Pearl Homes Management Ltd v Patterson Investments Limited & 3 others; Patterson Investiments Limited (Petitioner); Pearl Homes Management Ltd & 2 others (Respondent) (Environment & Land Petition E020 of 2022) [2023] KEELC 21404 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21404 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E020 OF 2022

JA MOGENI, J

NOVEMBER 2, 2023

BETWEEN

PEARL HOMES MANAGEMENT LTD ..... PETITIONER

AND

PATTERSON INVESTMENTS LIMITED ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

NAIROBI CITY COUNTY ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

AND

PATTERSON INVESTIMENTS LIMITED ..... PETITIONER

AND

PEARL HOMES MANAGEMENT LTD ..... RESPONDENT

GIBSON TATUA KANYI ..... RESPONDENT

JAMES MULELA MWEU ..... RESPONDENT

RULING

1. Before this Court for determination is the Petitioner/Applicant's Notice of Motion Application dated 8/08/2023 brought pursuant to Section 5 (i) of the High Court Practice (Vacation) Rules, Section 10 of the *Judicature Act* (Cap 8) of the Laws of Kenya. The Petitioner/Applicant is seeking for the following orders: -

    1. Spent.

2. Spent.

3. That the Honourable Court be pleased to issue an order of temporary injunction restraining the 1st Respondent, its agents, servants, employees and/or assigns from constructing, erecting structures and/or undertaking any form of development on land parcels No. LR No. 1870/V/249 and LR No. 1870/V/250 pending the hearing and determination of the main suit.

4. That the costs of this application be provided for.

2. The application is premised on the grounds stated on the face of the application, the Supporting Affidavit of James Mulela Mweu, Applicant herein sworn on the 8/08/2023.

3. The application is opposed by the 1st Respondent by way of Grounds of opposition dated 22/08/2023. The opposition is on the following grounds:

1. This Honourable Court does not have jurisdiction to hear this Application as it is functus officio since it has previously heard and determined the issues brought up in this Application.

2. The Application is barred by law under the doctrine of Res Judicata in so far as the Applicant seeks to reinstate issues that have been determined by thus Honourable Court in the 1st Respondent's Application dated 1/02/2023.

4. The Court gave orders on 11/08/2023 directing the Respondents had leave of 5 days to file their responses to the Petitioner's Application. The 1st Respondent had only filed grounds of opposition.

5. On 22/08/2023, counsels agreed to file written submissions to the application and the Court gave directions on the same. By the time of writing this Ruling, it is only the Petitioner/Applicant who had duly filed their submission and I have considered them. The Petitioner/Applicant filed their written submissions dated 19/09/2023.

Petitioner/Applicant's Contention

6. The Petitioner's case is that on 3/08/2023, the 1st Respondent proceeded to erect a billboard on the suit property therein indicating its readiness and intention to commence building on the piece of land and confirming that it has obtained the necessary approvals yet this matter is still pending determination in court. The Petitioner annexed a photograph of the billboard and marked it as JMM1.

7. The Applicant is apprehensive that the 1st Respondent intends to seize the Applicant's right to be heard and accorded justice by constructing on the suit parcels before the determination of the main suit.

8. This being an active matter in court, it is an abuse of the court process for the 1st Respondent to blatantly commence activities to alter the status of the suit properties in a permanent manner.

9. They contend that the construction of such a high rise building apartment on the suit land will render the verdict of this court difficult to execute as it will be costly to bring down such a building were the Petition to succeed.

10. The Petitioner has a prima facie case with a balance of success since it has shown that a portion of the suit property to be developed comprises of a public utility road not capable of being allocated to the 1st Respondent. That the balance of convenience tilts in the preservation of the status of the suit property pending the hearing and determination of this case. Should the 1st Respondent be allowed to construct, erect structures and or undertake any form of development on suit parcels, the Applicant's constitutional right to use of a public road will forever be infringed upon.

