



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CASE NO. E369 OF 2021

SWASTIC HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ANN NYAGUTHI KIMANI.....DEFENDANT/RESPONDENT

RULING

1. Before this Court for determination is the Application dated 03/12/2021 filed under Sections 3, 3A and 63(c) & (e) of Civil Procedure Act, Order 40 Rules 1 (a) (b), 2, 3 and 4 and Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Article 165 (6) of the Constitution of Kenya and all other enabling provisions of the law. The Applicant is seeking for the following Orders:-

a. Spent.

b. THAT pending the hearing and determination of this Application inter-partes and/or until further orders by this Honorable Court, an interim Order Be and is **HEREBY** issued by way of injunction restraining the Defendant/Respondent, whether acting by herself, agents, servants, employees, security personnel, contractors and/or by any other persons whatsoever, from entering upon, trespassing upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, charging or in any other manner howsoever from interfering with the Plaintiff's quiet enjoyment, possession and proprietorship rights of the property known as Land Reference Number 21080/26 IR No. 68327/75 situate in the City of Nairobi.

c. THAT pending the hearing, determination and final disposal of the suit, an interim Order Be and is **HEREBY** issued by way of injunction restraining the Defendant/Respondent, whether acting by herself, agents, servants, employees, security personnel, contractors and/or by any other persons whatsoever, from entering upon, trespassing upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, charging or in any other manner howsoever from interfering with the Plaintiff's quiet enjoyment, possession and proprietorship rights of the property known as Land Reference Number 21080/26 IR No. 68327/75 situate in the City of Nairobi.

d. THAT owing to the security threat arising from the Defendants/Respondent and the armed gangs who carried out the illegal acts complained of, the orders of the Court ensuing from this Application be served and enforced with the assistance of the Officer in Charge of Police Division Spring Valley Police Station (OCPD), and Officer in charge of Spring Valley Police Station (OCS), being the officers vested with the mandate to deal with the security incidents arising from the area where the Suit Property is situate.

e. THAT this Honourable Court be pleased to issue such further orders as it shall deem fit and necessary in the unique circumstances of this case.

f. THAT the costs of this Application be provided for.

2. I in turn have had time to analyze the emerging issues therein. The instant Application relates to the grant of temporary injunctive relief pending the hearing and determination of this application and suit.

3. The substantive law on this matter is **Order 40 Rule 1(a) of the Civil Procedure Rules 2010** which provides:-

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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."

4. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in **Giella vs. Cassman Brown & Co. Ltd supra**.

5. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** observed that:

"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.**

6. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicant has established a prima facie case. A prima facie case was defined in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, where Bosire, JA stated as follows:-

"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."

7. The Court of Appeal deliberating what amounted to a prima facie case in **Nguruman (Supra)** made the following comments:-

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

8. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.

9. In my considered view, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the application, I find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.

10. From the record, it is the Applicant's evidence that the Defendant forcefully, unlawfully, and illegally entered the suit property by utilizing a gang of intruders armed with all manner of crude weapons and tools and by use of force and threats to the Plaintiff, proceeded to erect a makeshift fence and dropped building materials and started erecting a building.

11. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavit, it is the view of the court that the plaintiff/applicant has established a prima facie case with a probability of success against the Defendant. As regards irreparable damage, I take the view that should the injunction not be granted the substratum of this case will be destroyed and the plaintiff/applicant will suffer irreparable loss which may not be quantified in damages. The balance of convenience if I had doubt, would tilt in favor of the plaintiff/applicant in order to safeguard the current status quo of the subject matter of the application pending hearing and determination.

12. Arising from all the above, I find merit in the application. Accordingly, I allow the Notice of Motion dated 03/12/2021 in terms of prayer (b).

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021

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MOGENI J.

JUDGE

In the presence of

Mr. Manwa for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Vincent Owuor Court Assistant