Lee v Duncan (Environment & Land Case E016 of 2022)
[2023] KEELC 313 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 313 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E016 OF 2022

OA ANGOTE, J

JANUARY 26, 2023

BETWEEN

JOHN STEWART LEE ..... PLAINTIFF

AND

IAN GORDON DUNCAN ..... DEFENDANT

RULING

1. Before this court for determination is the Plaintiff's Notice of Motion application dated April 20, 2022 seeking the following reliefs;

    a. That pending, the hearing and determination of this suit, the Defendant, his servants, agents, licensees and assigns be restrained from blocking, preventing or interfering in any way with the access/use of the access road/ driveway across the property known as LR No 5809/17 (the servient land) bordering the properties known as LR No 5809/30 and LR No 5809/31(the Dominant land)by the Plaintiff, his agents, assigns, lessees, licensees and occupiers for the time being of the dominant land.

    b. That the Officer Commanding Police Station, Hardy Police Station be directed to take all the necessary steps to enforce the orders granted by the Court herein and to ensure and secure the safety and protection of the Plaintiff, his agents, assigns, licensees, and tenants so as to prevent or deal with the occurrence of any breach of the peace during the enforcement of the orders.

    c. That the Costs of this Application.

2. The application is based on the grounds on the fac of the Motion and supported by the Affidavit of John Stewart Lee, the Plaintiff herein, who deponed that he is the registered proprietor of the parcel of land known as LR No 5809/30 and 5809/31(originally 5809/1) situate at Gogo Falls Lane, Hardy, Karen and that the Defendant is the registered owner and proprietor of LR No 5809/17 pursuant to a deed of conveyance dated December 20, 2006.

3. According to the Plaintiff, he has been in open, continuous and uninterrupted possession of properties LR 5809/30 and LR 5809/31 since 1979 and that upon purchasing LR No 5809/17 in 1992, he has always used the driveway thereon as a road of access and that the properties aforesaid are adjacent to riparian land and consequently the only access open to him is through the Defendant's property which access he has had for 30 years.

4. According to the Deponent, on or about February 26, 2022, the Defendant, without any explanation, locked the gate leading to the driveway causing the Plaintiff, his family, staff and tenants great distress as they can no longer access the lower side of his property and that as a result of the Defendant's actions, the lower side of his land can only be accessed by foot walking down the hillside from either direction and crossing through riparian land making it difficult to procure building materials, food and goods for the houses, equipment for maintenance and has hampered security to the area.

5. It was deponed by the Plaintiff that vehicles and visitors have been cut off from any access to his land; that there is no alternative option apart from building a road over riparian land which will cause harm to the environment and at great costs and that the Defendant's actions of blocking the driveway not only affects him as aforesaid, but is unconscionable as several electric poles are situate on the driveway which also acts as an access way for the Kenya Power and Lighting Company(KPLC) maintenance personnel.

6. It is the Plaintiff's case is that he has been using the access road for more than 20 years nec claim, nec viv and nec precario and as advised by Counsel, after the expiry of 20 years, the Defendant's exclusive rights over the driveway have been extinguished and he has obtained an interest in the driveway by operation of law.

7. In response to the application, the Defendant filed a Replying Affidavit in which he deponed that the application is premature, misconceived and has not satisfied the legal and evidential threshold for the reliefs sought and that it is not true that the Plaintiff has used the driveway on his property for over 20 or 30 years as alleged or at all.

8. The Defendant deponed that he is the registered owner of the property known as LR No 5809/17 which he duly purchased from the Plaintiff vide a conveyance dated December 20, 2006 free of any encumbrance and that LR Nos 5809/30 and 31 are not landlocked as claimed by the Plaintiff but have access to public roads known as Kifaru Lane and Gogo Falls Roads.

9. It was deponed that whereas his property comprises of a private driveway bordering the Plaintiff's properties, the same is for his exclusive use and is not a servient land to the properties LR No 5809/30 and 31. It is the Plaintiff's case that the Plaintiff never sold him the property with an easement to his properties and that if the suit properties were landlocked as alleged, the relevant authorities would not have approved the sub-division of the mother title LR 5809/1 without reservation of access roads for the sub-divided properties.

10. According to the Defendant, the Plaintiff has failed to disclose to the court that sometime in 2016/2017, he sold one of his properties LR No 5809/30 and/or 31 to one Isaac Jones; that prior to the sale, he had granted the Plaintiff access to the driveway on his property as an alternative route of access to the borehole on the Plaintiff's property and that the Plaintiff made a gate on his boundary wall for the said purpose but the gate has not been used since 2007.