11. The Petitioner deponed that the conflict concerning the suit parcels is yet to be determined therefore, the 1st Respondent's act of construction, erection of structures and or undertaking of any form of development will render the Applicant's Petition dated 20/05/2022 nugatory and a mere academic exercise with a paper judgement at the end.

12. The Applicant submitted that they not only have an arguable case but also a right to use of a public access road. The Applicant has also produced evidence showing that the right will be infringed upon should this Honourable Court not intervene. The suit property is the subject of the proceedings before this Honourable Court and ought not be interfered with or changed until a final decision is rendered lest the court issue a paper judgement.

13. Further, they submit that the Applicant has met the requirement of the first limb of the threshold and has a prima facie case with a probability of success.

14. In addition, should the 1st Respondent be allowed to proceed with construction on the suit property as intimated by their action of erecting a Billboard on the suit property, the Applicant will suffer irreparable harm which cannot be compensated by damages. The Applicant's property will be inaccessible and bringing down such a high rise building will be costly and inevitably change the public access road. This damage cannot be quantified and adequately compensated.

15. They also submit that the Applicant has met the second limb of the threshold and has sufficiently demonstrated that it will suffer irreparable harm that cannot be remedied by compensation by damages.

16. Lastly, the balance of convenience is in favour of the Applicant. Should the suit be decided in favour of the Applicant without the injunctive orders sought in place, the Applicant stands to suffer inconvenience greater than the inconvenience that will be suffered by the 1st Respondent should the orders sought be granted as the 1" Respondent is yet to commence construction.

1st Respondent's contention

17. On the other hand, the 1st Respondent only filed grounds of opposition on two grounds; the Court is functus officio and that the application is barred by law under the doctrine of res judicata.

Issues for determination

18. I have considered the motion, the supporting affidavit together with the annexures thereto, the grounds of opposition, the Applicant's written submissions and the cited authorities together with the relevant provisions of law and found that the issues for determination before this Court is whether the Application is properly defended and whether the Applicant has met the threshold for the grant of temporary injunction pending hearing and determination of the main suit.

Analysis and determination

Whether the application is properly defended

19. The Application before the Court was defended by the 1st Respondent by way of grounds of opposition. The Court granted the Respondents leave of 5 days to put in their responses, by the time the 5 days leave lapsed, the 1st Respondent had not filed any other response to the impugned application.

20. The legal provision on ways of opposing an application is Order 51 rule 14 of the Civil Procedure Rules which provides that;

> " Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
>
> (a) A notice preliminary objection: and/or;
>
> (b) Replying affidavit; and/or
>
> (c) A statement of grounds of opposition;"

21. I have considered the court of appeal authority relied upon by the applicant in Civil Appeal No. 95 of 2016 in the case of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR where the court cited with authority the case of Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR which stated:

> " As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath".

22. Further in the case of Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR the court held as follows:-

> " The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant".

23. From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application, they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.

24. However, though having held as such, the application by the applicant should not be deemed as having been allowed. This court has a duty to consider the application and proceed to determine it on its merits.

Functus officio

25. It is the 1st Respondent's contention that this Court is functus officio since it has previously heard and determined the issues brought up in this Application. In Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR, this court said of the doctrine of functus officio:-

> " I understand the doctrine, like its sister, the res- judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits".

26. As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

27. In the present Application, the Petitioner/Applicant is merely seeking Court to grant an order of temporary injunction restraining the 1st Respondent, its agents, servants, employees and/or assigns from constructing, erecting structures and/or undertaking any form of development on land parcels No. LR No. 1870/V/249 and LR No. 1870/V/250 pending the hearing and determination of the main suit.

28. A perusal of the Court record shows that the Court has not given any final decision on the issues raised in the instant application or rendered its verdict on the merits of on matters relation to the grant of a temporary injunction. The court has not become functus officio as far as application for a temporary injunction is concerned. I therefore decline to hold that the Court has become functus officio to this end.

