



Mini Holdings Limited v Nairobi City County & 2 others (Environment & Land Case E199 of 2023) [2024] KEELC 3484 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E199 OF 2023**

**MD MWANGI, J
APRIL 23, 2024**

BETWEEN

MINI HOLDINGS LIMITED PLAINTIFF

AND

NAIROBI CITY COUNTY 1ST DEFENDANT

KIAMBU DANDORA FARMERS COMPANY LIMITED 2ND DEFENDANT

CHIEF LANDS REGISTRAR 3RD DEFENDANT

RULING

1. For determination before this Court is the Notice of Motion application dated 1st December, 2023 by the Plaintiff/Applicant herein. It is expressed to brought under the provisions of Sections 1, 3, 3A, 63(c) & (e) and Section 80 of the Civil Procedure Act, Section 19 (2) of the Environment and Land Court Act and Order 51 of the Civil Procedure Rules, 2010.
2. The Plaintiff/Applicant through the said application seeks for the following orders:-
 - a. That a temporary injunction restraining the Defendants whether by themselves, their agents, servants, or agents, employees and/nominees from harassing, intimidating, threatening, or otherwise from interfering with the Plaintiff/Applicant’s possession, enjoyment or development of all or any part of all that property known as LR No. 209/9598 located along Kangundo Road, Mowlem, Embakasi West Sub County, Nairobi County pending the hearing and determination of this suit.
 - b. That the costs of this Application be provided for.
3. The application by the Plaintiff/Applicant is premised on the grounds on the face of it, averments and testimony of the 13 Paragraphed Supporting Affidavit of HAFEEZ MANJI sworn on 1st December, 2023 and five (5) annexures marked as “MHL-1 to 5” annexed thereto. He deposes to be the Director



of the Plaintiff herein. He indicates that he is familiar with matters of fact in relation to the suit and hence competent to swear the affidavit.

4. The deponent avers that the Plaintiff is the registered proprietor and occupier of the property known as LR No. 209/9598 located along Kangundo Road, Mowlem, Embakasi West Sub County, Nairobi County (“the suit property”). He annexes a copy of the title deed for the property - Grant No. LR 65291. He avers that on the night of 3rd September, 2023 persons unknown to the Plaintiff maliciously destroyed parts of the perimeter wall/fence of the property causing serious damage thereon. The said destruction was duly reported at Mowlem Police Station and an OB issued and later an official statement recorded with the Directorate of Criminal Investigations.
5. The Plaintiff subsequently applied to the 1st Defendant for commencement of the repair of the wall. The 1st Defendant approved the reconstruction vide the Letter dated 8th September, 2023. However, the 1st Defendant revoked and withdrew the said authority vide the Letter dated 13th September, 2023 citing a purported land dispute which was not known to the Plaintiff.
6. Subsequently, the Plaintiff received a Letter dated 24th November, 2023 from the 2nd Defendant’s Advocate threatening to demolish the perimeter wall on the basis that the Plaintiff has trespassed on its parcel of land. It is on this backdrop that the Plaintiff seeks the court’s intervention and prays for the orders stated in the application.
7. The application was opposed by the Defendants.

1st Defendant’s Replying Affidavit

8. The 1st Defendant opposed the Plaintiff’s application through the Replying Affidavit sworn by Wilfred Masinde, the Deputy Director of the 1st Defendant, deponed on the 6th February, 2024. The 1st deponent avers that the inclusion of LR No. 209/9598 in Block 242 (Original LR No. 11379/3) and its ownership can be verified by the Kiambu Dandora Farmers Limited and the Ministry of Land.
9. In response to the assertions contained in the Application, the deponent avers that the 1st Defendant issued an enforcement notice against construction of structures on the suit property on 19th October, 2023. The Notice required the Applicant to comply within 14 days from the date of issuance. However, to date, the Applicants have not demonstrated compliance by following the laid down procedure in the Physical and Land Use Planning Act, 2019.
10. The deponent asserts that the 1st Defendant fulfilled its obligation as a government institution as it could not permit the development to proceed considering that the ownership of the land was in dispute. The 1st Defendant could not allow illegal construction without first establishing the true owner of the property. The 1st Defendant therefore asserts that the application lacks merit and should thus be dismissed with costs.

2nd Defendant’s Replying Affidavit

11. The 2nd Defendant opposed the Plaintiff’s application vide a Replying Affidavit sworn by Joseph Mwangi, its Director, deponed on 29th January, 2024. The Director avers that the 2nd Defendant herein is the bona fide owner of the suit property known as LR No. 11379/3 having purchased the same in the year 1970 as evidenced by the Copy of the Title attached. The said property was subsequently sub-divided pursuant to a gazette notice dated 27th August, 2021 into several blocks.
12. The deponent states that the perimeter wall subject of these proceedings as constructed encroached/ trespassed on the 2nd Defendant’s property by 1.6720 Hectares. He attaches a Survey Report to that effect. He avers that despite not obtaining approvals from the relevant authorities, the Plaintiff



went ahead to construct a perimeter fence with the knowledge that it was trespassing onto the 2nd Defendant's parcel.

