Waiganjo & another v County Government of Nairobi & 4 others (Environment & Land Case E239 of 2024) [2025] KEELC 65 (KLR) (16 January 2025) (Ruling)

Neutral citation: [2025] KEELC 65 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E239 OF 2024

MD MWANGI, J

JANUARY 16, 2025

BETWEEN

JAMES KARIMI WAIGANJO ..... 1ST APPLICANT

ROBINSON KAHURA MBURU ..... 2ND APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI ..... 1ST RESPONDENT

FAIRVIEW INVESTMENT LIMITED ..... 2ND RESPONDENT

LANGTON INVESTMENT LIMITED ..... 3RD RESPONDENT

MERON LIMITED ..... 4TH RESPONDENT

THE CHIEF LAND REGISTRAR ..... 5TH RESPONDENT

(In respect to the Plaintiffs' Notice of Motion dated 12th May 2024 brought under the provisions of Article 40 of the Constitution, Section 13 of the Land Act, Sections 24, 25, 26, 29, 30, 36 and 68 of the Land Registration Act) and the 3rd Respondent's Notice of Motion dated 19th July 2024)

RULING

Background.

1. The Plaintiffs' Notice of Motion dated 12th May 2024 seeks inter alia for;

    a. An order of temporary injunction restraining the 1st, 2nd, 3rd, 4th and 5th Defendants jointly or severally, their agents or servants from transferring, selling, assigning, conveyancing, charging or further dealing in any manner whatsoever with the suit property pending the hearing and determination of the suit.

b. An order of eviction of the 3rd and 4th Defendants from the suit property forthwith pending the hearing and determination of the suit.

c. An order authorizing the Applicants to demolish all the illegal structures constructed on the suit property forthwith.

2. The application is premised on the grounds on the face of it and on the affidavit of James Karimi Waiganjo sworn at Nairobi on 12th May 2024.

3. The two Applicants allege that they were allocated the suit property L.R No. 18608 by the then Nairobi City Council through a temporary occupational license (TOL) vide a letter dated 23rd November 1992. The occupation was conditional on payment of Land Rent of Kshs. 3,600/- amongst other terms and conditions. They allege that they have since been faithfully paying rent for the suit property.

4. They further aver that the Nairobi City Council on 27th August 1997 allotted the suit property to them through an allotment letter dated 27th August 1997 and whereupon they were expected to pay rent for the suit property. The Applicants have allegedly assumed possession since then and have been paying ground rent since 1993 first by virtue of the TOL and then as allottees.

5. The Applicants state that they recently discovered that the 2nd, 3rd and 4th Defendants were claiming ownership of the suit property and had sent their representatives, agents, and or assigns to survey the plot and take possession. Upon enquiry, the Applicants state that they discovered that the 1st Respondent had irregularly and without notice to them with the help of the then Commissioner of Lands re-allocated the suit property to the 2nd Respondent sometimes in 1993.

6. The Applicants affirm that they discovered that the suit property had been earmarked for surrender in February 1993 and was re-allocated to the 2nd Respondent around the same time yet they were in occupation and possession through the temporary occupational license issued on 23rd November 1992. The Applicants assert that there was no change of user before the property was earmarked for surrender and subsequently transferred to the 2nd Respondent.

7. The Applicants accuse the 1st, 2nd, 3rd and 4th Defendants of conniving and or colluding to dispossess them of their property despite them having fulfilled all the terms and conditions of the TOL.

Response by the Respondents.

8. The 3rd Defendant responded to the Plaintiffs' application by way of a preliminary objection dated 12th July 2024 raising four (4) grounds as follows;

a. The 1st Respondent has no jurisdiction to allot land.

b. A letter of allotment cannot confer title.

c. The suit property L.R No. 18068 was unavailable for allocation.

d. A temporary occupation license cannot oust a certificate of title issued under the Registration of Titles Act.

9. The 3rd Respondent further filed grounds of opposition dated 19th July 2024 and a replying affidavit sworn by David Mucai Kunyiha at Nairobi on 19th July 2024.

10. The 3rd Defendant reiterated that;

i. No prima facie case has been made out of the reasons set out in the grounds in support of the application.

ii. There is no jurisdiction to issue an inhibition or injunction in the circumstances of the case or at all.

iii. None of the provisions cited in the application are available.

iv. There is no jurisdiction to make an order of eviction of the 3rd and 4th Defendants from the suit property forthwith.

v. There is no jurisdiction to make an order authorizing the Plaintiffs to demolish all the illegal structures constructed on the suit property forthwith.

