



Wideview Properties Ltd v Yongo & 3 others (Environment & Land Case E246 of 2023) [2024] KEELC 405 (KLR) (22 January 2024) (Ruling)

Neutral citation: [2024] KEELC 405 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E246 OF 2023
EK WABWOTO, J
JANUARY 22, 2024**

BETWEEN

WIDEVIEW PROPERTIES LTD PLAINTIFF

AND

BRIAN YONGO 1ST DEFENDANT

NEPTUNE CREDIT MANAGEMENT LTD 2ND DEFENDANT

YASMIN SUMAR 3RD DEFENDANT

FINE DIAMOND PROPERTIES LIMITED 4TH DEFENDANT

RULING

1. This ruling is in respect to three applications and a preliminary objection. The first application is the application dated 30th June, 2023 filed by the Plaintiff seeking the following orders.
 - i. Spent.
 - ii. That pending hearing and determination of this Application, this Honourable court be pleased to grant an injunction restraining the Defendants, their employees, agents and/or their assigns from entering, into, staying, trespassing, taking possession, leasing, subleasing, utilizing or in any way interfering with the Plaintiff’s quiet possession of its properties known as Apartment No. B4 and Apartment No. D1 Fine Diamond Apartments in Land Reference No. 209/4517.
 - iii. That this Honourable court be pleased to issue a mandatory injunction compelling the Defendants to give vacant possession and or surrender to the Plaintiff its properties known as Apartment No. B4 and Apartment No. D1 in Fine Diamond Apartments on Land Reference No. 209/4517 pending hearing and determination of the suit failure to which eviction orders to issue.



- iv. That this Honourable court be pleased to issue a temporary injunction against the Defendants from entering into, staying, trespassing, taking possession, leasing, subleasing, utilizing, dealing with the Plaintiff's property or in any way interfering with the Plaintiff's quiet possession of his property described as Apartment No. B4 and Apartment No. D1 in Fine Diamond Apartments on Land Reference No. 209/4517 pending hearing and determination of the suit.
 - v. That the costs of this application be borne by the Defendants.
2. The second application is the application dated 13th July, 2023 filed by the 1st Defendant which seeks to have Peter Gichuki King'ara Advocate and the firm of Gichuki King'ara and all other advocates practicing in the name and style of Gichuki King'ara & Co. Advocates be disqualified from representing the Plaintiff herein.
 3. The third application is the application dated 1st August 2023 filed by the 4th Defendant which application seeks to have the 4th Defendant struck out from the proceedings.
 4. The 2nd Defendant filed a preliminary objection which sought to have the suit struck out on the grounds that it was an abuse of the court process and res judicata pursuant to the case of ELC No. 12 of 2014 Neptune Credit Management Limited -vs- Invesco Insurance Company Limited.
 5. The three applications and preliminary objection were contested by the parties and pursuant to the directions issued by the court, it was directed that all the three applications and the preliminary objection be canvassed by way of written submissions and the same to be heard simultaneously to enable the court render its ruling.
 6. The parties herein filed their written submissions which the court has considered.
 7. The Plaintiff submitted that it is the registered owner/proprietor of the suit premises having purchased the same in the year 2010 from Invesco Insurance Company Limited. It was also submitted that the Plaintiff obtained ownership devoid of any encumbrance but the Defendants have been blocking the Plaintiff from enjoying the fruits of its rightful legal purchaser. It was also submitted that sometimes in the year 2011, the 1st Defendant trespassed and entered into the Apartment Number D1 alleging to have leased the same from the 2nd and 3rd Defendants. It was further submitted that the 2nd Defendant is in occupation of Apartment No. B4 and despite notice and demand to vacate, they have adamantly refused and/or ignored the notices and are still in illegal occupation of the suit properties.
 8. In respect to whether the Peter Gichuki King'ara Advocate and the firm of Gichuki King'ara and Co. Advocates and all advocates practicing in the name and style of the said firm be disqualified from representing the Plaintiff, it was submitted that the firm of Gichuki King'ara & Co. Advocates and/or Mr. Peter Gichuki King'ara have never acted for any of the Defendants on matters related to the subject matter of the suit or otherwise. It was also submitted that none of the Defendants are parties to the sale transaction complained of and as such no conflict of interest can arise and further the advocates have not been listed as witnesses by any of the parties in the matter to warrant the orders sought.
 9. The Plaintiff also submitted that there is nothing demonstrated by the Defendants that brings to play Rule 8 of the Advocates Practice Rules or Section 9 of the *Advocates Act* Cap 16 of the laws of Kenya as regards the Plaintiff's Advocates. It was further submitted that there is no conflict of interest in the current suit as Invesco Assurance Limited, the previous vendor of the suit properties is not a party to this suit and the firm of Gichuki King'ara does not intend to act against the said Company in any matter touching on the subject matter. The Plaintiff relied on the affidavit of Joseph Gitau Mburu sworn on 18th September, 2023 in opposition to the 1st Defendant's application. The following authorities were also cited which the Court has considered; ELC Case No. 1196 of 2004 Rajni Kant Nathan –



vs- Edward Nthuli & Others, Albert Charamba Mumba & 7 others -vs- Maurice M. Munyao & 148 others, Jopa Villas LLC -vs- Overseas Private Investment Corporation & 2 others [2014] eKLR, David M. Mereka & Mereka & Co. Advocates -vs- County Government of Nairobi [2021] eKLR among others.

