



Chelogoi v Shah & 4 others (Environment and Land Case Civil Suit E070 of 2023) [2024] KEELC 3353 (KLR) (22 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E070 OF 2023**

J OMANGE, J

APRIL 22, 2024

BETWEEN

DAVIS NATHAN CHELOGOI PLAINTIFF

AND

ASHOK RUPSHI SHAH 1ST DEFENDANT

HITENKUMAR AMRITLAL RAJA 2ND DEFENDANT

COMMISSIONER FOR LANDS 3RD DEFENDANT

RIGISTRAR OF TITLES 4TH DEFENDANT

**MIRIAM WAIRIMU WAMBUGU (SUED AS ADMINISTRATRIX OF THE
ESTATE OF THE LATE JACOB JUMA) 5TH DEFENDANT**

RULING

1. There are three applications before the court for determination. In the application dated 1st September, 2023 the Plaintiff/ Applicant sought orders that pending the hearing and determination of the suit, the court be pleased to issue a temporary injunction restraining the Defendants whether by themselves, their agents, servants and or personal representatives from leasing, selling, sub dividing, transferring, alienating, erecting structures, buildings, tilling, entering, evicting and or interfering with the plaintiff's peaceful occupation and use of all that parcel of land known as LR. NO 18485 (IR 232908) Lower Kabete Road, Nairobi; in the alternative the Plaintiff/ Applicant sought an order of Status Quo Ante maintaining the substratum of the suit pending the hearing of the determination of the application and suit.
2. In the 2nd application dated 16th November, 2023 the Plaintiff/ Applicant prayed for conservatory orders to be issued in respect of land records/ files/ documents in respect of the suit property LR



18485(IR232908) Lower Kabete road. In the alternative an order of status quo be issued maintaining the substratum of the suit property.

3. On the 17th January, 2024 the 1st and 2nd Defendant filed an application dated 17th January, 2024 in which they prayed for orders that pending the hearing and determination, of the suit, injunctive orders issue restraining the Plaintiff whether by himself, his agents, servants and or any other person authorized by or claiming through him from trespassing into, occupying, dealing with, transferring, selling, delineating, letting out, building upon, and or disposing or in any manner whatsoever dealing with and from interfering with the 1st and 2nd Defendants right of occupation, quiet possession, use and enjoyment of LR Number 18485. Secondly, that the court issues a mandatory injunction compelling the Plaintiff whether by himself, his agents, servants and or any other person authorized by or claiming through him to immediately yield vacant possession of LR Number 18485.
4. In the affidavit in support of the application the 1st and 2nd Defendants aver that they are the bona fide owners of the suit property having been declared legal owners by a Judgement of this court. They insist that this is a Judgement in rem which binds all parties regardless of whether they were party to the suit or not. That thereafter this position has been affirmed by the Chief Land Registrar who declared their title to be genuine. They further contend that the Plaintiffs title was refuted by the Chief Land Registrar vide a Ruling dated 10th August, 2023. The details of the Land Registrars ruling are reproduced for the benefit of the court. The court is referred to various letters and documentation in which the 1st and 2nd Defendants ownership is confirmed.
5. Regarding the Plaintiffs title, the 1st and 2nd Defendant raise several issues with the title presented by the Plaintiff which they insist is tainted with illegalities. The 1st and 2nd Defendant point out that the Plaintiff has been charged with a criminal offence. Lastly the 1st and 2nd Defendant dispute that the Plaintiff has been in possession of the suit property for the period that he alleges and insist that his continued occupation of the suit property and wanton destruction of trees are a violation of the 1st and 2nd Defendants Right to Property.
6. The application dated 15th September, 2023 and that dated 16th November, 2023 came up for directions on 28th January, 2024 on which date the court directed that the applications be heard jointly. The 1st and 2nd Defendants application came up for directions on 30th January, 2024 on which date the court directed that it be heard with the earlier applications.
7. The Plaintiff and the 1st and 2nd Defendants filed submissions in respect of all the applications.
8. The Plaintiffs' counsel in the submissions dated 17th January, 2024, submitted that there is need to grant conservatory orders as the Plaintiff has established a *prima facie* case and that the Plaintiff is likely to suffer prejudice as a result of a threatened violation by the 1st and 2nd Defendants who are threatening to evict him from the suit property. That there is danger that documents held by the 3rd and 4th Defendant are in danger of being destroyed to his detriment.
9. Counsel filed further submissions in opposition to the 1st and 2nd Defendants application dated 17th January, 2024. In the submissions, counsel identified two issues for the courts determination; Whether the 1st and 2nd Defendant have demonstrated and established the ingredients for issuance of the orders of Interlocutory Injunction and mandatory injunction as sought?

