



**Hassan & 2 others v Mohamed & 5 others (Environment & Land
Case 7 of 2017) [2024] KEELC 4804 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 7 OF 2017**

OA ANGOTE, J

JUNE 13, 2024

BETWEEN

ABDIRASHID ADAN HASSAN 1ST PLAINTIFF

JARED JUMA 2ND PLAINTIFF

STEPHEN MAROA NYAMOHANGA 3RD PLAINTIFF

AND

ABDI AKIM MOHAMED 1ST DEFENDANT

WARDHA MOHAMED ABDALLA 2ND DEFENDANT

MOHAMED SULEIMAN WARSAME 3RD DEFENDANT

AND

ABDIRAHAM TAKAR SHODE 1ST INTENDED DEFENDANT

DAHIR WARSAME 2ND INTENDED DEFENDANT

SAEED ABDULKADIR GIRIDHI 3RD INTENDED DEFENDANT

RULING

1. Before the Court for determination is the Plaintiffs’/Applicants’ Notice of Motion dated 25th February 2022 and brought under Order 51 Rule of the *Civil Procedure Rules*, Sections 1A, 3, 3A and 63E of the *Civil Procedure Act* and Article 159 of the *Constitution*. The Plaintiffs are seeking orders that:
 - a. Spent.
 - b. The Court be pleased to set aside, review and/or vary the orders dated and issued on 27th October 2021 withdrawing this suit.



- c. The Court be pleased to reinstate this suit for hearing and full determination.
 - d. The Court be pleased to enjoin and bring on board the 4th, 5th and 6th intended Defendants as the 4th, 5th and 6th Defendants.
 - e. Spent.
 - f. The Court be pleased to issue a temporary injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants by themselves, their agents, employees, servants and/or any other persons claiming and /or acting through them from continuing constructing, developing, building, erecting, alienating, selling or interfering in any manner however and whatsoever with all the land known as Reference Number L.R No. 36/II/194 situated along 6th Street Eastleigh Estate within Nairobi County (hereinafter the suit property) pending the hearing and determination of this suit.
 - g. Costs of this application be provided for.
2. The application is based on several grounds and supported by an affidavit sworn by the 1st Plaintiff, who deponed that the suit was erroneously withdrawn by the Court on account of a letter of withdrawal dated 30th April 2019 and written by CM Advocates.
 3. It was deponed by the 1st Plaintiff that CM Advocates confirmed to his advocates, Osoro Omwoyo Advocates that they did not represent any parties to the suit and that the letter that the Court acted on in withdrawing the suit was mistakenly filed in the instant suit.
 4. Concerning the suit property, the 1st Plaintiff stated that along with the other Plaintiffs, they entered into an agreement dated 16th December 2011 with the 1st and 2nd Defendants for the purchase of the suit property for Kshs. 20,000,000.
 5. According to the 1st Plaintiff, he was to take possession of the suit property after six months of signing the agreement; that within that period, the 1st and 2nd Defendants were supposed to have delivered the completion documents to them and that the 1st and 2nd Defendants failed to do so.
 6. The 1st Plaintiff averred that in order to defeat the agreement, the 1st and 2nd Defendants leased the suit property to the 3rd Defendant and that they entered into a secret agreement with the 4th, 5th and 6th Defendants.
 7. According to the 1st Plaintiff, in furtherance to the said agreement, the 4th, 5th and 6th Defendants bought the suit property and commenced the construction of a 14-storey building thereon. In conclusion he stated that it was in the interest of justice that the Court issues a temporary injunction restraining the Defendants from interfering with the suit property.
 8. The 3rd Defendant filed a replying affidavit dated 3rd October 2023. He stated that the firm of Osoro Omwoyo Advocates was not properly on record as they had not filed a Notice of Change of Advocates to represent the Plaintiffs in place of the previous advocates. He consequently asked that the application be dismissed with costs.
 9. The parties filed submissions and authorities which I have considered.

Analysis and Determination

10. The Plaintiffs have, through their omnibus application, sought multiple reliefs from this court. They have sought orders for reinstatement of the suit, joinder of defendants and injunction orders.



11. The Plaintiffs claim that this suit was erroneously withdrawn by the Court on account of a letter of withdrawal dated 30th April 2019 and written by CM Advocates. They aver that the firm of CM Advocates has never appeared for any of the parties in this suit. Further, that they communicated with CM Advocates who confirmed that the letter erroneously referred to ELC No. 7 of 2017 instead of ELC No. 7 of 2018.
12. The 3rd Defendant has opposed the Plaintiff's application for reinstatement of the suit, and claimed that there is no evidence to show that CM Advocates was not properly on record and that there has been no complaint to the Law Society of Kenya Disciplinary Committee.
13. It is not disputed that this suit was withdrawn under Order 25 Rule 1 of the *Civil Procedure Rules*, which provides that at any time before the setting down of the suit for hearing, the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
14. The 3rd Defendant has submitted that the Plaintiffs cannot seek to reinstate a suit which they have withdrawn. They relied on the case of *George Mwangi Kinuthia v Attorney General* [2019] eKLR, where the court held: -

