



Prior v Consolidated Water Limited (Environment & Land Case E001 of 2023) [2024] KEELC 1008 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1008 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E001 OF 2023**

JG KEMEI, J

FEBRUARY 22, 2024

BETWEEN

NEENA PRIOR PLAINTIFF

AND

CONSOLIDATED WATER LIMITED DEFENDANT

RULING

1. The Plaintiff/Applicant filed the instant motion against the Defendant/Respondent seeking Orders That;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Pending inter partes hearing and determination of this Application, this Honorable Court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, or through its servants, agents, employees, assigns or anybody claiming under it, pursuant to its instructions or any other person or whatsoever from entering, encroaching, trespassing, remaining on, using, damaging, wasting away and/or in any way dealing or interfering in any manner with the Plaintiff's peaceful, quiet possession, enjoyment and use of the property known as LR No. 158/71 (original number 158/13/1) situate in Tigoni, Limuru, Kiambu County for the purpose of harnessing or exploiting any natural resource or for any reason whatsoever.
 - e. Pending hearing and determination of the suit filed herewith, this Honorable Court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, or through its servants, agents, employees, assigns or anybody claiming under it, pursuant to



its instructions or any other person or whatsoever from entering, encroaching, trespassing, remaining on, using, damaging, wasting away and/or in any way dealing or interfering in any manner with the Plaintiff's peaceful, quiet possession, enjoyment and use of the property known as LR No. 158/71 (original number 158/13/1) situate in Tigoni, Limuru, Kiambu County for the purpose of harnessing or exploiting any natural resource or for any reason whatsoever.

- f. The costs of this application be provided for.
2. The Application is based on the grounds on the face of it that the Applicant is the registered owner of LR No. 158/71 (original number 158/13/1) (hereinafter the suit land) and entitled to full enjoyment and quiet possession of the suit land. That the Respondent through its agents/employees has been trespassing on the suit land without any color of right causing the Applicant loss as particularized under para. E hence the Application.
 3. Neena Prior, the Applicant swore her Supporting Affidavit on 3/8/2023. She reiterated the grounds of the motion set out above and annexed NP1 - copy of the Conveyance and therefore entitled to enjoy peaceful and quiet enjoyment of the suit land dated 10/7/2006. Further she annexed NP2 – copy of a letter from the Respondent's Lawyers.
 4. The Respondent's director John Wheeler swore his Replying Affidavit on 25/9/2023. He averred that the suit parcel LR No. 158/71 is a resultant sub-division of LR 158/13 which was owned by Consolidated Estates Ltd besides 9 other portions of land. That the original proprietor retained one portion LR 158/13 while the other 8 portions LR 158/34-41 were issued to individual members – who later became shareholders in Consolidated Water Limited, a company incorporated by the proprietor of LR 158/13/1. Copies of the CR12 and a letter dated 25/2/1981 were annexed as JW 1 a & b. That on parcel LR 158/13 a borehole was established and financed by the Respondent's shareholders with a storage tank and pressure to which the Respondent and adjacent parcels LR 158/34-41 have had a right of way.
 5. It was further averred that at all material times the Respondent has been managing the operations of the water system on behalf of its shareholders who include the Applicant. That the shareholders in turn pay monthly water bills to the Respondent. That regarding the Applicant, she purchased LR 158/71 in 2006 from Jach Limited, the previous owner – see JW3 letter from Jach Ltd on change of ownership. That the Applicant paid the water bills until sometime later when she reneged on that obligation demanding payment for use of the suit land – see copies of cheques and demand letter from Applicant annexed as JW2a&b. That the water system has been in place for over 40 years benefitting the Respondent's shareholders including the Applicant and allowing the application will amount to a denial of the shareholders' right to their livelihoods.
 6. In rebuttal, the Applicant filed her Supplementary Affidavit sworn on 6/11/2023. She avowed that the Respondent was incorporated with the main object to acquire LR No. 158/42, drill a borehole therein and distribute the water to plot numbers LR 158/13, 158/28, 158/34, 158/35, 158/36, 158/37, 158/38, 158/39/ 158/40 and 158/41. That the suit land was a subdivision of LR 158/13 and any claim to obtain water from the suit land which is not LR No. 158/42 is ultra vires its objects. That the Respondent has no easement over the suit land as claimed and her title is not encumbered by any easement known in law.
 7. On 31/10/2023 directions were taken to canvass the Application by way of written submissions.



8. The firm of Arwa & Change Advocates LLP filed submissions dated 6/11/2023 on behalf of the Applicant while the firm of Kiarie Joshua & Co. Advocates filed the Respondent's submissions dated 1/11/2023.
9. The Applicant drew two issues for determination; whether the Applicant has met the threshold for grant of the prayers sought and whether the Respondent has any right of easement over the suit land.
10. It was submitted that the Applicant has met the criteria set out in the celebrated case of *Giella v Cassman Brown and Co Ltd* [1973] EA 358 for grant of temporary injunction. That by virtue of her proven ownership under Section 26 *Land Registration Act* she is entitled to enjoy her rights to privacy and quiet enjoyment of the suit land. That the Respondent is acting ultra vires in light of its memo and articles of association to drill water on LR 158/42. Further that the Respondent does not own any property in the neighborhood to be regarded as a dominant tenement for existence of an easement.
11. On the other hand, the Respondent argued that the Applicant has not shown which right if at all, has been infringed. That for the Application to succeed, the Applicant must prove that they will suffer irreparable injury which cannot be compensated by an award of damages. That the Applicant has been in occupation of the suit land fully aware of the Respondent's activities and indeed paid water bills to it for the last 17 years without any complaint. The Court was urged to dismiss the Application.
12. The main issue for determination is whether the Application is merited.
13. The legal provision for temporary injunction is anchored in Order 40 Rule 1 *Civil Procedure Rules* that;
 - “ 1. Cases in which temporary injunction may be granted [Order 40, rule 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 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.”
14. It is trite that the granting of injunctive reliefs is a discretionary exercise predicated upon proof of three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience. See the celebrated cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR.