On the issue of whether the interlocutory injunction should be granted, counsel insisted that no prima facie case has been established as the issues are yet to be determined by the court. That the grounds upon which the Defendants seek the mandatory injunction are issues for determination before this court. That consequently this court cannot grant the mandatory injunction which will amount to grant of



- final orders in an interlocutory application. The court was referred to two supreme court decisions in which the apex court cautioned against issuing substantive orders during the hearing of an application.
10. The 1st and 2nd Defendants submit that the prayers sought by the Plaintiffs in the application dated 1st September, 2023 and 16th November, 2023 are injunctive in nature. Counsel submit that the tests for grant of injunctive orders are whether a prima facie case has been established. Further that the threshold in *Nguruman Limited versus Jan Bonde Nielsen* which is that, the party has a clear and unmistakable right to be protected must be established. Counsel submitted that the issue of ownership of the suit property had already been conclusively determined in *Milimani ELC 312 of 2009*. In that case a Judgement in rem has already been issued. The issue of whether the Plaintiff was a party to the proceedings was not relevant. He and the entire world is bound by the decision. The court was referred to the case of *Likizo Ltd versus Nasib Kashuru Limited and 5 others*. The court was also referred to the case of *Attorney General versus Ndungo & others* on the tenor and import of a Judgement in rem.
 11. Counsel referred the court to other decisions which the court has duly considered. In the end, the court was urged to find that the issue of legal ownership has already been determined and there would therefore be no basis at all to grant the injunction. Indeed, counsel strongly argued that the continued occupation of the suit property by the Plaintiff amounts to trespass which this court cannot countenance as no possible prima facie case can be established in the circumstances.
 12. The court was told the Plaintiff is undeserving of any injunctive orders as he has come to court with unclean hands and as such cannot take advantage of his own wrong as was posited in the case of *Nabro Properties versus Sky Structures Ltd*. In any event the court was told that the possession that was obtained by the Plaintiff was as a result of a letter of allotment which is a nullity. This was the indisputable holding in the Supreme Court decision of *Torino Enterprises Limited Versus Attorney General* Petition 5 (EOO6 of 2022) Counsel submitted that the Plaintiffs possession of the suit property does not confer upon him any prescriptive rights.
 13. Counsel further referred the court to proceedings which were held by the Land Registrar in which the Chief Land Registrar upheld the 1st and 2nd Defendants title. Counsel pointed out several anomalies in the Plaintiffs title and argued that the 1st and 2nd Defendants having been declared as the legal owners could not be restrained from lawful execution of the court's Judgement in rem.
 14. The Counsel further submitted that the Plaintiff has not proved that he would suffer any irreparable damage if the orders sought were not granted.
 15. On the 1st and 2nd Defendants application counsel more or less reiterated the submissions on the effect of the Judgement in rem and the proceedings which took place before the Land Registrar. In any event, counsel submitted that the title documents by the Plaintiff were illegal and had several anomalies. Further that the Plaintiffs letter of allotment had expired. On the limb of irreparable injury, the Counsel submitted that the Plaintiff was engaged in wanton destruction of trees in the suit property. This would cause the 1st and 2nd Defendants irreparable injury. Counsel urged the court to be guided by several decisions in which the courts found it fit to grant a mandatory injunction.
 16. Having considered the three applications and the responses thereto and the submissions filed therein by counsels the court notes that this matter is highly contested. The only two issues that are not in dispute are that there is a Judgement in 312 of 2009 in which the 1st and 2nd Defendant were the Plaintiffs and obtained various orders to wit;
 - a. That an order of permanent injunction is hereby issued to restrain the 1st Defendant and /or his servants /agents from trespassing, selling, transferring, constructing, charging, interfering, or



in any other manner dealing with the suit property L.R No.18485 (I.R NO.64014), Loresho, Nairobi Kenya.

