomsoever from encroaching upon, trespassing onto, remaining on or in any way howsoever interfering with all that plot known as Plot Number 07 excised from LR. No. 118/157 situate at Ruai Area 26, Nairobi pending the hearing and determination of this suit.
 - b. That the Officer Commanding station of Ruai Police Station be directed and/or ordered to enforce, implement and/or otherwise oversee compliance with the orders of the honorable court.
 - c. That costs of this Application be borne by the defendants.
2. The applicant's case is as set out in the body of the application and the supporting affidavit sworn by the applicant, Lucy Njeri Ngigi on January 5, 2023. She deposes that she is a bona fide purchaser of



the plot known as plot number 7 excised from the parcel of land known as LR No 118/157 situate at Ruai Area 26, Nairobi ('the suit property').

3. The applicant avers that she purchased the suit property from Mbukoni Holdings Limited, the 2nd defendant herein who were the owners of the land known as L.R. No. 118/157 from which the suit property was excised. Upon payment of the purchase price, she was issued with a receipt acknowledging payment, a Certificate Number 184 dated December 4, 1997 and a beacon certificate both dated December 4, 1997.
4. The applicant states that she immediately, after the purchase took possession of the suit property and commenced developments thereon. The 2nd defendant has however delayed and/or declined to complete the sale of the plot, transfer the subject plots and procure a certificate of title in her name despite several demands.
5. The applicant further avers that sometime in December, 2022, the 1st defendant encroached onto the suit property alleging ownership rights on the basis of a certificate of ownership number 179 issued by the 2nd defendant. That the 1st defendant has remained on the suit property and has proceeded to carry out developments thereon. The purported allocation of the suit property by the 2nd defendant amounts to breach of contract as the land was not available for allocation.
6. The applicant depones that the 1st defendant has undertaken some developments on the suit property which has hampered the plaintiff's intentions to construct therein. the plaintiff pleads that it is in the interest of justice that the prayers sought be granted to preserve the suit property from further alienation and waste due to the 1st defendant's illegal and wrongful actions.
7. The application was opposed by Mr. Akram Omar, the 1st defendant/respondent herein who filed a replying affidavit sworn on the January 25, 2023.
8. The 1st defendant avers that he is the duly registered proprietor of all that parcel of land known as LR No. 118/157 Plot NO. 7 situate in Ruai having been issued with a Certificate of Ownership and beacon certificate No. 179 on the February 7, 2022. He states that since the issuance of the ownership Certificate, he has been in occupation of the suit property without any interruptions or disturbance from anyone. He has even erected a house on the plot and the construction is at the second-floor level.
9. The 1st defendant avers that he acquired the plot through a purchase from the owner, the 2nd defendant herein at a consideration of Kshs. 1,000,000/= . He attaches a copy of the Agreement for Sale to that effect. He asserts that the plaintiff has not demonstrated how she acquired the property since she has not attached any agreement.
10. The deponent further argues that the applicant reported the matter to the Police but when summoned to present her documents of ownership, the plaintiff failed to attend. The 1st defendant alleges that the applicant further threatened to destroy the development on the suit property forcing him to lodge a complaint with the Police and an OB number was issued.
11. The 1st defendant contends that the orders sought are akin to eviction orders which being mandatory injunctions ought not to issue at the interlocutory stage.
12. Subject to the leave granted by the court on the January 16, 2023, the plaintiff/applicant filed a supplementary affidavit deponed on the February 1, 2023.
13. In the supplementary affidavit, the plaintiff/ applicant avers that the 1st defendant's replying affidavit is fatally defective and ought to be struck off the record. She reiterates her averments on the acquisition



of the suit property through a purchase from the 2nd defendant and the documents that were subsequently issued to her as stated in her supporting affidavit.

14. The applicant reiterates that she realized that the 1st defendant had encroached onto her property when he started constructing a perimeter wall. She reported the matter to the 2nd defendant and the Police but they refused and/or delayed inordinately to act on the complaint. She has been in constructive possession of the suit property since December 1997, after she purchased it from the 2nd Defendant.
15. The plaintiff alleged that the 1st defendant had not challenged her ownership documents neither had he raised any allegation of fraud against her. The plaintiff suggested that the 1st defendant must have been defrauded by the 2nd defendant who purportedly sold him the property which belonged to the plaintiff/ applicant.
16. The plaintiff denies destroying any property. She too contested the 1st defendant's allegation that she had been summoned to any Police Station over the suit property, save for the meeting held at Acacia Police Station after she reported the matter. She asserts that she has always had possession of the suit property but the 1st defendant is keen on dispossessing her of the same.

