Nickson v Collins & 3 others (Environment & Land Case 1 of 2024)
[2024] KEELC 14154 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14154 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 1 OF 2024

FO NYAGAKA, J

DECEMBER 10, 2024

BETWEEN

AMUHAYA SAGINI NICKSON ..... PLAINTIFF

AND

SAMMY COLLINS ..... 1ST DEFENDANT

TITUS BARAZA ..... 2ND DEFENDANT

EDWIN M. MAKHANU ..... 3RD DEFENDANT

CALEB SIMIYU MAKHANU ..... 4TH DEFENDANT

RULING

1. The Plaintiff instituted this suit on 03/01/2024 vide a Plaint dated the same date and verified by an Affidavit sworn by him on the said date. Accompanying the Plaint was a Notice of Motion dated the same date, brought under Certificate of Urgency. The Notice of Motion was brought under Section 3A and 22 of the *Civil Procedure Act* and Orders 5(16), 3(2) and 4(3) and what he termed as all the other enabling provisions of the law. He sought the following orders:

    1. ...spent

    2. That pending the hearing and determination of this suit, this Honorable Court be pleased to issue orders of injunction restraining the defendants by themselves, their servants, agents, proxies and or other persons exercising authority from them, from demolishing the perimeter boundary, fence, entering, remaining on or dealing in whatsoever manner with Trans Nzoia/ Botwo/521 the property of the plaintiff.

    3. That the Officer Commanding Station, Cherangani Police Station to enforce the orders.

    4. Costs of this application.

2. The Application was based on seven (7) grounds which are summarized as follows. The applicant was the legal owner of the suit parcel of land and had been residing on it with his family and mother Mabo Amangove. On 25/11/2023, the 1st Defendant came to the plaintiff's property and assaulted his mother, demanding to know why his father, Henry Mulongo Mulama had sold the suit property to the Plaintiff. On 10/12/2023 around 8:00 PM, the 1st - 4th defendants who were brothers descended on the applicant's property damaged and/or removed the boundary fence, beacons and crops. They threatened the life of the plaintiff's mother and wanted to evict them from the subject matter. Fearing for their lives, she reported the matter to the Cherangani Police Station *vide* Occurrence Book No. 34/11/12/2023. The defendants were charged in Kitale CRM 223 of 2023 pending before the Kitale Court. Despite swearing an affidavit on 13/12/2023 to keep peace, the Defendants returned to the suit land on 17/12/2023 and again assaulted applicant's mother, tilled the suit property, damaging crops and the repaired fence and chased away the plaintiff's servants working on the subject property. The Plaintiff's mother reported the matter at Nyakinyua Police Post vide OB No. 2/17/12/2023.

3. The applicant contended that the defendants were unruly, violent, and a threat to his family and were keen to lay a stab on his property and unless restrained by the court he stood to suffer irreparable damage. Attempts by the Officer Commanding Station Charanga in Police Station to mediate the dispute was futile. The applicant had a prima facie case against the respondents and the balance of convenience tilted in his favor. He was bound to suffer from losses arising from inability to utilize his subject land which was a source of his livelihood.

4. The application was supported by an Affidavit sworn by the Applicant on 03/01/2024. He repeated the contents of the grounds of the Application but in deposition form. In addition to the depositions, he annexed and marked RTA-1 copies of the title deed in respect of suit parcel in issue, an Affidavit sworn by the Respondents on 13/12/2023 promising to keep peace, photos showing damage to the land, and an Agreement dated 29/09/2023. He added that the respondents were driven by malice, violent and a threat to his family and property hence the need for the court to intervene.

5. Upon the Application being served the 1st, 3rd and 4th Defendants filed a Replying Affidavit sworn by the 4th Defendant on 26/02/2024. Annexed to it was a letter of authority giving him Authority to Plead on behalf of the 1st and the 3rd defendants. It was dated 20/02/2024. He deponed that for one to be granted orders of injunction he ought to satisfy three conditions which were that he had to establish a prima facie case with a probability of success, that he would suffer irreparable loss incapable of compensation by way of damages and if the court was in doubt the it could decide the application on a balance of probabilities.

6. He deposed further that the circumstances of his case were that the title deed in respect of the property was created illegally and unlawfully from parcel number Trans-Nzoia/Botwo/53, previously known as Botwo Farm Plot No. 42 (herein after referred to as "Parcel No. 53". It was done by the plaintiff in cohorts (sic) (here, the Judge thinks the Respondents meant "cahoots") with the Defendant's father. He gave the reason that parcel No. 53 was jointly purchased by their late mother Helen Inzayi Makhanu and their father from one Mary Cheptarus Langat. He annexed and marked CSM 1 copies of the Agreements dated 06/04/1985 and 04/04/1989. Further, at the point of applying for the title the Defendants' father, illegally, unlawfully and without the knowledge or consent or authority of their late mother, registered with the person in his name to her exclusion, even though the right thing ought to have been done by having both their names registered as joint owners. Their late mother contributed directly and indirectly to the purchase of the land as shown in the agreements with the seller. Their father's move was clandestine and deliberate and deliberate with intent to dispose of the land to the exclusion of their mother.