10. The Plaintiff urged the Court to dismiss the application dated 13th July, 2023 together with the 4th Defendant's application dated 1st August, 2023.
11. The 1st Defendant filed written submissions in support of his application dated 14th July, 2023 and the 2nd Defendant's preliminary objection dated 11th July, 2023. The 1st Defendant also filed written submissions in opposition to the Plaintiff's application dated 30th June, 2023.
12. The 1st Defendant submitted that the Plaintiff's application dated 30th June, 2023 is an exercise in futility, is incompetent, an abuse of Court process, a nonstarter and purely intended to vex the Court and the Defendants by dint of the ruling dated 6th February, 2014, ELC No. 12 of 2014, Nepture Credit Management v Invesco Assurance Company Limited.
13. The 1st Defendant also submitted that the 1st and 2nd Defendants have had possession of the said apartments from the year 2008 pursuant to a sale agreement between the 2nd Defendant and Invesco Assurance Company Limited and as such the Plaintiff has never had possession.
14. In respect to the averments of trespass, it was submitted that the Plaintiff seeks to enforce ownership rights as opposed to possessing rights to trespass. The 1st Defendant denied any trespass to the property.
15. It was also submitted that the Plaintiff should not be granted the prayer for mandatory injunction since the case is not clear for the Court to grant the prayers sought herein at an interlocutory stage.
16. The 4th Defendant filed written submissions dated 10th October, 2023 in respect to its application dated 1st August, 2023 and the Plaintiff's application dated 30th June, 2023.
17. On whether the 4th Defendant should be struck out from these proceedings, it was submitted that the 4th Defendant is a Management Company and that it only provides common services in the common areas and does not manage the individual units. The 4th Defendant argued that the dispute relating to ownership and possession of the suit properties pits the Plaintiff and other Defendants and as such the Plaintiff does not have a cause of action against the 4th Defendant. The 4th Defendant submitted that it is not a necessary party to the case and hence ought to be struck out from the pleadings.
18. In respect to the Plaintiff's application of an injunction, it was submitted that the Plaintiff has not met the threshold for grant of an injunction as set out in the case of Giella -vs- Cassman Brown [1973] EA 358. The Court was urged to dismiss the Plaintiff's application dated 30th June, 2023 and allow the 4th Defendant's application dated 1st August, 2023.
19. The Court has considered the three applications and the preliminary objection, together with the affidavits filed and the written submissions filed by the parties and has outlined the following issues for determination:
 - i. Whether the 2nd Defendant's preliminary objection is merited.
 - ii. Whether the Plaintiff is entitled to the temporary and mandatory injunctive orders sought.
 - iii. Whether Peter Gichuki King'ara Advocate and his Firm Gichuki King'ara & Co. Advocates be disqualified from acting on behalf of the Plaintiff in the matter.
 - iv. Whether the 4th Defendant should be struck out from these proceedings.



20. The Court shall proceed to address the said issues sequentially.
21. On whether or not the 2nd Defendant's preliminary objection is merited, the 2nd Defendant raised a preliminary objection on the main ground that the entire suit is an abuse of the court process in so far as it seeks to second guess, circumvent and or review the pending proceedings between the 2nd Defendant and Invesco Assurance Company Limited in ELC No. 12 of 2014 Neptune Credit Management Limited v Invesco Insurance Co. Ltd.
22. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696. At page 700 Law JA stated:
- “A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
- At page 701 Sir Charles Newbold, P added:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”
23. With regards to the issue of res judicata, Section 7 of the [Civil Procedure Act](#), reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated as follows: -
- i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
24. In the instant case, the Plaintiff is not a party to ELC Case No. 12 of 2014. The interim orders issued therein does not affect the Plaintiff at this stage and in the circumstances, this Court finds that the Preliminary Objection filed by the 2nd Defendant is not a proper Preliminary Objection in itself, does not meet the test set out in Mukisa Biscuits Case and the same is subsequently dismissed.
25. As to whether the Plaintiff is entitled to the temporary and mandatory injunctive orders sought, it is trite law that for an applicant for a temporary injunction to succeed, he must demonstrate that he has a prima facie case against the respondent and that he stands to suffer irreparable harm unless the injunction is granted. The existence or not of a prima facie case is a matter of fact and must be established through evidence. The same with whether or not one stands to suffer irreparable harm



