



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kiraguri & another v Indo Arica Finance Ltd (Environment and Land Appeal 4 of 2023) [2024] KEELC 4604 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4604 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 4 OF 2023**

**JA MOGENI, J
JUNE 10, 2024**

BETWEEN

JOSEPH WACHIRA KIRAGURI 1ST APPELLANT

SHELMITH WAMAITHA WACHIRA 2ND APPELLANT

AND

INDO ARICA FINANCE LTD RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion Application dated 2/06/2021 filed by the Appellant/Applicant. The said motion seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That an injunction do issue restraining the respondent and the intended interring (sic) 3rd party from evicting taking possession of harassing or otherwise interfering with applicants occupation of the House known as Nairobi/Block 76/4x8.
 - d. That one Mr Stephen Kiramana Ilongi be enjoined in these proceedings as an interested party and service upon him be effected by way of substituted service
 - e. That the purported sale by public auction of the property known as Nairobi/Block 76/4x8 made on 11th December 2020 be set aside.
 - f. That the land registrar be restrained by an order of this court from effecting transfer of the property known as Nairobi/Block 76/4x8 to the purported



Issues for Determination

10. Having considered the Application and Preliminary Objection filed by the Respondent, the written submissions filed herein, I deduce the following to be the main issues for determination: -
 - a. Whether the Preliminary Objection is properly before this court
 - b. Whether the applicant is deserving of the prayers made in the application

Analysis and Determination

a) Whether the Preliminary Objection is properly before this court.

11. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696 laid down the principle as to what constitutes a preliminary objection. A preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a preliminary objection would not be sustainable. In the said case Law, JA stated as follows: -

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

12. In the present matter the Respondent has hinged their preliminary objection on the fact that this court lacks jurisdiction since the gist of the application is about the exercise of statutory power of sale which is purely of a commercial nature.
13. This court has considered the application and submissions therein. The relevant provisions that grant the Environment and Land Court jurisdiction are Article 162(2) of *the Constitution* which provides as follows:

“ 162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) a) employment and labour relations; and
 - (b) b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

14. Pursuant to provisions, the *Environment and Land Court Act* was enacted which elaborates on the jurisdiction of the Environment and Land Court in section 13 thereof as follows:



1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
 - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
 - (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
15. It therefore follows that this court can hear and determine disputes relating to environment and use, occupation of, and title to land. In the instant application it relates to occupation and title to land which is said to have been sold via public auction transferring title from one party to the other allegedly in exercise of statutory power of sale of land. The dominant issue being that a party is claiming to have been denied their proprietary interest in the suit property unfairly. Bottomline, this court has jurisdiction over the dispute and I find the preliminary objection unmerited.
- b) Whether the applicant is deserving of the prayers made in the

application.

16. The applicant herein has sought for injunctive orders. These are equitable remedies that are granted at the discretion of the court. However, the said discretion must be exercised judicially as was held in the case of Hasmukh Khetshi Shah Vs Tinga Traders ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628, where the court held that;
- “It must be stated at the outset that the granting of the interim Injunction is an exercise of judicial discretion”
17. I am guided by the principles laid down in the case of Giella Vs Cassman Brown and Co. Ltd (1973) EA 358 in deciding whether or not to grant the orders sought herein. In the above case the court stated that the applicant must show that: -
- a. He has a prima facie case with probability of success.



- b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.
 - c. When the court is in doubt, to decide the case on a balance of convenience.
18. The applicant firstly needed to demonstrate that he has a prima facie with probability of success. A prima facie case was described in the case of Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125, as; -

“ 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 later”.
19. The applicant has alleged that the respondent sold by public auction the suit property despite a court order having been issued. I have however noted that all the applications made by the applicant seeking injunctive orders against the respondent were all dismissed by the court.
20. The suit filed on 5/12/2019 CMCC No. 8971 of 2019 together with an application filed were dismissed on 27/02/2020. A second application filed on 25/03/2020 seeking injunctive and restraining orders against the respondent to bar them from selling by public auction was dismissed through the ruling dated 6/08/2020 and the court in its ruling stated that the application was res judicata. A third application was dismissed vide the court ruling of 19/11/2020 declaring it to be res judicata.
21. The respondent in its response to the instant application avers that the applicant is litigious and that the application is an abuse of the court process. Further that the myriad applications made by the applicant/appellant are meant to deny the respondent the fruits of the rulings of the court made. He avers that litigation must at some point come to an end.
22. The applicant has also sought to enjoin one Stephen Kiramana Ilongi who he alleges bought the impugned suit property by public auction which he has submitted had been stopped by court order.
23. Having now considered the pleadings generally, the attached exhibit and the submissions, the Court finds and holds that the applicant has not made a prima facie case with probability of success.
24. The Plaintiff has also alleged that the Respondents did not notify him when they decided to sell the suit property yet the respondent has attached copies of notices to the replying affidavit. The 1st statutory notice for 90 days was issued vide a letter dated 9/04/2019, the second vide a letter dated 23/08/2019 and the Auctioneer also gave a notice dated 8/10/2019.
25. I am therefore convinced that the notice was issued and it was adequate. I also note that the applicant/appellant has stated that the property has already been sold. This being the case there is not prima facie case established regarding the ownership of the suit property by the applicant/appellant. Since he does not own the property then his claim to the property cannot then if there will be any loss he may suffer this can be compensated through payment of damages. This was the finding in the case of Wairimu Mureithi Vs City Council of Nairobi, Civil Appeal No. 5 of 1979 KLR 332 396 where it was held that: -

“ However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.



26. It is my position that the applicant has not demonstrated that he will suffer irreparable loss which cannot be compensated by an award of damages. On the balance of convenience; I find that it tilts in favour of the Respondent.
27. Having now carefully considered the applicant's Notice of Motion dated 2/06/2021 including the affidavits and annexures I find that it has no merit for two (2) reasons.
28. Firstly, I find the application to be Res Judicata having been heard and dismissed by the lower court three times on the same issue of injunctive orders.
29. Secondly, I find that contrary to the deposition by the applicant that there was no statutory notice issued to it before sale, the Respondent has demonstrated that they issued the requisite notice.
30. Finally, even after the applicant was given ample time to avail evidence of payment of the loan, no such evidence was forthcoming since from my perusal of records he only said he needed to sell his crop of wheat to pay up.
31. For the above reasons, I find that the Applicant has not established a prima facie with a probability of success. The balance of convenience does not favour the applicant either. I proceed and dismiss the application dated 2/06/2024 with costs to the Respondent
32. Thus this matter shall now be mentioned on 15/07/2024 for further directions on the disposal of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10th DAY OF JUNE 2024

MOGENI J

JUDGE

In the virtual presence of:

Muronji holding for Mr. Juma for Respondent

No appearance for Applicant Applicant/Appellant

Caroline Sagina – Court Assistant

.....

MOGENI J

JUDGE

