



Railways Housing Cooperative Society Limited v Bwosiemo & 2 others (Environmental and Land Originating Summons E024 of 2021) [2024] KEELC 3989 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2021
A NYUKURI, J
APRIL 29, 2024**

BETWEEN
RAILWAYS HOUSING COOPERATIVE SOCIETY LIMITED APPLICANT
AND
IAN MAGARA BWOSIEMO 1ST RESPONDENT
FUTURE ESTATES LIMITED 2ND RESPONDENT
BRENDA KWAMBOKA MANWAH 3RD RESPONDENT

RULING

Introduction

1. *Vide* a notice of motion dated 20th July 2022, the applicant sought against the respondents, the following orders;
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to issue a temporary order of injunction restraining and/or stopping the respondents either by themselves or through their relatives, workers, servants, agents and/or employees from constructing any building structure on the applicant's property known as L.R No. 25693 registered in the Lands Title Registry at Nairobi as Grant Number I.R 99992/1 and situated in North West of Mavoko Municipality within Machakos County measuring Three Decimal Six One Seven (3.617) Hectares or thereabouts pending the hearing and determination of the main suit.
 - d. That this Honourable Court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.



- e. That the costs of this application be borne by the respondents.
2. The application is anchored on the affidavit sworn by the plaintiff's chairperson, one Francis Waweru on 20th July, 2022. The applicant's case is that the 1st and 2nd defendants are the registered owners of all that parcel known as L.R. No. 25693 (hereinafter known as the 'Suit Property').
 3. He stated that the 1st and 2nd defendants registered a specific Power of Attorney in favour of the 3rd defendant herein vide registration number I/PA No. 42804/1. He stated that the 1st and 2nd defendants through their attorney the 3rd defendant entered into a sale agreement dated 4th December 2007 for sale of the suit property for a consideration of Kshs. 2,500,000/= which the applicant paid in full.
 4. He further stated that the applicant further obtained the requisite clearances and consents and prepared a Transfer Deed dated 13th January, 2010 executed in favour of the applicant and presented the same for registration at the lands registry however the same could not be done due to encumbrances on the suit property.
 5. He stated that it has come to the attention of the applicant of ongoing construction and re-beaconing of the suit property despite the matter being in court. He stated that as a result of the acts of the defendants, the applicant will suffer irreparable loss that cannot be adequately compensated by an award of damages if the orders sought herein are not granted.
 6. The application is opposed. Brenda Kwamboka Manwah, the 2nd respondent filed a replying affidavit dated 13th October 2022 and stated that they oppose the orders sought as they are frivolous and an abuse of the court process. She stated that neither she nor the 1st defendant have ever entered into a sale agreement with the applicant and denied granting the power of attorney to the 3rd respondent.
 7. She stated that the Power of Attorney that exist was made between them and their father and not the 3rd defendant as stated by the applicant. She stated that the sale agreement dated 7th August, 2003 was made between the 1st, 2nd and 3rd defendants and was later rescinded as the sale amount was not paid and that she was a stranger to the applicant's sale agreement.
 8. She asserted that at the time of the alleged sale agreement they were minors and that the 3rd defendant lacked capacity to enter into any agreement with the applicant over the suit property and the Ministry of Lands rejected the 3rd defendant's attempt to place a caveat on the suit property and the caveat placed was placed erroneously by a 3rd party. She prayed that the application be dismissed.
 9. The applicant filed submissions on the application dated 20th July, 2022. On whether the prerequisites for granting an injunction had been met, they placed reliance on the case of *Giella v Cassman Brown & Company Limited* [1973] EA and argued that they had satisfied the conditions for granting injunctions and the application should be allowed as prayed.
 10. The 1st and 2nd defendants also filed a notice of preliminary objection dated 21st September, 2022 to the Originating Summons dated 29th October, 2021 on the grounds that; the specific Power of Attorney dated 24th March, 2006 offends the provisions of the [Statutory Oaths and Declarations Act](#) (Cap 15); that the specific Power of Attorney dated 24th March, 2006 offends provisions of the [Stamp Duty Act](#) (Cap 480); that the prayers in the Originating Summons dated 29th October, 2021 cannot issue as against the respondents and; that the suit and application are fatally defective and should be struck out with costs to the respondent.
 11. The court directed that both the preliminary objection and application shall be heard together. Parties filed written submissions in support of their respective cases. On record are submissions filed by the



applicant dated 26th May 2023 and the respondent's submissions filed on 29th May 2023 and 7th June 2023.

Applicant's submissions

12. Counsel for the applicant submitted that the Power of Attorney in issue was duly executed by the parties in the Sale agreement dated 4th December, 2007 and Section 109 of the [Registered Land Act](#) (Repealed) provides that all instruments for the disposal of land must be executed by all parties to the transaction. Counsel submitted that the specific power of attorney was duly executed and registered as I/PA No. 42804/1 and the Registrar of Documents need not be joined as a party to the application, as the respondents bear the burden of proof to show that the same is not valid.
13. Counsel submitted that the respondents have failed to cite any specific statutory provisions from the [Statutory Oaths and Declarations Act](#) (Cap 15) and the [Stamp Duty Act](#) (Cap 480) that the applicants have infringed.
14. On whether the prayers in the Originating Summons dated 29th October, 2021 cannot issue as against the respondents, counsel submitted that the respondents should be compelled to transfer the suit property and relied on the case of [Solomon Ndegwa Kuria v Peter Nditu Gitau](#) [2019] eKLR for the proposition that specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles.
15. Counsel submitted that the suit and application raise triable issues, and that the court has jurisdiction to hear the same and not barred by limitation. Counsel prayed that the notice of preliminary objection dated 21st September, 2022 be dismissed.