Res judicata

29. The 1st Respondent argues that the present Application is barred by law under the doctrine of Res Judicata in so far as the Applicant seeks to reinstate issues that have been determined by thus Honourable Court in the 1st Respondent's Application dated 1/02/2023.

30. For avoidance of doubt, the 1st Respondent filed an application dated 1/02/2023 seeking the following orders:

    a. Spent.

    b. The Petition filed herein dated 20/05/2022 ("the Original Petition") be struck out.

    c. In the alternative to Prayer 2 above, this Honorable Court be pleased to Order that the Petitioner in the Petition filed and dated 20th May 2022 ("the Original Petition") provide security for the whole of the costs to be borne by the Applicant by way of a deposit of at least Kshs. 20,000,000/= into an interest earning account in the joint names of the Advocates for the Parties herein within such time as this Honorable Court shall direct failing which the Petition dated 20th May 2022 ("the Original Petition") be dismissed.

    d. This Honorable Court be pleased to grant any other Orders it deems fit and just.

31. Res Judicata is anchored on Section 7 of the *Civil Procedure Act* which provides that:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

32. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.

33. The 1st Respondent's Application dated 1/02/2023 mainly sought for security for costs since the issue of jurisdiction had been dealt with in their notice of preliminary objection that they had raised seeking to have the Petition to be struck out for want of jurisdiction.

34. For res judicata to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

35. It is evidently clear that the matter in issue in the present Application is definitely not directly and substantially the same as in the 1st Respondent's Application dated 1/02/2023. It is my considered view that the present application is not res judicata and therefore the Court can entertain it.

Whether the Applicant has met the threshold for the grant of a temporary injunction pending hearing and determination of the main suit.

36. The substantive law on this matter is Order 40 Rule 1(a) of the Civil Procedure Rules 2010 which provides:

> " Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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."

37. The Petitioner's application being one for a temporary injunction, the same shall be considered on the well-established principles of Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358. For the petitioner to succeed in the present application, they have to satisfy the court that they have a prima facie case with a probability of success and that unless the orders sought are granted, they will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience.

38. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR observed that:

> 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.

39. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a prima facie case. A prima facie case was defined in Mrao Ltd v. First American Bank of Kenya Ltd& 2 Others [2003] eKLR, where Bosire, JA stated 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."

40. The Court of Appeal deliberating what amounted to a prima facie case in Nguruman (Supra) made the following comments: -

> " 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."

41. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.

42. I have no serious problem with the above dicta, only to add that when dealing with an application for injunction, what essentially the court is being called to do, is to make a decision on how the subject matter of the suit ought to be preserved pending hearing of the suit. The core purpose of an injunction is to ensure that a person who has, on the face of it, demonstrated that his rights have been infringed, does not end up with a paper judgment because the subject matter of the case will have been destroyed, or even if not destroyed, the loss that he will suffer by not granting the order of injunction will be substantial.

43. That being said, in my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the application, find that a greater injustice has been occasioned. The guiding principle of the

overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.

44. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavit, it is the view of the court that the petitioner/applicant has established a prima facie case with a probability of success against the Respondents. As regards irreparable damage, I take the view that should the injunction not be granted the substratum of this case will be destroyed and the petitioner/applicant will suffer irreparable loss which may not be quantified in damages. The balance of convenience if I had doubt, would tilt in favor of the petitioner/applicant in order to safeguard the current status quo of the subject matter of the application pending hearing and determination.

45. Arising from all the above, I find merit in the application. Accordingly, I allow the Notice of Motion dated 8/08/2023 in terms of prayer 3 and 4.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER 2023

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MOGENI J

JUDGE

In the virtual presence of

Ms. Claire Nyakundi holding brief for Mr. Koceyo for the Petitioners

Ms. Mwendwa holding brief for Mr. Marete for the 1st Respondent

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE