



REPUBLIC OF KENYA



KENYA LAW
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**Naurori v Freeman & 2 others (Environment & Land Case
E010 of 2023) [2024] KEELC 809 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E010 OF 2023
CG MBOGO, J
FEBRUARY 22, 2024**

BETWEEN

WILLIAM SANINGO NAURORI PLAINTIFF

AND

BRIAN WAYNE FREEMAN 1ST DEFENDANT

FREEMAN SAFARIS LIMITED 2ND DEFENDANT

MARA PHOTOGRAPHIC SAFARIS 3RD DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion application dated 17th October, 2023 filed by the plaintiff/applicant. The application is expressed to be brought under Sections 1A,1B and 3A of the *Civil Procedure Act*, Sections 3,13, 7(1) of the Environment & Land Court Act and Order 40 Rule (1) of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. Pending hearing and determination of the underlying suit an order of injunction be and is hereby issued restraining the defendants/respondents whether by themselves or any person, their agents, employees from subleasing, operating business, selling the tourist camp, alienating or in any way interfering with the 30 acres property comprised in CisMara/Koyaki Darugurugurueti/940.
 3. Spent
 4. An order to compel the defendants/respondents herein to pay Kenya Shillings One Hundred and Ninety-Nine Million Three Hundred and Twenty-Six (KSHS 193,000,000) being the amount owed to the plaintiff/applicant for 21 years they have utilized the property since the year 2002 to date.



5. An order of eviction be and is hereby issued against the defendants/respondents for failure and refusal to pay monies due to the plaintiff/applicant.
 6. An order of permanent injunction do issue restraining the defendants/respondents whether by themselves, their agents, employees, or otherwise howsoever or any other person from carrying on business and use of the property comprised in CisMara/ Koyaki Darugururueti/ 940.
 7. The County Police Commander Narok County do supervise the compliance with the order pursuant to prayers 2,3,5 and 6 above.
 8. This honourable court be pleased to make any further orders it deems mete and just in the circumstances.
 9. The costs of the application be provided for.
2. The application is premised on the grounds inter alia that the oral lease is a binding and enforceable contract, due to the defendants/respondents continued occupation of the plaintiff/applicant's property. Also, that the efforts by the plaintiff/applicant to reduce the lease into writing have been thwarted by the defendants/respondents despite setting up a world class camp in the suit property.
 3. The application was supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that he is the registered owner of the suit property and that upon reaching consensus with the 1st defendant/ respondent, the defendants/respondents moved into the suit property and set up a camp with a promise that they would execute a written agreement which has never been done to date.
 4. The plaintiff/applicant further deposed that he offered to lease 30 acres from the suit property at an annual rental consideration of KShs. 360,000/- with the sum now due at Kshs. 7,560,000/-.
 5. Further, that this amount was to be reviewed annually and that it was a further term of their oral lease that the defendants/respondents would pay a booking fee of Kshs. 1,500,000/- with the sum due now at Kshs. 33,000,000/- for 21 years.
 6. The plaintiff/ applicant deposed that the defendants/ respondents have been operating business and transacting rendering him completely poor for not honouring their part of the bargain. Also, that he has been denied access of records of booking fees and bed night fees per client for computation purposes.
 7. As such, the plaintiff/defendant deposed that it was his legitimate expectation that having fully complied with his part of the bargain, he would receive due consideration. Further, that the defendants/respondents are hell bent on depriving him of his lawfully acquired property and now desire to evict him from his property.
 8. The application was opposed vide the replying affidavit of the 1st defendant/respondent sworn on 10th November, 2023. The 1st defendant/respondent deposed that there never existed any lease agreement between them whether oral or written.
 9. Further, that in the year 2002, they agreed on a mutual understanding where he would develop the suit property and later on upon death or owing to his incapability to operate the establishment, all developments thereon would vest on the plaintiff/applicant.
 10. He deposed that the plaintiff/applicant helped him acquire a 24-year lease up to the year 2040 over land reference no. 27668. That owing to the covid-19 pandemic, the 1st defendant/respondent was



inclined to close shop and surrendered the lease term to a new tenant and as such, did not operate a tourist camp on the plaintiff's/applicant's land but a separate one.

11. Further, that for 21 years, he has heavily invested on the suit property by virtue of the investment and a constructive trust created. He deposed that if it were to be construed that there was a lease agreement, the parties would be bound by the terms of the draft un-executed lease agreement dated 1st November, 2023, which runs for a period of 30 years.
12. That if bound by the said lease, the same would be a controlled tenancy, and any notices or actions ought to be complied with the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301. He deposed that the plaintiff/applicant has not met the conditions as per the case of Giella versus Cassman. Further, that the balance of convenience has not tilted in granting the injunctive orders sought, but tilts in maintaining the status quo.
13. The 1st defendant/respondent deposed that the 30 acres where the tourist camp is situated, is used for commercial purposes, where the locals source their livelihood. Further, that they are willing to paying \$75 as bed night fees and Kshs. 60,000/- as booking fees pending the hearing and determination of the suit and shall as well be transparent in sharing a list of clients that shall book with the tourist camp during the pendency of the suit. Also, that any loss incurred by the defendants/respondents for maintaining status quo would be compensated by way of damages.
14. In conclusion, the 1st defendant deposed that unless status quo is maintained, there is likely to be a breach of peace that may lead to loss of property.
15. The plaintiff/applicant filed a further affidavit in response thereto sworn on 30th November, 2023. The plaintiff/applicant deposed that he has established a cause of action as against the 2nd and 3rd defendants/respondents through whom the 1st defendant/respondent is operating. He deposed that when he approached the 1st defendant/respondent who had failed to pay rent, the 1st defendant/respondent drafted an agreement dated 1st November, 2010 whose terms he was not agreeable to.
16. Further, that there were negotiations which collapsed since the defendants/respondents were not willing to clear the arrears due as from the year 2001. According to him, there was a mutual understanding where the defendants/respondents would settle in his parcel of land for a defined period of time as they sought for an alternative parcel within the Maasai Mara region to operate the tourist camp.
17. The plaintiff/applicant further deposed that their relationship would never have created any form of joint tenancy of a constructive trust since the latter is a creation of law. As such, there has never been any lease agreement between him and the defendants/respondents and no certificate of lease has ever been issued in respect of the suit property. With regard to the 2nd and 3rd defendants/respondents, the plaintiff/applicant deposed that the 1st defendant/respondent in his attempt to defeat justice registered the companies to validate his continued occupation of his 30 acres of the suit property.
18. He deposed that there was contradiction where the 1st defendant/respondent denies operating a tourist camp on the suit property and admitting to have made heavy investments on the suit property for 21 years. Further, that the valuation report is overvalued and is manifest that the 1st defendant/respondent benefits to the detriment of the plaintiff/applicant. Also, that it would not be possible for the defendants/respondents to enter, take possession and establish a tourist camp if no oral agreement existed.
19. The plaintiff/respondent deposed that parties cannot be bound by the lease agreement dated 1st November, 2010 as it was not attested or executed by the parties. Further, that negotiations broke down



when he found that the terms of the agreement were exploitative and biased towards him and despite being prevailed upon by the local administration, the defendants/respondents continue to deprive him of his rights to benefit from his property.

