



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C CASE NO. 6 OF 2017

KAITHERI HOUSING INVESTMENT COMPANY LIMITEDPLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIRINYAGADEFENDANT/RESPONDENT

RULING

1. By way of a Notice of Motion dated 16th August, 2021 and filed in court on 8th September, 2021, the Plaintiff/Applicant is seeking the following orders: -

a. Spent

b. Spent

c. That the Defendant/Respondent be restrained by itself, its agents or servants by way of injunction from demolishing houses, and/or constructing new building on land parcel numbers INOI/KERUGOYA/3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160 & 3161 and/or interfering with the said land parcels for any reasons whatsoever until this suit is heard and determined.

d. That the Defendant be condemned to pay the costs of this application.

2. The application is premised on the grounds set out on the face thereof and on the supporting affidavit sworn on 16th August, 2021 and filed on 8th September, 2021 respectively.

3. The Defendant/Respondent opposed the application by way of Grounds of Opposition dated 14th October, 2021 and filed on 19th October, 2021.

4. When the application came up for hearing on 21st October, 2021, the parties agreed through their advocates on record that the application be disposed of by way of written submissions.

5. The applicant and respondent filed their respective submissions on 19th November, 2021 and 8th October, 2021 respectively.

PLAINTIFF/APPLICANT'S CASE AND SUBMISSIONS: -

6. The applicant's case is that it is the registered proprietor of land parcel registration numbers Inoi/Kerugoya/3151 to 3161.

7. The applicant stated that the respondent had unlawfully built some houses on the suit lands and is thus seeking the Respondent's eviction.

8. The applicant stated that the Respondent intended to build high rise building on the said plots and have gazette the same.

9. The applicant stated that the Respondent intended on demolishing the houses erected on the suit land so as to construct the new building.

10. The applicant stated that unless the Respondent is restrained by this Honourable Court, it will continue with its plan which will frustrate the plaintiff's efforts to evict them and cause irreparable damages.

11. The applicant further stated that it was only fair and just if an injunction is issued since the plaintiff has a strong case with probability of success.
12. The Applicant submitted that it has established a prima facie case with probability of success as from the affidavits and the official searches, it is clear that the suit lands belong to the applicant and further that the titles being free holds, the respondent has never compensated the applicant.
13. The applicant submitted that it stands to suffer irreparable injury that cannot be compensated by way of damages as the respondent intends to build a high rise building on the suit land which will complicate the pending case and the applicant might lose the said parcels completely.
14. They submitted that the balance of convenience tilts in their favour and prayed that the application be allowed.

PLAINTIFF/RESPONDENT'S CASE AND SUBMISSIONS: -

15. The respondent raised the following grounds of opposition: -
 - a. That the application is incompetent and bad in law.
 - b. The application is incurably defective and does not lie.
 - c. The application is frivolous, vexatious and otherwise an abuse of the court process.
 - d. That the application has not met the threshold in law relating to the issuance of injunctions.
16. The respondent submitted that the applicant had not established a prima facie case as set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358**.
17. The respondent also submitted that though the applicant had annexed certificates of search proving ownership of the suit lands, there are various decisions whereby the court has consistently declined to recognize and protect title to land obtained fraudulently or illegally.
18. The respondent submitted that such titles can be challenged under Sections 24 and 26 (a) of the Land Registration Act. She relied on the cases of **Naiz Mohamed Jan Mohamed vs Commissioner of Lands & others 1996 e KLR**, **John Peter Mureithi & others vs Attorney General & 2006 e KLR**, **Chemey Investment LTD vs Attorney General & others 2018 e KLR** and **James Gathetha vs Priscolla Gitungu & Another 2006 e KLR**.
19. The Respondent further submitted that on the 2nd Limb set out in the case of **GIELLA VS CASSMAN BROWN** (supra), the applicant had not demonstrated that it would suffer irreparable harm that cannot be compensated by an award of damages. This is because they had sought an alternative prayer for payment of current market price of the suit lands, at paragraph c of the amended plaint.
20. The respondent prayed that the application be dismissed with costs to the defendant.

ANALYSIS: -

21. I have considered the notice of motion, the supporting affidavit, grounds of opposition and the parties' rival submission.
22. The principles on interlocutory injunctions set out by the Court of Appeal in East Africa in the locus classicus case of **Giella v Cassman Brown & Co. Ltd (1973) EA** whereby the Court held as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, a n 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.”
23. In the case of ***Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] e KLR*** the Court of Appeal held as follows: -

“These are the three pillars on which rest 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... 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.”
24. A prima facie case is defined in the case of ***Mrao Ltd. Vs First American Bank of Kenya Limited & 2 Others*** [2003] whereby the court of appeal held as follows: -

“4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

25. Though the application has been opposed in equal measure, the Applicant has not attached any document such as photographs or even the Gazette notice to prove that indeed the Respondent intends to build a high rise building on the suit lands. It is trite law that whoever alleges must also prove. It is thus my view that the applicant has not established a prima facie case to warrant the grant of the orders sought.

26. In the case of *Nguruman Ltd (supra)*, the Court considered irreparable injury as follows:

“On the second factor, 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 of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

27. Though the applicant claimed that it would suffer irreparably, the Respondent submitted that the applicant had not demonstrated that it would suffer irreparable harm that cannot be compensated by an award of damages. This is because they had sought an alternative prayer for payment of current market price of the suit lands, at paragraph c of the amended plaint.

28. I have looked at the amended plaint and note that Indeed, the Applicant has sought an alternative prayer for compensation as follows: -

“(c) Alternatively payment of current market price of the said land parcels as a compensation.”

29. It is therefore my view that the plaintiff/Applicant, from her own admission will not suffer an irreparable injury which cannot be adequately compensated by way of damages as she has sought an alternative for damages in the Amended plaint.

CONCLUSION: -

30. From the foregoing I am of the considered view that the Notice of Motion dated 16th August, 2021 is without merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 4TH DAY OF MARCH, 2022

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wambui holding brief for Mr. Ndana for Plaintiff
2. Ms Nyangati holding brief for Mr. Ngigi for Defendant
3. Kabuta – Court clerk.