



**Ikileng v Owalla & 2 others (Environment & Land Case E021 of 2022)
[2022] KEELC 14692 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E021 OF 2022
OA ANGOTE, J
NOVEMBER 3, 2022**

BETWEEN

PETER OSAMONG IKILENG PLAINTIFF

AND

PATRICK OWALLA 1ST DEFENDANT

NAIROBI CITY COUNCIL 2ND DEFENDANT

DIRECTOR OF HOUSING NAIROBI CITY COUNTY 3RD DEFENDANT

RULING

Background

1. Before this court for determination is the Plaintiff's/Applicant's Notice of Motion application dated January 26, 2022 seeking the following reliefs;
 - a. The Court be pleased to grant an injunction restraining the Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Kayole/Spring Valley/Plot No 368/LR No 18304-18315 pending the hearing and determination of this suit.
 - b. The Officer Commanding Kayole Police Station do enforce compliance of the orders above.
 - c. The Costs of the Application be provided for;
 - d. The Honourable Court be pleased to make such further or orders as it may deem just and expedient in the circumstances of the case.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the Plaintiff who deponed that he is the registered proprietor of all that property known as Kayole Spring Valley /Plot No 368/L/R No 18304-18315 measuring approximately 0.03 Hectares (hereinafter the



suit property) and that sometime in 2021, when he had relocated to his rural home, the 1st Defendant invaded his property without permission and purported to assume ownership thereof.

3. The Plaintiff deponed that apart from refusing to vacate the suit property, it has come to his attention that the 1st Defendant has further interfered with his perimeter fence and is in the process of erecting permanent structures thereon; that despite complaints to the local chief at Kayole sub location, the Defendants have ignored summons and refused to vacate the suit property and that unless the court intervenes, there will likely be a breach of peace. The 1st Respondent did not respond to the application.
4. The 2nd and 3rd Respondents through Mr Abwao Erick Odhiambo, the 2nd Respondent's acting County Solicitor, deponed that the application is frivolous and an abuse of court process; that the 2nd and 3rd Respondents are strangers to the application and have not been directly linked to the allegations of interference with the Applicant's property in any manner whatsoever and that neither the 2nd nor the 3rd Defendants are in occupation of the suit property.
5. It was deponed by the 2nd and 3rd Defendants' solicitor that neither the 2nd nor 3rd Defendant has received a complaint from the Applicant with respect to the 1st Defendant's alleged acts of construction on the suit property and that the Applicant has not demonstrated a prima facie case against the 2nd and 3rd Defendants.
6. Vide a Supplementary Affidavit filed on June 15, 2022, the Applicant in response to the 2nd and 3rd Defendants' Replying Affidavit reiterated that he is the rightful proprietor of the suit property; that he stayed on the suit property and developed the same after being issued with a Certificate of Lease until 2021 when he retired to his rural home and left his tenants thereon and that the 2nd and 3rd Defendants are head lessors of the suit property and are custodians of the lease issued to the parties.

Submissions

7. The Plaintiff's counsel submitted that he is entitled to the orders sought, being the legal and beneficial owner of the suit property as evinced by the Certificate of Lease issued to him by the 2nd Respondent.
8. Counsel submitted that the Plaintiff stands to suffer irreparable loss if the injunctive orders are not granted and an award of damages will be insufficient; that the perimeter wall and the structures constructed on the suit property by the Plaintiff have been demolished by the 1st Defendant who is on the verge of taking over the suit property and depriving the Plaintiff of his proprietary rights and that having established his case, the Applicant should be granted costs of the suit.
9. The 2nd and 3rd Defendants' counsel submitted that the Plaintiff has not demonstrated a prima facie case with a probability of success; that the Plaintiff has not placed any evidence before the court to show that he is the registered proprietor of the suit property having only tendered a plot formalization card with no names and that the 2nd and 3rd Defendants are unable to state with certainty that he is the owner of the suit property.

Analysis and Determination

10. Having canvassed the application, Affidavits in support and against and the submissions, the sole issue that arises for determination is;
 - i. Whether the Plaintiff/ Applicant has met the threshold to warrant the grant of a temporary injunction.



11. The law on grant of interlocutory injunctions is provided for under Order 40 Rule 1 of the [Civil Procedure Rules, 2010](#) which provides as follows;

“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 if 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 orders.”

12. It is apparent that under Order 40 Rule 1 of the [Civil Procedure Rules](#), an order of temporary injunction may issue where the court is satisfied that there is a likelihood of the suit property being wasted or alienated before the suit is heard and determined.
13. Being an application for injunctive orders, the same will be weighed against the requisite essentials set out in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358 thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an 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.”

14. Vide the present application, it is the Plaintiff’s/ Applicant’s case that he is and has at all material times been the duly registered proprietor of the suit property having been allocated the land by the 2nd Defendant; that sometime in 2021, when he retired to his rural area, the 1st Defendant took over his property and that the 1st Defendant has interfered with his perimeter fence and has begun to construct a permanent structure thereon.
15. In support of his claim of ownership, the Plaintiff produced in evidence a Plot Formalization Card with respect to the suit property issued by the Nairobi City Council. The Plaintiff also produced a photograph showing the state of the suit property.
16. No response was filed by the 1st Respondent while the 2nd and 3rd Respondents deponed that they have not interfered with the suit property in any manner; that they have not received any complaint with respect to the alleged 1st Defendant’s activities on the suit property and that they have never been summoned by the Police or at all as alleged by the Plaintiff.
17. The Plaintiff’s Plot Formalization Card issued by the 2nd and 3rd Defendants in respect of the suit property has not been challenged by either the 1st Defendant, who has in any event not responded to the application, or by the 2nd and 3rd Defendants whose only contention was that the annexed card did not bear the Plaintiff’s names.



18. Vide the Supplementary Affidavit, the Plaintiff rectified this issue by annexing the interior part of the card which bears his name. That being the case, the court is persuaded that the Plaintiff has established a prima facie case with chances of success.

19. With regard to irreparable harm, the damage caused to the Applicant should be such that it cannot be remedied by damages. In *Halsbury's Laws of England*, Third Edition, Volume 21, paragraph 739, page 352, it is stated that :-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

20. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (supra) the Court stated as follows on irreparable injury or damage:

“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 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 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.”

21. The Plaintiff has asserted that the 1st Defendant has interfered with his perimeter fence, destroyed the temporary structures that were on the suit property and is in the process of constructing permanent structures thereon. All these assertions are undisputed. The Plaintiff has attached on his Affidavit a photo showing the property in the initial stages of construction.

22. It is clear that if the 1st Defendant is not restrained, he will carry on with the development which will undoubtedly destroy the substratum of the suit. As persuasively expressed by the court in *Olympic Sports House Ltd vs School Equipment Centre Ltd* (2012) eKLR, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.

23. In conclusion, the court finds that the Plaintiff has met the threshold for the grant of the orders sought. For those reasons, the Notice of Motion Application dated January 26, 2022 is allowed as follows:

- a. An injunction be and is hereby granted restraining the Defendants whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the property known as Kayole/Spring Valley/Plot No 368/LR No 18304-18315 pending the hearing and determination of this suit.



- b. The Officer Commanding Kayole Police Station do enforce compliance of the orders above.
- c. The Costs of the Application to be paid by the 1st Defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 3RD NOVEMBER, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Onyango holding brief for Otieno for Plaintiff

Ms Omenta for 3rd Defendants

Court Assistant: June

