Kariuki v Iprocure Limited (Environment & Land Case 25 of 2023)
[2023] KEELC 21410 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21410 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 25 OF 2023

FO NYAGAKA, J

NOVEMBER 7, 2023

BETWEEN

SOLOMON KIM KARIUKI ..... PLAINTIFF

AND

IPROCURE LIMITED ..... DEFENDANT

RULING

1. This matter is before me for the determination of a Notice of Motion dated 9/05/2023. The Application was filed under certificate of urgency paid for on 12/05/2022 but the Application was placed before me for the first time on 22/05/2022. It was anchored on order 69 and 51 of the *Civil Procedure Rules*, sections 1A, 3A and 63(e) of the *Civil Procedure Act*, chapter 21 Laws of Kenya, article 40 of the *Constitutionof Kenya* 2010 and (what was referred to as) "all other enabling provisions of the law." It sought the following orders:

    1. ...Spent
    2. ...Spent.
    3. That pending the hearing and determination of this suit, a temporary injunction do issue against the Respondent/ Defendant whether by themselves, their assigns, agents, employees, servants or otherwise from any further dealings within the parcel Kitale/Municipality Block 5/31 LR 2116/827.
    4. That the OCS Kitale Police Station do enforce and ensure compliance with orders 2 and 3 above.
    5. That costs of this application be provided for.
    6. Any other order that this Court deems fit to grant.

2. The application was based on grounds that the defendant had without reasonable excuse entered and had remained upon and erected a structure and was in occupation of 80 by 40 foot (3200 square feet) warehouse in the suit property without the consent of the plaintiff/applicant the owner of LR 2116/827/Kitale Municipality Block 5/31; the plaintiff had on several occasions tried to engage the respondent over the issue of trespass but they have been unresponsive and treated him with contempt by never replying to letter and demand letter (emphasis by the Court by way of underline); the defendant is continuing to enjoy the use of the said property and even constructing permanent structures on the said parcel of land and if the activities are not stopped it will drastically devalue the land when they finally demolish them; and the applicant's constitutionally protected right to property is under grievous threat and if the matter is not handled with utmost urgency he will be expose greatly to deprivation and violation of his right.

3. The application was supported by the affidavit of Solomon Kim Kariuki sworn on 9/05/2023 and the annextures thereto. In the affidavit the plaintiff deponed that he was the registered owner of the suit land, parcel No LR 2116/827/ Kitale Municipality Block 5/31. He annexed to the affidavit and marked as SK-01 a copy of a grant issued to him under the *Registration of Titles Act*. He deponed further that the defendant entered the parcel of land without his consent and put up a warehouse on 80 by 40 foot (3200 square feet). He annexed and marked as SK-02 a set of three photographs evidencing it.

4. His deposition was that when he visited the property on 10/09/2022 he discovered a "branded go-down branded Iprocure" and upon inquiry he was informed by the staff that it was leased to them. He annexed and marked as SK-03 a copy of a letter dated 03/10/2022 which he wrote to Iprocure Ltd demanding to be apprised of how the company got onto the land. That his later (*sic*) to the manager did not elicit response hence he sought legal advice.

5. He swore further that he had on several occasions tried to engage the respondent over the issue of trespass he had been unresponsive and treated him with contempt. He annexed a demand letter dated 18/04/2023 written by M/S Odhiambo & Odhiambo Advocates to the defendant. He marked it as SK-04. He then repeated the content of the grounds about his constitutionally protected property and that he had been prevented by the defendant from accessing his property to carry out economic activities renting the same for gain.

6. He deponed further that whenever he attempted to enter the suit property the defendant and its agents threatened him. That the erection of the ware house store and uncompleted structure was an eyesore and had defaced and devalued the property. He referred to the photographs he annexed to the affidavit and marked as SK-02. He deponed again that he had reported the matter to the police. He annexed and marked as SK-05 a copy of the occurrence book report of Kitale Police Station of 11/05/2023. He swore that the orders sought would not prejudice the defendant and instead he (applicant) would suffer irreparable harm if the orders sought were not granted. The defendant opposed the application through a replying affidavit sworn by one Isaac Nderitu Nyawira on 2/06/2023 and filed on 12/06/2023. He deponed that he was the manager of the respondent. He deponed that the respondent was a tenant in the premises by dint of a lease agreement dated 14/02/2022. He annexed and marked as MO-1 a copy of the lease agreement.

