Shitsugane v Nalanda (Environment & Land Case E008 of 2024) [2024] KEELC 5968 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5968 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE E008 OF 2024

FO NYAGAKA, J

SEPTEMBER 18, 2024

BETWEEN

KENNETH SHITSUGANE .... PLAINTIFF

AND

JACOB NASONGO NALANDA .... DEFENDANT

RULING

1. Some parties enjoy being innovative in life, and that is okay. But some of the innovations are neither helpful to them or anyone else nor innovations at all: in legal practice some of these are often demonstrative of unhelpful legal practice activism or in the very least showcase a lack of seriousness in professionalism. It is advisable that if one is not sure about the new "thing" they want to introduce they research on it thoroughly before taking a step to do so or they stick to the old or conventional one: it is safer to do the latter than venture precariously into uncharted waters. I say so because in my entire career of legal practice I have never come across an order for "conservatory injunction". In so far as the relevance of the prayers sought may lead this Court to admit, I only know of "conservatory orders", "temporary injunctions" and "mandatory injunctions", besides "Mareva injunctions". The one sought herein is a strange creature of law. Perhaps I still need to research more.

2. If the Applicant sought to move this Court to grant a conservatory order, its nature and definition is as has been captured by courts variously in the past as shown briefly below, and I will not re-invent the wheel. If he sought to pray for a temporary injunction, its definition too is given below. And, if he sought a mandatory injunction, its meaning too is given below.

3. On the one hand, the nature of a conservatory order was discussed by the Supreme Court of Kenya in Civil Applicati*on No. 5 of 2014* Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR, at paragraph 86 as follows: -

(86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.

4. In the Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR the Court had the following to say about the nature of conservatory orders: -

> " Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person".

5. Similarly, such an order - a conservatory one - was defined by the Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR as follows: -

> " 5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter".

6. On the other hand, Bryan A. Garner in Blacks' Law Dictionary, 11th Edition, Thompson Reuters, St. Paul MN, p. 938 defines a temporary injunction also known as preliminary injunction as

> an order "...issued before or during trial to prevent an irreparable injury from occurring before the Court has a chance to decide the case."

7. The same author defines a "Mandatory Injunction" at p. r937, 938 to mean '.....an injunction that orders an affirmative act or mandates a specified course of conduct. It is also termed "Affirmative Injunction"

8. In contrasting a conservatory order with an injunction, Ibrahim J (as he then was) held, in Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR, as follows:

> " The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side".

9. Be that as it may, by a Notice of Motion dated 21/02/2024 the Plaintiff moved this Court for two reliefs. He did not cite the provisions of law under which the Application was brought. Nevertheless, this Court has the duty to hear the application on merits because failure to cite any provisions of law or

citing, if any is done, the wrong provisions of the law does not render the Application fatally defective, although it is prudent and proper legal practice that where provisions exist regarding an issue a party is enjoined to cite them and explain their relevance or apply them to the facts of the case. Doing such makes the work of the judge or judicial officer easier and it is a mark of good professional practice particularly where the party is represented by learned counsel.

10. I have stated that failure to cite the provisions of law did not render this application incompetent or fatally defective because under Article 159(2)(d) of *the Constitution* 2010, this Court is enjoined to administer justice without undue technicalities. It provides that "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles - (d) justice shall be administered without undue regard to procedural technicalities;". Furthermore, Order 51 Rule 10(2) of the Civil Procedure Rules, 2010 provides that "No application shall be defeated on a technicality or for want of form that does not affect the substance of the application." Thus, while it should be noted that Article 159(2)(d) is not a panacea or whitewash for all procedural ills or failures and defects as was stated by the Court of Appeal in Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR, the Article, as read with Order 51 Rule 10(2), shall in in the instant Application come to the aid of the Applicant. In the Patricia Case (supra) the Supreme Court held:-

> " Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in Law Society of Kenya v. The Centre for *Human Rights & Democracy & 12 Others, Petition No. 14 of 2013*, that "Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls." Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite."

11. In the instant Application, the Plaintiff sought the following prayers:-

    1. ...spent
    2. ...spent.
    3. That this Honorable Court be pleased to issue a Conservatory injunction order restraining the defendant, whether by himself, his employees, agents or any other person him (sic) from interfering entering a portion of parcel No. LR. No. 9079/3/ (Ndalala Plot 1B) measuring 50 acres (hereinafter referred to as the said property) pending the hearing and determination of this suit.
    4. Costs of this application be provided for.

