



**Giir v Aboug (Environment & Land Case E225 of 2023)
[2024] KEELC 869 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 869 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E225 OF 2023
OA ANGOTE, J
FEBRUARY 15, 2024**

BETWEEN

SIDONIA AREK EDWARD MOU GIIR PLAINTIFF

AND

ALBINO MATHOM ABOUG DEFENDANT

RULING

1. There are two applications for this court’s determination. The first application is dated 13th June 2023 and filed by the Plaintiff, who seeks the following orders:
 - a. That this Honourable Court be pleased to issue an order of temporary injunction to restrain the Respondent by himself or through any of his servants and/or agents from illegally trespassing, occupying, developing, leasing or in any way interfering with the suit land pending the hearing and determination of the main suit.
 - b. That the Respondent is hereby ordered to vacate Land Reference number 214/382 (Original Number 214/64/5).
 - c. That the Officer Commanding Muthaiga Police Station do supervise compliance with this Honourable Court’s orders.
 - d. That the Honourable Court be pleased to give any further Orders and directions as it may deem fit and just to grant.
 - e. That the cost of this application be provided for.
2. The grounds of the application are that the Plaintiff is the absolute proprietor of Land Reference No. 214/382 (Original Number 216/64/5) situated in Muthaiga within Nairobi County (the suit property) and that in the year 2011, her husband entered into an oral loan agreement with the



- Respondent for a sum of three hundred thousand US Dollars (300,000 USD), which was paid to the applicant's husband by the Defendant.
3. It was deposed by the Plaintiff that her husband surrendered the title to the Defendant as collateral, to secure the loan and that at no point was a loan agreement executed between her husband and the Defendant.
 4. The deponent averred that in 2013, her husband repaid the loan with an interest of fifty thousand US Dollars (50,000 USD) to the Defendant through his advocates, Gikera & Vadgama Advocates. However, it was deposed by the Plaintiff, despite her husband making full repayment of the loan, the Defendant unlawfully retained her title document to the suit property and that she came to learn that the Defendant was in the process of fraudulently converting the said conveyance to be his to her detriment.
 5. According to the Plaintiff, the Defendant fabricated a purported loan agreement dated 23rd August 2011, altering the loan amount to the value of USD 2,500,000 and that the Defendant proceeded to present before the Magistrate Court an alleged consent judgement dated 17.07.2013 in Civil Case No. 4018 of 2013 purportedly executed between her husband and himself.
 6. It was deposed that the Defendant subsequently filed eviction proceedings in Civil Suit No. 4018 of 2013, and an eviction order dated 23rd September, 2013 was issued, granting the Defendant vacant possession of the property; that the eviction orders were issued despite the fact that the court lacked pecuniary jurisdiction, and that no legal eviction notice to vacate was ever served upon her or her husband. She avers that the eviction proceedings and orders were based on misconception and misconstruction of facts of ownership, and the same were null and void.
 7. The Plaintiff further deposed that subsequent to the eviction orders, the Defendant trespassed and continues to trespass on the said property from 2013 to date without legal justification, to her detriment and that she faces an imminent threat of being stripped of her proprietary rights over the said property.
 8. The Defendant filed Grounds of Opposition dated 3rd July 2023, in which he averred that this court lacks jurisdiction to hear this application and the suit and that the Plaintiff's suit is barred by statute under the provisions of Section 107 of the [Land Registration Act](#) and Section 162 of the [Land Act](#), the [Limitation of Actions Act](#) and Section 3 of the [Law of Contract Act](#).
 9. The Defendant asserted that as the Plaintiff is an admitted guarantor under a loan agreement, she is estopped from denying the terms of the loan agreement entered into between himself and the borrower in the absence of a denial by the borrower of the said loan agreement.
 10. The Defendant's claim is that the Plaintiff's land rights in the suit property were validly transferred to him and extinguished upon registration of the conveyance under the provisions of Section 99 of the [Government Lands Act](#) and that the suit does not disclose a prima facie case with a probability of success against him.
 11. The Defendant further filed a Replying Affidavit in which he deposed that the Plaintiff's husband, Garang Deng Aguer, sought from him a loan of USD 2,150,000; that they agreed that Mr. Aguer's house, which was registered in his wife's name, would be held by the Defendant as security for the loan; that they agreed that the Defendant would instruct his lawyers to draw up the necessary documents and that he would in the meantime release the loan amount, as he needed the money urgently.
 12. The Defendant deposed that on 23rd August 2011, he met the Plaintiff and her husband in his Advocates' offices and duly signed a loan agreement and that after the said agreement was signed and



delivered to the Defendant, Mr. Aguer requested him to release the additional loan balance in the sum of USD 350,000 which he did.