20. The plaintiff/applicant deposed that in as much as the defendants/respondents are willing to compensate him, the 1st defendant/respondent has not shown any willingness whatsoever and that he is a flight risk with no property in his personal name.
21. On 2nd January, 2024, the 1st defendant/respondent filed a supplementary affidavit in response thereto which was sworn on 18th December, 2023. While reiterating the averments contained in his replying affidavit, the 1st defendant/respondent deposed that having been on the suit property for 21 years on an agreement that the plaintiff/applicant shall be the heir of all his investments, a constructive trust on the suit land has been created and he has therefore acquired proprietary rights over the same.
22. On 2nd February, the plaintiff/applicant filed his written submissions dated 27th January, 2024. The plaintiff/applicant identified four issues for determination as listed below: -
 - a. Whether the plaintiff/applicant has a prima facie case against the defendants/respondents.
 - b. Whether the plaintiff/applicant would suffer irreparable loss.
 - c. Whether the defendants/respondents have a right and/or claim over the suit property by dint of constructive trust.
 - d. Whether circumstances exist to warrant a temporary injunction.
23. On 14th February, 2024, the defendants/respondents filed their written submissions dated 12th February, 2024.
24. I have read the application, affidavit in support of the application, the replies thereof, the documents annexed and the rival submissions filed by both parties as well as the authorities cited.
25. The issue for determination is whether the plaintiff/applicant has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.
26. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple 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), ally any doubts as to (b), by showing that the balance of convenience is in his favour.

These are the three pillars on which rest 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.”
27. From the above, the plaintiff/applicant ought to, first, establish a prima facie case. The plaintiff/applicant submitted that they have established a prima facie case and relied on the judicial decision of



Mrao Ltd versus First American Bank of Kenya Ltd [2003] eKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

28. In support of his application, the plaintiff/applicant has attached a copy of the title deed to the suit property. A copy of a certificate of official search dated 13th September, 2023 is also annexed.
29. Secondly, the plaintiff/applicant has to demonstrate that irreparable injury will be occasioned to him if an order of temporary injunction is not granted. In the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR, the court stated;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

30. The plaintiff/applicant deposed that for more than 21 years, he has not been paid the consideration as they had agreed with the 1st defendant/respondent. Also, that the 1st defendant/respondent who is operating business through the 2nd and 3rd defendants/respondents continues to transact business to his detriment. On the other hand, the 1st defendant/ respondent contended that the agreement was that he would be the heir of his business upon his demise. Also, that owing to the nature of their relationship, a constructive trust had been created. From his affidavit, the 1st defendant/ respondent was quick to propose an amount of the bed night fees as well as booking fees so as to balance the scales of justice. My analysis of this averment as contained in paragraph 13 (e) of his replying affidavit shows that there may have existed some form of agreement between him and the plaintiff/applicant.
31. In my analysis, there existed some sort of agreement whose form has been largely disputed. However, this does not negate the fact that both parties were to benefit in one way or the other. What is clear is that the plaintiff/applicant seems not to have benefited since then. On this, there is sufficient demonstration of irreparable loss being occasioned to the plaintiff/applicant.
32. Thirdly, the plaintiff/applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR defined the concept of balance of convenience as: -

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.”



33. In the case of Paul Gitonga Wanjau versus Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR, the court dealing with the issue of balance of convenience expressed itself thus: -

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

34. In Amir Suleiman versus Amboseli Resort Limited [2004] eKLR the learned judge gave further elaboration on what is meant by “balance of convenience” and stated: -

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

35. Having said the above, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them. I say so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history of events leading to the filing of the suit. Also, majority of the issues raised by the parties herein would require hearing through trial to comfortably perceive the said issues.

36. In view of the foregoing, I find that the plaintiff/applicant has met the criteria for grant of the orders of temporary injunction. The notice of motion dated 17th October, 2023 is hereby allowed in terms of the following prayer: -

1. An order of temporary injunction is hereby issued restraining the defendants/respondents whether by themselves or any other person, their agents, and/or their employees from subleasing, selling the tourist camp or alienating in any way with the 30 acres property comprised in CisMara/ Koyaki Darugurugurueti/ 940.
2. Costs to be in the cause.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 22ND DAY OF FEBRUARY, 2024.

HON. MBOGO C.G.

JUDGE

22/02/2024.

In the presence of: -

Mr. Abdirahman Ali – C/A

and in the presence of: -

The counsel for the Plaintiff/applicant



The counsel for the defendants/respondents