11. It was deponed by the Defendant that the plot sold to Isaac Jones is situate on the lower side of his property; that both Isaac Jones and the Plaintiff requested him to allow Mr Jones to temporarily use his driveway to access the property for purposes of constructing a small cottage on the western side of his

property as he worked on a small path linking the property to a public road and that the aforesaid path was by then a footpath and not a roadway for vehicular movement due to encroachment by a neighbor.

12. It was deponed by the Defendant that Isaac Jones knocked a hole in the perimeter wall of his property next to the Plaintiff's abandoned borehole access to facilitate his construction trucks access the driveway as an alternative route and a temporary shortcut and that sometime in 2018, he stopped Mr Isaac Jones from using the temporary short cut as it posed a security threat which neither the Plaintiff nor Mr Jones were willing to address.

13. It is the Defendant's case that he allowed Isaac Jones to use the driveway for his private vehicles but attempts to have Mr Jones sign an agreement for the use of the driveway as an easement were futile.

14. According to the Defendant, the property occupied by Mr Jones has a stream cutting across it and Mr Jones has constructed a footbridge over the stream crossing through his land on the Plaintiff's land which he utilizes as a foot path over to access the public roads on either side of his land and that he has refused to upgrade it for vehicular movement.

15. It was the Defendant's deposition that he willingly allowed the KPLC wayleave to put up electric poles for the supply of electricity and the Plaintiff has refused to compensate him for an alternative route on his property and that Mr Jones has since 2018 constructed two permanent houses with his construction trucks using Kifaru Lane and the Plaintiff's other plot as an access road without using his driveway.

16. The Defendant lastly deponed that the allegations that the driveway is mapped on any survey maps or deed plan as a right of way is unfounded and that he will suffer substantial and irreparable loss if the application is granted as the consequence would be to unlawfully deprive or interfere with the peaceful use of his property whereas the Plaintiff has nothing to lose, his property not being landlocked.

17. Vide a Further Affidavit sworn on May 18, 2022, the Plaintiff in response to the Defendant's Reply reiterated the contents of his Supporting Affidavit of April 20, 2022 stating that the Defendant cannot factually depone to his usage of the driveway pre-2006; that he does not have access to the main road from Kifaru lane and that there only exists a footpath that was widened for access of construction vehicles.

18. The Plaintiff deponed that Mr Isaac Jones is a tenant on his property; that the averments with respect to Mr Jone's occupation and permissions thereon set out in paras 19-24 are immaterial; that para 25 is equally immaterial in light of the fact that the Defendant has no evidence of the sale of the property to Mr Jones; that the Defendant's assertions that he was not approached with a request for negotiation are unconscionable and that the Defendant's actions continue to cause him harm.

Submissions

19. The Plaintiff's counsel submitted that that the Plaintiff has been in actual, effective, open and uninterrupted occupation of the property known as LR 5809/30 and 5809/31 situate at Gogo Falls Lane, Karen since 1979; that in the year 1992, he bought the property known as LR 5809/17; that he has always used the property for his access and that he has always used a driveway that passes through the Defendant's property for an uninterrupted period of 30 years now.

20. It was submitted that the aforementioned properties are adjacent to riparian land and as such the only access is through the Defendant's property; that on or about February 26, 2022, the Defendant without explanation locked the gate that opens into the driveway that passes through his property causing him and his family, staff and tenants who cannot access the lower part of his property without building a road over riparian road significant stress.

21. It was submitted that the Defendant's actions are unconscionable and that having used the access road for over 20 years, the Defendant's exclusive rights over the road have been extinguished by operation of law all of which demonstrate a prima facie case.

22. The Defendant's counsel submitted that Order 40 Rule 1(a) of the *Civil Procedure Rules* provides for the grant of an injunction where the property is in danger of being wasted, damaged or alienated and that in the present case, no property is in danger of being wasted or damaged.

23. It was submitted by the Defendant's counsel that on the contrary, the Defendant merely wishes to enjoy his property in peace and that in determining whether the Applicant is entitled to injunctive reliefs, the Court should be guided by the criteria laid out in the case of Giella vs Cassman Brown & Company Limited(1973)EA 358 which was cited with approval in *Robert Mugo wa Karanja vs Eco Bank(Kenya) Limited & Anor [2019]eKLR* being the establishment of a prima facie case, proof that the Applicant will suffer irreparable harm if the injunction is not granted and if the Court is in doubt, it should decide on a balance of convenience.

