Lati & another v Mukilya & 2 others (Environment & Land Case E007 of 2021) [2022] KEELC 13502 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13502 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND CASE E007 OF 2021

TW MURIGI, J

OCTOBER 5, 2022

BETWEEN

CHRISTOPHER MATATA LATI ..... 1ST APPLICANT

DANIEL NDISYA MUKUMBU ..... 2ND APPLICANT

AND

BONIFACE MULWA MUKILYA ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION SETTLEMENT ..... 2ND RESPONDENT

LAND REGISTRAR MAKUENI COUNTY ..... 3RD RESPONDENT

RULING

1. By anotice of motion dated February 27, 2021 brought pursuant to the provisions of article 159 of the *Constitution* of Kenya 2010, section 1A, 1B, 3A and 63 (c) of the *Civil Procedure Act*, order 40 rules 1, 2, 3, 4 & 7 of the *Civil Procedure Rules* and all other enabling provisions of the law the applicants seek for the following orders: -

    1. Spent.

    2. Spent.

    3. That a temporary injunction do issue restraining the 1st defendant/respondent by himself, his agents, servants, employees, anybody/authority working under him or otherwise howsoever from entering, encroaching into, trespassing, fencing off, digging up trenches, constructing and or in any other way interfering with the plaintiffs/applicants quiet enjoyment and proprietary rights over the premises known as plot number 278 Nguu ranch settlement scheme pending the hearing and determination of this suit.

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

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the 1st and 2nd applicants sworn on the even date.

The 1St Applicants' Case

3. It is the 1st applicant's case that upon allocation of the suit property on September 29, 1995 he took possession up to 2016 when he sold the same to the 2nd applicant.

4. He argued that like many allottees in Nguu ranch settlement scheme, he did not pay the 10% demanded by the settlement fund trustees to commence the process of documentation as they felt that they were the owners of the land having purchased the same from the white settler through their cooperative society. He went on to state that onFebruary 8, 2016, he sold the suit property to the 2nd applicant and handed him vacant possession. That around February 2021 the 2nd applicant informed him that the 1st respondent had trespassed and attempted to take possession of the suit property. He further averred that in 2019 he instituted ELC petition No 11 of 2019 against the land registrar Makueni, the director of land adjudication and settlement and the Hon Attorney General where he sought for orders that he be supplied with the information regarding the current status of the suit properties as there were some unknown people who were trying to take possession of the suit properties. He contends that the 2nd respondent in its replying affidavit in petition No 11 of 2019 confirmed that land parcel number Makueni/Nguu Ranch/88 as at August 31, 2018 was registered in the name of John Matheka Mailu, the person who sold to him the suit property.

The 2nd Applicant's Case

5. It is the2nd applicant's case that he is the defacto owner of the suit property having purchased the same from the 1st applicant who is the registered owner. He averred that upon purchase he took possession of the suit property and has been in occupation and use of the same. He went on to state that in the month of February 2021 the 1st respondent without any colour of right trespassed on the suit property and started fencing off the property in readiness to commence construction of buildings.

6. The 2nd applicant averred that the 1st respondent letter of offer was illegal and irregular since he was already in possession of the suit premises as at the time when the 2nd respondent offered him the suit premises. He argued that he will suffer irreparable loss unless an order of an injunction is issued.

7. Theapplicants contend that the continued trespass by the 1st respondent poses a great security risk to the 2nd applicant which will occasion irreparable loss. The applicants urged the court to allow the application.

The 1st Respondents' Case

8. In opposing the application, the 1st respondent *vide* his replying affidavit sworn on April 7, 2021 averred that he was allocated the suit plot *vide* the letter of allotment dated January 24, 2017. He went on to state that upon allocation and payment of 10% of the fees required, he took possession of the suit property and was in the process of being registered as the proprietor. He further averred that he confirmed from the verification record and the affidavit sworn by the adjudication officer that the suit plot was vacant and available for allocation.

9. The 1st respondent argued that according to the verification record on plots in Nguu ranch settlement scheme, the government withdrew plot No 278 from the 1st applicant after he failed to produce the letter of allotment and to pay 10% fees to enable the settlement fund trustees begin the process of documentation. He argued that the suit plot was regularly allocated to him after the 1st applicant failed

to comply with the conditions set out in the letter of allotment and to pay the mandatory 10% fees required.

