



**Ubhi, HSC v Mohamed (Environment & Land Case E039 of 2023)
[2024] KEELC 157 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E039 OF 2023
A NYUKURI, J
JANUARY 24, 2024**

BETWEEN

KUNDAN SIGN UBHI, HSC APPLICANT

AND

ABDINASIR HASSAN MOHAMED DEFENDANT

RULING

1. Before court is a notice of motion dated 17th May 2023 filed by the plaintiff seeking the following orders;
 - a. Spent
 - b. Spent
 - c. The defendant whether by himself, his invitees, agents, servants, employees, principal or otherwise howsoever be restrained by way of an injunction from entering upon, remaining upon, trespassing, damaging, wasting, carrying out construction and/or further construction on LR. No. 20203 IR No. 65250 Mavoko Municipality pending the inter-parties hearing of this suit.
 - d. An order of eviction do issue to remove the defendant, whether by himself, his invitees, agents, servants, employees, principal or otherwise howsoever from the suit property.
 - e. The OCS Mlolongo Police Station and/or Athi River Police Station be directed to supervise compliance with the orders of this court.
 - f. The costs of this application be provided for.
 - g. The court be pleased to issue such other or further order and directions as may appear to it just and convenient.



2. The application is supported by the affidavit sworn by the plaintiff's son one Opkar Singh Ubhi on 17th May 2023. The applicant's case is that the plaintiff is the registered owner and in possession of the parcel of land known as LR. No. 20203 IR. No. 65250 situated in Mavoko Municipality, Machakos District, having purchased the leasehold interest therein on 11th February 1997 at a consideration of Kshs. 1,200,000/-.
3. He deponed that on 20th March 2023, the plaintiff discovered that the defendant and his invitees and agents had wrongfully entered and taken possession of the parcel of land known as LR. No. 20203 IR. No. 65250 (suit property) and began putting up illegal structures, foreign objects and equipment thereon and placed his agents thereon. That the plaintiff reported this matter at Mlolongo Police Station vide the OB Number 35/30/3/2023. He stated that unless the defendant is stopped from the trespass, he will continue to be deprived of the use of his property. He attached copies of the lease certificate; photographs; OB; and search certificate.
4. The application is opposed. Abdinasir Hassan Mohamed the defendant/respondent herein filed replying affidavit sworn on 26th June 2023. He stated that the plaintiff was not the registered owner of the suit property as the same is owned by a community based organization known as "The Monstramen Self Help Group" who have been in actual possession, control and utilization thereof. He denied encroaching on the suit property and stated that he lawfully purchased a portion thereof from the Monstramen Self Help Group and that he has put up structures thereon worth more than Kshs. 10,000,000/-. He stated that the structures shown on the photographs do not belong to him. He stated that when he put up buildings thereon, the plaintiff did not lay any claim on the suit property. He attached a sale agreement, photographs of his structures and a schedule of expenditure.
5. In a rejoinder, Opkar Singh Ubhi filed a supplementary affidavit sworn on 18th July 2023. He stated that the replying affidavit of the defendant was incompetent for having not been drawn in the first person. Further that the defendant's allegations are contradictions as he states that Monstramen are in possession of the suit property and at the same time states that he is the one in possession.
6. He further deponed that the only document presented by the defendant is a sale agreement, which is fraudulent and an afterthought, as it is dated within the period of these and criminal proceedings. He also stated that there was no proof of payment of the purchase price. He stated that the defendant failed to avail evidence that could create the nexus between Monstramen Self Help Group and the suit property. He stated that the photographs by the defendants show a bare property yet he alleges to have spent Kshs. 10,000,000/- on constructions thereon.
7. The application was canvassed by way of written submissions. On record are the plaintiffs submissions filed on 26th October 2023 which the court has considered.

Analysis and determination

8. The court has carefully considered the application, the response and submissions; and the sole issue that arise for determination is whether the applicant has met the conditions for grant of both interlocutory and mandatory injunctions.
9. Order 40 Rule 1 of the *Civil Procedure Rules* provides for the jurisdiction of the court to grant temporary injunctions as follows;
[Order 40. rule 1] Cases in which temporary injunction may be granted.
 1. Where in any suit it is proved by affidavit or otherwise—



- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or
 - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.
10. Essentially, where a property in dispute is in danger of being wasted, damaged, alienated or likely to be removed or disposed, in circumstances that may lead to delay or obstruction of execution of the decree that may issue in favour of the plaintiff, the court may grant a temporary injunction to restrain the defendant from committing acts that may damage, waste or alienate the same, pending hearing of the suit.
11. Principles governing grant of temporary injunctions are well settled. A claimant must demonstrate the following three conditions;
 - a. The applicant must establish a prima facie with chances of success.
 - b. The applicant must demonstrate that he stands to suffer irreparable injury that cannot be compensated in damages if the temporary injunction is declined.
 - c. Where the court is in doubt, it ought to decide the application on the balance of convenience. (See *Giella v Cassman Brown* [1973] EA 358).
12. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal held as follows;