13. The deponent argues that the 2nd Defendant has not adduced any evidence connecting the 2nd Defendant or its agents to the alleged demolition of the perimeter wall. The Plaintiff should have provided CCTV footage as evidence on who carried out the demolitions.
14. The 2nd Defendant contended that the dispute herein involves boundary dispute hence this court would not have been the first port of settling the dispute. The court therefore lacks jurisdiction to determine the matter. As such, the Application should be dismissed with costs.

Further Affidavit by the Plaintiff/Applicant

15. The Plaintiff/Applicant filed a Further Affidavit sworn by Hafeez Manji on the 19th February, 2024. In response to the 1st Respondent's Replying Affidavit, the deponent reiterates his assertions that the 1st Defendant issued the Plaintiff with an approval for the boundary repair works evident by the Letter dated 8th September, 2023. He states that the permit was issued subject to the conditions that the Applicant was not to make any alterations to the structure and was to indemnify the 1st Respondent against any claims whatsoever made in regard to the permit. Despite compliance with the said conditions, the 1st Defendant unilaterally withdrew the said authority.
16. Further, despite the Plaintiff writing to the 1st Defendant on the 15th September, 2023 requesting for information leading to the cancellation of the permit, none has been availed to date. He reiterates the assertion that the Plaintiff is indeed the registered proprietor of the suit property. In the absence of alteration of the boundaries set on the Deed Plan annexed to the said title to any other person's property, there was no justification whatsoever to issue the cancellation.
17. In response to the 2nd Respondent's Replying Affidavit, the deponent refers to the Deed Plan dated 22nd July, 1981 duly signed by the Director of Surveys and states that the legal process for cancellation of a Deed Plan has not been adhered to. The boundaries remain as they are on the said Deed Plan.
18. He contends that it is not open for the 2nd Defendant to forcefully take possession of the Plaintiff's property without following due procedure of the law. The perimeter wall has been in existence for years.
19. In addition, the deponent avers that the property allegedly owned by the 2nd Defendant was acquired by the Government and allocated to various entities upon sub-division. He annexes the Judgement in Republic -vs- National Land Commission & Another; Samuel Wachira Wanja & 2Others (Ex-parte); Kiambu Dandora Farmers Co. Ltd. & Another (Interested Parties) (2021) eKLR.

Court's direction

20. The Court directed that the said notice of motion application to be canvassed by way of written submissions. Pursuant to those directions, all the parties obliged by filing their submissions accordingly.

Submissions by parties

21. The Advocate for the Plaintiff filed submissions dated 18th February, 2024, wherein he reiterated the arguments made in the pleadings and argued that as registered owner and in the absence of alterations to the Deed Plans, the boundary with the 2nd Defendant remains unaltered. He submitted that the Plaintiff had shown a prima facie case and should the Defendants proceed with their threats of



demolition of the perimeter wall it would result into the violation of its constitutional right to property and that the balance of convenience tilts in favour of granting the injunction.

22. The 1st Defendant on the other hand filed unsigned submissions dated 27th February, 2024 reiterating that it was performing its obligations in ensuring that no construction is undertaken where the ownership of the property is disputed. Further, that it is not a necessary party to the proceedings herein and should therefore be removed.
23. The 2nd Defendant's submissions are dated 2nd April, 2024 submitting that this court lacks jurisdiction to hear and determine the dispute herein. It is contended that the dispute falls within the jurisdiction of the Land Registrar as provided for under Section 18 of the Land Registration Act, 2012.

Issues for determination

24. I have read and carefully considered the pleadings, annexed evidence and submissions made. The issues for determination are:
 - a. Whether this court has jurisdiction to hear and determine the dispute herein
 - b. Whether the Plaintiff has met the threshold for grant of the Interlocutory Injunction
 - c. Whether the Plaintiff is entitled to the orders sought

Analysis and determination

A. Whether this court has jurisdiction to hear and determine the dispute herein

25. The 2nd Defendant contends that this court lacks jurisdiction to hear and determine the dispute herein. It contends that since the cause of action is a boundary dispute it should have been referred to the Land Registrar for determination first.
26. Section 18(2) of the Land Registration Act, 2012 prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. It provides as follows:

“The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”.

27. Section 19 of the Land Registration Act, 2012, on the other hand provides that the duty to fix boundaries to registered land is vested in the Land Registrar. It provides that:

“19.

- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.



- 2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section”.

