Lati v Kioko & 3 others (Environment & Land Case E006 of 2021)
[2022] KEELC 13536 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13536 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND CASE E006 OF 2021

TW MURIGI, J

OCTOBER 5, 2022

BETWEEN

CHRISTOPHER MATATA LATI ..... APPLICANT

AND

RUTH MUKULU KIOKO ..... 1ST RESPONDENT

MUTUNGA KINGÓO MUTUA ..... 2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 3RD RESPONDENT

LAND REGISTRAR MAKUENI COUNTY ..... 4TH RESPONDENT

RULING

1. Before this court for determination is the notice of motion application dated March 2, 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, in which the applicant seeks for the following orders: -

    a. Spent.

    b. Spent.

    c. That a temporary injunction do issue restraining the 1st and 2nd defendants/respondents by themselves, their agents, servants, employees, anybody/authority working under them or otherwise howsoever from entering, encroaching into, trespassing, fencing off, digging up trenches, constructing and or in any other way interfering with the plaintiff's/applicant's quiet enjoyment and proprietary rights over the premises known as plot numbers 88 and 89 Nguu Ranch Settlement Scheme pending the hearing and determination of this suit.

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

2. The application is premised on the grounds appearing on its face together the supporting affidavit of the applicant sworn on the even date.

The applicant's case

3. It is the applicant's case that in 1995 he purchased Plot No 88 and 89 from John Matheka and Jonathan Kieti Nzioki who were the original allottees of the suit properties. That after the purchase, he took possession and occupied the suit properties. The applicant stated that a ground and record status exercise carried out by the government in 2017 on the suit properties established that he was the owner and occupier of the suit properties.

4. The applicant further averred that like many allottees of Nguu Ranch Settlement Scheme, he did not pay the 10% demanded by the Settlement Fund Trustees to enable the Fund commence the process of documentation as they were of the view that it was not a controversial settlement scheme since they were the owners of the land having purchased the same from the white settler through their cooperative society. He stated that the Government was only required to sub-divide and title the land in their favour and charge them the cost of sub-division and issuance of titles. He went on to state that although squatters had over the years invaded the unoccupied parcels of land in the scheme, his parcels of land remained intact.

5. The applicant further averred that around September 2019, one Patrick Benido Mutinda attempted to take possession of the suit properties on the grounds that he had purchased the same from the 1st and 2nd respondents herein which prompted him to report the matter to the DCI Nzaui Sub County who then asked the parties to surrender copies of their supporting documents. He further averred that 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 to be supplied with information regarding the current status of the suit properties since there were some unknown people who were trying to take possession of the same. He contends that the 2nd respondent in its replying affidavit in ELC Petition No 11 of 2019 confirmed that land parcel number Makueni/Nguu Ranch/88 was at 31st of August 2018 registered in the name of John Matheka Mailu, the person who sold to him the suit property. That according to the 2nd respondent's replying affidavit, the suit plots were in the category of the plots that did not have adverse claims hence they were to be registered and titles issued.

6. The applicant went on to state that in 2018 while the Government was conducting an audit and verification exercise, some fraudsters in collusion with dishonest officials in the Ministry of Lands made documents in an attempt to grab his land. He stated that the 1st and 2nd respondents documents are subject to an ongoing investigation before the DCI.

7. The applicant further averred that, Patrick Benido Mutinda instituted a suit against him when it became apparent that he was not ready to part with the suit premises and sought for a temporary injunction which the Court vide its ruling dated December 17, 2020 declined to grant. The applicant argued that he will suffer irreparable loss unless 1st and 2nd respondents are restrained by an order of an injunction.

The 1st respondents' case

8. In opposing the application, the 1st respondent vide her replying affidavit sworn on April 7, 2021 averred that according to the verification record, Plot No 88 was retained by Matheka Mailu. The

1st respondent averred that according to the affidavit of Lawerance Karonge, the applicant did not purchase Plot No 88 from Matheka Mailu as there were no documents in support of the same. she went on to state that the government withdrew the suit properties from the original allottees Matheka Mailu and Kieti Nzioki, after they failed to pay the 10% commitment fees. She contends that she was allocated Plot No 88 vide the letter of allotment dated October 21, 2002 and that upon payment of the 10% commitment fees, she was eventually issued with a certificate of title.