7. He deposed again that he/they were disputing the sanctity of the title deed of parcel No. 53 on behalf of the Estate of the late mother because it was generated illegally and unlawfully. Further, any subsequent titles generated thereto, including the suit property's, could therefore not be indefeasible and confer absolute ownership on any land. He added that when filing the Defence they would be challenging the validity of the title. Further, their father had no capacity to sell the land as no Letters of Administration to their mother's Estate had been issued to him in respect of their late mother's portion or stake in the parcel No. 53, a fact which was yet to be determined. Thus, meddling with the Estate without the Letters of the Administration to the father and the plaintiff made them guilty of intermeddling, and the purchase transaction was void ab initio.

8. His further deposition was that the 2nd Defendant had applied for a Grant of Letters of Administration, due for issuance in less than a month. Thus, they would be moving the appropriate court to determine their late mother's stake in parcel No. 53 and counter all the intermeddling thereon committed by any person not authorized to do so. He attached and marked CSM 1 a copy of Gazette Notice No. 1543. He added that for these reasons the Plaintiff could not claim that his title was indefeasible and conferred absolute ownership of the land. He added that for the reasons given, the Plaintiff could not claim that he had a prima facie case with a probability of success. It was far-fetched. Again, the suit property had never been surveyed or demarcated by a qualified surveyor to determine where it started and ended in the event of granting an injunction. Thus, it would be difficult to implement the order as the actual location of the suit property No. 53 was unknown.

9. He added that his brothers and him had been in possession of the whole of parcel No. 53 to date, and continued to cultivate and enjoy quiet possession as the same was family land. Again, their mother's grave was on the land hence the land was of sentimental value to them and could not be valued by any monetary terms. He deposed that the grant of the orders sought would prejudice the life interest of their mother, especially if the court would finally find that the father had no capacity to intermeddle with parcel No. 53.

10. He deposed further that the Plaintiff had never been in possession of the suit land, and neither had he cultivated it or made any significant developments thereon. He would not suffer any loss in event of being compensated in monetary terms. He added that the prayer for injunction be declined. Further, if the plaintiff satisfied the court that he was the rightful owner and any loss or damage from the order would be easily compensated in monetary terms. He added that it was misleading for the Plaintiff to pray for an injunction to prevent the defendants from exercising authority over, remaining or entering on or dealing with the suit property when he was aware that he had never been in possession. Regarding the balance of convenience, he deposed that it tilted in the defendants' favor as it would be easier to undo the effects of not granting the injunction than granting. He gave the reason that if the injunction was granted their late mother's Estate would not to be allowed to deal with parcel No. 53 hence they would be displaced and in case the final outcome would be in their favour and it required that the Plaintiff be removed from the land. He prayed that the application being futile and one not satisfying the mandatory conditions for grant opening junction be dismissed.

11. The 2nd Defendant also filed a Replying Affidavit he swore on the same date but filed on 01/03/2024. He deposited that sometime in December the previous year, the Plaintiff began claiming ownership of part of land parcel number Trans Nzoia/ Botwo/53 as well as Land Reference No. Trans Nzoia/ Botwo/54 (parcel No. 54) illegally and unlawfully. This was because on 25/02/2019, he the 2nd Defendant, bought parcel No. 54 measuring 0.5 hectares from Nicodemus Wepukhulu Weputula at a consideration of Kenya Shillings 1,000,000/=. The said Nicodemus had previously bought the land from Henry Mulongo Makhanu (the Defendants' father) at a consideration of Kshs. 280,000 on 08/11/2009. He marked as annexture TPM a copy of the Agreement dated 25/02/2019.

12. He added that he was yet to transfer the parcel No. 54 to his name hence the title was still in the name of Henry Mulongo Makhanu, the father. He deposed that he was surprised that the plaintiff claimed ownership of parcel No. 521 and attempted to fence off 0.2 acres of parcel number 54 since he (Plaintiff) owned no title to parcel No. 54 and had never been in possession of the same or cultivated it. He deposed that on his part he had been in quiet, continuous and uninterrupted possession of parcel No. 54, cultivating and tending it, and the beacons and boundaries thereof were well defined and had never been disputed by anyone, including the plaintiff. He added that the Plaintiff's attempt to claim and defense of the 2nd Defendant's land amounted to trespass, conversion and theft.

