



Osman & 2 others v Abdi (Environment & Land Miscellaneous Case E001 of 2023) [2024] KEELC 4863 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2023**

JM MUTUNGI, J

JUNE 20, 2024

BETWEEN

BASAANE MOHAMUD OSMAN 1ST PLAINTIFF

SUGOW DAGALE HAJI 2ND PLAINTIFF

IBRAHIM DIRIYO ABSIYE 3RD PLAINTIFF

AND

ABDULLAHI DUBOW ABDI DEFENDANT

RULING

1. The Plaintiffs initiated the present suit by way of a plaint dated 7th December, 2023. Simultaneously with the Plaint, the Plaintiffs also filed a Notice of Motion of even date inter alia seeking a temporary injunction against the Respondent, including his servants, agents, and assigns, and further for the enforcement of the order by the Officer Commanding the Garissa Police Station.
2. The motion was predicated upon the grounds set in the Application and the annexed affidavit of Basaane Mohamud Osman. He contended that the Plaintiffs were the legitimate owners of L.R. No. 31601, having acquired the same from the National Government of Kenya. The Plaintiffs claim that the Defendant unlawfully encroached onto the suit property on or about 6th July 2021 and erected a fence thereon and commenced putting up buildings on the suit land. The Plaintiffs expressed fear that the Defendant would persist and continue with the unlawful encroachment and trespass. The Plaintiffs asserted that the Respondent had filed Garissa CM ELC No. E011 of 2021 against them relating to the same subject matter but the suit was dismissed on 16/11/2023 for want prosecution.
3. The Defendant filed his Replying Affidavit on 21st February, 2024 in opposition to the Plaintiffs application. He contended that the Plaintiff's application ought to be deemed Res Judicata, in view of the fact that the 1st Plaintiff filed a similar application in Garissa MC ELC No. 001 of 2024 and the application was considered by the Court and was dismissed. Interim orders in MCELC 001 of 2024



had already been dismissed. The Defendant averred that the present lawsuit should be considered sub judice, given that Garissa MCELC E001 of 2024, which involves the same parties and subject matter, is currently pending in the Magistrate Court. The Defendant urged the Court to stay the proceedings of the Lower Court. The Defendant asserted that he was the lawful owner of land parcels Garissa/2116 and 2117 the same having been regularly allocated to him as per minute number 3 on April 21, 1987, by the Garissa Municipal Council. He stated that he has consistently paid rent for these parcels of land to the Municipal Council of Garissa and, following the onset of devolution, to the County Government of Garissa. He stated that he was unfamiliar with the plaintiffs and vehemently denied any encroachment on their property, as he was unaware of its location. He contended that despite the predominant lack of land registration in Garissa County and the absence of issued Partial Development Plans within the County, the Physical Planning Office had inspected his land and verified his ownership of the two plots. He argued that, based on the plaintiffs' pleadings, it was unclear whether they were asserting that the disputed land included his property, pointing out that this matter could not be resolved during a preliminary phase. He asserted that the Plaintiffs had failed to present a prima facie case with a likelihood of success. Furthermore, he argued that should the Court ultimately rule in favor of the Plaintiffs, an award of damage would sufficiently remedy any harm they suffered. He pointed out that the Plaintiffs were seeking eviction against the Defendant which indicated the Defendant was in possession and as a consequence an order of eviction cannot be issued until the issue of ownership was determined at the hearing and conclusion of the trial.

4. On February 28, 2023, the Plaintiffs sought and were granted leave to file a Supplementary Affidavit but did not do so within the time allowed. The Court on 22/4/2024 scheduled Ruling on the application dated 7th December 2023 on the basis of the pleadings that the parties had filed and were on record.

Analysis and Determination

5. I have reviewed the application and the Supporting Affidavit, the Replying Affidavit, and the accompanying annexures. The issue for determination is whether the Plaintiff has met the criteria for granting an order of Temporary Injunction pending the hearing and determination of the suit.
6. The guiding principles for the grant of orders of temporary injunction are well settled and were articulated in the Case of *Giella Versus Cassman Brown* (1973) EA 358 and have been reiterated in numerous decisions from Kenyan Courts and more particularly in the Case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal stated that;

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to; 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 that 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”.



7. Consequently, the Applicants ought to first establish a prima facie case. The Court of Appeal in the Case of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) ECLR explained what a prima facie case entails. The Court stated thus:

“... 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.”

8. In support of their application, the Plaintiff in the present case have attached copies of documents of title to the suit property. The Defendant/Respondent however has also annexed documents to his Replying Affidavit to support his assertion that he was allocated two distinct parcels of land by the defunct Municipal Council of Garissa.

9. In the instant matter therefore there appears to be a dispute as to whether the location where the Plaintiffs claim their registered land is located is the same location where the Defendant’s two plots are located. The Defendant holds what he claims to be Letters of allocation while the Plaintiffs hold a certificate of title. There is no evidence of a Survey report that could assist in determining whether there has been any encroachment and/or trespass by either of the parties onto the others property.

10. The facts are in dispute and it is not possible at this stage of the proceedings to make a determination to make a finding that the Defendant has encroached into the Plaintiffs land. The Court is of the view that this is a matter that would require proof by way of evidence at the trial. The Court therefore is not satisfied the Plaintiff has established a prima facie case with a probability of success.

11. Having come to the conclusion that no prima facie case has been demonstrated, I need not consider the other two conditions for grant of temporary injunction. As expressed by the Court of Appeal in the Case of *Nguruman Limited –vs- Jan Bonde Nelson* (supra) the conditions for grant of an injunction have to be considered sequentially such that when the first condition of demonstrating a prima facie case fails, then an injunction cannot be granted. Notwithstanding that an order of injunction cannot be granted in the circumstances of this case, it is evident that both parties are claiming a right of entitlement to the same land albeit for different reasons. In such a situation where facts are disputed, the Court endeavours to have the status quo, as is, preserved until the parties rights are determined during the trial.

12. In the circumstances therefore, the order that commends itself to the Court is to require, and it is hereby ordered, that the parties observe and maintain the prevailing status quo as at the date of this Ruling such that no party shall undertake any further developments of a permanent nature on the disputed portion, sell or transfer the same pending the hearing and determination of the suit. The balance of convenience in the instant case would swing in favour of an order for status quo as ordered and I am fortified in that view having regard to the observations made by Mativo, J (as he then was) in the Case of *Paul Gitonga Wanjau –vs- Gathuthi Tea Factory Ltd & 2 others* (2016) eCLR where commenting on the application of the balance of convenience principle he stated as follows:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the Court makes a determination as to which party will suffer the



greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

13. In the instant matter the Plaintiffs have conceded that the Defendant is in occupation and has put up a fence on part of the disputed property which the Defendant claims belonged to him. Until the issue of ownership is proved, it would be presumptuous on the part of the Court at this stage to accept the assertions by either of the parties and issue any definitive orders and it is for that reason the Court has opted to issue an order for the maintenance of status quo to preserve the position, as is, until the matter is heard and determined on merits.
14. For the reasons I have advanced herein above, it is my determination that the Plaintiffs have not satisfied the conditions for grant of a temporary injunction and the Notice of Motion dated 7th December, 2023 is hereby dismissed. I direct that the costs of the application shall be in the cause.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF JUNE 2024.

J. M. MUTUNGI

ELC - JUDGE