“It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of Order 25 Rule 4 of the *Civil Procedure Rules*, 200. The order and rule herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view that once a suit has been withdrawn there is nothing that can be sought to be reinstated.”
15. The Plaintiffs have asserted that they did not engage the firm of CM Advocates in this suit, nor did they instruct them to withdraw the suit. In support of their claim, the Plaintiffs have annexed email correspondences between themselves and the firm of CM Advocates.
16. In the email of 23rd February, Wilfred Lusi, of the firm of CM Advocates, stated that there was a typographical error in the letter dated 30th April 2019. In the said letter, he states that he intended to withdraw ELC Suit No. 7 of 2018 and not ELC No. 7 of 2017. He also asserted that they are strangers to this suit.
17. This court is satisfied that the withdrawal of this suit was an inadvertent error by a third party. Under the *Civil Procedure Act* and *Rules*, there is no remedy provided in the instance where a suit is mistakenly withdrawn by a third party. However, there can be no injury without a remedy in law.
18. This court is enjoined under Section 1A (1) and (2) of the *Civil Procedure Act* and Section 3 of the *Environment and Land Court Act* to effect the overriding objective of the *Act*, which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the *Act*.
19. Section 3 of the *Civil Procedure Act* provides that in the absence of any provision to the contrary, a court is not limited in its exercise of special jurisdiction or power conferred under any other law in force.
20. Section 3A prescribes that a court is clothed with inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.



21. Section 63(e) prescribes that in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed, make such other interlocutory orders as may appear to the court to be just and convenient.
22. The Court of Appeal in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR relied on the explanation as to the extent of inherent powers of the court by the authors of the *Halsbury's Laws of England*, 4th Edition Vol. 37 Para. 14 as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”
23. This court therefore invokes its inherent powers and reinstates this suit for hearing and full determination on its merits.
24. The Plaintiffs have sought for an order to join the 4th, 5th and 6th Defendants to this suit. They aver that the 1st and 2nd Defendants have since conveyed the suit property to the 4th, 5th and 6th Defendants.
25. Order 1 Rule 10 (2) of the *Civil Procedure Rules* provides for the joinder of parties at any stage of proceedings;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
26. The Plaintiffs submit that the 4th, 5th and 6th Defendants should be joined in the suit based on a lease dated 20th February 2009 and registered on 12th October 2016. They also argue that the said persons are in charge of the building that is being constructed on the suit property.
27. The Plaintiffs have supported their claim by attaching photographs of the suit property and the lease agreement dated 12th October 2016.
28. The Intended Defendants are however not mentioned in the lease agreement. Their nexus to this suit and to the suit property specifically is not apparent. The Plaintiffs have also not sought



to amend their Complaint, neither have they annexed a draft Amended Complaint to show the remedies they seek against them. On this basis, the court declines to allow the prayer for joinder.

29. The Plaintiffs have also sought injunction orders against the Defendants from continuing constructing, developing, building, erecting, alienating, selling or interfering in any manner however and whatsoever with the suit property.
30. The law on grant of interlocutory injunctions is found under Order 40 Rule 1 of the Civil Procedure Rules, 2010 which provides 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 the execution if 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.”

31. The locus classicus case of *Giella v Cassman Brown* [1973] EA 358 sets out the essential conditions to be satisfied for a court to issue injunctive orders:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 the court is in doubt, it will decide an application on the balance of convenience.”

32. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate 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 rests 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. See Kenya Commercial Finance



Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

33. The first condition which the Plaintiffs must establish is that they have a prima facie case with a likelihood of success. In *Mrao Ltd v First American Bank of Kenya and 2 Others*, [2003] KLR 125 which was cited with approval in *Moses C. Mubia Njoroge & 16 Others v Jane W Lesaloi and 5 Others*, [2014]eKLR, the Court of Appeal defined a prima facie case as follows:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

34. In the sale agreement dated 16th December 2011, the Plaintiffs and the 1st and 2nd Defendants entered into a sale agreement with respect to the suit property, and the agreement was received for registration at the Land Registry on 22nd December 2011.
35. The Plaintiffs have annexed receipts of various part payments of the purchase price between 25th January 2012, and 1st March 2016. Also attached is a lease agreement between the 1st Defendant and the 3rd Defendant, dated 2009 and received for registration on 12th October 2016. The lease agreement is for 15 years from 1st November 2008.
36. It then appears that the Plaintiffs and the 3rd Defendant have competing interests in the suit property, which they appear to have obtained from the 1st Defendant. That being the case, the court finds that the Plaintiffs have a prima facie case with a likelihood of success.
37. The second element is whether the Plaintiffs will suffer irreparable injury which will not be compensated by an award for damages if the temporary injunction is not allowed. *Halsbury's Laws of England*, 3rd Edition Volume 21, Paragraph 739 page 352 defines irreparable injury as;

"injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected



or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question.”

38. The Plaintiffs have asserted that they will suffer irreparable damage because the 3rd Defendant is currently undertaking construction on the suit property. The Plaintiff’s claim is based on the right to property, protected under Article 40 of the Constitution.
39. The issue of ownership of the suit property ought to be resolved before the completion of construction and further conveyance of the suit property to innocent third parties. This court finds that the Plaintiff stands to suffer irreparable harm in the event the construction is completed and the suit property is sold.
40. In conclusion, this court issues the following orders:
 - a. The order of this court dated and issued on 27th October 2021 marking the suit as withdrawn is hereby set aside.
 - b. This suit is reinstated for hearing and determination on its merits.
 - c. A temporary injunction is hereby issued against the 1st, 2nd and 3rd Defendants by themselves, their agents, employees, servants and/or any other persons claiming and /or acting through them from continuing constructing, developing, building, erecting, alienating, selling or interfering in any manner however and whatsoever with all the land known as Reference Number L.R No. 36/II/194 situated along 6th Street Eastleigh Estate within Nairobi County (hereinafter the suit property) pending the hearing and determination of the suit.
 - d. Costs of the application to be in the course.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF JUNE, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Munyua holding brief for Osoro for Plaintiff

No appearance for Defendant

Court Assistant: Tracy