12. The Application was based on four grounds and supported by the Affidavit of the Applicant, one Kenneth Shitsugane Olembo, sworn on 24/02/2024. The grounds were that the Plaintiff entered into a lease agreement with the Defendant which lease had since expired. The defendant had refused to vacate despite demand and notice being given to him. The Plaintiff has since entered into a new lease with a third party and it was bound to be frustrated if the orders sought were not granted. The conservatory orders were necessary to preserve the land.

13. In the Supporting Affidavit he deposed that he was the administrator of the estate of both Prof. Reuben James Olembo and Prof. Norah Khadinzi Olembo (both deceased - hence competent to swear the affidavit). The deceased were his father and mother respectively. He had sought and obtained letters of administration to their estate. He attached and marked as KS1 copies of the Letters of Administration. Further, his late parents were the registered owners of parcel number LR 9079/3 as joint tenants. He attached as KS2 a copy of the certificate of title. Further, his late mother donated to him a General

Power of Attorney on 01/07/2019 and it was registered in the Land Registry on 18/09/2019. He annexed as KS3 a copy of the duly registered power of attorney.

14. He deposed that his mother died on the 01/03/2021. In the year 2020, his late mother entered into lease agreement with the defendant respondent over 50 acres of part of land, Parcel No. LR. 9079/3 (Plot 1B Ndalala Settlement Scheme). He attached and marked as NS-1 a copy of the lease agreement dated 15/12/2020. Further, he signed the lease agreement on behalf of his late mother, who had donated the Power of Attorney to him. The lease was for a term of five years, commencing 01/012019 to December, 2023 specifically for growing sugarcane. Further, it was a term of the lease that the lessee was not to grow crop on the parcel of land in the final year of the lease. The lease had since expired and he had given notice to the Defendant to vacate since the lease was not extended but the Defendant had refused and continued to trespass on the suit land.

15. He deposed that he had since entered into another lease agreement with one Thomas Isoka Nakitare which was to commence on 01/01/2024. He attached and marked KS6 a copy of the lease. He deposed that he was unable to give vacant possession to the new lessee since the Defendant had refused to vacate. This was despite him reporting the matter to the police and being issued with OB No. 19 of 31/01/2024 at Kwanza Policy Station. He prayed for eviction orders.

16. The application was opposed by the Defendant through his Replying of Affidavit sworn on 04/03/2024. He deposed that parcel LR. No. 9079/3 was distinct from plot 1 in Ndalala Settlement Scheme and hence the averment in paragraph 3 of the Plaint and paragraph 7 of the Supporting Affidavit that parcel number LR No. 9079/3 was the same plot 1 Ndalala Settlement Scheme was false. Further, plot number LR. No. 9079/3 was never the subject of the lease pleaded in paragraph *3* plaint and 7 of the Supporting Affidavit. The legal owner of plot 1 Ndalala Settlement Scheme was one Bernard Makanga and the Applicant had not offered any ownership document over the said plot. The said Plot was not registered in the name of the late Prof. Norah K. Olembo.

17. He went on to depone that the prayer as sought in the Plaint was for his eviction from parcel number LR No. 9079/3 also shown as plot 1B Ndalala Settlement Scheme while prayers 2 and 3 were of the application were for an injunction to restrain him from entering into plot LR. No. 9079/3 (Ndalala Plot 1B). Further, he was in occupation of plot No. 1B Ndalala Settlement Scheme. He annexed and marked JNN1 (a)- (c) photographs showing his sugar cane crop on 50 acres of the said parcel of land, owned by one Bernard Makanga.

18. He deponed that the prayers sought were a mandatory injunction to keep him out of plot number 1 in Ndalala Settlement Scheme while the suit was still pending yet a temporary injunction was meant to preserve and not to disrupt the status quo. Hence the orders sought were final since they would amount to his eviction from the land.

19. He annexed and marked as JNN2 a photocopy of the lease dated 08/09/2019 between himself and Prof. Norah Khadzini Olembo. The lease was in regard to 50 acres comprised in plot 1B Ndalala Settlement Scheme and it was for five years with effect from 01/01/2019 to 31/12/2023, subject to renewal. He had fully paid the sum of Kenyan shillings 3 million for the lease. The lessor died on the 11/03/2021 and at no time prior to the service of the instant application did he know that the Applicant was the Administrator of the estate. The Applicant was obliged to renew his lease with his mother (deceased). With the provision in the list and that is why he had a counterclaim over the extension of this. Further, the agreement dated 05/12/2020 which was annexed as NS-1 to the supporting affidavit was entered into by error since the agreement of 08/09/2018 was still in force and it had neither been amended or varied. The sum of Kenya Shillings 3 million was paid in consideration of the lease dated 08/09/2018. He annexed and marked as JNN3 a copy of the Lease dated 31/12/2019

entered between the Applicant and himself on the same date, by which the Applicant was to lease to him 120 acres being part of plot 1B Ndalala Settlement Scheme for a period of five years with effect 01/01/2020 to 31/12/2024 at a consideration of Kenya Shillings 6,000,000 pursuant to which means he had paid 1, 9000, 0000 but the Applicant failed to give him possession.