10. The 2nd and 3rd respondents did not respond to the application although they had been duly served.

11. The application was canvassed by way of written submissions.

Applicants' Submissions

12. Theapplicants submissions were filed onMarch 22, 2022. Learned counsel for the applicants submitted that the only issue for determination is whether the applicants are entitled to an order of a temporary injunction pending the hearing and determination of this suit.

13. Learned counsel submitted that the applicants had met the conditions for the grant an order of an injunction, as laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* 1973 EA 358. Counsel submitted that the applicants had established a *prima facie* case with high probability of success and reiterated the averments in the supporting affidavits sworn by the applicants.

14. Theapplicants argued that the 2nd respondent allocated the suit property to the 1st respondent when the same was not available for allocation as the 2nd applicant was already in occupation of the same. The applicants further submitted that the 2nd respondent made documents with the sole intention of defrauding the applicants of the suit property on the pretext that the 1st applicant did not pay the 10% demanded while the government on the other hand recommended the registration of all the parcels for allottees who had not paid the fees demanded by the trustees.

15. Counsel went on tosubmit that the 1st respondent had trespassed on the suit land and had started constructing a fence on the grounds that he was allocated the suit premises. To buttress his submissions on this point, counsel placed reliance in the case of *Mrao Ltd v First American Bank Ltd & 2 others* (2003) eKLR and *Kenleb Cons Ltd v Gatitu Service Station Ltd & another* (1990) KLR.

16. On the second factor, counsel submitted, that the 1st applicant will suffer irreparable loss as the 2nd respondent would fence off the entire suit property and enclose the 2nd applicant together with his family and livestock, thereby endangering his family. To buttress his submissions counsel cited the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Ltd & 2 others* (2016) eKLR.

17. Counsel argued that the balance of convenience was in favour of the applicants as they had established a prima face case with a high probability of success.

18. With regardsto the issue of costs the applicants argued that the costs should be inthe cause.

The 1St Respondent's Submissions

19. The 1st respondents submissions were filed on June 29, 2022. Learned counsel for the 1st respondent submitted that the only issue determination is whether the applicants are entitled to an order of an injunction.

20. With regards the conditions to be met for an order of an injunction to issue, counsel cited the celebrated case of *Giella vCassman Brown & Co Ltd* [1973] EA 358. Counsel submitted that the applicants have not established a prima facie case with a high probability of success as the 1st applicant failed to comply with the terms of the letter of allotment that required the payment of 10% commitment fees. Counsel submitted that the committee withdrew the suit property from the 1st applicant after he failed to produce documents in support of ownership and prove payment of the mandatory 10% commitment fees.

21. Counsel argued that the 1st applicant being literate had read the mandatory clause in the letter of allotment hence he knew the consequences for failure to comply with the same.

22. Counsel submitted that the defendant would suffer irreparable harm if an order of an injunction were to issue since they had already paid the 10% committed fees and had also received purchase money for the suitproperty.

Analysis and Detrmination

23. Having considered the pleadings, the application, affidavits and the rival submissions, I find that the only that only issue that arises for determination is whether the applicants have met the threshold for the grant of an order of injunction.

24. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 where the court set out the principles applicable in an application for an injunction as follows: -First the 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 harm which would not be adequately compensated by an award of damages.Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

25. The first issue for determination is whether the applicants have established that they have a *prima facie* case with a high probability of success.

26. A prima facie case was defined by the Court of Appeal in *Mrao Ltd vFirst American Bank of Kenya Ltd & 2 others* (2003) eKLR which defined a *prima facie* case as follows;

> " 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."

27. The1st applicant averred that he is the registered owner of the suit property. In this regard, he produced a letter of offer dated September 29, 1995 and a letter of acceptance dated April 17, 1996 annexures (CML1). He further averred that on February 8, 2016 he sold the suit property to the 2nd applicant and handed vacant possession to him. That a ground and status exercise carried out by the government on the suit properties established that he was the owner and occupier of the suit property.

28. The2nd applicant averred that he is the defacto owner of the suit property having purchased the same from the 1st applicant. In this regards he produced a sale agreement between himself and the 1st applicant (annexure DNM1). He deposed that after he purchased the suit premises, he took possession and has been in occupation and use of the same. He stated that sometime in February 2021 the 1st respondent trespassed on the suit property while claiming that he was the owner of the property. He went on to state that the 1st respondent gave him his letter of offer dated January 24, 2017(annexure DNM2). He produced photographs to demonstrate the acts of trespass on the suit property (annexure DNM3) and to prove that he was the owner of the suit premises.