24. Counsel submitted that the Plaintiff has not demonstrated his enjoyment of the right of way for the minimum period of 20 years as required by Section 32 of the Limitations of Actions Act; that further, it is undisputed that the Defendant is the bonafide owner of the suit property and has always enjoyed quiet and uninterrupted possession thereof since he purchased the property from the Plaintiff in 2006 and that the Plaintiff could have claimed the easement by contract and having failed to do so, cannot now claim the same.

25. Reliance was placed on the case of *National Bank of Kenya vs Pipelastic Samkolit(K)Ltd & Another [2001] eKLR* where it was held that a court of law cannot purport to rewrite a contract between the parties and that Section 32 of the *Limitation of Actions Act* provides that an easement crystallizes into an absolute and indefeasible right upon the lapse of 20 years which time has not yet lapsed in view of the fact that the Defendant purchased the property in 2006.

26. It was submitted that the Defendant's property is not servient land to the properties LR No 5809/30 and 5809/31, which properties are not landlocked and can be accessed using alternative means as evinced by the fact that approval was given for the sub-division of the mother title without any reservations for access roads to the sub-divided properties.

27. According to the Defendant's counsel, the fact that the Plaintiff used the driveway prior to the conveyance between the parties is immaterial as he had absolute rights over the property; that an owner of a property with absolute rights cannot claim to have overriding interests therein as there are no dominant or servient tenents in the same and that the Court in *Esther Wanjiku Mwangi vs Wambui Ngarachu)sued as the legal representative of the estate of Ngarachu Chege-deceased[2019]eKLR*, cited with approval the observation in *Re Ellenborough Park[1956]Ch 131* where the Court specifically pointed out that for an easement to exist, there must be a dominant and servient tenement.

Analysis & determination

28. Having read the application, the Affidavits in support and against and the submissions, the sole issue that arises for determination is whether the Plaintiff/ Applicant has met the threshold to warrant the grant of a temporary injunction.

29. The law on grant of interlocutory injunctions is provided for in Order 40 Rule 1 of the Civil Procedure Rules, 2010. The same provides as follows;

> ' 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 if 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.'

30. A reading of Order 40 Rule 1 aforesaid makes it clear that an order of temporary injunction may issue where the court is satisfied that there is a likelihood of the suit property being wasted or alienated before the suit is heard and determined.

31. The parameters for the grant of temporary injunctions were established in the oft cited case of Giella vs Cassman Brown (1973) EA 358 thus:

> ' The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.'

32. The Plaintiff/Applicant in this case is expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR* where the Court stated thus;

> ' 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 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.'

33. As correctly cited by the parties, the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR* defined prima facie 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.'

34. More recently, the Court of Appeal in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others(supra) while agreeing with the definition of a prima facie case in the Mrao Case (supra) went ahead to further expound as follows;

> ' We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

35. The Court will be guided by the foregoing principles as well as by the general principle that no definitive findings on law or facts should be made at this interlocutory stage.

36. In the present application, it is the Plaintiff's case that he is the registered owner of the parcels of land known as LR No 5809/30 and 31 while the Defendant is the registered proprietor of LR No 5809/17 which the Plaintiff sold to him sometime in 2006. According to the Plaintiff, there exists on the Defendant's property a driveway which he has used for the last 30 years as an access to the lower side of his property as there are no alternative means of accessing it other than on foot.

37. According to the Plaintiff, by virtue of the fact that he has used the driveway for more than 20 years, he has acquired prescriptive rights over the driveway and that sometime in 2022, the Defendant without reason or explanation restricted the aforesaid access.

38. The Plaintiff adduced into evidence copies of the conveyance with respect to the sale of LR No 5809/30 and 5809/31 as well as LR No 5809/17, a cadastral drawing showing the aforesaid properties and photographs showing KPLC poles on the driveway

39. In contrast, the Defendant asserts that the Plaintiff's properties LR No 5809/30 and 31 are not landlocked as alleged or at all and that each of them have access to public roads; that if indeed the properties were landlocked, the authorities concerned with approval of land use would not have

approved the sub-division of the mother title LR No 5809/1 and that LR No 5809/17 is his property and comprises a private driveway bordering the Plaintiffs' properties, which driveway is for his exclusive use.

40. It was deponed by the Defendant that it is the Plaintiff who sold him the property and did so without stating that the driveway was his easement; that he had initially granted the Plaintiff access to the driveway to access a borehole on his property but the same has not been in use since 2007 and that at the Plaintiff's request, he granted temporary access through his property to one Mr Jones whom the Plaintiff had sold one of the properties to access the driveway temporarily for construction works and that in 2022, he withdrew the access granted to Mr Jones in 2018.