11. In the replying affidavit, the deponent alleges that the Plaintiffs/Applicants are fraudsters and their suit is an attempt to deprive the 3rd Defendant of its property.

12. The 3rd Defendant too filed a Notice of Motion dated 19th July 2024 brought under the provisions of Order 2 rule 15(1)(a), (b) and (d) of the Civil Procedure Rules seeking to strike out the Plaintiffs' suit with costs. The application is premised on the grounds that;

a. There is no property known as L.R No. 18068 and there can be no cause of action in the circumstances.

b. There is no jurisdiction to make an order vesting the property in the Plaintiffs in the absence of the title to the suit property.

c. The suit is fatally defective as the Plaintiffs have no title, proprietary interest, or rights in the parcel of land known as L.R No. 18068.

d. The 1st Defendant has no power to allot land and the suit property was not available for allocation at the time the Plaintiffs claim it was allotted to them by the 1st Defendant.

e. The property was lawfully subdivided from the parcel of land known as L.R No. 17665 which is owned by the 2nd Defendant and a certificate of title was issued under Registration of Titles Act.

f. The suit property was initially transferred to the Trustees of Starehe Boys Center on 11th May 1993, then to the Registered Trustees of the Kohlenberg Foundation on 7th April 1994 from whence the 3rd Defendant acquired it from on 30th June 1999.

g. The alleged letter of allotment dated 27th August 1997 cannot confer title to land or be used to defeat a title of a person who has been registered as the proprietor of the land.

h. The alleged TOL issued to the Plaintiffs on 23rd November 1992 could not oust a certificate of title granted under the Registration of Titles Act.

i. The 3rd Defendant surrendered the certificate of title of the suit property to the Ministry of Lands following a change of user from education to residential development and a certificate of title was issued with a title number L.R 28401.

j. The suit is frivolous, vexatious and an abuse of the process of court intended to cause the 3rd Defendant unnecessary anxiety and expense.

k. The suit has no foundation and justiciable cause of action, as the Plaintiffs do not have a certificate of title and the prayers sought are incapable of being granted.

13. The 2nd Respondent on its part filed a replying affidavit sworn by one FRANCIS MURA MICHUKI, in opposition to the Plaintiffs' Notice of Motion dated 12th May 2024 and in support of the 3rd Defendant's application dated 19th July 2024. The deponent deposes that he has been working for the 2nd Defendant company which is a family company since 1986 as its manager.

14. He affirms the allegations by the 3rd Defendant that the suit property does not exist and the orders sought by the Plaintiffs cannot therefore issue. The 2nd Defendant sold and transferred the parcel of land comprised of L.R No. 18068 to Starehe Boys Centre Registered Trustees on 23rd April 1993 and it therefore does not hold the parcel of land in its name.

15. The Plaintiffs have not attached any title to the suit property to demonstrate its ownership or the foundation of its claim before the court. An allotment letter cannot confer title to land. Additionally, and at the time of the alleged allotment to the Plaintiffs, the parcel of land registered as L.R No. 18068 was not available for allotment.

16. The 2nd Defendant affirms that the 1st Defendant/Respondent has never had constitutional or legislative mandate to allot land as alluded in the letter dated 27th August 1997. The letter is therefore of no legal effect.

17. The 2nd Defendant reiterates that the parcel of land was first sold to Starehe Boys Center Registered Trustees and subsequently to the 3rd Defendant. The deponent has explained the sequence of events at paragraph 11 of the replying affidavit.

18. The deponent of the replying affidavit further vehemently denies that the Plaintiffs have had possession of the suit property since 1992 as alleged. He reiterates that the Plaintiffs' claim has no foundation and pray that it be struck out.

19. The 4th Defendant on its part filed grounds of opposition objecting to the Plaintiffs' application dated 12th May 2024. They assert that;-

a. The suit as drawn and filed relates to a non-existent property. The suit and the application are therefore untenable in law and the reliefs sought cannot be granted.

b. The Plaintiffs' suit does not meet the threshold for the issuance of a mandatory order of eviction at the interim stage as elaborated in the locus classicus case of Andrew Kamau Mucuha –vs- Ripples Limited (2001) eKLR.