29. On the other hand, the 1st respondent averred that he was allocated the suit property and immediately took possession thereof. He averred that the plaintiff failed to appear before the committee appointed in 2006 by the government, to verify plots in Nguu settlement scheme. That after the 1st applicant

failed to produce his letter of allotment or proof of payment of 10% commitment fees, the suit plot was withdrawn from him and allocated to the 1st respondent.

30. The 1st applicant's proprietary claim is anchored on the letter of offer dated September 29, 1995 issued by the director land adjudication (annexure CML1) and the letter of acceptance of dated April 17, 1996, while the 2nd applicant relied on the sale agreement to prove ownership of the suit property.

31. On the other hand,the 1st respondent proprietary claim is anchored on the letter of offer dated January 24, 2017 issued by the director of land adjudication.

32. Both parties are claiming ownership over the suit property based on their respective letters of offer. The1st applicant's letter of offer is dated September 24, 1995 while the 1st respondent's letter of offer is dated January 24, 2017. Both letters were issued by department of land adjudication and settlement Nairobi. The 1st applicant further produced a letter of acceptance dated April 17, 1996 issued by the department of land adjudication. It is not in dispute that the 1st applicant sold the suit premises to the 2nd applicant. The applicants argued that the suit property was fraudulently allocated to the 1st respondent. The issue of ownership is contested. The issues of ownership and fraud are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the court is not required to determine the issues which will be canvased at the trial.

33. The court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy.

34. In the case of *Mbuthia v Jimba Credit Finance Corporation & anor* [1988] eKLR the court held that;

> "In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases."

35. Similarly, in the case of *Edwin Kamau Muniu vBarclays Bank of Kenya Ltd* NBI HCCC No 1118 of 2002, the court held that;

> "In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether theapplicant is entitled to an injunction sought on the usual criteria."

36. At the interlocutory stage, the court is not required to make final findings on the contested matters. The issues of ownership and fraud can only be determined in a full trial where the parties will have the opportunity to call evidence and have the same challenged by way of cross examination.

37. In the case of *Joash Ochieng Ougo& anor v Virginia Edith Wambui Otieno* [1987] eKLR, the Court of Appeal held that;

> "The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial."

38. It is evident that the 1st applicant's proprietary claim over the suit property is anchored on the letters of offer and acceptance of the suit property while the 2nd applicant's claim is based on the sale agreement between himself and the 2nd applicant. The 1st respondent's claim is based on the letter of offer. Looking at the documents annexed to the applicants supporting affidavits, it is evident that the applicants claim is not baseless. I find that the applicants have established a prima facie case with a probability of success.

39. As regards the issue whether the applicants will suffer irreparable harm which cannot be adequately compensated by award of damages, the applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

40. The Court of Appeal in *Nguruman Limited v Bonde Nielsen & 2 others* (2014) eKLR held that: -

> " On the second factor, 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 facie*, 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 stand 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."

41. The applicants argued that the 1st respondent may fence off the entire suit property and thereby enclose and expose the 2nd applicant to irreparable loss. The 1st respondent stated that he had received purchase money from a third party. It is crystal clear that the 1st respondent has sold the suit property to a third party. The 1st respondent having confirmed that he has received purchase money from a third party, this court finds that there is a real likelihood that the suit property may be transferred to the third party and therefore making the process of recovery difficult. The court is therefore convinced that the applicants stand to suffer irreparable harm that cannot be compensated by way of damages if the suit property is transferred to the third party pending the hearing and determination of this suit.

42. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the applicants by refusing to grant the injunction, against the hardship to be borne by the 1st respondent's by granting the injunction.

43. Looking at the evidence presented by the parties herein, I find that if the suit property is not preserved, it may be wasted away. On the issue of balance of convenience, I find that it tilts in favour of maintaining the status quo on the suit property.

44. In light of the foregoing, I find that the applicants have met the threshold for the grant of a temporary injunction. Consequently, the application dated February 27, 2021 is allowed as prayed pending the hearing and determination of this suit. Costs in the cause.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF OCTOBER, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Mathuva for the Applicant