Court's direction

17. The court's directions were that the application be canvassed by way of written submissions. The plaintiff/applicant complied and filed her submissions on the April 14, 2023. The 1st defendant had not filed his submissions at the time of writing this Ruling despite the lapse of the timelines granted by court.

Plaintiff/Applicant's Submissions

18. The applicant submits that the application is substantively anchored on the provisions of Order 40 Rules 1(a), 2, 3 and 10 of the *Civil Procedure Rules*, 2010. She avers that she has demonstrated the need to preserve the suit property against continued wastage by the 1st Defendant.
19. On the principles of granting injunctions as set out in *Giella v Cassman Brown & Co. Limited* (1973) EA, the plaintiff submits that she has established a prima facie with a probability of success. She affirms that she has adduced sufficient evidence on how she acquired the suit property. She relies on the ownership documents annexed to her supporting affidavit which confirm that she lawfully purchased the suit property from the 2nd defendant. The 2nd defendant has not disputed her acquisition of the same neither has it challenged the authenticity of the said title documents. This, according to the Plaintiff further confirms that she is the rightful owner of the suit property.
20. On the 2nd condition of irreparable damage, the applicant submits that the ongoing illegal constructions and trespass on the suit property by the 1st defendant will cause irreparable damage to her which may not be adequately compensated by an award of damages.

Issues for Determination

21. I have considered the application, the affidavits both in support and in opposition, as well as the written submissions by the plaintiff thereof. The only issue for determination in this matter is whether the Plaintiff has made a case for the grant of an order of interlocutory injunction.



Analysis and Determination

22. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No. 77 of 2012 (2014) eKLR where 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, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests 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”.

23. The first hurdle for an applicant is to establish that he/she has a *prima facie* case before an order of injunction can be issued. Does the applicant have a good case to entitle her to complain against the defendant/respondents activities in the long run?
24. The plaintiff/applicant submitted that she has established a prima facie case. She attached a copy of the receipt that was issued to her acknowledging payment. She has also attached copies of a Certificate Number 184 stating that she is the owner of the suit property and a Beacon Certificate both dated December 4, 1997.
25. The 1st defendant on the other hand has equally exhibited a Sale Agreement dated September 29, 2021, a Certificate No. 179 dated February 7, 2022 and a Beacon Certificate of even date as proof of his ownership of the suit property.
26. It is evident that neither of the parties has been registered and/or issued with a certificate of title as the proprietor of the suit property. Therefore, both their claims are based on the documents allegedly issued by the 2nd defendant. The applicant has explained the how she acquired the ownership documents and annexed them as proof that she has an equitable interest in the suit property that requires protection by the court. I find that the applicant has established a prima facie case.
27. In the above cited case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (*supra*) the court was categorical that at this stage of the proceedings, the court must not examine the merits of the case closely. The court stated that:-

“..We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or its threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the rights which he alleges.”



28. Ringera J (as he then was) in the case of *Airland Tours and Travels Ltd v National Industrial Credit Bank* Nairobi (Milimani) HCCC No 1234 of 2002 too stated that:-

“.....in an interlocutory application the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.”

29. The second consideration would be whether the Plaintiff has demonstrated that irreparable injury will be occasioned to her if an order of temporary injunction is not granted. The judicial decision in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury. The court in that case 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.”

30. The plaintiff averred in Paragraph 6 of her supplementary affidavit that she took constructive possession of the suit property from December 4, 1997. She subsequently avers that the 1st defendant has trespassed onto the suit property and commenced some construction on it. She attached some photographs showing the ongoing constructions. This is a fact that has been acknowledged by the 1st defendant in his replying affidavit. The 1st defendant confirms that he is in occupation of the suit property and has indeed constructed a house thereon which is currently at the second floor level. Evidently, therefore the plaintiff/ applicant is not in actual physical possession of the suit property.

31. Granting the orders as framed by the applicant would be tantamount to issuing eviction orders against the 1st defendant at this interim stage without allowing parties to ventilate their respective positions in a trial.

32. Considering that both the applicant and the 1st defendant have apparent equitable interests over the suit property, it is in the interest of justice that the suit property, the substratum of this suit be preserved pending the hearing and determination of the suit.

33. The court therefore directs that the status quo be maintained pending the hearing and determination of this suit.

34. For avoidance of any doubt, the court directions are as follows;

- a. The status quo be maintained pending the hearing and determination of this suit. The 1st defendant shall remain in possession of the suit property but he is ordered not to undertake any further construction activities thereof from the date of this order pending the hearing and determination of this suit.
- b. The Officer Commanding Station, Ruai Police Station is directed and/or ordered to enforce, implement and/or otherwise oversee compliance with the orders of the honorable court.

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MAY, 2023



M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ochieng for the Plaintiff /Applicant

No appearance for the Defendants/Respondents

Court assistant - Yvette

