Wachana v Busienei & 5 others (Enviromental and Land Originating Summons E003 of 2024) [2024] KEELC 6140 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6140 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2024

EO OBAGA, J

SEPTEMBER 26, 2024

BETWEEN

MARY MASULIA WACHANA ..... APPLICANT

AND

ELISHA KARE BUSIENEI ..... 1ST RESPONDENT

AGNES ROP ..... 2ND RESPONDENT

STEPHEN KEMBOI ..... 3RD RESPONDENT

PHILLIP KIBOR (AS ADMINISTRATOR OF THE ESTATE OF JACKSON KIBOR ..... 4TH RESPONDENT

MOSES SIRMA & JOSHUA METTO (AS ADMINISTRATORS OF THE ESTATE OF ELIZABETH JEPCHOGE SIRMA ..... 5TH RESPONDENT

REBECCA SOI ..... 6TH RESPONDENT

RULING

1. By an Amended Notice of Motion dated 2nd May, 2024 the Applicant sought the following orders: -

    a. Spent.

    b. Spent.

    c. That the respondents, their servants or agents and all persons acting via authority of the respondents be restrained from orchestrating the arrest and/or eviction of the applicant/her servants and/or agents or in any way demolishing or causing to be demolished or removed all buildings and property of the applicant on title No Eldoret Municipality/Block 14/604/49 pending the hearing and final determination of the originating summons.

d. That Permanent Injunction do issue restraining the Respondents, their servants, agents and all other persons authorized by the respondents from arresting, evicting or causing the arrest and eviction of the Applicant, her servants, agents and all persons authorized by the applicant from title No Eldoret Municipality/Block 14/604/49.

2. The application is based on the grounds thereof and on the Applicant's Supporting Affidavit sworn on 02.05.2024. She avers that she purchased a portion of the suit parcel measuring approx. 0.5 Acre sometimes on 23/7/1998; she was given a provisional number No Eldoret Municipality/Block 14/604/49.

3. That pursuant to the said sale, she took possession of the parcel of land and has extensively developed the same; she has built a four-room bungalow, planted trees, has been cultivating the remaining portion. That she has remained in occupation thereon since 1998 to date.

4. It is her claim that the respondents have been issuing threats of evicting them from the suit parcel since the year 2018 and the same has escalated to acts by the respondents through their agents of demolishing her house on the suit land and carrying away household goods. She urged the court to grant the orders sought in the application.

5. In her response to the Replying Affidavits filed by the respondents; she stated that the suit property No Eldoret Municipality/Block 14/604/49 is a number provisionally allocated to her although the same has not been registered. She reiterated that her claim is with regard to half a portion of the entire parcel which she occupies.

6. It was her contention that she purchased the portion of the suit parcel for valuable consideration and has been in a quiet and uninterrupted occupation thereon. She thus urged the court to issue the injunctive relief sought in order to preserve the suit land and maintain status quo.

7. The application was opposed. Counsel for the 1st, 2nd, 3rd, 4th and 6th respondent filed their replying affidavit sworn by the 3rd respondent on 10/6/2024 while Counsel for 5th Respondent filed his replying affidavit sworn on the 5/7/2024.

8. The 3rd respondent in his response gave a brief history of the land parcel; it was his contention that Eldoret Municipality Block 14/604 has never been subdivided and therefore Eldoret Municipality Block 14/604/49 as alleged by the applicant does not exist and the same can be noted from the register. He dismissed the applicant's claim as being frivolous since the issue of ownership is pending for determination in Eldoret ELC Case No 27 of 2012.

9. It was his contention that the applicant cannot purport to be in possession of the suit land yet the issue of possession is pending in court. He thus urged the court to dismiss the application in the interest of justice.

10. The 5th respondent in his replying affidavit dismissed the suit as being sub-judice on account of Eldoret ELC Case No 27 of 2012 (formerly Kitale E&L Case No 131 of 2013 and Eldoret HCCC No 243 of 1998; since the same relate to the same subject matter hence the need to prevent conflicting decisions. It was his claim that the applicant had concealed the existence of the said suit for ulterior motive.

11. It was his contention that the application is untenable and bad in law for the reason that the same was brought under the wrong provisions of law. Further, that the supporting affidavit is muddled with misrepresentations of material facts and subsequently amounts to an abuse of the court process.

12. He asserted that the applicant has never been in possession of the suit land whatsoever and that they are the ones in possession of the suit land at the moment and thus if the orders sought are granted, the same will be tantamount to evicting them from their own parcel of land before determination of the suit.