7. He deponed that the defendant's landlord by name Peter N Mburu was a tenant of the Plaintiff and that (Kitale) ELC Case No 24 of 2023, Solomon Kim Kariuki vs. Peter N. Mburu was pending in Court over the tenancy. He deponed further that the same tenancy dispute was before the Business Premises Tribunal and interim orders had been granted restraining the Applicant herein from evicting, threatening, intimidating, harassing or levying distress upon one Peter N Mburu. He annexe and marked as MO-2 a copy of the orders by the tribunal.

8. He swore that he believed the respondent had reasonable and justifiable explanation for being on the suit property by being a tenant of Peter N. Mburu who was a tenant of the applicant. He stated that the action herein being one of trespass against the respondent, allowing the orders restraining the plaintiff's use of the property would be tantamount to summarily allowing the plaintiff's claim despite it having a good defence. He deponed that the interest of justice demanded that the application be dismissed with costs.

9. The application was disposed of by way of written submissions. Only the applicant filed his. He relied on the case of *Ngurumani Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and submitted that three issues lay for determination of such an application. He listed them as proving whether there was a *prima facie* case with a probability of success, whether irreparable loss which cannot be remedied by an order of damages would occur, and if in doubt in whose favour the balance of convenience would tilt.

10. About the issue of *prima facie* case, he relied on the *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*, Civil Appeal No 39 of 2002. He argued that being the owner of the suit land and having not given consent to the respondent to be in occupation of the 80 by 40 feet where it has built a warehouse and having tried to reach out to the defendant to explain how it got onto the parcel but in vain, he had proved a *prima facie* case for trespass.

11. Regarding the issue of irreparable harm which cannot be remedied by damages, he submitted that the defendant was in occupation of the premises and continuing to carry out business thereon. This involved movement of trucks and lorries and some constructions. He had been denied access to the property for renting it out hence the denial thereof was disadvantaging him and infringing on his property rights as protected under article 40 of the *Constitution*.

12. On the issue of the balance of convenience, he relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai*[2018] eKLR where the court defined a balance of convenience to denote a situation where if an injunction is not granted and the suit ultimately decided in favour of the plaintiff the inconvenience would be greater to him than to the defendant if the injunction is granted and the suit dismissed. He then submitted that the balance of convenience titled in his favour. He prayed for the grant of the orders.

13. In addition to the written submissions his learned counsel highlighted the argument orally by restating that the respondent did not have the consent of the applicant to be on his land and he had tried to engage with defendant with a view to knowing how it got onto his land and the issue of trespass but in vain hence he had established a *prima facie* case against him. On irreparable harm, learned counsel submitted that by virtue of the defendant carrying on business on the land and paying rent of KES 150,000/= per month to a stranger who was not the owner of the land the plaintiff's right to property was being infringed. On the balance of convenience, he submitted that he had produced the title to the land and it had not been disputed hence the balance titled in his favour.

14. Regarding whether to grant the application would amount to allowing the suit, he submitted that in failing to grant it that would amount to permitting the respondent to continue with the trespass. About the orders of the tribunal that were attached and relied on by the respondent, he submitted that they related to different parties other than the defendant herein. And on the respondent's submission that there was no irreparable loss to the applicant since he had quantified the damages in the suit, he submitted that the respondent could recover the same from Peter. N Mburu if they were awarded hence the defendant would not suffer irreparable hard. He stated that the land was the applicant's and there was no reason whatsoever for the respondent to be on it hence even if it was on the land since 2022 and paying rent to a stranger was not good reason to be thereon.

15. Learned counsel for the respondent submitted that his client was on the parcel of as of right, it having been leased to him by one Peter N. Mburu who was a tenant of the plaintiff. He stated that the tenancy of Peter N. Mburu had not been terminated and there was a dispute of the same before the Business Tribunal which had issued orders stopping him from interfering with the defendant's tenancy. He pointed to the copies of the lease agreement and the orders of the tribunal.

