



Ayora v Odhiambo & another (Environmental and Land Originating Summons E012 of 2023) [2024] KEELC 1124 (KLR) (26 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2023
EK WABWOTO, J
FEBRUARY 26, 2024**

BETWEEN

ALFRED JUMA AYORA PLAINTIFF

AND

TERESIAH ADHIAMBO ODHIAMBO 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

RULING

1. The application before this Court is the 1st Respondent's application dated 19th June, 2023 which seeks to discharge and set aside the orders granted by this Court on 17th April, 2023. The application is supported by the affidavit sworn by Teresiah Adhiambo Odhiambo sworn on 22nd May, 2023.
2. The application was also premised on the grounds that the 1st Respondent is the absolute proprietor of all that property known as Nairobi/Block 99/142. It was also argued that the Plaintiff's application dated 28th February, 2023 which culminated in the temporary injunctive orders given on 17th April, 2023 was founded on a gross misrepresentation of facts. It was also averred that there have been third parties claiming ownership of the suit property including one Mr. Alex Apoko (also known as "Ringtone"). It was further averred that the 1st Respondent had filed ELC Case No. E135 of 2023 in a bid to protect her property which suit has temporary injunctive orders in existence against Alex Apoko and his agents. It was also averred that no prejudice will be suffered if the orders are set aside.
3. The application was opposed by the Plaintiff vide a Replying Affidavit sworn by Alfred Juma Ayora on 1st September, 2023. It was deposed that the perimeter wall around the suit property was constructed in 2011 and that the 1st Respondent has had knowledge of the Plaintiff's open, continuous and uninterrupted possession and occupation of the suit property for over two (2) decades but has never made any effort to evict him except between February 2023 and July, 2023.



4. The Plaintiff deponed that the temporary order of injunction was issued on 3rd March, 2023 and the 1st Respondent upon being served chose not to participate during the Interpartes hearing of the application on 17th April, 2023.
5. It was also averred that the 1st Respondent does not offer any explanation why she elected not to participate in the hearing of the said application. It was argued further that the 1st Respondent being fully aware of the proceedings in this matter elected to file another suit in Nairobi ELC No. 135 of 2023. The Plaintiff denied any knowledge of Alex Apoko, named as the Defendant in ELC No. 135 of 2023. It was also averred that the 1st Defendant had a duty to disclose the existence of this suit and the orders issued on 17th April, 2023 when the injunction application came up for hearing on 20th June, 2023. The Plaintiff averred that failure to disclose the same constituted a material non-disclosure that disentitles her to any equitable relief. It was also averred that the Plaintiff shall stand to suffer prejudice if the orders issued by the Court are set aside since the 1st Respondent shall proceed to evict the Plaintiff and destroy the substratum of these proceedings. The Court was urged to dismiss the application.
6. During the plenary hearing of the application, learned counsel Mr. Mbaluto submitted on behalf of the 1st Defendant while Mr. Rapando submitted on behalf of the Plaintiff.
7. The Court has considered the application, the rival affidavits filed and oral submissions made by the parties and the main issue for consideration is whether this Court should proceed to set aside its orders issued on 17th April, 2023.
8. The jurisdiction of the court to set aside an order of injunction is set outlined under Order 40 Rule 7 [Civil Procedure Rules](#), 2010 which provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
9. The Court has the discretionary powers to vary, review and or set aside its orders. In [Patriotic Guards Ltd v. James Kipchirchir Sambu](#) [2018]eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
10. In the case of *Shah v. Mbogo* [1967] EA 116 the court stated that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
11. In the instant case, the 1st Respondent argued that she is the registered proprietor of the suit property and that there exist injunctive orders in suit Milimani ELC Case No. E135 of 2023. It was also argued that the Plaintiff had grossly misrepresented facts in this suit when obtaining interim orders.
12. On the other hand, the Plaintiff maintained that he is in occupation of the suit property and he stands to be evicted should the orders issued herein be set aside.



13. What the Court is able to gather from the rival affidavits and submissions made by both counsel is that the Plaintiff is in occupation of the suit property and that the interim orders issued were granted on the fact that the Plaintiff had demonstrated a prima facie case in so far as being in occupation of the suit property was concerned. The jurisdiction of an equity Court requires it to look at the matter wholly and consider how best to achieve a just and fair outcome on the peculiar facts of the case. In the case of *National Commercial Bank Ltd -vs- Olint Corporation* 2009 WLR 1405, the privy Council stated that the purpose of interlocutory injunction is to improve the chance of the Court being able to do justice after a determination on the merits at the trial.
14. In the instant case, the issues raised by the 1st Respondent can be effectively considered and handled during trial but as it is, the Plaintiff stands to suffer prejudice if the orders are set aside owing to the fact that he has demonstrated being in occupation of the suit property. The 1st Defendant did not provide any evidence to the contrary.
15. The Court has discretionary powers under Order 40 Rule 6 of the *Civil Procedure Rules* 2010 not to grant an application to set aside an interim order if there are sufficient reasons to do so. In this case, I believe there are sufficient reasons to decline the application.
16. In view of the foregoing, this Court is unable to accede to the prayers sought by the 1st Respondent and in the circumstances the 1st Respondent's application dated 19th June, 2023 is hereby dismissed. Costs of the application to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2024

E. K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Rapando for the Plaintiff.

Mr. Mbaluto for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant: Caroline Nafuna.