20. Further, by the agreement dated 01/12/2019, the consideration was to be paid to the Applicant's agent named Wycliffe Olumosi Mukokwa. He deposed to offer details of a number of payments he had made giving the total of Kenyan Shillings 1,900,000. He annexed and marked JNN4 (a), (b) and (c) photocopies of M-pesa payments of 12/12/2019 and the Kenya Commercial Bank (KCB) statements showing withdrawals of that 31/12/2019 and the bank transfer of 07/01/2020 and a supporting affidavit of Wycliffe Olumosi Mukokwa confirming receipt of other cash payments.

21. He deposed further that in mid-January 2024, the Applicant called him and intimated that he was ready to extend the lease that expired on 31/12/2023 but he required the Respondent to add Kenya Shillings 500,000. Thus, on 23/02/2024, he (Respondent) deposited Kshs. 500,000/= in the Applicant's account for that purpose. He annexed and marked JNN5 (a), (b) and (c) photocopies of the deposit slip of Kshs. 300,000 and a check of Kshs. 200,000/= payable to the Applicant and the deposit slip.

22. He deposed that he was surprised to learn that the Applicant had leased the land to a third party while he knew that he was in possession of Kenya Shillings 2,400,000 which was for the intended extension of the lease. Lastly, he deponed that he had filed a counterclaim for the refund of his money.

23. The Application was canvassed by way of written submissions. The Applicant filed his dated 24/05/2024 while the Respondent filed his dated 28/06/2024. This Court has considered the submissions in the process of analyzing the issues for determination as seen below.

Issue, Analysis and Determination

24. Both parties did not set forth issues for determination in this application. This Court has however, considered the same and is of the view that the following issues lie for determination.

    a. Whether the Application is merited.

    b. Who to bear the costs of the Application.

25. On numerous occasions courts in Kenya have restated that the remedy of orders of injunction is an equitable one. The grant or otherwise of it by a court is discretionary. However, the discretion should be exercised judiciously as was stated in the case of Kahoho v Secretary General, EACJ Applicati*on No. 5 of 2012*. By being judicious it means the court must take into account all the facts and circumstances of each case and arrive at a decision not plainly wrong.

26. Furthermore, in Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR (http://kenyalaw.org/caselaw/cases/view/118862) Munyao J. stated as much when he held that, "… the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously."

27. In order for a party to succeed in an application for a temporary injunction he must pass the three-pronged test set out in Giella -vs- Cassman Brown [1973] EA 358, which is:

    (a) Whether the applicant has established a prima facie case

    (b) Whether the he or she would suffer irreparable loss that may not be compensated by damages and

    (c) That if the court is in doubt, it may rule on a balance of convenience.

28. On whether an Applicant will suffer irreparable loss, the meaning of the phrase “irreparable loss” is key. In Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR http://kenyalaw.org/caselaw/cases/view/156488/ Munyao J. stated 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.”

29. Further, in Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR, the Court stated as follows, “… the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously.”

30. In Stek Cosmetics Limited v Family Bank Limited & another [2020] eKLR Mwita J. stated as follows:-

> “ This being an application for interlocutory injunction, the law is settled that an applicant must demonstrate that he has a prima facie case with probability of success, that he will suffer irreparable loss that cannot be adequately compensated by damages or that the balance of convenience is in his favour. In that regard, it is the applicant’s duty to demonstrate that it meets the test set in various decisions, leading among them, Giella V Cassman Brown & Company Limited.”

31. Thus, in the instant case, the Applicant prays for an order of a conservatory injunction (sic) to restrain the Defendant, whether by himself, his employees, agents or any other person him (sic) from interfering entering a portion of parcel No. LR. No. 9079/3 (Ndalala Plot 1B) measuring 50 acres. As stated before, this is a strange order not known in law, whether by Order 40 of the Civil Procedure Rules, 2010 or any other law. Nevertheless, the Applicant seems to prays that the court bars the said party from getting onto and using the said 50 acres of land being part of the suit property. However, in the grounds in support of the Applicant, and in his own Affidavit sworn on 21/02/2024 he depone that the Respondent was leased to the said portion of land since 01/01/2019 for five years, and has been and is in occupation and use of the same. Further, that despite him giving notice to the said Defendant the latter has refused to vacate the land, an action which if permitted to go on will frustrate the lease that he has entered with a third party over the suit land.

