



REPUBLIC OF KENYA



KENYA LAW
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Hussein v Adan & 2 others (Environment and Land Case Civil Suit E368 of 2022) [2023] KEELC 524 (KLR) (31 January 2023) (Ruling)

Neutral citation: [2023] KEELC 524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E368 OF 2022**

**MD MWANGI, J
JANUARY 31, 2023**

BETWEEN

MOHAMED ABDULLAHI HUSSEIN PLAINTIFF

AND

MAHAD ADAN 1ST DEFENDANT

FRANCIS MWANGI MAUNJI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

(In respect of the Plaintiff's application dated 7th November, 2022 under the provisions of Section 3A of the Civil Procedure Act, Order 40 rules 1, 2, 3, 4, & 8, Order 51 rule 1 of the Civil Procedure Rules, 2010 seeking for Orders of an interlocutory injunction)

RULING

Background

1. This suit was commenced by way of plaint dated November 7, 2022. Alongside the plaint, the plaintiff filed the notice of motion application under certificate of urgency seeking for the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. Pending the hearing and determination of the suit herein, an order of injunction be and is hereby issued restraining the defendants whether by themselves, agents or servants from excavating, altering the nature, remaining upon, trespassing, alienating, constructing upon, occupying, dumping any construction materials or machinery thereon, disposing of, transferring, charging, leasing and/or in any manner whatsoever dealing with all that parcel



of land known as Land Reference 36/11/13 situated in Eastleigh Estate within Nairobi City County, which order should be enforced by the officer commanding station Eastleigh North police station or any other nearby police station.

5. The costs of the application be provided for.
2. The application is based on the grounds on the face of it and further supported by an affidavit by the plaintiff herein deponed on the same date. The plaintiff deposes that he is the registered owner of the property known as Land Reference 36/11/13 situated in Eastleigh Estate within Nairobi City County (hereinafter referred to as the suit property).
3. The plaintiff alleges that he acquired the suit property through purchase from the previous lawful registered owner in the year 2020. That the 1st and 2nd defendants with assistance of their agents and hired goons violently invaded the suit property, evicted the Plaintiff's agent and gained forcible entry into the suit property without any right known in law. He further alleges that the 1st and 2nd defendants have since commenced extensive illegal construction activities on the suit property and are currently excavating the same with a view to erecting storey buildings thereon while aware that they do not have valid interests over the suit property and their actions border on criminality. That his efforts to stop the activities of the 2nd and 3rd defendants have failed and /or been ignored prompting him to seek this court's assistance.
4. The plaintiff further depones that he has since learnt of the existence of a public notice placed by the Nairobi City County Executive Committee Member, in charge of Urban Planning, Urban Renewal and Project Management in conjunction with the 1st and 2nd defendant with the intention to change the user of the suit property from single dwelling units to commercial cum residential (apartments and shops). The nature and character of the suit property is therefore likely to be altered to his prejudice and he will be dispossessed of his property thereby suffering irreparable loss.
5. The deponent believes that he has established a prima facie case with high chances of success to warrant the grant of the orders sought. The balance of convenience also tilts towards preserving the suit property against the impending the change of user by the 1st and 2nd defendants.
6. The Application is opposed by the 1st and 2nd defendants. The 3rd defendant did not file any response in opposition to the application.

2nd Defendant's Replying Affidavit

7. The 2nd defendant, Francis Mwangi Maunji, filed a Replying Affidavit deponed on the 15th November, 2022. He avers that he is the duly registered proprietor of the suit property in possession and occupation and has always been in open and uninterrupted occupation, possession and use of the suit property. That prior to the registration, he lawfully and legally acquired the suit property in 1991 from the previous registered proprietor who voluntarily transferred and he therefore acquired the whole interest in the suit.
8. He deposes that the purported transfer through purchase from one Philip Njuguna Wa Ruth is fraudulent and the Plaintiff has never taken possession of the suit property as alleged. That he even had tenants in occupation of the suit property during the period the Plaintiff alleges to have been in occupation. Infact one of the Tenants had failed to pay rent forcing him to file Nairobi Elc No. E090 of 2020; Francis Mwangi Maunji vs Peter Irungu Mwangi seeking an eviction order, which order was granted. He exhibited copies of the proceedings as an annexure.



9. The deponent further states that the Plaintiff has not produced any documents in support of the allegation of purchase of the suit property. The Plaintiff has neither a sale agreement nor proof of payment of Stamp Duty hence the transaction, if at all was fraudulent.
10. The 2nd defendant further deposes that the purchase price indicated in the indenture presented by the Plaintiff is doubtful as the value of the suit property is much higher than the figure indicated therein. He avers that he has never been summoned to any Police Station and/or the Directorate of Criminal Investigations over the allegations touching on the suit property. He therefore prays that application be dismissed with costs as the Plaintiff has not established a prima facie case with a probability of success. He has not demonstrated a right to be protected as he has never been in occupation of the suit property at any one time. Therefore, the Plaintiff will not suffer any harm or damage if the application is not granted. That the balance of convenience tilts in favour of not granting the order of injunction sought.

