



Lali & another v Haji & 3 others; Kenya Wildlife Service (Interested Party) (Environment & Land Case 001 of 2023) [2023] KEELC 20459 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 001 OF 2023
EK MAKORI, J
OCTOBER 6, 2023**

BETWEEN

MOHAMMED MOHAMMED LALI 1ST PLAINTIFF

HAJI ATHMAN MBWARAJI 2ND PLAINTIFF

AND

HARUN HAJI 1ST DEFENDANT

HUSSEIN HAJI ALI 2ND DEFENDANT

COUNTY GOVERNMENT OF LAMU 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

AND

KENYA WILDLIFE SERVICE INTERESTED PARTY

RULING

1. The application dated 17th January 2023 seeks the following reliefs:
 - a. Spent,
 - b. Pending the hearing and determination of this application, the 1st and 2nd respondents, their servants, and agents be restrained by way of injunction from destroying structures and crops, harassing and or denying the applicant access to their four (4) acres of the unsurveyed and unregistered land situated in Kiwayu sub-location, Ndau- location in the County Lamu.
 - c. Pending the hearing and determination of this application, the 1st and 2nd respondents, their servants, employees, and agents be restrained by way of a temporary injunction from entering



upon or in any manner dealing with the suit property or interfering in any manner whatsoever with the applicants' quiet possession thereof.

- d. The Officer Commanding Station, Kiunga Police Station oversees the enforcement of these orders in observance of peace and order.
 - e. The Court be pleased to grant any other orders and reliefs the Court may deem just, expedient, and fit to grant in the circumstances.
2. All the respondents have opposed the application with responses filed. The court directed parties to file written submissions in the matter. I can reckon that there was compliance.
 3. The applicants aver that they inherited three and one acres of land respectively from one late Asha Kombo Yakub (mother of the 1st applicant and Athman Mbwarahaji (father of the 2nd applicant), who were native occupants of Kiwayu Island who carried on farming and rearing of livestock on the said parcels since Kenya's pre-independence era.
 4. That before adjudication, allocation, and formal registration of their parents, Kiwayu Island was Gazetted as a National Reserve under Kiunga National and Marine Reserve *Vide* Gazette Notice No 3022 of 4th October 1979. under the management of the Kenya Wildlife Services – the interested party herein. However, their ancestral rights over the land were respected and upheld as per the minutes of meetings held between them and the government. Besides they also reported their grievances to the Justice, and Reconciliation Commission (TJRC) whose report recommended that the rightful owners of Kiwayu Island be settled on the portions they hold.
 5. Despite the foregoing, their houses have been pulled down with the connivance of the County Administration and the instigation of the 1st and 2nd respondents who lay claim over the parcel of land.
 6. The 1st and 2nd respondents aver that the applicants have not established their rights which have been infringed. The several adjudication processes over the disputed parcel have been in their favour, besides, the land is a National Reserve.
 7. The 3rd respondent, 4th and the interested party aver that this is the National Marine Reserve and the applicants have no claim over it at all and thus the current application ought to be dismissed.
 8. Parties have quoted for consideration the following cases dealing with the award of injunctions generally – *Giella v Cassman Brown Co. Ltd* [1973] E.A 359. *Mrao Ltd v First American Bank Ltd and 2 Others* [2003]KLR 125, *Nguruman Ltd v Jan Bonde Nielsen and 2 Others* [2014]eKLR, *Kenya Commercial Bank v Afraba Education Society* [2000] E.A 86 and *Josphat Njoroge Mwangi and Another v David Omoge & Another* [2014]eKLR.
 9. The issue for determination is whether at this stage the court can order for temporary injunction pending the hearing and determination of the current suit by the plaintiff.
 10. For this court to issue a temporary injunction, the principles to consider are as stated in the case of *Nguruman Ltd v Jan Bonde Nielsen and 2 Others* [2014]eKLR:

“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. Afraba 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 a 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.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if an interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, 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 an adequate remedy.

"Prima facie" is a Latin phrase for "at first sight", whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the *American Cyanamid Co. Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Bhatt V. Republic* [1957] E.A. 332.

Recently, this court in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:

"In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter.



A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is a standard, which is higher than an arguable case.”

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.”

11. The applicants claim possession of four acres of unsurveyed and unregistered land in the Kiwayu sub-location Ndaun location in Lamu County. The applicants aver that they have been feuding with the 1st and 2nd respondents over its ownership and they believe it is them who instigated their eviction so that they continue on a spree of selling. It turns out that the land in question belongs to the Kenya Wildlife Service – the interested parties having been Gazetted as a National Reserve under Kiunga National and Marine Reserve *Vide* Gazette Notice No 3022 of 4th October 1979. The applicant seems to be aware of this fact and proceeds to state that their ancestral rights to own this land have been known and recognized by the Government that even the TJRC had recommended the settlers on that land be allocated the land. It never happened.
12. It follows that the applicants and the respondent are feuding over land to which they have no title in their favour but rather land that belongs to the Kiunga National Reserve which is under the Kenya Wildlife Services – the third interested party who has not consented to either the applicants or the respondents to occupy the land. The upshot is that injunctive orders cannot be issued at this stage. If I got the applicants perhaps, we have a historical injustice case that was reported to the TJRC and needs to be addressed by the National Land Commission and not this Court.
13. The upshot is that the application dated 17th January 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 6TH OCTOBER, 2023.

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E. K. MAKORI

In the presence of:

Mr. Shujaa for the 1st and 2nd defendants

Court Clerk: Happy

In the absence of:

Mr Otieno for the plaintiff



M/s Swaleh for the 3rd Defendant

Mr. Mkala for the 4th Defendants

Mr Wokabi for the Interested Party

Court Clerk: Happy