13. The Defendant stated that the Plaintiff's husband defaulted in the repayment of the said USD 2,150,000 and he exercised his legal right in the agreement and lodged the conveyance for registration at the lands office in December 2011 and that upon registration of the said conveyance, the Plaintiff's land rights in the suit property were transferred to him and extinguished.
14. The Defendant further averred that he obtained a court order for eviction of the borrower in Civil Suit No. 4018 of 2013; that he also demanded the borrower to pay the additional loan of USD 350,000; that he has been in exclusive possession of the suit property and that he has also applied for and been granted a development permit by the Nairobi County to carry out renovations of the suit property.
15. The Defendant stated that it has been twelve years since the land was registered in his name and ten years since he acquired the property pursuant to an eviction order and that the borrower never disputed or challenged his contractual right under the agreement or the exercise of his contractual rights in 2011.
16. The second application dated 4th July 2023, was filed by the Defendant, who seeks the following reliefs:
 - a. That the case be dismissed.
 - b. That the Defendant be awarded costs of the suit and of this application on full indemnity basis.
17. The grounds of the application are that this Honourable Court lacks jurisdiction to hear the suit; that the Plaintiff's suit herein against the Defendant is barred by statute under the provisions of Section 136 of the repealed *Government Lands Act* as saved under Section 107 of the *Land Registration Act* and Section 162 of the *Land Act* and that the Plaintiff's suit against the Defendant herein is barred by statute under the provisions of the *Limitation of Actions Act* and Section 3 of the *Law of Contract*.
18. In her Replying Affidavit, the Plaintiff deponed that she was unlawfully evicted from the suit property in 2013 and the Defendant unlawfully took possession of the same and that the Respondent's reliance on Section 136(1) of the *Government Lands Act*, Section 107 of the *Land Registration Act* and Section 162 of the *Land Act* are retrospective and cannot hold in the circumstances of this suit.
19. It was deponed that the alleged transfer in an Indenture of Conveyance from the Plaintiff to the Defendant was marred by fraud, illegalities and duress; that she only permitted her property to be used as collateral to guarantee repayment of the loan of three hundred thousand dollars and nothing more and that the purported loan agreement was an afterthought and the 2,150,000 USD purportedly paid to her husband is misleading and was not governed by the purported agreement.
20. The Plaintiff deponed that the title to the suit property has never been extinguished; that the purported search produced by the Defendant is for 2016, which does not reflect the actual state of affairs on the ground and that she has produced the most recent search illustrating that the property is fully hers. Both parties filed written submissions and authorities which I have considered.

Analysis and Determination

21. The issues for determination by this court are:
 - a. Whether this court should grant an order of temporary injunction against the Defendant.
 - b. Whether this suit is statute barred
 - c. The reliefs this court should issue.



22. By way of a brief background, this suit was instituted through a Plaint, in which the Plaintiff has sought for a declaration that she is the lawful and registered proprietor of the suit property; an order of eviction of the Defendant from the suit property and orders of permanent injunction mesne profits and general damages for trespass.
23. The Plaintiff has also sought for a mandatory injunction against the Defendant to remove and demolish all the dwelling structures on the suit property, and to discharge the charge registered over the Plaintiff's property in favour of Mwananchi Credit Limited.
24. In the current application, the Plaintiff has sought that an order of temporary injunction be issued against the Defendant to restrain him from illegally trespassing, occupying, developing, leasing or in any way interfering with the suit land pending the hearing and determination of the main suit.
25. The law on grant of interlocutory injunctions is prescribed under Order 40, Rule 1 of the [Civil Procedure Rules, 2010](#) as follows:

“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 if 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.”

26. As set out in the locus classicus case of *Giella vs Cassman Brown* (1973) EA 358 and by the Court of Appeal in [Nguruman Limited vs Jan Bonde Nielsen & 2 Others](#) [2014] eKLR, an applicant seeking an interlocutory injunction must satisfy the court on the following three requirements, that:
 - a. They have a prima facie case with a probability of success;
 - b. They will otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and
 - c. If the court is in doubt, it will decide an application on the balance of convenience.
27. The first requirement is for the Plaintiff to satisfy this court that she has a prima face case. A prima facie case was defined in [Mrao Ltd vs First American Bank of Kenya and 2 Others](#), (2003) KLR 125 as follows:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

28. In this case, the Plaintiff's case is that the Defendant is in unlawful possession of the suit property; that an oral loan agreement for 300,000 USD subsisted between the Defendant and her husband and that



the Defendant fabricated a purported loan agreement altering the loan amount from 300,000 USD to USD 2,500,000.