41. The Defendant adduced into evidence copies of sketch maps showing the layout of the properties, pictures of the subject gate and driveway, correspondence between himself and Mr Jones with respect to signing an agreement for the use of the driveway as an easement, photograph of a stream and a footbridge and a certificate of accuracy for production of photographic and video evidence

42. The Court has carefully considered the material before it. It is apparent that the present dispute revolves around the driveway situate on LR No 5809/17. To begin with, it is not disputed that the Plaintiff is the owner of the properties known as LR No 5809/30 and 31 whereas the Defendant is the owner of LR No 5809/17. It is also not disputed that the aforesaid properties are adjoining each other and there exists on the Defendant's property, LR No 5809/1, a driveway through which there is an access to the Plaintiff's aforesaid properties.

43. As the owner of the LR No 5809/17, it follows that the Defendant is entitled to the full benefit and unrestricted use and enjoyment of the suit property save as otherwise provided by law. Section 25 (1) of the *Land Registration Act*, 2012 provides as follows:-

> ' The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:
>
> To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and to such liabilities rights and interests as affect the same and are declared by section 28 not to require noting in the register unless the contrary is expressed in the register.'

44. Under section 28 of the Act, one of the overriding interests that need not be registered on the register is the 'rights of way, rights of water and profits subsisting at the time of registration.' In the present circumstances, whereas the existence of the driveway and the fact that it accesses the Plaintiff's properties is not disputed, a perusal of the maps produced into evidence makes it apparent that it is not a road of access.

45. The impugned driveway is not a road set out in any of the survey plans. It has equally not been stated that the procedure for creation of a public access road pursuant to Sections 9 of the *Public Roads and Roads of Access Act* or indeed Section 98 of the *Land Registration Act* has ever been initiated.

46. The Plaintiff claims to have acquired an easement over the property by virtue of having used the access way for 20 years pursuant to the provisions of Section 32 of the Limitations of Actions Act which provides as follows:

> ' (1) Where-

a) The access and use of light or air to and from any building have been enjoyed with the building as an easement; or

b) Any way or watercourse, or the use of any water, has been enjoyed as an easement; or

c) Any other easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.

(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.'

47. The evidence before this court shows that the Defendant acquired parcel No 5809/17 from the Plaintiff in the year 2006. Even assuming, though disputed, that the Plaintiff has been using the driveway right from the date of sale of the property to the Defendant, it falls short of the 20 years requirement set out in section 32 aforesaid. Of course, time could not have began to run as against the Defendant before the sale of the land in 2006 when the Plaintiff was the owner of the property.

48. Further, the fact that there is an alternative means of access to the suit property is not disputed. The sufficiency of the alternative route is a matter for trial. In light of the foregoing, it is the finding of the Court that the Plaintiff has not established a prima facie case with chances of success.

49. Having found that no prima facie case has been established, the Court need not venture into the other limbs of irreparable harm and balance of convenience. The Court will however discuss the same for purposes of completeness.

50. It has been stated with regard to irreparable harm, that the damage caused to the Applicant should be such that it cannot be remedied by damages. In Nguruman Limited vs Jan Bonde Nielsen & 2 Others (supra)the Court stated as follows on irreparable injury or damage:

> ' On the second factor, that the applicant must establish that he might otherwise' suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'

51. The Plaintiff has asserted that he will suffer irreparable harm if the injunctive orders are not granted. He contends that the lower side of his property can only be accessed by foot walking down the hillside from either direction and crossing through riparian land making it difficult to procure building materials, food and goods for the houses, equipment for maintenance and has hampered security to the area.

52. He states that vehicles and visitors have been cut off from any access. While stating the aforesaid, no evidence has been adduced in that respect. The nature of the available road has not been shown to enable the Court determine whether indeed, prima facie, the inability to use the Defendant's driveway and relying on the aforesaid road will cause the Plaintiff and his licensees untold difficulties in accessing the lower side of the Plaintiff's property, to lead to the conclusion that there will be irreparable harm in the event the injunctive order is not granted.

53. As to the balance of convenience, the Court associates itself with the decision in *Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR* where it was held as follows:

> ' The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.'

54. In the circumstances, and considering that the suit property is registered in the name of the Defendant, the Court opines that the balance of convenience titlts in favour of the Defendant.

55. For those reasons, it is the finding of the court that the application dated April 20, 2022 is unmeritorious and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JANUARY, 2023.

O. A. Angote

Judge

In the presence of;

Mr. Kiraike for Kimathi for Plaintiff

Mr. Litoro for Defendant/Respondent

Court Assistant - Valentine