



Oduor & another v Sibbo Water and Sanitation Company Limited (Environment & Land Case e001 of 2024) [2024] KEELC 1424 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E001 OF 2024
AY KOROSS, J
MARCH 14, 2024**

BETWEEN

GEORGE OTIENO ODUOR 1ST PLAINTIFF

GLOBAL COMMUNICATIONS INSTITUTE (GLOBCOM) 2ND PLAINTIFF

AND

SIBBO WATER AND SANITATION COMPANY LIMITED DEFENDANT

RULING

1. This ruling seeks to determine the notice of motion dated 1/02/2024 that is filed by the plaintiffs and they pray for several reliefs some of which are spent and the substantive prayers for determination are: -
 - a. That pending hearing and determination of this suit, the hon. court be pleased to issue a temporary injunction restraining the defendant and/or its employees, servants, agents, licensees, representatives and/or any other person acting under its authority or claiming under it from flooding, directing, dumping and/or disposing waste water into land parcel no. Central Alego/Hono/3550 and/or from encroaching or in any way trespassing onto or interfering with the plaintiff's use and/or quiet possession of the said property.
 - b. Costs of the motion be borne by the defendant.
2. The motion is supported by grounds set out on the body thereof and on the affidavit of the 1st plaintiff George Otieno Oduor which he deposed on 1/02/2024.
3. In summary, it is his position he is the registered proprietor of land parcel no. Central/Alego/Hono/3550 (suit property) whereas the 2nd plaintiff is his tenant and has ostensibly given him authority to swear the affidavit.
4. The plaintiff contends on several occasions and in particular from 25/10/2023, the defendant through its employees or agents deliberately and recklessly dumped waste water onto the suit property



thus causing havoc including exposing them to health hazards, disruptions and the suit property's diminution value would be affected.

5. According to the 1st plaintiff, their call for cease and desist has not heeded any response from the defendant hence he has sought protection from this court.
6. Despite evidence of service, the defendant did not file any response to the motion thus deeming the motion unopposed. As directed by the court, the motion is canvassed by way of written submissions. The plaintiff's counsel on record Otieno & Amisi Advocates filed written submissions dated 7/02/2024. However, the defendant did not file any.
7. In their submissions, counsel identifies a single issue for determination; whether the plaintiffs have met the threshold to warrant the grant of an injunction.
8. Counsel places reliance on the well cited case of *Giella v Cassman Brown & another* [1973] EA 358 which settled the principles that guide courts in exercising discretion on whether to grant an injunction and they are inter alia, an applicant must; (a) establish a *prima facie* case with probability of success, (b) show he stands to suffer irreparable harm which cannot be adequately compensated by an award of damages and, (c) if the court is still in doubt, it can decide it on a balance of convenience. Counsel submits the plaintiffs have met the criteria.
9. On the 1st principle of existence of a *prima facie* case, counsel submits a preliminary review of the evidence placed before court which includes a copy of title over the suit property, photographs and correspondence demonstrate the plaintiffs have a *prima facie* case. To buttress his argument, counsel places reliance on *Mrao v First American Bank of Kenya* (2003) eKLR.
10. On the 2nd limb of the principle and in asserting the plaintiffs will suffer irreparable loss, counsel relies on several authorities including the Court of Appeal decision of *Said Ahmed v. Mannaseh Benga and Another* (2019) eKLR which stated: -

“...where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of *Aikman v Muchoki* [1984] KLR 353.’ See the case of *Joseph Mbugua Gichanga v Co-operative of Kenya Ltd* [2005] eKLR per Maraga, J.”
11. On the last limb, counsel argues the balance of convenience shifts in the plaintiffs favour as the defendant's acts are unlawful and expose the occupants of the suit property to health risks.
12. I have carefully considered the motion, its grounds, affidavit in support and plaintiffs' submissions and the issues falling for determination are;
 - (i) whether the motion is merited and
 - (ii) what orders should this court issue including an order as to costs. I will sequentially analyse the legal and jurisprudential frameworks on these issues.
13. On the 1st issue, my invitation to intervene has been moved by Section 63 (e) of the *Civil Procedure Act* and this provision of law including Subsection (c) thereof states as follows: -

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed

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- (a)
- (b)
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
- (d)
- (e) make such other interlocutory orders as may appear to the court to be just and convenient.”