9. She contends that she did not acquire the suit property fraudulently since she followed the due process in acquiring the same. She argued that the suit properties did not fall under the category of allottes without documents.

The 2nd respondent's case

10. Opposing the application, the 2nd respondent vide his replying affidavit averred that according to the verification record Plot No 88 was retained by Matheka Mailu. That as per paragraph 12 of the affidavit sworn by Lawerence Karonge, the applicant did not purchase Plot No 88 as he failed to produce documents in support of the sale. He contends that he was allocated Plot No 89 vide a letter of allotment dated October 21, 2002 whereupon he proceeded to pay the 10% commitment fees and was thereafter issued with a certificate of title on September 21, 2018. He further averred that the suit properties were withdrawn from Matheka Mailu and Kieti Nzyoiki after they failed to pay the 10% commitment fees. He maintains that he did not acquire the suit property by fraud as he followed the due process in acquiring the same.

11. The 3rd and 4th respondents did not respond to the application although they had been duly served.

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

The applicant's submissions

13. The applicant's submissions were filed on April 4, 2022. Counsel for the applicant's gave an elaborate history of the suit properties and reiterated the averments in the applicant's supporting affidavit.

14. Counsel submitted that the only issue for determination is whether the applicant is entitled to a grant of a temporary injunction. With regards to the conditions to be met for the grant of a temporary injunction, Counsel cited the case of *Giella v Cassman Brown & Co Ltd* 1973 EA 358. In answer to the first issue, Counsel submitted that the applicant had established a *prima facie* case with a high probability of success. To buttress his submissions Counsel placed reliance on the following authorities: -

    1. *Mrao Ltd v First American Bank Ltd & 2 Others* (2003) eKLR.

    2. *Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another* (1990) KLR 557.

15. On the second factor, counsel submitted that the applicant will suffer irreparable harm if the 1st and 2nd respondents are not restrained as they would fence off the entire suit premises locking out the applicant's livestock which would lead to decimation and loss of livelihood to the applicant and his entire family.

16. Counsel submitted that the balance of convenience was in favour of the applicant as he has established a *prima facie* case with a high probability of success and has also demonstrated that he will suffer irreparable loss if the orders sought are not granted.

The 1st and the 2nd respondents' written submissions

17. The 1st and the 2nd respondents submissions were filed on June 29, 2022. Counsel for the 1st and the 2nd respondents submitted that the only issue for determination is whether the applicant is entitled to a temporary injunction pending the hearing and determination of the suit.

18. Learned Counsel for the respondents submitted that the applicant has not met the conditions for the grant of an injunction as laid down in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358.

19. Counsel submitted that the applicant has not established a *prima facie* case with a probability of success and reiterated the averments in the respondents replying affidavits. In addition, Counsel submitted that the applicant has not demonstrated that the letters of allotment were fraudulently obtained by the Defendants and the Land Registrar.

20. Counsel went on to submit that the Defendants had already sold the suit premises and that the transfer was halted when the documents were handed over to the DCI.

21. Counsel argued that the issue of balance of convenience does not arise as the respondents are the absolute and indefeasible proprietors of the suit properties.

Analysis and determination

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

23. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the *Civil Procedure Rules 2010* which provides that;

> " 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 of 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."

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 held that in order to qualify for an injunction;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 applicant has established that he has a prima facie case with a probability of success.

26. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR 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. The applicant averred that he is owner of the suit properties having purchased the same in 1995 from John Matheka Mailu and Johnathan Kieti Nzioki. In this regard, he produced a letter of offer for Plot No 88 for John Matheka Mailu dated 29th of September 1995 issued by the Department of Land Adjudication and settlement Nairobi, letter of allocation for Plot No 88 to John Matheka Mailu dated February 3, 1995 from the District Commissioner office, a letter of offer for Plot No 88 to the applicant dated September 29, 1995 and a letter of acceptance for Plot No 88 dated April 25, 1996 issued to the applicant (CML1). He further produced a letter of offer for Plot No 89 to Johnathan Kieti Nzioki, letter of allocation for Plot No 89 to Johnathan Kieti dated 2nd of August 1994 and letter of offer for Plot No 89 to the applicant dated September 29, 1995(annexures CML2). The applicant further averred that a ground and status verification exercise carried out by the Government confirmed that he was the owner and occupier of the suit properties. In this regard he produced a letter dated January 15, 2017 by the District Land Adjudication & Settlement Officer regarding the exercise. He contends that the 1st and 2nd Defendants colluded with dishonest officials in the Ministry of Lands to defraud him of his land.

