



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 463 OF 2016

WIN NJOKI KORI.....PLAINTIFF

VERSUS

JAMES KIANJA KARANJA.....1ST DEFENDANT

CHARLES NJUGI2ND DEFENDANT

RULING

(Application for review of an order dismissing an application for injunction; review sought on ground that ruling was delivered without realization that an amended plaint and further affidavit had been filed and that as a result the amended plaint and further affidavit were not considered; review granted; upon consideration of the merits of the application for injunction inclusive of the amended plaint and further affidavit, application for injunction dismissed)

1. This is a ruling in respect of plaintiff's Notice of Motion dated 4th July 2017. The application is brought under Order 45 rule 1 of the Civil Procedure Rules among other provisions. The plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. THAT the ruling and the order of court dated 22nd June 2017 be reviewed, varied and set aside.

4. THAT the application dated 22nd November, 2016 be heard afresh and the interim order issued on the basis of that application be reinstated.

5. THAT costs of this application be borne by the respondents.

2. The application is supported by an affidavit sworn by the plaintiff on 4th July 2017 wherein she deposed that she obtained leave from court to file a further affidavit and an amended plaint on 17th March 2017. That she accordingly filed the further affidavit and amended plaint. She annexed a copy of each. She further deposed that as at the time the ruling dated was delivered, those documents had been filed and they showed that plot number Gilgil/Gilgil Block 1/3950 had been subdivided and the new number of the suit property is Gilgil/Gilgil Block 1/34615. Consequently, to the extent that the aforesaid ruling was delivered on the basis that the plaint had not been amended and was referring to a non-existent property,

the ruling ought to be reviewed and the injunction sought on Notice of Motion dated 22nd November 2016 granted.

3. Though duly served with the application through his advocates on record, the 1st defendant never responded to the application. The 1st defendant was similarly not represented at the inter parte hearing of the application. Consequently, counsel for the plaintiff urged the court to allow the application as it was unopposed.

4. I have considered the application, the supporting affidavit and counsel's submissions. As pointed out in the ruling dated 22nd June 2017, the further affidavit filed on 29th March 2017 was not in the court file as at the date the ruling was written and delivered. The same position applies to the amended pleadings. It may very well be that both were filed on 29th March 2017 as deposed by the plaintiff. Paying for the pleadings and having them stamped at the court's registry is one step in the filing process. Having them actually placed in the court file is the final and ultimate step. If pleadings and documents are not in the court file, then they certainly do not form part of the record. It is nowadays common to find that litigants or their advocates file documents but carry them away with a view to placing them in the court file on the day the matter comes up in court.

5. Though the court's registry has a duty to ensure that pleadings and documents are properly and timeously placed in the correct file, parties who carry away such pleadings and documents bear the ultimate responsibility. In any case, a party has a duty to ensure that her case is properly pleaded and forms part of the record. It is important to also note that the practice of placing pleadings or documents in the court file on the day the matter comes up is disruptive and hampers proper preparation by judicial officers.

6. In this matter, the plaintiff sought and was granted leave to amend the plaint to correct an error on the plot number of the suit property and to also file a further affidavit. I have now seen on record the amended plaint and further affidavit. It is stated in both the amended plaint and the further affidavit that the initial suit property was subdivided and that the plaintiff is currently the registered proprietor of the parcel known as Gilgil/Gilgil Block 1/34615.

7. I also note that the plaintiff has in the amended plaint added a second defendant though no leave was sought or granted for that. There is no evidence on record as to whether the 2nd defendant has been served with summons to enter appearance and the application dated 22nd November 2016.

8. I further note that Notice of Motion dated 22nd November 2016 has not been amended. It still seeks the following orders:

1. *(Spent).*

2. *(Spent).*

3. *THAT pending the hearing of this suit, **the respondent**, whether acting in person, by proxy, through its agents, servants, employees, officer or any other person acting at its behest, be restrained by way of a permanent injunction from entering, remaining, constructing, trespassing, cultivating, occupying and/or in any manner whatsoever interfering with the plaintiff's quiet occupation and utilization of the parcel of land **adjacent** to **GILGIL/GILGIL 1/3950**. [Emphasis supplied]*

9. The applicant has sought review under Order 45 rule 1 of the Civil Procedure Rules. The rule provides as follows:

1. Application for review of decree or order

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

10. From the reasons advanced in support of the application, it is clear that review is sought “*on account of some mistake or error apparent on the face of the record*”, the mistake or error being that it never came to the court’s attention that the plaintiff had filed an amended plaint and further affidavit in which it was made clear that the suit property had been subdivided thus resulting in a new plot known as **GILGIL/GILGIL BLOCK 1/34615**.

