



Sunland Prospects Limited v Kiambu Dandora Farmers Company Ltd (Environment and Land Case Civil Suit E078 of 2020) [2022] KEELC 2543 (KLR) (4 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E078 OF 2020**

SO OKONG'O, J

JULY 4, 2022

BETWEEN

SUNLAND PROSPECTS LIMITED PLAINTIFF

AND

KIAMBU DANDORA FARMERS COMPANY LTD DEFENDANT

RULING

The application:

1. What is before me is the Plaintiff's Notice of Motion application dated 19th August 2020 seeking a temporary injunction restraining the defendant, its members, assigns, agents, servants and any other person whomsoever acting on its behalf from encroaching, trespassing, demolishing, subdividing, working on, depleting, assigning, transferring, developing, selling, leasing gifting and in any manner whatsoever dealing with the plaintiff's parcel of land known as L.R No. 209/9462 (hereinafter referred to as "the suit property") pending the hearing and determination of this suit. The application is supported by the affidavit and supplementary affidavit sworn by David Kinyua Waweru on 19th August 2020 and 22nd February 2021 respectively.
2. The application has been brought on the grounds that the plaintiff is the registered owner of the suit property having acquired the same through Grant No. I.R 36983 dated 17th September 1982 that was issued in its favour by the Commissioner of Lands. The plaintiff has averred that it has been in possession of the suit property since 1979 and has developed a portion thereof with buildings that it uses for commercial purposes. The plaintiff has averred that between 30th July 2020 and 8th August 2020, the defendant's members without any justifiable cause invaded the suit property while armed with machetes, clubs and other crude weapons demolished a perimeter wall that was erected around the property, grabbed a portion of the property and started to subdivide and share the same amongst themselves. The plaintiff has averred that the defendant's actions aforesaid are illegal and unconstitutional. The plaintiff has averred that it stands to suffer irreparable harm, loss and damage if



the orders sought are not granted as it risks losing the suit property. The plaintiff has annexed to the supporting affidavit among others a copy of its Grant for the suit property and photographs showing the defendant's alleged activities on the property.

3. In its supplementary affidavit, the plaintiff has averred that it is not aware that the National Land Commission had cancelled the surveys that gave rise to its title for the suit property. The plaintiff has averred that its title is valid until cancelled by the court. The plaintiff has averred that the defendant had no legal basis for invading the suit property and destroying the structures put up thereon. The plaintiff has denied that the suit property was excised from land belonging to the defendant. The plaintiff has averred further that it was not aware of the existence of ELC Petition No. 47 of 2011. The plaintiff has averred that it brought this suit following the invasion of the suit property by the defendant. The plaintiff has averred that the defendant should have waited for the determination of the said ELC Petition No. 47 of 2011 before taking any action in relation to the suit property. The plaintiff has averred that the issues raised in ELC Petition No. 47 of 2011 are different from those raised in this suit. The plaintiff has averred that since the defendant's actions interfered with its quiet enjoyment of the suit property, it had no alternative but to seek redress. The plaintiff annexed to its supplementary affidavit among others, a copy of a letter of allotment dated 5th July 1979.

The defendant's response:

4. The application is opposed by the defendant through a Notice of Preliminary Objection and a replying affidavit sworn by Joseph Mwangi Karanja both dated 2nd September 2020. In its preliminary objection, the defendant has contended that the plaintiff's suit is sub-judice in that there is a matter pending before the court namely, ELC Petition No. 47 of 2011, *Abdilabi Muiruri Muigai v National Land Commission & others* in which the ownership of L.R No. 11379/3 is in issue. The defendant has contended that the court has no jurisdiction to entertain the plaintiff's suit and the application before the court.
5. In its replying affidavit, the defendant has contended that it is the registered owner of all that property known as L.R No. 11379/3, I.R No. 23514 (hereinafter referred to as "the defendant's property"). The defendant has averred that it was issued with a title for the suit property on 8th July 1970. The defendant has contended that the suit property owned by the plaintiff is within the defendant's property. The defendant has averred that there was an attempt by the Government in 1974 to compulsorily acquire the defendant's property which measures 818 acres but the plan was abandoned when the defendant challenged the same in court. The defendant has averred that following the aborted compulsory acquisition of the defendant's property by the Government, the property remained registered in the name of the defendant as the owner thereof.
6. The defendant has averred that the suit property was subsequently encroached by squatters, unknown persons, politicians and government officials without the defendant's authority who claimed to have been allocated the defendant's property by the Government. The defendant has averred that it lodged a complaint with the National Land Commission against the illegal encroachment and allocation of the defendant's property. The defendant has averred that it subsequently entered into a settlement agreement with the National Land Commission (hereinafter referred to as "the commission") which spelt out how the commission was going to help the defendant to recover its land that had been encroached onto.
7. The defendant has averred that the said settlement agreement authorized the defendant to take up all the unoccupied spaces within the defendant's land while the commission was going to review all the titles that had been issued in respect of land excised from the defendant's land like that held by the plaintiff. The defendant has averred that following a review of the said titles including that of the suit



property, the commission made a determination that all the titles that were created in respect of land within the defendant's property were illegal and directed that the surveys that led to the creation of the same be cancelled as the same were conducted without the defendant's consent.

