



Ethics and Anti-Corruption Commission v Njogu & 4 others (Environment & Land Case E009 of 2023) [2024] KEELC 3675 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E009 OF 2023**

JO OLOLA, J

MAY 9, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

RAPHAEL MUTURI NJOGU 1ST DEFENDANT

NGATIA TARCISIUS AQUILINE 2ND DEFENDANT

JOHN KAHUHO WAMBUGU 3RD DEFENDANT

SAMMY SILAS KOMEN MWAITA 4TH DEFENDANT

KENYA COMMERCIAL BANK 5TH DEFENDANT

RULING

1. By the Notice of Motion dated 15th February 2023, the Ethics and Anti-Corruption Commission (the Plaintiff) prays for an order of temporary injunction to issue restraining the 3rd and 5th Defendants herein from dealing by way of sale, transfer, mortgage, development or in any other manner whatsoever with all that property known as Nyeri Municipality Block 1/1403 pending the hearing and determination of the suit.
2. The Application is supported by an Affidavit of one Simon Lei, an investigator with the Plaintiff Commission who avers that he is a member of a team currently investigating a complaint regarding an alleged irregular and/or unlawful alienation of the parcel of land known as Nyeri/Municipality Block 1/1403.
3. The Plaintiff avers that it commenced the said investigations upon receipt of a complaint to the effect that the suit property which was allegedly part of Government House No. HG 27 had unlawfully been allocated to the 1st Defendant and that the same had subsequently been transferred to the 2nd and 3rd Defendants.



4. The Plaintiff further avers that it received information that the 3rd Defendant had subsequently commenced construction on the said property and charged the title thereto to secure a facility from the 5th Defendant. It is the Plaintiff's case that in order to preserve the subject matter of their investigations, the Plaintiff moved to Court and obtained orders preserving the subject matter pending investigations.
5. The Plaintiff further avers that the investigations have so far revealed that the suit property was indeed public land situated at Kunville within Nyeri Town and that the same was not available for allocation since it was already committed to the State Department of Housing for Government House No. HG 27.
6. It is further the Plaintiff's case that it has filed this present suit for purposes of inter alia recovering the suit property in order to revert the same to the public and that since the preservation orders earlier issued were to lapse on 22nd February 2023, it was only proper that the orders sought herein be granted to avoid any adverse dealing with the suit property.
7. John Kihuhu Wambugu (the 3rd Defendant) is opposed to the Application. In his Replying Affidavit sworn on 28th March 2023, the 3rd Respondent avers that the Application is an abuse of the Court process as the Applicant has failed to disclose any grounds on which the Application is premised. The 3rd Defendant further avers that the Plaintiff has previously filed against itself Nyeri ELC Miscellaneous No. E013 of 2022 wherein it sought prohibitory orders that were issued against the 3rd Defendant on 22nd August, 2022.
8. The 3rd Defendant avers further that despite the prohibitory orders being in place, the Plaintiff had sought further interlocutory orders herein which orders have the same intent as the one sought in the previous proceedings.
9. Further and in addition to the foregoing, the 3rd Defendant asserts that he is an innocent purchaser for value of the suit property which had been offered to the predecessors in title by way of sale conducted by the Government itself through its representatives. It is further his case that he obtained the property upon obtaining all requisite approvals and that in the exercise of his proprietary rights over the same he has paid for all rates due and commenced construction thereon after obtaining a permit from the County Government of Nyeri.
10. The 3rd Defendant asserts that vide a letter of offer dated 30th July 2015, he obtained a loan from the Kenya Commercial Bank Limited for an initial principal sum of Kshs.8,000,000/- (now Kshs.20,400,000/-) and that the orders issued herein are prejudicial as they have restrained him from completing the project yet the loan continued to incur interest.
11. In addition, the 3rd Defendant avers that the suit property is matrimonial property to which himself and his wife Esther Muthoni Gladys work towards developing jointly and that the Plaintiff is therefore seeking orders against a person who is not a party to the proceedings.
12. Kenya Commercial Bank of Kenya Limited (the 5th Defendant) is equally opposed to the Application. In a Replying Affidavit sworn by its Mortgage Relationship Manager Mary Ninah on 12th June 2023, the 5th Defendant avers that it is holding Title No. Nyeri Municipality Block 1/1403 on simple deposit, over subsidiary loan documents for securities created by the 3rd Defendant using his other parcels of land as collateral, hence no legal charge is registered over the suit land.
13. The 5th Defendant further asserts that it is only holding the suit land title over a deed of assignment over the rental income to be received from the rental premises being constructed on the suit land and that it would release it to the 3rd Defendant upon clearing off the loan debt. It is the 5th Defendant's



case that the orders sought in the Application should not be directed at itself as it did transact honestly with the 3rd Defendant as its customer who had proved he had a clean title and after the 5th Defendant conducted due diligence on the property.