32. On his part the Defendant admits to being on the land and exhibits by way of annexture JNN-1 photographs of sugar cane growing on the land which he depone he has planted pursuant to the lease agreement. He argues that to grant the orders prayed would be granting an eviction of him from the parcel yet he has a claim against the Plaintiff by way of a Counterclaim which stems from the fact that the Plaintiff owes him the sum of Kshs. 2,400,000/= part of which, specifically Kshs. 500,000/=, was for the renewal of the lease as promised by the Applicant.

33. In essence the Plaintiff seems to seek an order of mandatory injunction against the Defendant because the latter is on the suit land. To grant such an order as sought, this Court has to be convinced to a very high degree, higher than a balance of probability, that the order is the only efficacious relief it must give at the interim stage since it would essentially compromise the issues in contest. The Respondent

submits that this prayer is not an appropriate one at this stage. He relies on the case of Jonathan Kipyegon Maina v John Kiptonui Matingwony & 4 others [2017] eKLR J. Onyango J held that

> " In the instant case the court has not been told what special circumstances exist to warrant the grant of a mandatory injunction against the defendants who have been in occupation of the suit property for more than 14 years. I believe the right forum for the applicant to make out a case for their eviction would be at a full hearing."

34. This Court agrees with the submissions by the Applicant that the principles for grant of an order of temporary injunction are well established in the Giella case (supra) and the Nguruman Limited v. Job Blonde Nelson & 2 others CA No.77 of 2012 (2014) eKLR one. It even agrees with his further submission on the meaning of a prima facie case as given in the Mrao Ltd vs First American Bank of Kenya and 2 others (2003) KLR 125, case which he cited, wherein the Court of Appeal defined a prima facie case 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".

35. These are proper submissions for a prayer for a temporary injunction. However, what remains is for this Court to determine whether these principles apply to a prayer for grant of a mandatory injunction and whether the facts in the instant case as the order sought appears to be fit it.

36. In the case of Washington Okeyo V *Kenya Breweries Limited Civil Appeal No. 332 of 2000* the Court of Appeal held as follows:

> " A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and the court thinks it is one which ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant tries to steal a match on the plaintiff, a mandatory injunction will be granted at an interlocutory stage."

37. In our sister jurisdiction, United Kingdom the Court, in Locabail International Finance Limited V Agro Export and Another (1986) 1 ALLER 901 stated,

> " A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than that required for a prohibitory injunction"

38. In the instant case, I do not see a right which has been infringed calling for an explanation in light of the fact that there existed a lease agreement between the parties and which has either constructively or by representation or misrepresentation, by way of payment of a sum of Kshs. 500,000/= to the account of the Applicant, a fact on oath not denied on oath, been impliedly renewed or is a subject

of contest as to whether it has been renewed or not. In any event, the Respondent is on the suit land and has cane growing on it pursuant to the contested lease agreement. As held by my learned sister Judge in the Jonathan Kipyegon (supra), I see no special circumstances which would persuade me to grant a mandatory injunction against a party who is in occupation of the suit property and has invested on it for over five years now. The fact of the Plaintiff entering into an agreement with another person, a third party over the same property before sorting out the dispute between himself and the Defendant is not a special circumstance which can warrant issuance if a mandatory injunction. Fear of loss of money under, or breach of the subsequent agreement with a third party can never found special circumstances. To permit such an action will open floodgates of scrupulous individuals, in life, taking advantage of such situations to fleece others through court processes. This Court would do justice if it hears all the parties through adduction of evidence in a full trial. The Applicant has thus not established a prima facie case, leave alone failing to convince the court that a mandatory injunction is an appropriate remedy at this stage. Thus, the application fails.

39. The Application is hereby dismissed with costs to the Respondent.

40. Further to the orders above, the parties herein are given at most thirty (30) days to comply with Order 11 of the Civil Procedure Rules, 2010. The suit shall mentioned virtually on 05/11/2024.

41. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAM PLATFORM THIS 18TH DAY OF SEPTEMBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDG, ELC KITALE

In the presence of:

1. M. Korongo Advocate ---------for the Plaintiff

2. Kiarie Advocate ---------------for the Defendant