14. Order 40 Rule 1 of the Civil Procedure Rules gives effect to this provision of law and empowers this court to grant an injunctive relief by stating 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 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.”

- 15. Interlocutory injunctions are meant to preserve the substratum of the suit pending its hearing and determination and are not meant to occasion prejudice to any party.
- 16. The decision of Mrao Limited (*Supra*) reminds this court that its power in an application for interlocutory injunction is discretionary. Such discretion is judicial and as is always the case, judicial discretion has to be exercised on the basis of law and evidence.
- 17. The principles that guide this court in determining whether a temporary injunction ought to be issued are settled in the celebrated cases of Giella v. Cassman Brown (*Supra*).
- 18. Having addressed the law. I will now turn to the facts of this case and establish whether the plaintiffs have met the 3 pillars of injunctions which they have to meet separately, distinctively, logically and have to surmount them sequentially. See Court of Appeal decision of Nguruman Limited v. Jan Blonde Nielsen & 2 others [2014] eKLR.
- 19. On the 1st pillar of prima facie case, this court has to satisfy itself that an applicant and in this case the plaintiffs, have a certain right which has ostensibly been or in the process of being contravened by the defendant. See Nguruman Limited (*Supra*) and Mrao (*Supra*).
- 20. Now, being alive that I must not conduct a minitrial, from documents availed before this court, the 1st plaintiff is allegedly the registered owner of the suit property, he has an alleged subsisting tenancy agreement with the 2nd plaintiff as a landlord, photographs show pools of standing water around some structures ostensibly existing on the suit property and on this, I am satisfied the 1st plaintiff has established prima facie case.



21. However, the same cannot be said of the 2nd plaintiff. This is because I have not come across a written authority for the 1st plaintiff to swear affidavits on its behalf and on that basis, I find only the 1st plaintiff has established a prima facie case.
22. On the 2nd pillar of establishing of irreparable loss, *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR cited with approval *Halsbury's Laws of England* [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] which stated thus: -

“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.”
23. The allegations posited by the 1st plaintiff were not controverted and from the photographs which allegedly depict the state of the suit property, it is evident the 1st plaintiff has several structures upon it which appear to host commercial businesses and from them, standing water has surrounded these structures.
24. Thus, undoubtedly, if water continues being dumped on the suit property as is alleged, the 1st plaintiff's structures will suffer irreparable loss and the occupants of these properties might be exposed to the negative impact of standing water which cannot be compensated by damages. I find the 1st plaintiff will suffer irreparable harm which cannot be compensated by an award of damages. See *Said Ahmed (Supra)*.
25. As to the 3rd pillar, from the photographs that were tendered to this court, the 1st plaintiff's structures which are allegedly on the suit property and are allegedly occupied will be affected if the alleged dumping of water is not stopped, I find in comparison to the defendant, the 1st plaintiff will be highly inconvenienced. See *Pius Kipchirchir Kogo v Franklin Kimeli Tenai* [2018] eKLR.
26. For the findings and reasons herein stated above, I ultimately find the 1st plaintiff has met the threshold for grant of temporary injunction, the motion dated 1/02/2024 is merited and costs shall be in the cause. To this end, I hereby issue the following final disposal orders:-
 - a. There be an order of temporary injunction which shall remain in force for a period of only one year restraining the defendant and/or its employees, servants, agents, licensees, representatives and/or any other person acting under its authority or claiming under it from flooding, directing, dumping and/or disposing waste water onto land parcel no. Central Alego/Hono/3550 and/or from encroaching or in any way trespassing onto or interfering with the 1st plaintiff's use and/or quiet possession of the said property.
 - b. Costs shall be in the cause.
 - c. Parties to comply with Order 11 within 30 days hereof.
 - d. Suit shall be mentioned before the Deputy Registrar for pretrial directions on 8/05/2024.



It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF MARCH 2024.

HON. A. Y. KOROSS

JUDGE

14/3/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Oduor for the plaintiffs

N/A for the defendant

Court assistant: Ishmael Orwa