13. He deposed that the Plaintiff's prayer for injunction to restrain him and the other defendants from using or being in possession of parcel number 54 and his attempt to fence off 0.2 acres thereof was not legally possible. Regarding the Plaintiff's prayer for injunction in respect of parcel No. 54, he associated himself with the deposition of the Caleb Simiyu Makhanu in the Replying Affidavit. He prayed that the application dismissed.

14. On 07/03/2024, the Plaintiff filed an Affidavit which he referred to as "Answer to Defendant's Replying Affidavits". Vide a Ruling delivered on 12/04/2024 the document was expunged from the record for reasons given therein. After a Preliminary Objection was raised on a number of issued and Ruling delivered on 25/07/2024 the instant Application, dated 03/01/2024, was finally set down for hearing which proceeded by way of written submissions.

Issue, Analysis And Determination

15. I have considered the application, the law and rival submissions by the parties. The questions this Court is to determine is whether the application is merited and who to bear the cost of the application.

16. The law regarding the grant or refusal to grant an order of injunction is now settled. This Court starts the determination herein by noting that the application was brought under Sections 3A and 22 of the *Civil Procedure Act* and Orders 5(16), 3(2) and 4(3) and what the Plaintiff termed as "all the other enabling provisions of the law." This Court does not hesitate to find that the provisions cited by the applicant, together with the meaningless phrase "all other enabling provisions of the law", for reason of failure by the applicant to explain and show what it means, are all irrelevant. They do not in any way form the basis for or the law regarding the grant of a temporary injunction which is Order 40 of the *Civil Procedure Rules*. The provisions that govern the grant or otherwise of the injunction are stipulated in Order 40 Rule 1 of the Rules.

17. The provision is that;

> " 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 of 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."

18. Order 40 Rules 6 provides;

> "Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

19. It goes without saying, from the provisions quoted above, that there is no room for reliance on the provisions cited by the plaintiff in support of his application. Be that as it may, court have been enjoined by Article 159 of the *Constitution of Kenya* to determine disputes more from the perspective of doing substantive justice rather than following procedural technicalities, unless the procedural requirement involved go to the root of the dispute.

20. Further, Order 51 Rule 14 provides that applications should not be defeated merely because of failure to cite a provision or citing a wrong one. The provision stipulates:

> "(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
>
> (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

21. Further, I am persuaded by the holding in *Microsoft Corporation vs. Mitsumi Garage Ltd & Another* Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460, where the Court appreciated that:

> "Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue."

22. That said, the law regarding the grant of temporary injunction is enunciated in the case of *Giella V. Cassman Brown & Co. Ltd* (1973) EA 358. The court held that for a party to succeed for grant of such an order he/she/it has to satisfy 3 conditions, namely, he/she have a prima facie case with a probability of success, and if he does so, that he will suffer loss which may not be compensated by way of damages, and where the Court was is in doubt it should decide the matter on a balance of convenience.

23. This has been restated in many cases. For instance, in *Nguruman Limited V. Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, the Court emphasized the importance of satisfying all the three requirements for an order of injunction to issue. It stated: -

> "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.

24. See *Kenya Commercial Finance Co. Ltd V. 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." (Emphasis added).

25. Lastly, in the case of *Showind Industries V Guardian Bank Limited & Another* (2002) 1 EA 284, Ringera J. (as he was then was) stated as follows: -

> "…….an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches".

26. Applying the above principles to the facts of the instant case, the Plaintiff contends that he is the lawful owner of parcel number Trans Nzoia/Botwo/521. He has a copy of the title deed to evidence this fact. The copy is annexed and marked as RTA 1A shows it was issued on 16/11/2023. This was only 16 days from the agreed last date of payment of the purchase price was to be completed, as per the agreement he annexed and marked as RTA 1D. The copy of the agreement is dated 23/09/2023 and was for Botwo Farm/Karara Sub-location LR. 6106 or parcel No. Plot No. 496) measuring 0.5 acres. From the face of it, the agreement shows that when it was entered into, a sum of Kshs. 300,000/= was paid on execution. Some handwritten additions after the paragraph showing the mode of payment indicates that the balance of Kshs. 600,000/= was to be paid before 31/01/2023 sic. But on the left-hand margin, other handwritten additions show that the said sum was to be paid on or before 01/10/2023 and the balance of Kshs. 300,000/= to be paid 31/01/2023 sic. After that there are additions by hand which purport to show that the sum of Kshs. 400,000/= was paid on 01/10/2023 and the balance paid on some unclear date (cut out). The additions are not countersigned by all the witnesses or most of them. Even the purported additional payments are not. This casts great doubt as to the authenticity of the said agreement, and whether or not it meets the legal conditions on making agreements of sale of land. There seems to be a lot than meets the eye in regard to the agreement and which calls for evidence at the trial.

