



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT MILIMANI

ELC NO. E034 OF 2021

IN THE MATTER OF PLOT CERTIFICATE NO. 211 LR NO 8469/4

DORCAS WAMBUI MBIRITI.....APPLICANT

AND

RICHARD KANG'ETHE NDICHU.....RESPONDENT

RULING

1. The plaintiffs initiated this suit through an Originating Summons dated 26/08/2021 and concurrently filed a Notice of Motion dated 26/08/2021 supported by the Affidavit of the Applicant herself sworn on 26/08/2021. In the said Application brought under Order 37 Rule 3, Order 40 and Order 51 of the Civil Procedure Rules, Section 68 (1) of the Land Registration Act, 2012, Section 1A, 1B and 3A of the Civil Procedure Act the Applicant is seeking for the following;

a. Spent.

b. THAT this Honorable Court be pleased to issue an order of injunction restraining the respondent either by himself and his servants, employees and /or agents and/ or anyone serving from him collecting rent from plot no 211 LR NO 8469 /4 being part of 8469/4.

c. THAT in view of the above prayer no 2 the Honorable Court be pleased to issue an order that rental income of the property on own as plot 211 being part of LR NO 8469/4 be dispensed in a joint account allowing rent to be collected by agreed proper agent and dispensed in the said account.

d. THAT this Honorable Court be pleased to issue an order of declaring her as the sole proprietor of plot no 211 part LR NO 8469/4 and for the shared certificate no 211 by Mwhike farmers Co Ltd to be rectified accordingly.

2. On 28/09/2021 when the matter came up for hearing Counsel for Applicant informed the Court that the Respondent had duly been served as evidenced by Affidavit of Service sworn byon.....

3. Having satisfied myself on Service of the Application I proceeded to hear the Application which was argued orally by Seth Ojienda Counsel for the Applicant.

4. The Respondent on the other hand though duly served did not attend court.

THE APPLICANT'S CASE

5. The Application is supported inter alia by grounds stated in the said Notice of Motion and also by supporting affidavit sworn by Dorcas Wambui Mbiriti on 26/08/2021. The grounds in a nut shell are as follows;-

(a) THAT the applicant is the original owner of plot 211 part of LR no 8469/4 having acquired the same by purchase on or before in the year 2010 from her mother.

(b) THAT on 19th July 2011 his estranged husband Mr. Richard Kangethe Ndichu, the Respondent herein swore an affidavit giving false information that his name should be included in the certificate of title with respect to the said parcel of land.

(c) THAT the applicant visited Mwhike farmers Co Ltd and confirmed the respondent fraudulently acquired interest in plot 211 part LR NO 8469/4.

(d) THAT the applicant and the Respondent have jointly developed plot no 211 part of LR NO 8469 /4 in to rental premises.

(e) That the Respondent has unilaterally and exclusively taken possession of plot no 211-part LR NO 8469 /4 and is taking rent to the exclusion of the applicant.

6. The applicant in the Originating Motion is seeking for orders declaring her as the sole proprietor of plot no 211 part LR NO 8469/4 and that the share certificate no 211 by Mwihike farmers Co Ltd to be rectified accordingly.

7. The Respondent though duly served as stated earlier did not appear in court and the application was thus heard *ex parte*.

ISSUES FOR DETERMINATION

8. Having considered all the relevant pleadings, the following arise as the issues for determination before this court.

a. Whether the applicant has met the conditions necessary to warrant the grant of an interlocutory injunction pending full hearing by demonstrating to court existence of a prima facie case on the disputed property

b. Whether the property is at risk of being wasted by the Respondent in the event that this court does not grant the orders being sought.

Whether the applicant has met the conditions necessary to warrant the grant of an interlocutory injunction.

9. Being an application for injunctive orders the same shall be weighed against the requisite essentials set out in the *locus classicus* 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.”

10. The Applicant in this case is expected to meet these three principles and should surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited V Jan Bonde Nielsen & 2 Ors [2014] eKLR* where the Court stated thus;

“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.”

Prima facie case?

11. As correctly cited by the parties the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR* defined prima facie thus;

“...So what is a prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter.”

12. In view of the above, the court will now interrogate whether the Applicant has demonstrated a prima facie case with a probability of success.

13. The Applicant alleges that she is the original owner of plot 211 part of LR no 8469/4 having acquired the same vide purchase on or before the year 2010 from her mother, as allegedly captured in plot allocation certificate no 211 herein exhibited as DWM1. It is the applicants contention that the Respondent has fraudulently caused his name to be added to the share certificate. Further she alleges that she is the sole owner of the disputed plot and that the certificate of Title once issued should bear her names its so contended. I must state with

caution that this being an interlocutory stage hearing I cannot make determination on the said allegations without hearing the case substantively on merit.

14. In the case of Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR Kimondo J held that:

“... from a legal standpoint, a letter of allotment is not a title to

property. It is a transient and [is] often a right or offer to take property”

15. Subsequently, it is the Applicant’s prayer that the rental income be collected by an agent and deposited in a joint account. In David Kimani Kiriga & another v Esther Mugure Kiriga [2021] eKLR Chitembwe J found that:

“It is evident from the submissions of both parties that no prejudice will be suffered by any party if the rent proceeds is deposited either in the bank account in court or in a joint account of both counsels. In my view, although the trial court is yet to determine the issue of ownership, the applicants’ application for injunction restraining the respondent from collecting the rent was not granted. The dismissal of the application leaves the respondent free to collect the rent. Thus the proposal by the respondent to have the rent deposited in court or in a joint account is quite reasonable.”

16. Further, in David Kimani Kiriga case (supra) the court thus provided:

“I do find that in the interest of justice, the rent proceeds should be deposited in a joint interest earning account of both counsels.

Wastage or in Legal Language Irreparable injury?

17. On the second consideration, the Applicant must establish that she might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction.

18. Irreparable injury was defined in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR as:-

“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.”

19. Can the loss of rental income herein be said to be wastage and alienation of the suit property tantamount to irreparable damage? (The Applicant alleges that the Respondent has taken exclusive possession of plot no 211-part LR NO 8469 /4 and that he is collecting rent to the exclusion of the Applicant.)

Balance of Convenience?

20. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, the court in defining balance of convenience stated thus;

“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.”

21. The Applicant in this case alleges to be the original owner of the property having purchased the same from her mother on or around the year 2010. It is unclear how the Respondent who is said to be her spouse has taken exclusive possession of the suit property to the extent of collecting rental income despite the parties having jointly developed plot no 211 part of LR NO 8469 /4 into rental premises. In the present circumstances, where does the balance of convenience lie?

22. On my final orders and findings:

a) Prayer 2 seeks an injunction restraining the Respondent from collecting rent pending hearing. Weighing all factors I am not convinced that I should issue a blanket injunction restraining collection of rent at this stage. I decline to give this prayer.

b) To preserve the suit property, I grant prayer 3 to the extent that the rental income should be deposited in a joint account to be opened bearing the names of the applicant and the respondent pending hearing of this suit or further Orders of the Court.

c) I order that a Notice should be sent to the tenants that this court has ordered them to pay rent into a joint account for both jointly operated by the Applicant and the Respondent and not directly pay to the Applicant or Respondent in person.

d) The Cost of this application will be in the Cause

Orders accordingly.

Dated, signed and delivered through Virtual court at Nairobi this 30th September 2021.

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JACQUELINE MOGENI

JUDGE

In presence of:-

No appearance for Parties

Mr. Vincent Owuor - Court Assistant