



Suresh v Suswa Management Limited & another (Environment and Land Miscellaneous Application E172 of 2022) [2023] KEELC 20771 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20771 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E172 OF 2022
AA OMOLLO, J
OCTOBER 12, 2023

BETWEEN

ASHISH SURESH APPLICANT

AND

SUSWA MANAGEMENT LIMITED 1ST RESPONDENT

P7 SECURITY LIMITED 2ND RESPONDENT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 25th August 2022 seeking for the following orders;
 1. Spent
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 3. That the Defendants/Respondents and/or servants and/or employees, agents be prohibited forthwith by this court from unlawfully intercepting/harassing, intimidating and/or denying access, closing or threatening to block access of the suit property known as Unit MN3 by and or in any manner whatsoever and/or howsoever threatening/interfering with the applicant's quiet occupation, access and lawful enjoyment of suit premises at Suswa Estate pending the hearing and determination of the instant suit.
 4. That Costs be provided for.
2. The application was supported by an affidavit sworn on 25th August 2022 by Ashish Suresh who deposed inter alia, that the jointly owns with his wife Ameeta Shah the property described as Unit MN3 herein after referred to as "the unit." That the property is owned by virtue of the lease agreement between them and the 1st Defendant/Respondent to which they are shareholders.



3. He further deposed that being the registered proprietors of the unit, they were in occupation and used it as a dwelling place and when away opened it up for guests on short and mid-term basis. That the 1st Defendant/Respondent through fraudulent means colluded with the 2nd Defendant/Respondent to deny access to their guests which is in contravention of the lease agreement in particular clause 3 which states;

“That Lessor hereby covenants with the lessee that the Lessee performing and observing the several covenants on the part of the lessee herein contained shall be entitled peaceably to hold and enjoy the said maisonette during the term hereby created without any interruption by the Lessor or any person rightfully claiming under it...”

4. The Applicant deposed further that apprehensive of being blocked from accessing, enjoying peaceful and uninterrupted occupation of the unit; they sent a cease-and-desist demand to the Respondents through their Advocates on record and also shared to the 1st Respondent on personal WhatsApp. He added that unless this court intervenes and the orders sought herein are granted, the Respondents will continue denying them access to the unit and the Applicants stands to suffer irreparable loss.
5. In opposition of the application, the 1st Respondent filed a replying affidavit sworn by Nabeel Khan, it's board chairman on 22nd February 2023 contending that the Respondents have not denied the Applicant or his guest access to their unit. He added that the estate in which the unit is situated has its security protocols subject to all dwellers and their guests especially that there was a murder in of the unit in the past
6. The 1st Respondent stated that the applicant has never raised any such issue with the Board within the estate which operates an open-door policy and could have addressed any matters. That the Applicant therefore failed to explore internal grievance mechanisms that are elaborate within the estate before filing this application. Further, he denied that the board was served with any demand letter.
7. The applicant filed a supplementary affidavit maintaining that his guests were denied entry to the unit in his absence and that the murder referred to happened over 4 years ago. He averred that he raised the issue with the board chairman severally but he did not budge, therefore there being no formalized internal grievance mechanism by the 1st Respondent, the concerns raised in the channels available were dismissed.
8. In support of his motion, the Applicant filed submissions dated 26th May 2023 outlining the background and issue for determination as to whether he had met the conditions for grant of a temporary injunction as set out in the case of *Giella v Cassman Brown & Company Limited* (1973) EA 358.
9. The Applicant submitted that he had a prima facie case with a probability of success as determined in the case of *Mrao Limited v First American Bank of Kenya Limited & Others* [2003] KLR 125 as the core of the Plaintiff's complaint is his right to peaceably hold and enjoy the unit as per the lease term without any interruption, therefore the right to use the unit has been infringed by the Respondents that would necessitate a rebuttal. Further, that although the 1st Defendant / Respondent deny interrupting his access to the unit, they went on to give reasons why the access was denied. That they failed to demonstrate that the alleged changes of the security in the estate was communicated to all stakeholders.
10. The Applicant submitted that the irreparable loss he complains about cannot be measured in monetary terms as there is apprehension that the 1st Respondent through the 2nd Respondent will continue to



deny him or his guests' access to the premises. Further, the Applicant submitted that having met the first two elements and the balance of convenience should not be put to test.

Analysis

11. It is not in dispute that the Applicant is the registered owner of the unit which he alleges that the Respondents have interfered with their right of access. 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* (supra) 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....”

12. The Applicant does not indicate on which date access was denied and or the manner in which the access was interfered with. The grounds stated on the face of the application do not bring out any particulars that this court looking at the application can decipher the interference. Instead, the Applicant is relying on the 1st Respondent's statement that “the estate came up with certain rules due to security threat that was experienced was informed or provided with an alternative access as the changes were being effected” as proof that there was denial of access.
13. The Applicant argued that unless the orders sought are granted, they are likely to suffer irreparable loss. In the supporting affidavit, the Applicant deposed that they use the premises as their dwelling and while away, they open it up to friends and guests for short to medium term stays. He has however not pleaded that pursuant to the actions of the Respondents, the premises are no longer used as their dwelling place or that their guests have been unable to gain access. This court is not persuaded that the failure to grant the orders of temporary injunction is likely to cause irreparable loss.
14. In conclusion, I find that the Applicant has not met the threshold for granting orders of temporary injunctions. The result is that the application is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH OCTOBER, 2023

A. OMOLLO

JUDGE

