



Daula Mohamed Omar t/a Nairobi Bahati Njema Investment v Ali & 3 others (Environment & Land Case 48 of 2023) [2024] KEELC 1259 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 48 OF 2023**

FM NJOROGE, J

MARCH 7, 2024

BETWEEN

**DAULA MOHAMED OMAR T/A NAIROBI BAHATI NJEMA
INVESTMENT PLAINTIFF**

AND

**KHALID MOHAMED ALI 1ST DEFENDANT
KHALFAN MOHAMED ABDALLA RAFROUF 2ND DEFENDANT
HOLISTIC EDUCATIONAL TRUST 3RD DEFENDANT
THE LAND REGISTRAR, KILIFI COUNTY 4TH DEFENDANT**

RULING

1. The Plaintiff’s Notice of Motion dated 23rd June 2023 has been brought under Section 1A, 3A & 63 of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 *Civil Procedure Rules* and it is seeking the following orders:
 1.(Spent.)
 2. That pending the hearing and determination of this application *inter-partes*, the Honourable court be pleased to issue an order of injunction restraining the 3rd Defendant herein either by herself, her agents, servants, assigns and/or any person working under her directions from alienating, encumbering, disposing off, wasting, damaging or any other way interfering or dealing with all that Land Parcel Registration No. Kilifi/Mtondia/948;
 3. That pending the hearing and determination of the suit herein, the honourable court be pleased to issue an order of injunction restraining the 3rd Defendant, either by herself, her agents, servants, assigns and/or any disposing off, wasting, damaging or in any other way interfering or dealing with all that Land Parcel Registration No. Kilifi/Mtondia/948;



4. That costs of this application be provided for.
2. The application is founded on the grounds stated at its foot and on the supporting affidavit Daula Mohamed Omar, the Plaintiff who stated that in the year 2014 he was introduced to the 1st defendant herein, a freelance property broker to assist in acquiring property, and he showed her the suit property owned by one Salim Abdalla Hemed. That she then appointed the 1st Defendant to be her agent in the sale transaction and deposited the entire purchase price of Kshs. 1,500,000 in his account for onward transmission to the vendor. She stated that after signing the sale agreement dated May 20, 2014 the vendor was paid the purchase price in full and surrendered all the conveyance completion documents to the mutual advocate. It was her statement that up to the year 2018, the transfer of the suit property had not been effected and upon follow up she learnt that the 1st Defendant had sold the suit property to a third party behind her back after having fraudulently transferred the suit property to his name. Ms. Daula Mohamed further stated that she applied to have a caution placed on the suit title which was denied. She later met the 1st Defendant who swore an affidavit confirming that she had entrusted him with facilitating the transfer and registration of the suit property from the vendor to her. She then reported the matter to DCI Urban Police Station Mombasa and the vendor in his statement confirmed that he had sold the suit property to her. It was her further statement that upon visiting the suit property there was ongoing construction which she found out was been carried out by the 3rd Defendant; upon investigations she found out that the suit property had been transferred by the 2nd Defendant to the 3rd Defendant hence the instant application.
3. The 1st Defendant filed a replying affidavit in response to the application wherein he concurs with the averments by the Plaintiff. He however, states that he should not be a party to this suit as he already admitted liability through a plea agreement and sorted out issues with the Plaintiff.
4. The 2nd Defendant filed a replying affidavit in response stating that the Plaintiff did not comply with the terms of the agreement for sale dated May 20, 2014 as she never obtained consent from the Land Control Board thus she is only entitled to a refund of her amount from the vendor. He stated that he signed a transfer document in respect of the suit property and was consequently issued with a Title deed. He also stated that a caution was registered against the title and was removed pursuant to a court order issued on March 29, 2022. He further stated that he did sign a transfer as gift for construction of Madrassa and related amenities for orphans in favour of the 3rd Defendant on November 17, 2021 which transfer was effected on April 8, 2022.
5. The 3rd Defendant filed a replying affidavit sworn by Attas Shariff Ali a trustee of the 3rd defendant who stated that the plaintiff did not comply with the terms of the Agreement for sale dated May 20, 2014. Further, there was no Land Control Board Consent obtained by the plaintiff thus the transaction became null and void as at July 1, 2015 and is only entitled to a refund of her deposit from the vendor and not orders sought in the plaint herein.

Analysis and determination

6. The application was canvassed by way of written submissions. I have taken into account the submissions as well as the authorities relied upon. The issue for determination is whether the plaintiff meets the threshold for grant of the injunctive orders sought.
7. The law governing the granting of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the [*Civil Procedure Rules 2010*](#) which provides that: -

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 [Rev. 2012] Civil Procedure Cap. 21 [Subsidiary] C17 – 165;
- (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.”
8. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [*Supra*] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -
- Firstly, an applicant must show a *prima facie case* with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
9. The Court of Appeal in the case of *Nguruman Limited –v- Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:
- ...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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a *prima facie case* that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie case* is not established, then irreparable injury and balance of convenience need no consideration.”
10. The Court of Appeal in *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, defined a *prima facie case* 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 later”.
11. A *prima facie case* thus means not a case that must succeed, but an arguable case, and one in which the evidence shows an infringement of a right or some probability of success of the applicant’s case at the trial. Has the Plaintiff therefore demonstrated that kind of case here?
12. The plaintiff’s case is anchored on the transaction between the 1st defendant and herself that did not materialize due to fraudulent activities by the 1st defendant and which consequently ended up as a



criminal case. The suit property herein is already in the name of the 3rd Defendant having been gifted to it by the 2nd defendant. The plaintiff does not disclose any *prima facie case* against the 3rd defendant who is the title holder. In this court's view, she is not deserving of the orders sought as her case is against the 1st defendant.

13. Having established that the plaintiff has not established a *prima facie case*, I need not delve into the two other pillars. This was well settled in *Nguruman Limited -v- Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows: -

" In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a *prima facie* level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. ... If *prima facie case* is not established, then irreparable injury and balance of convenience need no consideration." (emphasis mine)

14. In the upshot I find that the application dated 23/6/2023 lacks merit and it is hereby dismissed. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 7TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

