



REPUBLIC OF KENYA



**Njagi v Mwangi & another (Environment & Land Case E410 of 2022)
[2023] KEELC 19830 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E410 OF 2022
EK WABWOTO, J
SEPTEMBER 20, 2023**

BETWEEN

ISAAC KAGIRI NJAGI PLAINTIFF

AND

STEPHEN MWANGI 1ST RESPONDENT

ESTHER WANJIKU MWANGI 2ND RESPONDENT

RULING

1. The Plaintiff is the registered proprietor of all that parcel of land known as Nairobi/Block 116/313. It is averred that the Defendants invaded the Plaintiff's property sometimes in 2013 and constructed on the said parcel of land some illegal and unapproved structures to which the Defendants have been appropriating rent from the suit property from 2014 to the tune of Ksh 400,000/= monthly which adds upto Ksh 38,400,000/- to date.
2. The Plaintiff also averred that all efforts to remove the Defendants from the suit property has been futile including attempts made in October 2020 wherein the Plaintiff procured the services of Pyramid Auctioneers to proclaim rent from illegal occupiers as a result of which the Defendants declined to vacate.
3. What is now before this court is the plaintiff's application brought by way of Notice of Motion dated 3rd October, 2022 seeking injunctive orders against the Defendants. The Application also seeks temporary injunction restraining the defendants from interfering, encroaching, entering, trespassing, alienating or in any other manner interfering with the plaintiff's possession and ownership of the suit property. The plaintiff also seeks orders for preservation of rent generated from the illegal structures built by the Defendants and that the said rent be deposited in an advocates' joint interest earning account. The plaintiff also seeks an order that the Officer Commanding Kasarani Police Station to assist in the enforcement of the orders if granted.



4. The application was supported by the affidavit of the plaintiff sworn on 3rd October 2022. It was deposed that the plaintiff has established a prima facie case to warrant the grant of the orders sought. It was also deposed that the defendants are trespassers and intruders who should be evicted and stopped from interfering with the property.
5. The plaintiff's application was opposed by the 1st and 2nd defendants. The 2nd defendant opposed the plaintiff's application through a replying affidavit sworn on 7th December 2022. The 2nd defendant averred that she purchased the suit property vide a sale agreement dated 9th July 1998 and fully paid for an allotment and transfer that was made in her favour. She also deposed that there were hitches in obtaining the said title which issue was brought to the attention of the relevant authorities. She also deposed that the plaintiff's title herein was fraudulent since the plaintiff has nothing to show on the suit property. The 2nd defendant also deposed that she had been on the suit property since purchasing the same in 1998 and has built commercial stalls earning rental income from them.
6. The plaintiff's application was argued by way of written submissions. The plaintiff filed its submissions dated 25th August 2023 while the defendants filed their submissions on dated 8th May 2023. In his submissions, the plaintiff submitted that the root of title can be traced to Joseph Njau Kairu and Peter Githinji who later sold the land vide a sale agreement dated 4th January 1999. It was also submitted that the plaintiff was consequently issued with an allotment letter, possessed a certificate of title and had developed the property as evidenced by a valuation report dated 14th April 2014. It was reiterated that since each of the previous owners had titles that had neither been challenged nor cancelled, it should prove that the plaintiff's ownership documents were legitimate as compared to the Defendants claims. It was also submitted that in 2014, the Defendants invaded the suit premise, started constructing structures and collecting rent from the tenants despite requests to stop interference and trespassing on the same. For this reason, the Plaintiff sought to have the rent from the illegal structures preserved. The plaintiff submitted further that he had established valid grounds for the grant of the injunctive reliefs sought against the defendants.
7. In their submissions, the defendants submitted that the plaintiff had not established valid grounds for the grant of the injunction sought. It was submitted that the plaintiff had not established that it had a prima facie case against the defendants. It was also submitted that since 1998, the Plaintiff has never occupied the land nor laid claim on it. Moreover, all structures on the land had been put up by the Defendants and not the Plaintiff. In the 1st Defendant's replying affidavit dated 7th December 2022, it was submitted that the original land owner was New Roysambu Housing Co. Limited. Following subdivision, Mr. Charles Thiongo was allotted plot no. 103(Block No. 116/313) on 17th January 1992. It was claimed that on 9th July 1998, the 1st Respondent entered into an agreement with Mr. Thiongo for a consideration of Kshs 300,000. The defendants urged the court to dismiss the application with costs.
8. I have considered the plaintiff's application together with the supporting affidavit. I have also considered the affidavits that were filed by the 2nd defendant in opposition to the application. I have also considered the submissions by the advocates for the parties.
9. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. As was stated in *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.



10. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the court of Appeal adopted the definition of a prima facie case that was given in *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and went further to state as follows:

“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. ...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 threatened with violation... 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.”

11. In the instant case the plaintiff though being the registered owner of the suit property has never been in occupation of the same since 2013 when the defendants put up the said structures upon which the defendants have been collecting rental income, the plaintiff also despite being aware of the defendants presence in the said property never took any action until the year October 2020 when he attempted to remove them by engaging a licensed auctioneer through levying of distress for rent an action which was not successful. In the circumstances, I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. Since the plaintiff has failed to establish a prima facie case, it is not necessary for me to consider whether the plaintiff will suffer irreparable harm which cannot be compensated in damages.
12. A remedy for injunction being an equitable remedy is a discretionary to any court. The discretion must be exercised judiciously. The plaintiff never attempted to seek for the same earlier in 2013 when he alleges that the defendants entered his property or in October 2020 when he had attempted to evict the defendants
13. Due to the foregoing, the plaintiff’s application is not for granting. I wish to add that even if I had found that the plaintiff had established a prima facie case, I would still not have granted the orders sought. I am of the view that the plaintiff can be adequately compensated by way of damages since the existing structures on the suit land were put up by the defendants and not the plaintiff.
14. The upshot of the foregoing is that the Notice of Motion dated 3rd October 2022 is without merit. The same is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kahuthu for the Plaintiff.

Ms. Mwanzia h/b for Mr. Mutua for the 1st and 2nd Defendants.

Court Assistant; Caroline Nafuna

