



REPUBLIC OF KENYA



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**Trimax Energy Limited v Mohamed (Environment & Land Case
E250 of 2022) [2022] KEELC 12758 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 12758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E250 OF 2022
EK WABWOTO, J
OCTOBER 3, 2022**

BETWEEN

TRIMAX ENERGY LIMITED PLAINTIFF

AND

SHIRAZ JAN MOHAMED DEFENDANT

RULING

1. This ruling is in respect to two applications. The plaintiff's application dated July 26, 2022 and the defendant's application dated August 25, 2022.
2. In the plaintiff's application dated July 26, 2022, the plaintiff sought the following orders: -
 - i. Spent...
 - ii. Spent ...
 - iii. This honourable court be pleased to issue an order of temporary injunction restraining the respondent herein by himself, his servants, employee, agents, disclosed and undisclosed principals or any other persons working under his instructions or behest from entering upon, selling, transferring, alienating, disposing, charging or otherwise interfering with the title and occupation of the properties listed herein below pending the hearing and determination of the suit: -
 - a. Property grant number IR land reference number 20277.
 - b. Property grant number IR 63376 land reference number 20280.
 - c. Property grant number IR 78494 land reference number 20276.
 - d. Property grant number 92931 land reference number 20279.



- e. Property grant number 92931 land reference number 20294.
 - iv. The OCPD/OCS Embakasi Police Station to assist with the enforcement of these court orders.
 - v. Cost of the application be borne by the respondent.
 - vi. Any other reliefs as the court may deem fit.
3. The application was supported by the Affidavit of Ahmed Hassan Hilowle sworn on July 26, 2022.
 4. Upon service of the said application, the defendant/respondent filed an application dated August 25, 2022 seeking for the following orders: -
 - i. Spent
 - ii. Spent...
 - iii. That the honourable court be pleased to vacate, lift and or set aside its interim orders granted on July 27, 2022 pending the hearing and determination of this suit.
 - iv. That pending the hearing and determination of this suit, the plaintiff/respondent its servants, employees, agents, assigns, or any other person or entity working under its instructions be restrained by way of a temporary injunction from advertising for sale, entering upon, selling, transferring, alienating, changing or in any other way interfering with the defendant/applicant occupation and possession of grant number IR 65576 land reference number 20280.
 - v. That the honourable court be pleased to give further orders and or directions as it may deem fit to grant.
 - vi. That the costs of this application be provided for.
 5. The defendant's application is supported by the grounds on the face thereof and the affidavit of Shiraz Jan Mohamed, the defendant herein sworn on August 25, 2022, a director of the 1st defendant herein.
 6. Pursuant to the directions of the court issued on September 26, 2022, the court directed both applications to be heard together upon which a ruling will be delivered for both applications. The applications were heard by way of oral submissions from the counsel appearing for the parties. Learned Counsel Mr Charles Madowo Advocate submitted on behalf of the plaintiff while Learned Counsel Mr Kibet Wisdom made oral submissions on behalf of the defendant.
 7. During the hearing of the applications, Mr Madowo relied on the affidavit sworn by Ahmed Hassan Hilowle, a director of the plaintiff on July 26, 2022. It was the plaintiff's case that the defendant has only joined issue with one property which is LR No 20280 which he was granted in the year 2015 and has had possession ever since. Counsel submitted that they seek injunctive orders against the defendant from seeking to protect its interest in the property and to preserve the same. Counsel also submitted that on July 25, 2022, defendant in the company of more than 30 armed persons attempted to take possession of the said property land reference number 20280 on the pretext that it was his property.
 8. It was also argued that, the defendant had filed a Miscellaneous Application in the year 2021 wherein a different party was listed as being in occupation of the suit property land reference number 20280. Counsel further argued that the plaintiff had established a prima facie case by demonstrating that the plaintiff was in occupation of the same and that if the orders sought are not granted, the plaintiff will suffer irreparable harm and finally the balance of convenience.