1st Defendant's Grounds of Opposition

11. The 1st defendant on his part filed grounds of opposition dated November 16, 2022. The 1st defendant states that the application by the Plaintiff has no basis and it is aimed at misleading the court. The 1st defendant has no proprietary interests in the suit property at all.
12. He avers that the public notice of change of user indicates that the registered owner of the suit property sought approval to change its use from single dwelling units to commercial cum residential (apartments and shops).
13. The 1st defendant therefore insists that he has been wrongly sued and that the remedies sought cannot lie against him. he prays that his name be struck out of this cause and costs awarded to him.

2nd Defendant's Further Affidavit

14. The 2nd defendant was granted leave by the court on the November 21, 2022 to file a further affidavit which he did. the further affidavit is deponed on the November 24, 2022.
15. The 2nd defendant depones that he was in possession back in 1999 and operated a petrol station with one George Kamau Wainaina. That he has been paying land rates as the registered owner as demanded by the Nairobi city county and its predecessor. He annexed the rates payment request and payment receipts to that effect.

He further states that in the year 2001, he entered into a lease agreement with one Johnson Gathii Karanja for a term of 6 years which was extended for a further 6 years. He annexes a copy of the memorandum of lease and the novation of lease dated the March 1, 2017 over the suit property to that effect.

Court's direction

16. The court directed that the application be canvassed by way of written submissions. None of the parties filed any submissions.

Issues for determination

17. Having considered the pleadings filed in this matter, the sole issue that arises for determination is whether the plaintiff/applicant has met the threshold to warrant the grant of an interlocutory injunction.



Analysis and determination

18. The application by the Plaintiff being one that seeks an order of interlocutory injunction, has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co. Ltd* 1973 E.A 358 and which are:-

- a. The applicant must show a prima facie case with a probability of success at the trial;
- b. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages; and,
- c. If in doubt, the court will decide the application on a balance of convenience.

19. The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR further stated as follows in regard to applications for an order of interlocutory injunctions:

“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 v. Afraba 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.”

20. Therefore, if an applicant established a prima facie case, that alone is not enough basis to grant an interlocutory injunction. The court must be satisfied that the injury the applicant will suffer if the injunction is not granted will be irreparable and incapable of being compensated by an award of damages.

21. On the other hand, if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration.



22. The Court in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined a prima facie case thus;
- “... So what is a prima facie case? I would say that in civil cases it is a case in 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.”
23. In the case of *Naftali Ruthi Kinyua vs Patrick Thuita Gachure & another* [2015] eKLR, the Court of Appeal stated that:
- “With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus,
- “If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”
24. I will first start with the 1st defendant’s position in this application. The 1st defendant states in his grounds of opposition that he has no proprietary interests whatsoever in the suit property. He denies any involvement with the suit property as alleged or at all. He therefore avers that he has been wrongly sued and his name should be struck out of this suit entirely.
25. The plaintiff has not demonstrated the reason why he joined the 1st defendant in this case. I find no *prima facie* case against the 1st defendant. Although the 1st defendant prays that his name be struck out of these proceedings, he will need to file a formal application for the court to make such a determination.
26. In the present case, the plaintiff/applicant alleges ownership of the suit property. The plaintiff has attached a conveyance dated February 4, 2020 and an alleged certificate of postal search. The plaintiff alleges that he has been in possession of the suit property since the year 2020 after acquiring it. That the 1st and 2nd defendants have forcefully evicted him from the suit property.
27. The 2nd defendant response to the plaintiff’s claim, has adduced a conveyance dated the July 9, 1991 and a certificate of postal search as at February 27, 2015. The 2nd defendant has also produced documents confirming that he was in possession and control of the suit property back to the year 1999 when he operated a petrol station on the suit property. He went further to produce receipts confirming payment of land rates.
28. The plaintiff in support of his claim merely filed a conveyance allegedly signed by himself and one Philip Njuguna wa Ruth and a certificate of postal search supposedly confirming him as the registered owner of the suit property. I must point out that some of the details in the attached certificate of postal search do not correspond with the details in the conveyance document presented by the plaintiff. This is apparent on the face of the documents.
29. The register in the conveyance document is described as ‘volume N3 folio 401 file 461’. In the certificate of postal search however, the register is described as ‘N88 folio 146/19 file 461’.
30. It gets even more interesting on the ‘area’. The search indicates the area as ‘60 feet by 100 feet’. This alone raises doubts as to the validity of the documents relied upon by the plaintiff.



31. Though the plaintiff alleges to have purchased the suit property from its previous registered owner, he did not attach the sale agreement to confirm the transaction; neither did he attach the title documents of the alleged previous owner of the suit property, not even a search.
32. The 2nd defendant in his affidavits demonstrated his ownership of the suit property and the fact that he has been in actual occupation since 1999. The plaintiff did not contradict the averments by the 2nd defendant in any way.
33. The court is not persuaded that the plaintiff has established a prima facie case to warrant the issuance of the orders sought. guided by the decision in the Nguruman Ltd case (supra), I need not go further than that.
34. For the foregoing reasons, I do find that the plaintiff's application dated November 7, 2022 is not merited and I hereby dismiss the same with costs to the defendants/respondents.
35. Accordingly, the court issues the following orders; -
 - a. The plaintiff's application lacks merit and is therefore dismissed.
 - b. Costs of the application shall be awarded to the defendants/respondents.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Olaha for the 2nd defendant/Respondent.

Mr. Odunga for the Plaintiff/Applicant.

N/A for the 1st defendant and 2nd defendant.

Court Assistant: Yvette.

M.D. MWANGI

JUDGE