15. The starting point is to establish whether the Applicant has demonstrated a prima facie case to grant the orders sought. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123, defined a prima facie case as:
- “ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
16. In Nguruman case (*supra*) the Court of Appeal went on to further state that in considering whether or not a *prima facie* case has been established, the Court does not hold a mini trial 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. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant’s case is more likely than not to ultimately succeed.
17. The Applicant avers that she is the registered proprietor of the suit land as shown by NP1 – copy of conveyance dated 10/7/2006. The Applicant accuses the Respondent of inter alia exploiting the natural resources on the suit property in violation of her peaceful and quiet enjoyment of the property; committing nuisance and trespass. She vehemently denies any existence of any easement over the suit land and puts the Respondent to strict proof.
18. The Respondent does not dispute the Applicant’s ownership of the suit land but elaborated that the suit land is a result of subdivision of LR 158/13 which it owned and has always carried out water drilling services thereon as far back as 25/2/1981 according to JW1b. Further that upon acquiring the suit land in 2006, the Applicant duly paid for her water bills until she reneged on that obligation and started demanding payment for use of her land. Indeed, copies of cheques drawn by the Applicant in favor of the Respondent bear witness to the payments advanced as far back as 10/8/2018. It is therefore not in doubt that the Applicant acquired the suit land well aware of the borehole thereon and the Respondent’s services in that respect.
19. The Applicant annexed NP1 – copy of her conveyance of the suit land in her favor with Jach Limited dated 10/7/2006. Paras A and B of the Conveyance inter alia in part;
- ‘.... the Land was conveyed to the Vendor TO HOLD for an estate in fee simple SUBJECT TO the provisions of the Government Lands Act 1902 and to the Rules for the time being in force thereunder and SUBJECT ALSO to the covenants conditions and restrictions contained in the Indenture of Conveyance dated the First day of March One Thousand Nine Hundred and Fifty-Six....’
20. On the face of it, it emerges that the suit land was sold to the Applicant subject to conditions contained in another Indenture of 1/3/1956 which unfortunately is not before this Court. The Respondent averred that there was a borehole over the suit land which the Respondent and adjacent land parcels LR 158/34-41 have had a right of way. That the Respondent has been managing the borehole operations on behalf of its shareholder who include the Applicant and the shareholders pay monthly water bills as evidenced by copies of cheques issued by the Applicant –see annexure JW2 (a & b) dating back to 2018,2019 and 2021. The Applicant contend that there is no easement over the suit land to warrant the Respondent’s activities and decried violation of her and her predecessor’s rights based on NP2 – copy of email dated 18/7/2023 and shareholders’ meeting of 29/1/2022.



21. The Applicant's objections against the Respondent's activities were launched later in the day in light of proof of her payment of the water bills establish that she has acquiesced to the Respondent's activities over the suit land. Further the issue of whether or not there exists an easement over the suit land, is matter that would call for hearing and analysis of evidence and therefore cannot be determined at this stage.
22. Based on the evidence before Court and applying the standard of a prima face case in the case of *Nguruman (supra)*, the Court is of the view that the Applicant has not established a *prima facie* case in support of the prayer sought in the instant motion.
23. However, considering the nature of the Applicant's claim and Respondent's activities on the suit land, the Court invokes the proviso of Order 40 *Civil Procedure Rules* which empowers this Court to make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as appropriate.
24. The Court of Appeal in the case *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR defined status quo as follows:

“Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the Court order.”
25. The purpose and aim of granting status quo orders has been a subject of numerous Court decisions. In the case of *Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another* [2020] eKLR, the purpose of a status quo order was explained as follows:

“... By maintaining the status quo, the Court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”
26. Odunga J (as he then was) stated as follows in *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR;

“When a Court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs ... Status quo must therefore be interpreted with respect to existing factual scenario ...”
27. Similarly, the Court of Appeal in *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR stated that an order for status quo maybe granted as a measure of interim protection. Addressing the centrality of loss to both parties in an appeal (in this case a suit), the Learned Judges added that a Court must strive to prevent loss by preserving the *status quo* because any loss may render the appeal nugatory.
28. In the end, the commendable order at this stage is to maintain *status quo* – to mean that the water system remains operational without physical interference of the Applicant's quiet use and enjoyment of the suit land.



29. Each party to meet the cost of the Application.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Anyango HB Arwa for Plaintiff/Applicant

Musyoka for Defendant/Respondent

Court Assistants – Phyllis/Oliver

