



Kunde Road Residents Welfare Association v Osogo & another (Environment & Land Case E069 of 2022) [2023] KEELC 17855 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E069 OF 2022**

OA ANGOTE, J

JUNE 8, 2023

BETWEEN

KUNDE ROAD RESIDENTS WELFARE ASSOCIATION PLAINTIFF

AND

THEO OSOGO 1ST DEFENDANT

PAMOJA AFRICA ALLIANCE PARTY 2ND DEFENDANT

RULING

Background

1. Before this Court for determination is the Plaintiffs' Notice of Motion application dated the 22nd February, 2022 brought pursuant to the provisions of Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, 2010, Orders 40 Rule 2 and 51 Rules 1, of the *Civil Procedure Rules*, 2010 seeking the following reliefs;
 - i. That Pending the hearing and determination of this suit, the Defendant/Respondent his servants, employees and/or agents or anyone claiming through him or otherwise howsoever be restrained by way of a temporary injunction from holding any political meetings and continuing any commercial and/or political activities at House no 2 Korosho Road.
 - ii. That the OCS Kilimani Police station and the District County Commissioner (D.C.C) and/or the officers under their command be directed to ensure compliance of any court orders issued herein.
 - iii. The Costs of this Application be awarded to the Plaintiff/ Applicant.
2. The application is supported by the Affidavit of the Chairman of the Plaintiff who deposed that the Plaintiff is a registered association created by the residents of Kunde Road in Thompsons Estate for



purposes of looking after their welfare and that the properties in the estate are single dwelling units and are zoned for residential use only.

3. The Plaintiff's Chairman deposed that the residents have as a community agreed to maintain a regulated gated community free of commercial high rise and multi-dwelling developments and that the Nairobi City County has confirmed that the estate has been zoned as a residential user.
4. It is the Plaintiff's case that the Defendants have unilaterally decided to convert House no 2 on Korosho road into offices, which process was done without following due process on change of user and that the Defendants are undertaking commercial and political activities on the suit property since September, 2021.
5. It was deposed that the 1st Defendant, through his Counsel in a letter dated 19th October, 2021, stated that the suit premises has never been converted for commercial use despite the 1st Defendant carrying out commercial activities thereon; that the effects of a development on private rights is a material consideration in the granting of development permission and that prior to undertaking a change of user on the premises, the Defendants ought to have carried out an environmental impact assessment as provided under Section 58(1) and (2) of the [Environment Management and Co-ordination Act](#).
6. Mr Nzomo deposed that Section 17 of the [Political Parties Act](#) provides that activities carried out in a political party's office are not only political but commercial; that the Defendants have caused large rowdy crowds to come into the estate, who have caused disturbances leading to unnecessary panic and mental anguish among the residents of the estate and that there have been several incidences of vandalism and other reported losses all attributed to the Defendants activities.
7. There was no response to the application. The Plaintiff filed submissions which I have considered.

Analysis and Determination

8. The law on grant of interlocutory injunctions is provided for under Order 40 Rule 1 of the [Civil Procedure Rules](#), 2010. The same provides as follows;

“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 if 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.”

9. Whereas Order 40 Rule 2 provides as follows;

- “(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction



to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

10. It is trite that in determining an application for a temporary injunction, the Courts are guided by the *locus classicus* case of *Giella v Cassman Brown* [1973] EA 358 which sets out the pre-requisites thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

11. As expressed by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, an Applicant is required to meet all the three conditions and do so sequentially. The Court stated thus;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

- (a) Establish his case only at a *prima facie* level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Ally any doubts as to (b) 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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd v Afraka Education Society* [2001] Vol. 1 EA 86) If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

12. The Court will be guided by the foregoing principles as well as by the general principle that no definitive findings on law or facts should be made at this interlocutory stage.



13. What constitutes a prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited & 2 Others* [2003] eKLR as follows:

“...So what is a prima facie case? I would say that in civil cases it is a case in 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. This definition received approval by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra*) who went ahead to further expound as follows;

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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 is 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 right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

15. Vide the present application, the Plaintiff is seeking to have the Defendants restrained from carrying out any political and/or commercial activities on the suit property. It is the Plaintiff’s case that the suit property is a zoned residential area; that the above notwithstanding, the Defendants have turned House no 2 into an office where the 1st Defendant carries out its political activities, which includes commercial activities.
16. The Defendants have not controverted the said position. Indeed, the Defendants have not refuted the claim that they have caused large rowdy crowds to come into the estate, who have caused disturbances leading to unnecessary panic and mental anguish among the residents of the estate; and that as a result of their activities, there have been several incidences of vandalism and burglaries.
17. The Plaintiff adduced in evidence a copy of the Certificate of Registration of the Plaintiff, a copy of the estate by-laws (notice), the Petition dated 13th August, 2015 lodged before the Nairobi City County, the letter from the 1st Defendant’s Advocate dated 19th October, 2021 and OB extracts from Muthangari Police Station.
18. The Plaintiff herein is a Welfare Association for the residents of Kunde Road-Thompson Estate, which estate as demonstrated by the Plaintiff is a zoned residential community with single dwelling units. The notice adduced by the Plaintiff indicates;

“Notice to potential buyers.



All buyers of the property within this neighborhood are notified of the community's stated policy to maintain a regulated gated community free of commercial and high rise and multi dwelling development.”

19. A reading of the Petition affirms that the estate is indeed a single dwelling residential community. It is trite that any user of a property/premise contra to its original user requires the necessary approvals. There being no evidence of any approvals for the Defendants to use the suit property contrary to its initial use, that is residential, the Court finds that there indeed exists a right that is at risk of being infringed and the same calls for a rebuttal.
20. That being the case, it is the finding of the court that the Plaintiff has established a prima facie case with chances of success.
21. With regard to irreparable harm, the damage caused to the Applicant should be such that it cannot be remedied by damages. The Plaintiff has given an elaborate description of the inconvenience and interference with the enjoyment of its members' properties resulting from the Defendants' political/commercial operations on the suit property, which has led to vandalism and a rise in burglaries.
22. The nature of the injury complained of by the Plaintiff and its members will be of a continuing nature for as long as the Defendants operate the office in the Estate. The Court finds that the violation of the right to a peaceful environment ultimately affects the physical and social environment, and is not one that can be adequately compensated monetarily.
23. For those reasons, the application dated 22nd February, 2022 is found to be merited, and the same is allowed as follows:
 - a. A temporary injunction is hereby issued restraining the Defendants/Respondents their servants, employees and/or agents or anyone claiming through them from holding any political meetings and continuing any commercial and/or political activities at House no 2 Korosho Road.
 - b. The OCS Kilimani Police station and the District County Commissioner (D.C.C) and/or the officers under their command are hereby directed to ensure compliance of the court orders issued herein.
 - c. The Defendants shall bear the costs of the Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF JUNE, 2023

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant - Tracy