- b. That a declaration is hereby issued that the Plaintiffs are legal owners of L.R. 18485(I.R NO.64014), Loresho, Nairobi, Kenya by virtue of transfer dated 21st March,2007 and registered in the lands registry, Nairobi.
 - c. That a declaration is hereby issued that the title held by the 1st Defendant is fake and fraudulent and therefore the 1st Defendant has no legal right or claim over L.R No. 18485(I.R NO.64014), Loresho, Nairobi, Kenya.
 - d. General damage for trespass Kshs. 50,000,000/-.
 - e. Costs of the suit and interest
17. The second issue that is also not contested is that the Plaintiff herein, who was not a party in 312 of 2009 save for in the execution proceedings is in occupation of the suit property for a period he alleges to be 28 years while the 1st and 2nd Defendant vigorously assert that this occupation is illegal given the Judgement in rem in 312 of 2009. It is the view of the 1st and 2nd Defendant that this court should summarily issue a mandatory injunction to address this illegality. The Plaintiff on the other hand insists that he has a right to be heard.
18. This court has a duty to hear the parties substantively and make definitive findings on the issues they have raised in the pleadings. As such at this interlocutory stage I will refrain from delving deeply into the contested issues. The court identifies the following issues for determination at this stage; Whether the court should grant the injunction or status quo orders sought by the Plaintiff Whether the court should grant the injunction and mandatory injunction orders sought by the 1st and 2nd Defendant?
19. The law on grant of interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the [Civil Procedure Rules](#) 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 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.”
20. Whether the court should grant the injunction or status quo orders sought by the Plaintiff.
- The Plaintiff seeks primarily an injunction on two aspects one that his occupation of the suit property should not be interfered with while the matter is heard and secondly that the records at the Ministry of Lands should not be altered until this case is finalized.



21. On the question of whether the court should grant the injunction or mandatory injunction orders sought by the 1st and 2nd Defendants; the 1st and 2nd Defendant argue that in view of the Judgement in rem this is a clear case in which the Judgement binds all parties including the Plaintiff who did not participate in the suit until after the Judgement had been delivered.
22. In the *locus classicus* of *Giella v Cassman Brown & Company Limited* [1973] E.A. 358., the court set out the well-known principles governing the issuance of an injunction;

“First, an applicant must establish 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.”
23. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* the Court of Appeal had this to say on *prima facie* case;

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”
24. The court cautioned that the court should not hold a mini trial or examine the merits of the case closely. The court went further to guide that the positions of the parties were not to be proved in such a manner as to give the final decision. Of relevance is that the court stated that a party did not have to establish title if he could demonstrate that he has a fair and bona fide question to raise as to the existence of the right which he alleges.
25. On the question of mandatory injunctions, the courts have clearly enunciated the principles. In the case of *Nation Media Group Versus Washington Okeyo* the court stated; -

“..... A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.”
26. In the case of *Kenya Breweries versus Washington Okeyo* the Court of Appeal cited with approval Vol. 24 Halsbury’s Laws of England 4th Edn. Para 948 which reads: “A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.
27. In view of the issues raised by both the Plaintiffs and the 1st and 2nd Defendants herein the case cannot be said to be a clear case. This is a highly contested case in which fraud has been pleaded by both the Plaintiff and the 1st and 2nd Defendants. Criminal proceedings have been instituted at one point or another against the two main disputants. Proceedings have been held in other Government agencies namely the Ministry of Lands and the Directorate of Criminal investigation. These are the issues which parties will have a chance to present during the hearing and be subjected to cross examination. In view of these issues it would be unfortunate for this court to take a position by making factual findings on the basis of affidavits.



