



**Yejoka Garden Restaurant Limited v Staroot Residency (Environment & Land
Miscellaneous Case E190 of 2022) [2023] KEELC 21472 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E190 OF 2022
OA ANGOTE, J
NOVEMBER 9, 2023**

BETWEEN

YEJOKA GARDEN RESTAURANT LIMITED APPLICANT

AND

STAROOT RESIDENCY RESPONDENT

RULING

1. Before this Court for determination is the Applicant's/Plaintiff's Notice of Motion dated 20th September, 2022, brought pursuant to the provisions of Sections 3A, and 3B of the [Civil Procedure Act](#), Orders 2 Rule 13 and 40 Rule 1 of the [Civil Procedure Rules](#) seeking the following reliefs;
 - i. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendant's, by themselves, their agents or servants from entering, trespassing, or in any other way dealing and or interfering with the Plaintiffs' peaceful use and possession of land parcel No 1/181/R-Nairobi, pending the hearing and determination of this suit.
 - ii. That the OCS Kilimani to enforce the orders made herein.
 - iii. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Gebrehiwot Daniel Hadgu, the Director of the Applicant, who deponed that him and the company (Plaintiff) are the registered owners of the whole parcel of land known as L.R 1/181/R-Nairobi and that the Respondent is currently carrying out construction on the property L.R No 1/183 Kilimani, which directly neighbors his property.
3. It is the deposition of the Plaintiff's Director that from August, 2020 to date, the Respondent has been trespassing on the property; that the Respondents' project encroaches on his property in that the windows therein open up to his property and will ultimately block the suit property from receiving



- natural light and that the Respondent is further constructing a sewer line that passes through the suit property.
4. Mr Hadgu deponed that the project on L.R No 1/183 Kilimani has interfered and/or tampered with the electricity poles in the area causing them to sag, which poses a serious electrical hazard to the environment and exposes the people working and living around the project's environs to among others fatal electrical injuries and that the project is being undertaken without due regard to construction procedures.
 5. The Respondent, through its Manager, Zhang Chi, filed a Replying Affidavit in which he deponed that the application is replete with falsehoods and material non-disclosure; that the Applicant is not the registered owner of the suit property; that the Respondent is the registered owner of all that land known as L.R No 1/183/Kilimani –Nairobi and enjoys all the rights and privileges appurtenant thereto; that the Respondent is constructing over 200 units on its land and in so doing has neither trespassed nor encroached into the Applicant's land or property and that its enjoyment of its rights to property cannot be termed as encroachment or infringement.
 6. According to the deponent, the assertions that the Respondent's windows open into the Applicant's property is not only misleading and dishonest but an absolute misrepresentation of material facts; that the windows in the Respondent's residency do not come close to the boundaries of the two properties and that the allegations that the project is blocking the Applicants entitlement to natural light is a misapprehension and the Court is welcome to make a site visit to affirm the same.
 7. Mr Zhang deponed that prior to the institution of this suit, the Applicant had filed another suit before the National Environment Tribunal being NET Appeal No 27 of 2022 *Yejoka Garden Restaurant Limited v Staroot residency and 2 Others* where they propagated the same unsubstantiated allegations of windows opening to their property and that they withdrew the aforesaid Petition upon the Respondents filing of a Preliminary Objection contesting the Tribunal's jurisdiction.
 8. It was his further deposition that the Respondent has at all times ensured that it operates within the confines of its boundaries and has neither entered nor erected any structure on the Applicant's parcel of land; that it obtained all the relevant and necessary approvals and/ or authorizations before embarking on the development and that the Respondent has always abided by the construction laws and the safety procedures laid down in law.
 9. According to the Respondent's Director, it is the duty of the Kenya Power and Lighting Company (KPLC) to ensure that electric poles and wires are always in a proper state of repair; that nonetheless, the Applicant has not tendered any complaints to the KPLC on the matters alleged; that the Applicant's absurd attempts to have the Respondent vacate its own parcel of land is a clear attempt to violate, infringe or limit the Respondent's right to property and that having not discharged its burden, the application should be dismissed.
 10. Both parties filed submissions and a bundle of authorities which I have considered.