13. The Application was canvassed by way of written submissions; the Applicant filed her submissions dated 19/7/2024, counsel for the 1st, 2nd, 3rd, 4th and 6th respondents filed their submissions dated 26/7/2024 which I have read and considered. At the time of writing this ruling, I had not seen any submissions on behalf of the 5th respondents either in the physical file or in the CTS portal. Be that as it may, I will proceed to render my decision as hereunder;

14. I have taken into account the Amended Notice of Motion Application, the Affidavits together with the annexures thereto and the rival submissions. It is my considered view that the sole issue arising for determination is whether the Applicant has met the requirements for the grant of an Order of temporary injunction.

15. The law relating to injunctions is provided under Order 40 (1) (2) of the *Civil Procedure Rule*. Further section 13 (7) (a) of the *Environment and Land Court Act*, 2015; mandates this court to grant interim preservation orders; including an interim order of injunction in the nature sought herein.

16. The principles guiding the grant of injunctions are well settled. An applicant seeking orders of injunction must satisfy the 3-pillar test set out in the celebrated case of *Giella v Cassman Brown and Co. Ltd* [1973] EA. 358 at 360 as follows: -

    a. where he is required to demonstrate that he has a *prima facie* case with serious triable and arguable issues with a probability of success against the respondent. The test on *prima facie* case does not mean establishing a case beyond reasonable doubt;

    b. He will suffer irreparable harm/injury which cannot be adequately compensated by damages;

    c. Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.

    (See also *East African Industries v Trufoods* [1972] EA 420)

17. It has also been established that all the 3 pillars indicated above are to be applied as separate, distinct and logical hurdles which an applicant for an Order of Injunction is expected to surmount sequentially. The existence of one pillar alone does not automatically entitle an Applicant to an order of injunction without considering the other hurdles. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86.

18. The first ground that an Applicant must establish is that he has a *prima facie* case which raises arguable and triable issues with a probability of success. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2* (*supra*) explained what amounts to a *prima facie* case and stated as follows:

> "a *prima facie* case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

19. In determining an application at this interlocutory stage, the court is mindful not to delve into the real issues in dispute in the main suit. The issue of possession and ownership of the suit parcel herein is at the center of the main suit and I will not therefore comment on the same. At an interlocutory stage,

the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC No 1234 of 2002).

20. It is important to note that both the applicant and the 5th respondent are alleging to be in possession of the suit parcel. It is the applicant's contention that she has been in exclusive and uninterrupted possession of a portion of the suit land; she annexed copies of the OB report and referred to Eldoret Criminal Case E942 of 2024, where her agent and/or servant has been charged for forcible detainer. These assertions and evidence were not controverted by respondents.

21. The 5th respondent on his part has not adduced any evidence to show that he is in possession of the suit and his averments therefore remain mere allegations.

22. From material presented before this court, it is evident that the applicant has demonstrated that there exists a right which is being threatened to be infringed by the actions of the respondents. It is therefore my finding that the Applicant has satisfactorily proved that she has a *prima facie* case.

23. The second limb is that an Applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by damages unless an Order of Injunction is granted. The burden is on the applicant to demonstrate the nature and extent of the substantial injury likely to be suffered.

24. The court in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR defined what amounts to an irreparable injury as follows;

> " irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

25. It is the Applicant's claim that she has extensively developed her portion of the suit land, she has built a four-room bungalow, planted trees and has been cultivating on the remaining portion. She contends that unless the orders sought are granted, the respondents will make good their threat and forcefully evict her from the suit land thus rendering her destitute.

26. An injury is irreparable where there is no standard by which an amount can be measured with reasonable precision and accuracy or is in such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

27. Consequently, I find that the Applicant has demonstrated the irreparable loss that he is likely to suffer and the same may not be adequately compensated by an award of damages to the required threshold.

28. The final element to be met is on the balance of convenience. The court needs to be satisfied that the inconvenience likely to be caused to the Applicant by declining the injunction is greater than that which is likely to be caused to the respondents. The court is called upon to balance the inconveniences of both parties and possible injuries to them and their properties. (See *Charter House Investment Limited v Simon K. Sang and 3 others* [2010] eKLR).

29. As held hereinabove, the Applicant is in possession and occupation of a portion of the suit parcel; which she has extensively developed by building structures and with items of intrinsic value. Unless restrained, the respondents' actions will render her homeless and destitute.

30. In view of the circumstances; it is my considered opinion that the inconvenience likely to be caused to the Applicant is greater than that which is likely to be caused to the Respondents.

Conclusion:

31. In view of the foregoing, I find that the Amended Notice of Motion Application dated 2.05.2024 is merited and the same is hereby allowed in terms of prayer (c). Costs of the Application to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED IN ELDORET ON 26TH DAY OF SEPTEMBER, 2024.

E. OBAGA

JUDGE

Ruling delivered in the virtual presence of: -

Mr. Kapten for Mr. Wasilwa for the Applicant.

Mr. Kagunza for the 5th Respondent.

Court Assistant – Laban

E. OBAGA

JUDGE

26th SEPTEMBER, 2024