20. The 1st Defendant on its part filed grounds of opposition dated 5th August 2024 objecting to the 3rd Defendant's application. In the said grounds, the 1st Defendant asserted that;

a. The 3rd Defendant has not sufficiently demonstrated that the Plaintiffs' claim is legally untenable.

b. The 3rd Defendant's application would deny the parties the right to have their issues heard and determined.

c. The 3rd Defendant's application undermines the principles of natural justice by precluding a substantive hearing where there is need for judicial clarification regarding the suit property.

d. Due to the presence of multiple parties, all claiming an interest in the suit property, this suit should not be dismissed but should be allowed to proceed to ensure that all claims are properly adjudicated.

e. The existence of multiple suits involving similar parties and the same subject matter necessitates a comprehensive determination to ensure a fair and just resolution.

f. The proper way to address the multiplicity of suits is not by striking out the current suit but through consolidation to ensure a comprehensive and consistent resolution of all related matters.

Court's direction.

21. The court's directions were that the two applications be heard concurrently and be canvassed by way of written submissions. All the parties complied and filed their comprehensive submissions which this court has had an opportunity to consider in writing this ruling.

Issues for determination

22. Considering the two applications before this court, the various responses by the parties and the submissions filed herein, the issues for determination are;

i. Whether the Plaintiffs' application has met the threshold for the grant of the orders sought at the interim stage of these proceedings.

ii. Whether the 3rd Defendant has made a case for striking out of the Plaintiffs' suit.

iii. What orders should issue in regard to costs.

Analysis and determination.

Whether the Plaintiffs' application has met the threshold for the grant of the orders sought.

23. The Plaintiffs' in their application had prayed for an interim order of inhibition pending hearing and determination of the application. For purposes of this ruling that prayer is spent and the court will not expend any time on it. As stated at the very first paragraph of this ruling, the prayers that concern this court are three (3), namely;

i. the prayer for an order of temporary injunction;

ii. the prayer for an order of eviction of the 3rd and 4th Defendants/Respondents; and

iii. the prayer for an order authorizing the Applicants to demolish the illegal structures on the suit property.

24. Undoubtedly, the Plaintiffs' application dated 12th May 2024 is an interlocutory application.

25. In the old English case of Gilbert –versus- Eden (1878) 9 Ch.D, Cotton L.J defined interlocutory applications as those applications,

> " ...which do not decide the rights of the parties but are made for purposes of keeping things in status quo till the rights (of parties) can be decided or for purposes of obtaining some direction of the court as to how the cause is to be concluded, as to what is to be done in the

progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties."

26. The objective and the scope of an interlocutory application is to protect the Applicant from injury by violation of his legal right which cannot adequately be compensated in damages if the matter in dispute were ultimately determined in his favour or obtaining directions on the hearing of the case.

27. It is not the business of the court to, at the stage of an interlocutory application, make any conclusive or definitive findings of law or facts. As Gicheru J.A. (as he then was) put it in the case of Rockland Kenya Limited –versus- Elliot White Miller (1994) eKLR , 'it is not the function of the court to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend on to decide difficult questions of law which call for detailed arguments and mature considerations.' Such matters are to be dealt with at the trial.

28. The Plaintiffs' prayers seeking for eviction of the third and 4th Defendants and for orders authorizing them to demolish structures on the suit property are final orders which are indeed sought in the plaint. They are orders that can only be granted after a full trial and upon the court considering the evidence from all the parties. These two prayers are an invitation to this court to conclusively determine the dispute herein in favour of the Plaintiffs without the advantage of critically analyzing the evidence by the other parties. The court declines the invitation and reject the prayers for eviction and for orders authorizing demolition of the structures on the suit property.

29. The prayers by the Plaintiffs are not for a mandatory injunction which in any case and as categorically submitted by the 4th Respondent, may only be granted exceptionally and in the clearest of cases. The Plaintiffs have not demonstrated any exceptional grounds to warrant the issuance of such drastic orders at the interim stage of these proceedings.

30. In respect to the prayer for an order of temporary injunction, the law is well settled. The principles were set out in Giella –vs- Cassman Brown & Co. (1973) E.A. 378. An Applicant must establish a prima facie case, demonstrate irreparable injury if a temporary injunction is not granted, and ally any doubts as to (b) by showing that the balance of convenience is in his favour.