In an interlocutory injunction application, the applicant has to satisfy the tripple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) allay 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 states are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
13. A prima facie case was described in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR as follows;

In civil cases, it is a case in which, on the material presented to the court a tribunal property directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
14. The plaintiff herein stated that he is the registered owner of the leasehold interest in the suit property. To demonstrate this allegation, he provided a certificate of title and search, that proves as much. On the other hand, the defendant stated that the purchased the suit property from Monstramen Self Help Group. He produced a sale agreement dated 21st March 2023 which indicated that the vendor, Monstramen Self Help Group had a beneficial interest in the suit property. Having considered both the plaintiff's and defendant's documents of ownership of the suit property, it is clear that the plaintiff



has demonstrated being the registered proprietor of the suit property having been registered as such on 11th February 1997, as demonstrated in Entry No. 2 of the title.

15. Although the sale agreement presented by the defendant states that Monstramen Self Help Group has a beneficial interest in the suit property, the same has neither been explained or demonstrated and therefore there is no evidence to show that the said Monstramen Self Help Group is a registered entity, or exists or their basis of alleged ownership of the suit property at the time of the alleged sale to the defendant. In addition, as pointed out by the plaintiff, there is no evidence to show that the defendant paid the consideration or any part thereof as indicated in his sale agreement.
16. Section 26 of the [Land Registration Act](#) No. 3 of 2012 provides for indefeasibility of title where there is no proof of fraud, misrepresentation, want of procedure or corruption. In this instance, there is no doubt that the plaintiff is the registered proprietor of the leasehold interest in the suit property. The official search and title proves that the defendant has not alleged that the title of the plaintiff was obtained by fraud or any other ground listed under Section 26 of the [Land Registration Act](#). The defendant has no title to the suit property and even the sale agreement is questionable as no proof of payment of consideration has been shown. For those reasons, at a prima facie level, the plaintiff has demonstrated that he has a valid legal right over the suit property and that the defendant who concedes being on the suit property, is a trespasser. In the premises, I find and hold that the plaintiff has demonstrated a prima facie case with chances of success.
17. On the question of irreparable injury, there is evidence that the defendant who has no title to the suit property is constructing thereon, and therefore the substratum of the suit may be permanently altered. In the premises, I find and hold that the plaintiff has shown that he stands to suffer irreparable injury if injunction is not granted.
18. The plaintiff being the registered proprietor and having been in possession of the suit property up to 20th March 2023 and the defendant conceding that he only got into the suit property in March 2023, it is my finding that the balance of convenience tilts in favour of the plaintiff.
19. In the premises, I am satisfied that the plaintiff has met the threshold for grant of temporary injunction sought.
20. A mandatory injunction is only granted where there are special circumstances and where it is so clear that the suit need not be heard on merit before a mandatory injunction is granted at an interlocutory stage. The right to be heard before a decision is made, is a right protected under Article 50 of the [Constitution](#). However weak a person's case is, they ought to be given opportunity to be heard. Grant of a mandatory injunction therefore takes away that right as the same renders moot the hearing of a suit on merit. It is therefore my view that unless it is clear and in the interests of justice that an applicant deserves an order that would deny the opposing party a right to be heard, the court ought to exercise that jurisdiction sparingly and with a lot of caution.
21. In the case of [Kenya Breweries Ltd & Another v Washington O. Okeyo](#) [2002] eKLR, the court stated as follows;

A mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.
22. As pointed out above, the right to be heard before a person is condemned is a Constitutional right and the same is non derogable. Denying a person an opportunity to be heard is not a matter to be taken



lightly and the same can only be done in special circumstances where the interest of justice dictate so. In the instant case, the defendant has brought a sale agreement alleging that the entity who sold him the land had a beneficial interest therein. Therefore my view is that evicting the defendant from the suit property would not be proper without giving him an opportunity to be heard. The defendant does not allege to be personally living on the suit property but he alleges to have put up buildings thereon. It is therefore necessary to give him an opportunity to be heard before eviction is ordered. However as earlier observed and found in this ruling, the plaintiff is entitled to temporary injunction against him.

23. I therefore find and hold that the plaintiff has not met the threshold for mandatory injunction and hence I decline to order for eviction. For avoidance of doubt, although the defendant's structures are not to be removed pending hearing of this suit, he is restrained from interfering with the suit property in terms sought by the plaintiff/applicant.
24. In the end, the plaintiff's application dated 17th May 2023 partially succeeds and I make the following orders;
 - a. The defendant whether by himself, his invitees, agents, servants, employees, principal or otherwise howsoever be and is hereby restrained by way of injunction from entering upon, trespassing, damaging, wasting, carrying out construction and or further construction on LR. No. 20203 IR No. 65250 Mavoko Municipality pending hearing of this suit.
 - b. The OCS Mlolongo police station is hereby directed to supervise compliance with the orders above.
 - c. The costs of the application are awarded to the plaintiff/applicant.
25. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Omullo for plaintiff/applicant

No appearance for defendant/respondent

Josephine - Court Assistant