9. Learned Counsel Mr Kibet submitting on behalf of the defendant argued that the court was misled to issue interim injunctive orders against the defendant on July 27, 2022. Counsel argued that the plaintiff did not disclose material facts to the court. Counsel state that the plaintiff failed to inform the court that the defendant is the owner of the LR No 20280 of grant No IR 65576. Counsel pointed out to the court that the defendant had attached his copy of the title deed showing that the property was transferred to him in the year 1995 and the defendant had been in occupation ever since. Counsel also disclosed that in ELC Misc Case No E112 of 2021 he had obtained evictions orders against one John Muswanyi orders which were issued by Justice Oguttu Mboya
10. It was also contended that there is a boundary wall which the defendant had erected at a cost of Kshs 21,244,849/-.
11. Counsel also submitted that the plaintiff had not met the threshold for grant of the injunctive orders sought since they did not disclose the material facts and the court should refuse to grant them the injunctive orders sought. Counsel cited several decisions in support of his case including the case of [*Esther Lugali Gachomo v Equity Bank*](#) [2019] eKLR.

Analysis and findings

12. The court has carefully considered the applications as presented as well as the parties' affidavits and oral submissions for and against the applications. In my humble view the main issues for determination are as follows: -
 - i. Whether this court should set aside and or vary its interim orders issued on July 27, 2022.
 - ii. Whether the plaintiff and the defendant herein have separately established and made out a case for grant of injunction orders sought against either of them.
 - iii. Who should bear the costs of both applications.
13. I will now proceed to analyze all the issues sequentially. The jurisdiction of the court to set aside an or vary an order of injunction is outlined under order 40 rule 7 [*Civil Procedure Rules, 2010*](#) which provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
14. In the instant case, the interim injunctive orders were issued on July 27, 2022 basing on the material facts that were placed before court at that time. The orders issued were issued based on facts placed before this court to the effect that the defendant had on July 25, 2022 and in company of more than 30 armed persons attempted to forcefully take possession of property grant number 63376 land reference number 20280 which the plaintiff had acquired since 2015.
15. A court may set aside and or vary its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders. It is not in doubt that the defendant acquired land reference number 20280 on June 26, 1995 a fact which was never controverted by the plaintiff. The plaintiff has not shown how the claim against the present defendant can be salvaged in respect to the other four properties which the defendant has no interest at all. The plaintiff did not do due diligence before filing this suit. Nowadays it is easier to get the correct details of any party before moving to court. The plaintiff clearly flogged a wrong horse. Had the said information been availed before this court, this court would not have arrived at the same decision.



16. In view of the above and having considered the facts in support of the application and in opposition, I am satisfied that the defendant has met the threshold to warrant setting aside and or variation of the orders issued on July 26, 2022 in respect to land reference number 20280.
17. On the issue of the injunctive orders sought by the plaintiff and the defendant in their respective applications, both parties are enjoined and or obliged to establish and prove specific condition, which are pertinent before a court of law can proceed to grant the order sought.
18. One of the prerequisite conditions that must be established and proved is the existence of a *prima facie* case with overwhelming chances of success. In this regard, both parties herein were obliged to prove this particular condition. Before venturing to ascertain and/or interrogate whether the parties have established a *prima facie* case in this matter, it is imperative to discern the meaning and import of what constitutes a *prima facie* case. In this regard, the definition of what constitutes a *prima facie* case was supplied by the court of appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where the court held as follows:
- “In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
19. Other than the foregoing decision, the meaning, scope and tenor of what constitutes *prima facie* case, was revisited in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;
- “Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of *prima facie* case. The leading English House of Lords case of the *American Cyanamid Co Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of “*prima facie* case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of *prima facie* case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Hatt v Republic* [1957] EA 332.”
20. Having appreciated and correctly understood the meaning and import of what constitutes a *prima facie* case, it is now appropriate to undertake the interrogation of the parties cases.
21. It was the plaintiff’s case that being the legal and beneficial owner of the following properties property grant number IR land reference number 20277, property grant number IR 63376 land reference number 20280, property grant number IR 78494 land reference number 20276, property grant number 92931 land reference number 20279, and property grant number 92931 land reference number 20294 the defendant had attempted on July 25, 2022 with armed persons to forcefully take over possession of property grant number IR 63376 land reference number 20280 which the plaintiff had acquired way back in 2015. On the other hand, the defendant’s case was that he has been the registered owner of property known as Land reference number 20280 from June 26, 1995 and has been rightly enjoying possession. It was also the defendant’s case that pursuant to ELC Misc Case No



E112 of 2021 he had obtained evictions orders against one John Muswany orders which were issued by Justice Oguttu Mboya.