31. The principles set out in the Giella case (supra) were affirmed by the Court of Appeal for the case of Nguruman limited -vs- Jan Bonde Nielsen & 2 others (2014) eKLR, where the court held that;

> " The party on whom the burden of proving a prima facie case lies must show a right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a minitrial 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.
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> .....The standard of proof of their prima facie case is on a balance or as otherwise put, on a preponderance of probabilities."

32. In Mrao Limited v First American Bank of Kenya (2003) KLR 125, the court defined a prima facie case in the following terms: -

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.
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> .....A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard which is higher that an arguable case."

33. The Plaintiffs' claim on the suit property is premised on an allotment letter issued by the Nairobi City County Government (the Successor in title to the defunct Nairobi City Council). It has been submitted by both the 2nd, 3rd and 4th Defendants that the 1st Respondent or its predecessor in title has no legal authority to issue allotment letters. That is a point that is rather obvious and elementary.

34. Further, from a cursory glance of the documents before the court, the allotment letter was issued at a time when the suit property already had a title under the Registration of Titles Act (now repealed), in the name of a private entity.

35. I am not persuaded that the Plaintiffs have established a prima facie case as defined in the above cited cases.

36. As the court in the Nguruman case (supra) stated;

> " .....all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to circumvent sequentially."

37. The impact of the above holding is that if a prima facie case is not established, the court need not go any further to consider whether the Applicant established irreparable injury, if the order of temporary injunction is not established. That means that the Plaintiffs' application fails in its entirety.

38. I will now move to the issue whether the 3rd Defendant has made a case for striking out of the Plaintiffs' case through its preliminary objection dated 19th July 2024 and the Notice of Motion dated 19th July 2024.

39. As the 3rd Defendant puts it in its submissions, the crux of the preliminary objection is that the Plaintiffs have no title, proprietary interests or rights in L.R 18068. Further, the 3rd Defendant affirms that L.R No. 18068 does not exist. It is further submitted that a temporary occupation license cannot oust a title issued under the Registration of Titles Act.

40. It is also submitted that an allotment letter, even if the Plaintiffs had been issued with one, is incapable of conferring interest in land. It is nothing more than an offer awaiting the fulfilment of the conditions stipulated therein. Additionally, the 1st Defendant has no power to allot land and the suit property was not available anyway for allocation.

41. The 3rd Defendant submits that the Plaintiffs' suit discloses no reasonable cause of action, is scandalous, frivolous and vexatious. Further that it is otherwise an abuse of the process of court.

42. The preliminary objection by the 3rd Defendant raises facts that requires to be ascertained. It is not premised on pure points of law. I agree with the submissions by the 1st Defendant and the Plaintiffs in that regard.

43. While it is not in dispute that the court has the power to strike out a suit, this is a power that must be exercised sparingly. As it has been variously held, the power should be exercised in the clearest of cases.

44. The principles were encapsulated in the case of D.T. Dobie & Company (Kenya) Limited –vs- Joseph Mbaria Muchina & another (1980) eKLR, where Madan J (as he then was) stated that;

> " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a treasonable cause of action or being otherwise an abuse of the process of court.
>
> ...In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient."

45. Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham as emphasized by the Court of Appeal in the case Blue Shield Insurance Company Limited –vs- Joseph Mboya Oguttu (2009) eKLR.

46. I have carefully considered the plaint filed by the Plaintiffs in this case. Besides their claim for title of the suit property, the Plaintiffs have sought alterative prayers for compensation for breach of terms and conditions of the TOL and allotment letter against the 1st Defendant whom they accuse of illegally allocating the suit property to the 2nd, 3rd and 4th Defendants. That is the one triable issue that saves the Plaintiffs' suit. I am therefore not persuaded that the Plaintiffs' case is a complete sham.

47. Accordingly, I disallow the 3rd Defendant's preliminary objection dated 19th July 2024 and the Notice of Motion of even date.

48. I make no orders as to costs, in respect of the two applications and the preliminary objection.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF JANUARY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Njiru h/b for Mr. Kiragu Kimani SC for the 3rd Defendant

Ms. Ogoda for the 1st Defendant

Mr. Allan Kamau for the 5th Defendant

N/A for the Plaintiffs, the 2nd and 4th Defendants

Court Assistant: Mpoye