16. He submitted that since the issue before the court was an alleged trespass and the defendant had given a reasonable or *bona fide* explanation in answer thereof, the application could not stand. He submitted that the defendant was faithfully paying rent to his landlord who in turn was paying rent to the applicant. He argued that the applicant has not met the *Giella v Cassman Brown* principles.

17. On the issue of irreparable harm not capable of being redressed by damages, it submitted that the applicant sought Kes 6,000,000/= in damages from the respondent. Therefore, the damages had been quantified and would be payable if the suit succeeded hence not need to grant the injunction. He stated that the balance of convenience favoured his client because it was a tenant of a landlord who himself was a tenant of the plaintiff and who was paying rent to him over the suit premises. Moreover, the defendant had been on the premises conducting business thereon since February 2022 hence the position should not be interfered with. He summed it that to grant the injunction would be tantamount to allowing the suit.

He prayed for dismissal of the application.

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Issue, Analysis and Determination

18. I have considered the application, the law on grant or refusal to grant injunctions, the submissions by both the plaintiff and the defendant. I am of the view that only two questions lie before me for determination. One, is whether the application is merited, and two, who to bear the costs of the application.

19. Regarding the first issue, To grant or refuse to grant an injunction, an equitable remedy in its nature, is at the discretion of the court which it exercises based on facts of each case. In so doing the court should act judiciously. This was stated in the case of *Kahoho v Secretary General*, EACJ Application No 5 of 2012.

20. Again, in *Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others* [2016] eKLR, the Court stated that

> "... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously." I need not explain what it means by a court being judicious but it suffices to say that in so doing it must take into account all the facts and circumstances of each case and make a decision that is not plainly wrong. It is a delicately balance of the interests of the parties and justice.

21. Therefore, as I exercise the discretion I am called upon to do herein, I must bear in mind that for an application of the sort to succeed, it must pass the test set out in the case of *Giella v Cassman Brown*[1973] EA 358. It is a three-pronged one whose limbs are:

    a. Whether the applicant has established a *prima facie* case

    b. Whether the he or she would suffer irreparable loss that may not be compensated by damages and

c. That if the court is in doubt, it may rule on a balance of convenience.

22. The limbs are to be considered sequentially. Thus, this court sets out to consider the first one, being, whether the plaintiff has established a *prima facie* case. The Court of Appeal defined a Prima facie case in the case of *Mrao Ltd v First American Bank Of Kenya Ltd& 2 others* [2003] eKLR It stated,

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

23. Eleven years later, the same court went on to hold in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR as follows:

> " There is no scope to confuse between an interlocutory and permanent orders of injunction and since the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since Giella case (*supra*) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

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 Afraha 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."

24. In the same case (*Nguruman*) the court went further to clarify 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."

25. In the instant case, although the plaintiff did not expressly depone that he had leased the suit property to one Peter M. Mburu he stated through a letter dated 03/10/2022, marked as Annexture SK-03 to the Supporting Affidavit, that he had done so and wondered how the Defendant herein had come to occupy the same. He deponed though that he discovered this fact on 19/09/2022 when he visited the property. While he did not expressly depone it, it is clear from paragraph 5 of the supporting affidavit that he did not take any action by way of moving the Court urgently to remedy the situation if indeed there was a right being violated. Instead he wrote a letter dated 3/10/2022 asking for a copy of a lease held by the defendants on the suit property.

26. He submitted that, the defendant, without reasonable excuse entered onto and remained on the suit land. However, from his own depositions at paragraph 7 that he had on several occasions tried to engaged the defendant over the "trespass" but they were unresponsive. He evidenced this by way of a letter dated 18/04/2023, Annexture SK04, which was a demand letter issued by his Advocates herein. I have carefully read the letter. It is a mere demand letter. It does not indicate any engagements the plaintiff ever made with the defendants, neve even the letter of 03/10/2022.

27. But on the contrary to the deposition on lack of reasonable cause, the plaintiff deponed that he had sought for a copy of Alease from the defendant to show that it was lawfully on the land. He did so at paragraph 3. This demonstrates that he was aware that the defendant had reasonable cause to enter and remain on the land. It is no wonder that the issue of his lease with the lessor of the defendant became a subject in the Business Premises Rent Tribunal. After that he depones at paragraph 11 of the supporting affidavit that the structures on the property are an eyesore, and in paragraph 12 that he had reported to the police.