Analysis and Determination

11. The law on the grant of interlocutory injunctions is provided for under Order 40 Rule 1 of the [*Civil Procedure Rules, 2010*](#). The same provides as follows;

“Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution if any decree that may be passed against the defendant in the suit,

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.”

12. Consequently, under Order 40 Rule 1 of the *Civil Procedure Rules*, an order of temporary injunction may issue where the Court is satisfied that there is a likelihood of the suit property being wasted or alienated before the suit is heard and determined.

13. Being an application for injunctive orders the same shall be weighed against the requisite essentials set out in the celebrated case of *Giella v Cassman Brown* (1973) EA 358 thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

14. The Applicant in this case is expected to meet the three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court stated 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. 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 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.”



15. The Court will be guided by the foregoing principles as well by the general principle that no definitive findings on law or facts should be made at this interlocutory stage.
16. As correctly stated by the Respondent, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR defined a prima facie case 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.”
17. More recently, the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others*(*supra*) while agreeing with the definition of a prima facie case in the *Mrao Case* (*supra*) went ahead to further expound 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.”
18. In the present application, the Applicant has sought for a temporary injunctive order against the Respondent restraining him from interfering with the suit property. It is his case that he has at all material times been the proprietor of the suit property-L.R No 1/181/R-Nairobi; that the Respondent is the proprietor of L.R No 1/183-Nairobi, a neighboring plot and that the Respondent is carrying out construction on its property aforesaid and the ongoing construction project encroaches on his property in that the windows therein open into the suit property.
19. It is the Plaintiff’s case that in addition to the above, the ongoing project on the Respondent’s land will block the natural light to the suit property and that the Respondent has further constructed sewer lines which encroach onto the suit property and has tampered with electric poles.
20. In response, the Respondent asserts that it is the registered proprietor of L.R No 1/181-Kilimani; that whereas it is indeed carrying out construction on its property, the same is being carried out within the confines of its property and is not encroaching on the suit property in any way whatsoever.
21. The Respondent adduced into evidence a copy of the title for the suit property; pictures of the boundaries showing the distance between the two properties and a copy of the EIA License with respect to the development on L.R No 1/183.



22. To begin with, it is not disputed that the Applicant is the registered proprietor of the parcel of land known as L.R No 1/181/R whereas the Respondent is the registered proprietor of L.R No 1/183 and that the two properties are adjoining.
23. The dispute between the parties regards whether or not the Respondent's ongoing construction project has encroached onto the Applicant's land. However, the Applicant has not placed before the court any material upon which the court can ascertain whether this is the position. The Applicant has not annexed any document to show the extent of its land or that the Respondent has encroached on to the same in any of the ways alleged.
24. It is a general principle of law that he who alleges must prove. This principle is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*. Section 107 provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
25. Sections 109 and 112 of the same *Act* states as follows:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
26. Whereas at this prima facie stage, the Applicant is not expected to fully meet the burden of proof in civil cases, it must at the very least demonstrate to the Court that it has a right which has been threatened. This has not been done. The Court finds that the Applicant has not established a prima facie case
27. Having failed to establish *prima facie* case, it is not necessary to proceed to examine whether the other two conditions as set out in the Giella Case have been satisfied. The Court will however proceed to do so for purposes of completion.
28. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra*) the Court of Appeal stated as follows on irreparable injury or damage:
- “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 face, 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 adequate remedy.”



29. Considering the Motion, the Applicant has not alluded to any irreparable harm that it may suffer that may not be adequately remedied by damages should the injunction sought not be granted. Indeed, no evidence was presented to this court to show that the Plaintiff will not receive natural light, which could have persuaded the court that the Plaintiff is likely to suffer irreparable injury that cannot be compensated by way of damages.
30. For those reasons, the Court declines to grant the prayers sought in the Notice of Motion dated 20th September, 2022. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF NOVEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mugambi for Ms Abok for Applicant

Ms Ndichu holding brief for Kagunga for Respondent

Court Assistant - Tracy