Respondent's submissions

16. The respondents counsel submitted that the applicants in this matter are persona non grata in the sale of the suit property as the original sale agreement was between the 3rd respondent and a legitimately appointed attorney.
17. Counsel argued that section 109 of the [Evidence Act](#) (Cap 80) places the burden of proof on the applicant. Counsel also relied on the case of [CMC Aviation LTD v Crusair Ltd \(No.1\)](#) [1987] KLR 103 to buttress his position on the burden of proof. Counsel prayed that the preliminary objection be allowed as prayed and the application be dismissed with costs. It was further submitted for the respondent that failure to cite the law upon which the application was premised was fatal. Counsel argued that the documents relied on by the applicant to demonstrate purchase of the suit property were fraudulent and reliance was placed on the case of [Kibiro Wagoro Makumi alias Kibiro Wagoro v Francis Nduati Macharia & another](#) Murang'a ELC 63 of 2017.

Analysis and determination

18. I have considered the application, response, preliminary objection and submissions and in my considered view, the issues for determination are:
 - a. Whether the preliminary objection dated 21st September, 2022 is merited?
 - b. Whether the applicant meets the threshold for granting temporary injunction?
19. A preliminary objection is a precise objection based on a pure point of law raised on the basis that the facts relied upon are not disputed. (See [Mukisa Biscuits Manufacturing Company v West End Distributors Ltd](#)). Considering the preliminary objection herein, while the respondents stated that the



power of attorney in issue offends the provisions of the [Oaths and Statutory Declarations Act](#) and the [Stamp Duty Act](#), no specific sections of the two pieces of legislation were pointed out as having been violated and for that reason, those grounds must fail for want of specificity. The other two grounds of the preliminary objection were that the prayers in the originating summons cannot issue and that the application is fatally defective. No reasons or grounds have been given for those propositions and therefore, for want of specificity the two grounds are vague and must fail. In the premises, I find no merit in the preliminary objection and the same is hereby dismissed.

20. I now turn to the merits of the application. The guiding principles for the grant of orders of temporary injunction are well settled and the applicant must demonstrate a *prima facie* case with chances of success; demonstrate that if the injunction is not granted the applicant stands to suffer irreparable injury that may not be compensated in damages and where the court is in doubt, it ought to decide on a balance of convenience. The conditions were set out in the decision of *Giella vs Cassman Brown* (1973) EA 358 and reiterated in numerous court decisions and more particularly in the case of [Nguruman Limited vs 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.

21. A *prima facie* case was described in the decision of [Mrao Ltd v First American Bank of Kenya Ltd](#) [2003] eKLR as follows;

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.

22. Secondly, the plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The decision of [Pius Kipchirchir Kogo vs Frank Kimeli Tenai](#) [2018] eKLR provides an explanation for what is meant by irreparable injury and it states;

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.

23. Thirdly, the plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of [Pius Kipchirchir Kogo vs Frank Kimeli Tenai](#) [2018] eKLR which 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.

24. On whether the applicant has demonstrated a prima facie case, it stated that it purchased the suit property from the 1st and 2nd Respondents on 4th December 2007. The applicant attached a sale agreement and a transfer executed by the 1st and 2nd respondents dated 13th January 2010. Although the 2nd defendant raised many issues regarding the power of attorney, and denied selling the suit property, they referred to an agreement between themselves and the 3rd defendant regarding the suit property. Having considered the documents presented by the applicants I am satisfied that they have established a prima facie case against the respondents, by showing that they lawfully purchased the suit property.
25. On whether the applicants stand to suffer irreparable loss that cannot be atoned in damages, the applicants stated that the respondent had began putting up structures on the suit property, and he annexed photographs of the same, a fact not denied by the respondents. For those reasons, it is clear that the suit property is in danger of being alienated to the detriment of the applicant.
26. On the question of balance of convenience, as the applicants purchased the suit property, the balance of convenience tilts in favour of granting the injunction.
27. In the premises, I find and hold that the application dated 20th July 2022 is merited and the same is hereby allowed in the following terms;
 - a. That this Honourable Court hereby issues an order of temporary injunction restraining and/or stopping the Respondents either by themselves or through their relatives, workers, servants, agents and/or employees from constructing any buildings or structures on the property known as L.R No. 25693 registered in the Lands Title Registry at Nairobi as Grant Number I.R 99992/1 and situated in North West of Mavoko Municipality within Machakos County Measuring Three Decimal Six One Seven (3.617) Hectares or thereabouts pending the hearing and determination of this suit.
 - b. Costs of the application are awarded to the applicant.
28. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF APRIL 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Gideon holding brief for Mr. Kamunde for applicants

No appearance for respondents

Court assistant – Abdisalam