28. On the other hand, the 1st and the 2nd respondents stated that they were allocated the suit properties upon application to the Ministry of Lands and Settlement. That upon complying with the conditions in the letters of allotment, they were eventually registered and issued with certificates of title. The respondents argued that as per the verification record the suit properties were withdrawn from the original allotees after they failed to pay the mandatory 10% commitment fees.

29. From the documentary evidence annexed in the applicant's affidavit, it clear that the applicant was issued with a letter of offer and acceptance by the Department of Land Adjudication Nairobi.

30. The applicant's proprietary claim is based on the letters of offer dated September 28, 1995 issued by the Ministry of Lands and Settlement, department of Land Adjudication and the letter of acceptance dated April 25, 1996. The applicant further relied on the letter by the DLASO dated January 15, 2017 who confirmed that the suit plots were allocated to the applicant.

31. The 1st and 2nd respondents claim is anchored on their respective title deeds. From the Plaintiffs list of documents, it is also clear that the 1st respondent was issued with a letter of offer for Plot No 88 Nguu Ranch Settlement scheme dated October 21, 2002 and a letter of acceptance dated July 1, 2004 by the department of Land Adjudication Nairobi and with a certificate of title on the September 21, 2018. With regards to the 2nd respondent, he was issued with a letter of offer on January 12, 2018 and a certificate of title on October 30, 2018.

32. Both parties are claiming ownership over the suit properties. From the documentary evidence annexed in the Plaintiff's pleadings, it is evident that the 1st respondent is the Registered owner of land parcel No Makueni/Nguu Ranch/ 88 while the 2nd respondent is the Registered owner of land parcel No Makueni/Nguu Ranch/89. Both parties claim that they have letters of allotment to the suit properties. The issue of ownership of the suit plots 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 & Another* [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 v Barclays 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 the applicant is entitled to an injunction sought on the usual criteria."

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

37. Looking at the documents annexed to the applicant's pleadings and supporting affidavit, it is clear that the plaintiff's claim is not baseless. On the basis of the material that is on record, i find that the plaintiff/ applicant has established a prima facie case with a probability of success.

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

39. 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."

40. The applicant averred that after he purchased the suit properties, he took possession and has been in occupation and use of the same. He contends that 1st and 2nd respondents trespassed on the suit premises and had started fencing off the same in an attempt to take possession of the entire suit properties.

41. On the other hand, the 1st and 2nd respondents stated that they were the registered owners of the suit properties and that they had sold the same to third parties. The 1st respondent stated she was in the process of transferring the property to a third party when her documents were taken by the DCI. It is not in doubt that the Plaintiff/ applicant is in occupation of the suit property. The 1st and 2nd respondents having confirmed that they have sold the suit properties, this Court finds and holds that there is a real likelihood that the suit properties may be transferred to third parties before the suit is heard and determined and therefore making the process of recovery difficult. The Court is therefore convinced that the applicant stands to suffer irreparable harm that cannot be compensated by way of damages if the suit properties are transferred to third parties.

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

43. It is not in doubt that this matter raises serious contested issues. A temporary injunction is meant to preserve and protect the suit property as was held in the case of *Exclusive Estates Ltd...v.... Kenya Posts & Telecommunications Corporation & Another*, Civil Appeal No 62 of 2004 where the Court held that;

> " A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter"

44. Further in the case of *Joash chienge 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."

45. Looking at the evidence presented by the parties herein, I find that if the suit properties are not preserved, they may be wasted away. On the issue of balance of convenience, this Court finds and holds that it tilts in favour of maintaining the status quo on the suit property.

46. In light of the foregoing, I find that the applicant has met the threshold for the grant of a temporary injunction.

47. Consequently, the application dated March 2, 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 holding brief for Nyandieka for the applicant.