14. I have carefully perused and considered the Plaintiff's Application as well as the responses thereto by the 3rd and 5th Defendants respectively. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
15. By the Application before the Court the Plaintiff prays for an order of injunction to restrain the 3rd and 5th Defendants herein from dealing with all that parcel of land known as Nyeri Municipality Block 1/1403 by way of sale, transfer, mortgage, auction or development pending the hearing and determination of the suit filed herein. The Application before the Court is expressed to be brought pursuant to Order 40 Rule 1 of the [Civil Procedure Rules](#) which provides thus:

- “(1) Where in any suit it is proved by affidavit or otherwise-
- (a) that any property in dispute 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.”

16. The principles governing the grant or denial of the injunctive orders were laid down in the celebrated case of *Giella v Cassman Brown* (1973) EA 358 where the court observed thus:

“First, 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 court is in doubt, it will decide an application on a balance of convenience.”

17. Arising from the foregoing, the first question that this Court must ask itself is whether or not the Plaintiff has established a *prima facie* case with a probability of success at the trial. In answer to that question, we must turn to the case of [Mrao Limited v First American Bank of Kenya Limited & 2 Others](#) (2003) 1 KLR where the Court of Appeal defined a *prima facie* case as follows:

“... in civil cases, it is a case which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



18. Expounding on that definition of a *prima facie* case in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR, the Court of Appeal further observed as follows:

“We adopt that definition save to add the following conditions by way of explaining it. 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. We reiterate that in considering whether or not a *prima facie* case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

19. In the matter before me, the Plaintiff insists that the suit property was originally public land unavailable for allocation as the same was already committed to the State Department for Housing being Government House No. HG 27. It is the Plaintiff’s contention that the suit property was at some point around the year 1999 irregularly and unlawfully allocated by the 4th Defendant who was then the Commissioner of Lands to the 1st and 2nd Defendants who subsequently caused the same to be transferred to the 3rd Defendant.
20. As it were the 3rd Defendant does not deny that the property may have been public land at some point. It is however the 3rd Defendant’s case that it is the Government through the Ministry of Lands that had put up the suit property for sale by a letter dated 24th January, 2007 having classified the same as a non-strategic house. It is further the 3rd Defendant’s case that the Government had then put up a condition that where the property was an irregularly alienated Government house, the same was to be valued for the allottee to pay the market price. It is his case that in regard to this particular property it was valued at Kshs.2,783,000/- which he had paid. In light of that, the 3rd Defendant holds that any irregularity in the title was addressed and that he had acquired the same as an innocent purchaser for value without notice of any irregularity.
21. In my considered opinion, given the admission that the suit property was originally public land, the issue as to whether the 3rd Defendant had acquired the same regularly or irregularly can only be determined at the trial. The question that I hear the Plaintiff to be asking is whether, given the fact that the suit property was said to constitute alienated Government land with a Government house thereon, the 4th Defendant or any of his representatives could alienate the same in favour of the 1st Defendant or any other person.
22. It is not lost to this Court that this Country has had its fair share of problems associated with improper allocation of public land. The recognition that there had been some irregular and illegal grants issued in respect of Government land has informed a number of radical proposals to address the same under the 2010 *Constitution*. Under Article 68 of the *Constitution*, Kenyans put an obligation on parliament to enact a legislation to *inter alia* enable the review of all grants or dispositions of public land to establish



their propriety or legality. I am in no doubt that it is pursuant to that noble obligation that the Plaintiff has instituted this claim.

23. In that regard, it is again not lost on the Court that the 3rd Defendant has not only commenced construction on the suit property but has also used the same as collateral charged to the 5th Respondent for purposes of securing rental income expected to be generated from the rental premises being erected thereon. If this Court were to allow the 3rd and 5th Respondents to deal with the suit property in the manner they wish prior to the conclusion of this case, there is every possibility that the property stands to suffer further damages and even alienation to third Parties especially where the 3rd Defendant were to default in his obligations to the 5th Defendant.
24. If that were to happen and ultimately the Plaintiff proves its case, the Plaintiff and the public at large stand to suffer irreparable injury and loss. That being the case, I am persuaded that it is in the best interest of justice that the suit be preserved in its present state.
25. In the premises, I hereby allow the Motion dated 15th February, 2023 in terms of prayers 4 and 5 thereof.
26. The costs of the Application shall be in the suit.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 9TH DAY OF MAY, 2024.**

In the presence of:-

Mr. Ayoo for the Plaintiff

No appearance for the Defendants

Court assistant – Kendi

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J. O. OLOLA

JUDGE