27. At this point, this Court pauses and address one issue raised by the applicants regarding the serialization of the annextures to the Supporting Affidavit of the Applicant. The defendants argued that the annextures were serialized using initials "RTA" which meant that they were serialized by the plaintiff's

Advocate. They argued further that this contravened the law. They raised grounds of opposition on the admissibility and use of the same. The grounds were dated 14/03/2024, brought by the 2nd defendant.

28. I have looked at law, being Rule 9 of the *Oaths and Statutory Declarations Rules* made under Section 6 of the *Oaths and Statutory Declarations Act*, Chapter 15 Laws of Kenya. I find no breach of the said provisions because they do not stipulate that the initials of the serialization have to be those of the deponent of the Affidavit. All that the provision requires a deponent who takes an oath by way of affidavit to which he annexes copies of documents it to have them "securely sealed ... under the seal of the commissioner" and "marked with serial letters of identification." In my humble view that serialization can take the form of any mark or initial that distinguishes one document to the other. There is nothing magical or specific about the choice of the serial letters to be used for identification: it is only that the legal practice has often relied on the convenient serialization letters of the initials of the deponent. I therefore dismiss the argument.

29. Turning to the annextures I have mentioned above, which were meant to support the facts deposed to by the plaintiff, it is worth noting that the Plaintiff has not annexed any copy(ies) of an application for consent to the Land Control Board. Also, he has not annexed any copy of consent to transfer the land issued by the Land Control Board to show that after entering into an agreement with Henry Mulongo, the parties (two people) applied for and obtained a consent by the Land Control Board in relation to the transaction. This is because the transaction involved dealing in land falling under a controlled area in the sense that it was agricultural land. The lack of such crucial documents go to support the Defendants' contention that the title held by the plaintiff may have been obtained illegally or irregularly and may not ultimately be indefeasible. Secondly, the Agreement was entered into between the plaintiff and the said vendor before an area chief. An issue will arise at the hearing as to whether the agreement was made within the law. It also goes without saying that the issue of registration of the suit land in the Plaintiff's name will then be a subject for determination before this court as to whether it was lawful or not. Needless to say, that one other issue that will arise is how it is that the consent of the Land Control Board was completed within a fortnight yet notice needed to be given or whether the procedure was followed. Further, the Plaintiff has not adduced any evidence to show that, indeed, the suit land has been surveyed, mutation forms issued, the Registry Index Map amended and beacons erected or put in place on the ground in order to clearly show the marked boundaries and a title deed to be issued. These are many gaps which seem to emerge and would arise in the context of the dispute herein.

30. Further, the annexture RTA 1D (agreement) showed that the plaintiff entered into it with Mr. Henry Mulongo on 23/09/2023. Completion dated was to be 31/10/2023 or so. The Plaintiff argues that he has been in occupation of the suit land and that that is the only land he and the mother know as home and only place for use and occupation. Clearly an issue that arises here is particularly when that use and occupation arose. Was it in December, 2023 as the Defendants argue? Whether it is then or not, only three months after the commencement of the agreement of sale the Plaintiff claims to have erected houses and put crops on the land, particularly within two weeks or so of the alleged completion of the agreement, is in doubt.

31. On their part, the Defendants deponed that they have been in occupation of the said land use all along as their inheritance. Further, that the plaintiff had never been an occupation thereof. They depose that it was in December when the issues (of the Plaintiff's claim to the land) herein arose when he started staging claim. That was how the issue before the court arose.

32. In those circumstances I am prepared to agree and I am convinced the Applicant has not been an occupation and use of the land. Since this court is now satisfied that the Plaintiff has not been in occupation, then he has not established a prima facie case as required for the grant of the orders of injunction. That being so the Court need not to look the other limbs necessary for the grant of an order

of temporary injunction. The first hurdle has not been passed. To determine the second condition would be a waste of precious judicial time.

33. The upshot is that the Application dated 03/01/2024 is dismissed with costs to the Defendants/ Respondents.

34. This court directs that the parties file compliance documents in terms of Order 11 of the *Civil Procedure Rules* within the next 30 days and exchange the same. The matter will be mentioned on 06/02/2025 for confirmation of that purpose.

35. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED ORALLY VIA THE TEAMS PLATFORM THIS 10TH DAY OF DECEMBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

T. Aswani Advocate for the Plaintiff.

Letaiya Advocate for the 1st, 3rd and 4th Defendants.

Makhani Titus (2nd Defendant) in person