



REPUBLIC OF KENYA



KENYA LAW
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Morjaria & 2 others v Kabate & 4 others (Environment & Land Case 85 of 2018) [2022] KEELC 14559 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14559 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 85 OF 2018
MAO ODENY, J
NOVEMBER 3, 2022

BETWEEN

VIJAY RANCHHOD MORJARIA 1ST PLAINTIFF
LALITA RANCHHOD MORJARIA 2ND PLAINTIFF
BHAVIN RANCHHOD MORJARIA 3RD PLAINTIFF

AND

GEORGE KATANA KABATE 1ST DEFENDANT
MUMBA NZAI KIRAGA 2ND DEFENDANT
ELINA IHA MITSANZE 3RD DEFENDANT
DUNCAN YAWA NDEGWA 4TH DEFENDANT
HESBONE KAI MWASAMBU 5TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated August 17, 2021 by the 1st Defendant/Applicant seeking the following orders; -
 - a. Spent.
 - b. That this Honourable Court do issue a temporary injunction restraining the Respondents by themselves or their servants, employees, agents or any other person acting for them or on their behalf from trespassing onto, constructing, subdividing, surveying, interfering and or dealing in any manner with the suit land.



- c. That this Honourable Court do issue a mandatory injunction compelling the Respondents by themselves or any other person acting on their behalf to demolish and remove all the erected permanent structures within the Applicant's land.
 - d. That the costs of the suit be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

1st Defendant/applicant's Submissions

3. The application was supported by the affidavit of George Katana Kabate sworn on the 17th day of August, 2021 whereby he deponed that he was the legally registered proprietor of land Parcel No. Kilifi/ Jimba/ 199 *vide* a letter from the National Land Commission dated November 11, 2019.
4. He also deponed that the Plaintiff/ Respondents have illegally transferred the said land to themselves and placed a restriction on the suit property and further that the Plaintiff/Respondents have proceeded and commenced constructions and demolished structures on the suit property.
5. Counsel cited the principles for grant of injunctions and relied on the cases of *Giella vs. Cassman Brown* (1973) EA 358, *EA. Industries Ltd v Trufoods Ltd* (1972) EA 420, *Mrao Ltd V First American Bank of Kenya Ltd & 2 others*, *Nguruman Um/ted v Jan Bonde Nielson & 2 others* and submitted that at the annexure marked "GKK-1" reveal that the National Land Commission on November 11, 2019 indicated that a determination for review of grants in respect to Plot no. Kilifi/Jimba/199 had been finalized.
6. Counsel further submitted that the determination was gazetted vide the Kenya Gazette Notice Vol. CXXI-No.21 Number 1549 of February 15, 2019 whereby the Commission regularized the property in favour of the 1st Defendant and ordered for revocation of the purported title to Plaintiffs hence the 1st defendant has established a prima facie case.
7. On the issue whether the court should issue a mandatory injunction, counsel relied on the cases of *Kenya Power & Lighting Co. Ltd v Samwel Mandere Ogete* cited in the *Kenya Breweries Ltd & Another v Washington O. Okeya* and submitted that the Plaintiffs' actions and activities are clear illustrations of how the plaintiffs have attempted to acquire and steal the rights to the suit property from the Defendant illegally and un procedurally.
8. Counsel therefore urged the court to allow the application as prayed.

Plaintiff/Respondents' Submissions

9. The Plaintiffs opposed the application *vide* a replying affidavit sworn by the 1st Plaintiff/ Respondent whereby he deponed that the Applicant is not the legal registered owner of the suit premises as he has not exhibited any title deed in his affidavit.
10. It was the Respondent's case that he has in his possession the title deed to the suit premises as the registered owners of the property and that their letter from the National Land Commission dated September 16, 2016 preceded the Applicant's letter dated November 11, 2019 which confirmed them as the owners of the land. Further that by the time the National Land Commission issued the letter on November 11, 2019, it was already functus officio as the matter was already in court and the letter was of no legal consequences.



11. On the issue whether the Applicant will suffer irreparable damage, counsel submitted that the Applicant has no right to the suit land to claim that he is likely to suffer any irreparable injury and therefore the balance of convenience, does not lie in his favour.
12. Dr. Mutubwa submitted that an injunction cannot issue in the current case as the 1st Defendant/ Applicant does not have any right, legal or equitable with regard to the suit property, that is likely to be infringed and relied on the case of *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*, (1990) eKLR
13. On the effect of the order dated July 16, 2018 counsel submitted this Honourable Court issued an order compelling all the Defendants herein including the 1st Defendant to demolish and remove all illegal construction on several parcels of land belonging to the Plaintiffs/Respondents including Kilifi/ Jimba/199. Which order has not been appealed against and urged the court to dismiss the application with costs to the plaintiffs.

Analysis and Determination.

14. The issues for determination in an application for temporary and mandatory injunctions are well settled. An applicant must meet the threshold for grant of an injunction.
15. The threshold for grant of orders of injunctions was established in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 wherein it was held that the applicant has to satisfy the following conditions;
 - a. The applicant has to establish a prima facie case
 - b. The applicant must show that if the order sought is denied he/she would suffer irreparable damage that cannot be adequately compensated by damages
 - c. Should the court be in doubt as to whether the applicant has satisfied the foregoing ingredients, then it will decide the application on a balance of convenience.
16. Similarly Order 40 r. (2) *CPR* provides that: -
 - “(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”
17. The Applicant argues that he is the legally registered proprietor of Land Parcel No. Kilifi/ Jimba/ 199 vide a letter from the National Land Commission dated November 11, 2019. He also deposed in his supporting affidavit that the Plaintiff/ Respondents have illegally transferred the said land to themselves and placed a restriction on the suit property.
18. The applicant has not produced any title in his name to show that he is the legally registered owner of the suit land. In the contrary the Applicant admits that the Respondents have transferred the suit land



in their names and are continuing with construction. The applicant relies on a letter from the National Land Commissions which he says nullified the title held by the Respondents in respect of the suit land.

19. It is further on record that the court issued an injunction against the Defendants on July 16, 2018 which order is still subsisting as no appeal has been preferred by the Applicant. If the Applicant was aggrieved with the said order then he should have filed an application for review, variation or an appeal against the order.
20. The applicant has argued the application as if he wants the court to determine the merit of the case vide interlocutory application. I find that the Applicant has not met the threshold for grant of the orders sought of both temporary and mandatory injunctions.
21. The Applicant can be compensated by way of damages as was defined in the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) eKLR.

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.

22. I have considered the application, the submissions by counsel and find that the balance of convenience lies in favour of the Respondents who have exhibited a title to the suit land. The application is therefore dismissed with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