28. On its part, the defendant responded by deponing that it was on the premises by virtue of a lease agreement between them and the said Peter M. Mburu. They annexed the agreement as MO-1 to the replying affidavit of one Isaac Nderitu Nyawira. Further that the matter was the subject of a Reference in the Business Premises Tribunal.

29. From the facts above, I am of the humble view that the instant suit does not demonstrate a *prima facie* case as defined in the *Mrao* and *Nguruman cases* (*supra*). First, the defendant is in actual occupation of the suit land. Even if the plaintiff was not aware of his entry onto the suit land at first, he became aware of its presence nine months before he moved the court for the orders sought. In essence he acquiesced to the defendant's presence on and use of the suit land. This is supported by the plaintiff's own deposition that he tried to engage the defendant regarding the acts of trespass but in vain. Actually, he indirectly admits to the fact of the presence of the plaintiff on the land by permission by deponing in paragraph 5 of his supporting affidavit that he requested it for a copy of the lease in October, 2022 but did not receive one.

30. Moreover, the defendant deponed, and it is not disputed that there is, pending before the Business Premises Tribunal a Reference between the Plaintiff and Peter M. Mburu, being Reference No.BPRT/E027/2023 as evidenced by Annexture MO-2 in the Replying Affidavit of Isaac N. Nyawira over an alleged breach of the lease agreement between them for reason of the sub-lease between the said Peter m. Mburu and the defendant. What that means is that if this court were to issue an injunction herein,

it would amount to terminating a lease which is the subject of the Tribunal. That would effectively interfere with the jurisdiction and proceedings of the Tribunal.

31. It would appear to me, from the submissions of the plaintiff that his issue, or pain so to say, is that a sum of Kes 150, 000/= is being paid, as evidenced by Annexture MO-1, a lease agreement dated 14/02/2022, by the Defendant "to a stranger who is not paying the owner", as was submitted orally by learned counsel for the Plaintiff on 11/07/2023. This was the main point of highlight in the oral submissions. Well, the issue of non-remittance of rent due to the Plaintiff from Peter M. Mburu is a fact which was not deponed anywhere by the Plaintiff hence it was only inadmissible hearsay (evidence) from the Bar, by way of submission. And even it were to be so, it would not be a matter of jurisdiction of this Court but the Tribunal unless the leased had been terminated already and arrears claimed, in which case, the jurisdiction of this court would be determined first. Thus, the deposition that the warehouse is an eyesore is not really here nor there but actually an argument designed to convince this Court to grant an injunction. He could have rather deponed that it was a heartache in not receiving rent. Therefore, their first claim fails on the first limb.

32. Since the first prong for the grant of a temporary injunction has failed there is no need to consider the next two. As the Court of Appeal stated in the *Nguruman case* (*supra*), the limbs are sequential hurdles which an applicant must go over successfully. Suffice it to say that irreparable loss was ably defined by Munyao J. in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where he stated as follows: "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."

33. I see none above. The respondents' act of doing business by use of lorries and trucks on the land is a necessary process of carrying out the business it is engaged in. The plaintiff's argument that he has been denied the chance to carry out business on the suit property is a shot on the foot because he already had a lease agreement with Peter M. Mburu over the suit land and let him take possession. That validity or otherwise of that matter is before the Business Premises Rent Tribunal. The Tribunal has not permitted him to be on the suit land by terminating the said lease. Therefore, even the second limb could not have succeeded even if the first had.

34. The upshot of the entire consideration is that the application dated 09/05/2023 failed miserably. It must and is to be dismissed with costs to the Respondent.

35. To fast-track the matter, the parties are directed to appear before this court virtually on 22/11/2023 at 8.30 am to submit on whether this suit proceed, in light of the fact that the subject matter is pending before the Business Premises Rent Tribunal.

27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 7TH DAY OF NOVEMBER, 2023.

HON. DR. IUR NYAGAKA

JUDGE