29. According to the Plaintiff, the Defendant proceeded to present before the Magistrate Court in Civil Case No. 4018 of 2013 an alleged consent judgement dated 17.07.2013 purportedly executed between her husband and the Defendant; and that the Defendant subsequently obtained an eviction order dated 23.09.2013, granting him vacant possession of the property.
30. The Plaintiff annexed on her Supporting Affidavit a copy of the conveyance from Jaribu Motors to herself in 2008; a copy of a search certificate indicating that she is the registered owner of the suit dated 28th February 2023; rulings dated 14th February 2020 and 12th March 2021 in High Court Civil Case No. 544 of 2013 which was an interpleader case; a consent entered in Civil Case No. 544 of 2013 between the Defendant's then Advocates Gikera & Vadgama Advocates, the Plaintiff and the Defendant ; and an order of temporary injunction against the Plaintiff's husband issued in Civil Case No. 4018 of 2013 on 15th July 2013.
31. It is apparent that the eviction orders that disposed the Plaintiff of the suit property, and the conveyance which transferred the suit property to the Defendant's name was premised on the validity of the loan agreement.
32. The conveyance, and the Indenture dated 29th November, 2011 seems to have transferred the suit property to the Defendant. According to the 2016 search annexed on the Replying Affidavit, the suit is registered in the name of the Defendant. However, the Plaintiff has annexed a search certificate for 2023, which seems to indicate that she is the registered property owner. The issue of who is the registered owner can therefore only be determined at trial.
33. It would appear that on the basis of the evidence showing that the Defendant became the registered proprietor of the suit property on 23rd December, 2011, the Defendant moved the lower court in Milimani CMCC No. 4018 of 2013 and had the Plaintiff evicted from the suit premises. That order has never been set aside or vacated despite the argument by the Plaintiff that the lower court did not have jurisdiction to deal with the same.
34. To the extent that the Defendant has an Indenture and a search showing that he is the registered proprietor of the suit property, and the Defendant having taken possession of the house pursuant to a court order which has not been set aside, it is the finding of this court that the Plaintiff has not established a prima facie case with chances of success.
35. Further, the Plaintiff was required to establish that if the orders of temporary injunction are not granted, she will suffer irreparable loss that cannot be compensated by way of damages.
36. Irreparable injury is defined in *Halsbury's Laws of England*, Third Edition, Volume 21, paragraph 739, page 352 as follows:

“It is the very first principle of injunction law that prima facie the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of



compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.”

37. In these circumstances, the Defendant has been in possession of the suit property for more than ten years, since 2013. The Defendant has also disclosed that they have obtained a development permit from the Nairobi County Government to undertake renovations of the suit property. To the extent that it is the Defendant who has been in possession of the suit property since 2013, it is the finding of this court that the Plaintiff has not shown the irreparable injury that she will suffer that cannot be compensated by way of damages.
38. In any event, should this court grant the order of injunction sought by the Defendant, this will result in his eviction from the suit property pending the final determination of this court. Eviction of the Defendant at this stage will therefore cause a greater inconvenience to him, should the suit be decided in his favor.
39. Considering that the Plaintiff is no longer in possession of the suit property, the balance of convenience does not lie in her favor. The Plaintiff’s application is therefore for dismissal.
40. The issue of whether this suit is time barred pursuant to the provisions of Section 136 of the Government Lands Act can only be dealt with at the hearing of the suit. It is the trial court which will determine, on the basis of the evidence before it, when the cause of action herein arose.
41. At this point, it is not clear who the registered owner of the suit property is. The Defendant has presented a search certificate of 2016 which indicates that he is the registered owner while the Plaintiff has annexed a search certificate from 2023, which seems to indicate that she is the registered property owner. The issue of who is the registered owner of the land can only be fully considered after trial.
42. That being the case, it is the finding of this court that the Plaintiff’s suit cannot be dismissed at this stage for being statute barred as argued by the Defendant. The Defendant’s application is therefore found to be unmeritorious.
43. For those reasons, the Defendant’s application dated 4th July 2023 and the Plaintiff’s application dated 13th June, 2023 are dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Korir for Plaintiff

Mr. Otieno for Oyatsi for Defendant

Court Assistant - Tracy