11. I am satisfied that the amended plaint and further affidavit were filed on 29th March 2017 though as I have already observed, they were not in the court file as at the date of writing and delivery of the ruling dated 22nd June 2017. I am therefore persuaded that the plaintiff has made a case for review of the ruling dated 22nd June 2017. I accordingly proceed to review the ruling.

12. The plaintiff’s case as pleaded in the amended plaint is that she owns the parcel of land known as Gilgil/Gilgil Block 1/34615, the suit property. She avers that the defendants have unlawfully and forcefully settled themselves on the foot of a hill that borders her parcel of land. She accuses the defendants of invading her land, cutting down crops, damaging a well and interfering with boundaries. She thus seeks judgment in the nature of a permanent injunction restraining the defendants from *inter alia* interfering with her quiet possession of the suit property.

13. In Notice of Motion dated 22nd November 2016 the plaintiff sought an injunction restraining “the respondent” from *inter alia* interfering with her quiet occupation and utilization of the parcel of land adjacent to Gilgil/Gilgil 1/3950. The application was supported by an affidavit sworn by the plaintiff on 22nd November 2016. In it she accused the defendant of invading her land, destroying her crops and digging water ways which complicated her efforts to manage floods. She further accused the defendant of diverting sewage water to make his farm without considering the surrounding community. She exhibited a copy of title deed for Gilgil/Gilgil Block 1/34615 (Kekopey) as proof of ownership. In further affidavit sworn on 28th March 2017, the plaintiff prayed that her pleadings be amended to reflect the correct plot number as Gilgil/Gilgil Block 1/34615 (Kekopey). The plaintiff thus urged the court to grant the injunction sought in the application.

14. Notice of Motion dated 22nd November 2016 was opposed by the first defendant through a replying affidavit sworn on 9th March 2017 in which he deposed that the plaintiff is his neighbour and denied ever trespassing on the plaintiff’s plot. He urged the court to dismiss the application.

15. I have considered the application, the affidavits filed by both parties and submissions. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. In the recent

case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal further elaborated the test as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a *prima facie* level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

16. The plaintiff herein has established from the annexed title deed that she is the registered proprietor of Gilgil/Gilgil Block 1/34615 (Kekopey). She has made accusations against the first defendant of destroying her crops, digging water ways which have complicated her efforts to manage floods and diverting sewage water to make his farm without considering the surrounding community. The first defendant has responded to these accusations by stating that the plaintiff is his neighbour. He has denied ever trespassing on the plaintiff's plot.

17. It must be remembered that in the application before the court, the plaintiff has sought an injunction to restrain the defendant from interfering with parcel of land **adjacent** to Gilgil/Gilgil 1/3950. Even if we amend the plot number to read Gilgil/Gilgil Block 1/34615 (Kekopey) as the plaintiff has done vide the amended plaint, the question still remains what would be meant, after the amendment, by parcel of land adjacent to Gilgil/Gilgil Block 1/34615 (Kekopey)? The identity of the particular plot in respect of which the injunction is sought is not clear.

18. I am thus not persuaded that the plaintiff has established a *prima facie* case. In line with **Nguruman Limited v Jan Bonde Nielsen** (*supra*), since no *prima facie* case has been established, I need not consider irreparable injury and balance of convenience.

19. In view of the foregoing, Notice of Motion dated 22nd November 2016 is dismissed with costs to the first defendant.

Dated, signed and delivered in open court at Nakuru this 1st day of November 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Alwala holding brief for Mr. Githui for the plaintiff/applicant

No appearance for the Defendant/respondent

Court Assistants: Gichaba and Lotkomoi