- unless an injunction is granted. The Court has noted that from the evidence on record, the Plaintiff purchased apartment number B4 and D1 from Invesco Assurance Company Limited in the year 2010 and a transfer completed even though it did not take possession.
26. In the instant matter it is not in dispute that the property B4 and D1 are registered under the names of the Plaintiff and that pursuant to sections 25 and 26 of the Land Registration Act, the plaintiff has established a prima facie case warranting the grant of some interim reliefs sought despite the fact that it is not in possession.
 27. In view of the foregoing, it is necessary to preserve the suit property by protecting the interest of the Plaintiff herein at this stage and hence this court will proceed to grant the temporary injunction relieve sought noting the need to protect the property even though the Plaintiff is not in physical possession.
 28. As to whether or not a mandatory injunction can be granted at an interlocutory stage, it is trite law that a mandatory injunction should not normally be granted at an interlocutory stage 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. The Plaintiff has sought for vacant possession and eviction of the Defendants at this interlocutory stage. The same cannot be granted at this stage without hearing the parties since granting of the said orders will lead to the disposal of the entire suit. The court also notes that the Plaintiff has sought for the same prayers in its plaint. In the circumstances, this court shall refrain from granting that order at this stage.
 29. As to whether or not the 4th Defendant should be struck out from these proceedings, it was argued by the 4th Defendant that there is no cause of action as against the 4th Defendant and further that the orders sought can be effectively enforced without necessarily having the 4th Defendant as a party herein.
 30. The Plaintiff in opposing this application argued that the 4th Defendant handles tenancy in respect to the properties including Apartment B4 and D1, the 4th Defendant collects service charge and further that it has colluded with the other Defendants recognizing them as tenants /and or owners over the suit property instead of the Plaintiff.
 31. It was also argued that the 4th Defendant is the one who granted access to strangers in respect to the Plaintiff's property and the court was urged to dismiss the application.
 32. A perusal of the plaint filed herein demonstrates that the Plaintiff has pleaded that the 4th Defendant manages the properties herein are at the heart of this dispute. It was also pleaded that the 4th Defendant has been served with numerous demands seeking vacation of the premises and have declined to comply.
 33. A party is deemed necessary to the proceedings if he or she ought to have been joined are parties who are necessary to the constitution of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings.
 34. In respect to the reliefs sought, the Plaintiff has also sought for an order that the 4th Defendant do effect the orders and decree that will be issued by this Court.
 35. In view of the foregoing, it is the finding of this court that it will not be for the interest of justice to struck-out the 4th Defendant from these proceedings at this stage.



36. On whether the firm of Gichuki King'ara & Co. Advocates and Counsel Peter Gichuki King'ara be disqualified from representing the Plaintiff, it is evident from the sale agreement that the firm of Gichuki King'ara acted for both the vendor and purchaser. There is a high likelihood of conflict of interest which may negate a fair trial. The court is further guided by the case of Guardian Bank Limited v Sonal Holdings (K) Limited & 2 Others [2014] eKLR;

“...in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say “ I intend to call them as witnesses”. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a lawsuit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation”.

37. In conclusion, the plaintiff's application dated 30th June 2023, the 1st Defendant's application dated 13th July, 2023, the 4th Defendant's application dated 1st August, 2023 and the 2nd Defendant's preliminary objection dated 11th July, 2023 are hereby determined in the following terms;

- i. The preliminary objection dated 11th July, 2023 is hereby dismissed for lack of merit.
- ii. The 4th Defendant's application dated 1st August, 2023 is hereby dismissed for lack of merit.
- iii. A temporary injunction is hereby issued against the Defendants from leasing and or subleasing, disposing off the properties known as Apartment No. B4 and Apartment No. D1 in Fine Diamond Apartment on Land Reference No. 209/4517 pending the hearing and determination of the suit.
- iv. The law firm of Gichuki King'ara & Co. Advocates and Peter Gichuki King'ara Advocate be and are hereby disqualified from representing the Plaintiff in these proceedings.
- v. Each party to bear own costs of the applications and the Preliminary Objection.
- vi. Parties are directed to comply with the provisions of order 11 of the Civil Procedure Code within 30 days from today.
- vii. This matter shall be mentioned on 11th March, 2024 for further directions.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JANUARY, 2024.

E.K. WABWOTO



JUDGE

In the presence of

Mr. Brian Yongo the 1st Defendant acting in person.

Mr. Wachira holding brief for Mr. King'ara for the Plaintiff.

N/A for other parties.

Court Assistant: Caroline Nafuna