28. The main issue in the Plaintiff’s case is that of protection of the Plaintiff’s proprietary rights. The establishment of the boundary between the Plaintiff’s parcel and that of the 2nd Defendant’s is incidental to the main issue.
29. Even if the dispute was on the boundary, it is not the kind of boundary contemplated under Section 18 of the Land Registration Act.
30. In the case of *Azzuri Limited -vs- Pink Properties Limited* [2017] eKLR, Justice Angote while making a decision relating to general boundaries had this to say:

‘In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”

The paper defines “General Boundaries” as follows:

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”

31. The Court of Appeal upheld the decision of Justice Angote in *Azzuri Limited vs. Pink Properties Limited* (2018) eKLR.
32. In the case of *George Kamau Macharia vs. Dexta Ltd* (2019) eKLR, Kemei J went ahead to distinguish between “Fixed boundaries” and “General boundaries.” She held that the Registrar’s mandate is only over general boundaries. For parcels of Land registered under the repealed Registration of Titles Act, their boundaries are fixed and defined. The Registrar has no mandate over such fixed boundaries.
33. The Plaintiff/ Applicant adduced a Grant No. LR 65291 issued under the Registration of Titles Act. It has also attached a Deed Plan No. 111305 duly signed by the Director of Surveys. Therefore, even of if the Plaintiff’s cause of action was a boundaries dispute as alleged by the 2nd Defendant, the boundaries of the parcels of land mentioned in the pleadings herein are fixed boundaries. The Land Registrar has no mandate over such a dispute.
34. It therefore follows that this Court is duly seized of this matter and has the jurisdiction to determine it.



B. Whether the Plaintiff has met the threshold for grant of the Interlocutory Injunction

35. On whether the applicants have met the threshold for grant of temporary injunction, Order 40 Rule 1 of the Civil Procedure Rules empowers the court to grant a temporary injunction where an Applicant demonstrates that a suit property is in danger of being wasted, damaged, alienated, wrongfully sold in execution or the defendant threatens to remove or dispose the same in circumstances that will obstruct or delay execution of any decree in favour of the Applicant if they eventually succeed in their claim.
36. The principles for grant of a temporary injunction are well settled. The Applicant must establish a prima facie case with chances of success; 2ndly, the Applicant must demonstrate that if the injunction is not granted, he or she stands to suffer irreparable injury that may not be compensated in damages and where the court is in doubt it ought to consider where the scale of convenience tilts. (See *Giella v. Cassman Brown* [1973] EA 358.)
37. In the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR, 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”.
38. A prima facie case is one which demonstrates sufficient evidence to establish the plaintiffs’ claim of apparent violation of their right, requiring evidence of rebuttal from the defendant. In *Mrao v. First American Bank of Kenya Limited & 2 Others* [2003] eKLR, the Court of Appeal defined a prima facie case as one which on the material presented in 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 respondent.
39. In the instant case, the Applicant has demonstrated that it is the registered owner of the suit property by attaching the title and the Certificate of Lease.
40. Registration of land gives the registered proprietor thereof indefeasible and absolute ownership, unless it is proved that registration was done by fraud, misrepresentation, unprocedurally or through a corrupt scheme.
41. Section 26 of the Land Registration Act provides as follows:
 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

42. In the instant case, there is no allegation by the Defendants herein that the Plaintiff obtained registration of the suit property by fraud, misrepresentation, want of procedure or through corruption. All that the 2nd Defendant alleges is that the perimeter wall erected by the Plaintiff has encroached/ trespassed on its property by 1.6720 Hectares. The issue can only be ascertained upon trial. Given the fact that the Plaintiff is in possession of a certificate of title for the suit property, he is entitled to quiet and peaceful possession of its land. I am satisfied that the Applicant has demonstrated a prima facie case.
43. On the question of whether the Plaintiff/Applicant stands to suffer irreparable loss, the Applicant has stated that unless the orders sought are granted, there is bound to be loss of property. Indeed, there is evidence that this matter was reported at Mowlem Police station as per the attached OB report and the Directorate of Criminal Investigation as per the attached OB report. In the premises, I am satisfied that the Applicant has demonstrated that if orders sought are not granted, it stands to suffer irreparable loss.
44. The Applicant being the registered owner of the suit property, it is my view that the balance of convenience tilts in favour of granting the orders sought.
45. Ultimately, I am satisfied that the Plaintiff's Notice of Motion application has merit and on preponderance of probability succeeds with costs. For avoidance of doubt, I make to the following orders: -
- a. A temporary injunction is hereby issued restraining the Defendants whether by, their agents, servants, or agents, employees and/ nominees from harassing, intimidating, threatening, or otherwise from interfering with the Plaintiff/Applicant's possession, enjoyment or development of all or any part of all that property known as LR No. 209/9598 located along Kangundo Road, Mowlem, Embakasi West Sub County, Nairobi County pending the hearing and determination of this suit.
- b. That the costs of this Application are granted to the Plaintiff/Applicant.

It is ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF APRIL, 2024.

M.D MWANGI

JUDGE

In the virtual presence of:

Mr. Muoka for the Plaintiff/Applicant

Mr. Were for the 2nd Defendant/Respondent

No appearance for the 1st and 3rd Defendants

Court Assistant: Yvette

M.D MWANGI

JUDGE