22. The defendant also argued that the plaintiff had misrepresented to the court when obtaining interim orders that the defendant had an interest in the other four properties being; property grant number IR land reference number 20277, property grant number IR 78494 land reference number 20276, property grant number 92931 land reference number 20279 and property grant number 92931 land reference number 20294 which in essence the defendant had no interest at all. The defendant also contended that in contempt of the orders issued on July 27, 2022 the plaintiff had demolished the perimeter wall for land reference number 20280 which the defendant had erected at a cost of Kshs 21,244,849/-.
23. The defendant was able to demonstrate this through annexures “SJM 2& 3 “of the supporting affidavit sworn by the defendant which were photographs of the demolished wall and annexure “SJM 1” which was a copy of the title. The defendant’s property known as land reference 20280 is distinct and separate from the other four properties. No evidence was shown of any interference by the defendant or trespass to the plaintiff’s other four properties in fact it was the defendant’s case that he has no interest in the plaintiff’s properties known as land refence 20277, 20276, 20279 and 20294 and as such it is the finding of this court that the plaintiff has not made out a *prima facie* case to warrant the grant of injunctive orders as sought by them in respect to land reference number 20280. On the other hand, evidence before this court shows that the defendant acquired property number 20280 before the plaintiff and has even invested heavily in the same by erecting a perimeter wall which was partially demolished by the plaintiff. In view of the foregoing, I find that the defendant has shown a *prima facie* case and further that damages in the circumstances of the case cannot certainly be adequate to recompense him.
24. Other than the requirement to prove and established the existence of a *prima facie* case, a claimant for an order of temporary injunction, must also prove that same is disposed to suffer irreparable loss if the order sought for are not granted.
25. Essentially, no order of temporary injunction can issue and/or be granted if the imminent loss is one that is quantifiable, ascertainable and capable of compensation in monetary terms. Premised on the foregoing, it was therefore incumbent upon the parties to also prove and/or place before the honourable court credible evidence pertaining to the nature of irreparable loss that may accrue and/or arise.
26. What then constitutes irreparable loss? To this end, it is imperative to take cognizance of the definition supplied *vide* the holding in the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the honorable court observed as follows;

“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.”



27. Having considered that fact that the defendant has established a *prima facie* case herein, I am afraid that the plaintiff has not placed before the court any evidence of irreparable loss. In this regard, there being no evidence of such loss, an order of temporary injunction cannot certainly issue in favour of the plaintiff.
28. Lastly as regards the issue of balance of convenience, I associate myself with the decision in [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR where it was held as follows:
- “The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”
29. In light of my findings above, I am satisfied that the balance of convenience lies in favour of the defendant who has satisfied the conditions necessary for the grant of the injunctory orders sought in respect to land reference number 20280.
30. On the issue of costs, the same is at the discretion of the court and I will direct that each party will bear their own costs of the applications.

Final orders

31. In conclusion, the plaintiff's application dated July 26, 2022 and the defendant's application dated August 25, 2022 are disposed in the following terms:
- i. The orders issued on July 27, 2022 are varied to the extent that the injunction orders pending the hearing and determination of this suit shall not apply to property known as grant number IR 65576 land reference number 20280.
 - ii. That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the plaintiff whether through its servants, employees, agents or anyone acting at its behest or whatsoever from trespassing, entering into or interfering in any manner with the defendant's occupation and possession of grant number IR 65576 land reference number 20280.
 - iii. The OCPD/OCS Embakasi Police Station to assist with the enforcement of this court order.
 - iv. Each party to bear own costs of both applications.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF OCTOBER 2022.

EK WABWOTO

JUDGE

In the presence of: -



N/A for the plaintiff.

N/A for the defendant.

Courts assistants- Caroline Nafuna and Philomena Mwangi.

EK WABWOTO

JUDGE