8. The defendant has averred that when the plaintiff was allegedly allocated the suit property and issued with a title, the land from which the suit property was created was registered in the name of the defendant and has remained so registered. The defendant has averred that the suit property which is a portion of the defendant's property was not available for allocation to the plaintiff without the defendant's consent. The defendant has averred that it is in occupation of the entire land comprised in the title of the defendant's property including the suit property.
9. The defendant has denied that it has trespassed on the suit property. The defendant has contended that it has all along been in occupation of the entire land comprising of 818 acres which forms the defendant's property part of which is claimed by the plaintiff. The defendant has averred that it is necessary for the court to interrogate how the plaintiff acquired its title to the suit property. The defendant has averred that on account of the illegal manner in which the plaintiff acquired the suit property, the orders sought cannot issue in its favour.
10. The defendant has averred that the court is already seized of ELC Petition No. 47 of 2011, *Abdilabi Muiruri v National Land Commission & others* in which the ownership of the defendant's property is in issue and in which the court will consider the legality of titles that were created for the parcels of land excised from the defendant's property. The defendant has averred that it issued a public notice for those who were interested in the subject matter of the petition particularly those who held titles created from the defendant's property to join the petition but the plaintiff herein which was aware of the petition ignored the notice and refused to join the petition. The defendant has averred that this court cannot entertain the plaintiff's suit until the said petition is heard and determined as proceedings in this suit would have effect on the said petition. The defendant has averred that the plaintiff should have joined the petition and made the present application therein. The defendant has urged the court to strike out the plaintiff's suit and application with costs.

The submissions by the parties:

11. The application was heard by way of written submissions. The plaintiff filed submissions dated 29th March 2021 while the defendant did not file submissions even after time was extended for the defendant to do so. The plaintiff has submitted that it has satisfied the conditions for granting a temporary injunction. The plaintiff has submitted that it has established a prima facie case with a probability of success against the defendant and has also shown that it stands to suffer irreparable injury if the orders sought are not granted. The plaintiff has submitted that even if the court was to consider the balance of convenience, the same tilts in favour of granting the orders sought.

Analysis of the parties' cases and determination:

12. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the defendant's replying affidavit and notice of preliminary objection filed in opposition to the application. Finally, I have considered the submissions on record. The plaintiff is seeking a temporary injunction pending the hearing of the suit. The principles upon which the court exercises its discretion in applications for a temporary injunction are well settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing,



the application would be determined on a balance of convenience. 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* [2003] KLR 125 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...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.”

13. From the evidence before me, I am satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. The plaintiff has demonstrated that it has a title to the suit property that has not been cancelled. The plaintiff has demonstrated further that it is in possession of the suit property and has developed part of it. The plaintiff has also demonstrated that the defendant through its members and agents entered the suit property without the plaintiff's permission, broke down the perimeter wall that the plaintiff had constructed around the property and purported to divide the undeveloped part of the property amongst the defendant's members.
14. The defendant has not given any reasonable justification for its action complained of by the plaintiff. The defendant has not demonstrated that the suit property was acquired illegally by the plaintiff. The issue as to whether the defendant's property was compulsorily acquired by the Government is pending determination before this court in ELC Petition No. 47 of 2011. The issue as to whether the defendant holds a valid title over the defendant's property will be determined in the said petition. The purported settlement agreement between the defendant and the National Land Commission (the commission) could not form a legal basis for the defendant's invasion of the suit property. In my view, even if the plaintiff's title was created unlawfully, the defendant had no right to forcefully dispossess the plaintiff of the suit property. The defendant was bound to follow due process to repossess the land which it claimed was unlawfully allocated to the plaintiff. For the foregoing reasons, it is my finding that a *prima facie* case of trespass has been established by the plaintiff against the defendant.
15. I am also satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted. The plaintiff is in possession of the suit property and has had such possession for several years. The property is partly developed. The defendant's activities are geared towards dispossessing the plaintiff of the suit property. I am satisfied that the plaintiff risks eviction from the suit property if the orders sought are not granted.
16. Having satisfied myself that the plaintiff has a prima facie case against the defendant and that it stands to suffer irreparable injury if the injunction sought is not granted, it is not necessary for me to consider the balance of convenience. Even if I was to consider the same, I would have found that in the circumstances of this case, the same tilts in favour of granting the injunction sought.
17. I did not find any merit in the defendant's preliminary objection and sub-judice argument. I do not think that the issue of the pendency of Petition No. 47 of 2011 has been raised by the defendant in good faith. If the defendant honestly held the view that the dispute herein between it and the plaintiff



could be resolved in the said petition, it could have waited for the determination of the said petition before taking any action prejudicial to the plaintiff's interest in the suit property. The defendant having invaded and purported to take possession of the suit property despite the pendency of the said petition cannot be heard to say that the plaintiff should have joined the petition and raised its complaints therein. In any event, the plaintiff which is not a party to the said petition could not have brought the present complaint in the petition. The plaintiff had a constitutional right to come to court for redress when the suit property was invaded.

18. In conclusion, I hereby allow the Notice of Motion application dated 19th August, 2020 in terms of prayer (3) thereof. The plaintiff shall have the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Wahome for the Plaintiff

Ms. Awelo h/b for Mr. Murunga for the Defendant

Ms. C. Nyokabi-Court Assistant