28. The question of the Judgement in rem has been raised severally. I do not wish to address myself to the issue in detail at this interlocutory stage. Section 44 of the *Evidence Act* which relates to Judgement in rem deals with the admissibility of a final Judgement. Black's Law Dictionary defines admissibility as "the quality, state or condition of being allowed into hearing, trial or other official proceedings" Section 44 thus allows a party to produce a Judgement in rem as evidence which the court is to consider. The section does not oust the possibility of a hearing. In view of the serious issues raised in this case which include fraud alleged by both parties, the court cannot summarily without hearing the parties down its tools by making final orders at this interlocutory stage.
29. I find that the court has a duty to hear both parties substantively and not extinguish their right to be heard at this interlocutory stage.
30. The Plaintiff has filed a Plaintiff and the 1st and 2nd Defendants a statement of defence and counterclaim in which both raise grave issues for the courts determination. At this interlocutory stage it would be a travesty of justice for this court to make any findings of fact or to finally determine the rights of the parties.
31. Not only the Plaintiff, but the 1st Defendant and the 2nd Defendant have the right to be heard substantively on the pleadings they have filed in this court namely the Plaintiff, the Defence and the Counterclaim. The jurisprudence of the Supreme Court, Court of Appeal and concurrent courts have been to uphold without any equivocation the right to a fair hearing.
32. In the case of Standard Chartered Financial Services & A. D Gregory and Manchester Outfitters & others the Court of Appeal memorably affirmed; -
 "..... indeed the right to a fair trial is not just a fundamental right. It is one of inalienable rights enshrined in Article 10 of the *Universal Declaration of Human Rights* (UDHR) and Article 6 of the *International Convention of Civil and Political Rights*(ICCPR) among other conventions which this country has ratified. Article 25(C) of the *Constitution* of Kenya 2010 elevates it to an inderogable right which cannot be limited or taken away from a litigant. The Right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse... ."
33. While this matter is awaiting hearing and determination of the main suit, in the interest of law and order and to ensure that the property is not transferred to third parties or the property wasted, it is essential that the court exercises its discretion to give orders at this stage.
34. The Plaintiff had sought orders of injunction and in the alternative status quo orders while the 1st and 2nd Defendant had sought for an injunction and a mandatory injunction.
35. In the unique circumstances of this matter I find wisdom in the words of Muriithi J in Mombasa Misc. Civil Application (JR) No.26 of 2010 *Republic -v- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Exparte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schriel*. The Learned Judge stated,
 "In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the



doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

36. I find that it is in order to issue status quo orders which this court has powers to issue under, Rule 28 (K) of the Practice Directions on Proceedings in the Environment and Land Court and on Proceedings relating to the Environment and the Use and Occupation of Title to Land and Proceedings in other courts.
37. In line with the guidance given by the Supreme Court in the *Bia Tosha Distributors v Kenya Breweries Limited & 6 Others* petition 15 of 2020(2023) KESC 14 (KLR) Constitutional judicial review (17th February 2023), it is essential that the orders for status quo be accompanied by the descriptive particulars of the exact position the court seeks to preserve.
38. In the final result the court issues the following orders;
- a. The Status quo maintaining as at 22nd April, 2024 be maintained.
For clarity the status quo is defined as follows;
 - i. The Plaintiff is to remain in occupation of the suit property pending the hearing and determination of the suit.
 - ii. The Plaintiff is not to carry out any logging, or construction, let out or cause any destruction on the suit property.
 - iii. The 3rd and 4th Defendant should not make any changes to the land records and documents relating to LR Number 18485 IR 64011 or LR Number 18485 IR 232908, Lower Kabete Nairobi.
 - b. That the matter be listed for case management so that a case management time table can be agreed upon which all parties shall be required to strictly adhere to.
 - c. Costs of the three applications shall abide the hearing and determination of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL 2024.

JUDY OMANGE

JUDGE

In the Presence of: -

Mr. Orioki for the Plaintiff with Mr. Ash Brian and Cecilia Wairimu

Mr. Mwangi for the 1st and 2nd Defendant

Mr. Allan Kamau for the 3rd and 4th Defendant

Court Clerk: Steve

