



Sarah v Multiple Hauliers (EA) Limited & another (Environment & Land Case 12 of 2021) [2023] KEELC 15667 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15667 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 12 OF 2021
EK WABWOTO, J
FEBRUARY 21, 2023**

BETWEEN

HALIMA HAJI SARAH PLAINTIFF

AND

MULTIPLE HAULIERS (EA) LIMITED 1ST DEFENDANT

AJMAL COMPANY LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect to the 2nd Defendant's application dated 23rd November 2022 seeking for the following orders: -
 - i. Spent..
 - ii. That this Honourable Court be pleased to discharge, vary or set aside the orders granted on the 28th July 2022 stopping any further developments on Land Reference Number 200/4194/38 and allow the 2nd Defendant/Applicant to continue with the development of the suit property in accordance with the development approvals pending the inter-partes hearing of this application.
 - iii. That this Honourable court be pleased to discharge, vary or set aside the orders granted on the 28th of July 2022 stopping any further developments on Land Reference Number 200/4194/38 and allow the 2nd Defendant/Applicant to continue with the development of the suit property in accordance with the development approvals pending the hearing and determination of this application.
 - iv. That the 2nd Defendant/Applicant be allowed to proceed with the development of the suit property as per the approved plans issued by the Nairobi City County Government.



- v. That this Honourable Court be pleased to set aside all other subsequent orders to enforce the orders granted on the 28th of July 2022.
 - vi. The costs of this application be provided for.
 - vii. Any other similar orders that this Honourable court deems just, fair and in the interest of justice to provide.
2. The said application was premised on the following grounds in support:
1. That the 2nd Defendant is the *bona fide*, legal and registered owner of property Land Reference Number 209/4194/38, having purchased the same in the year 2021 from the 1st defendant for valuable consideration.
 2. That this Honourable Court issued an order on the 28th of July 2022 restraining the 2nd Defendant/Applicant from making any further developments on the suit property.
 3. That this order has adversely affected the 2nd Defendant as it continues to incur daily costs of Kshs 500,000 arising from losses and penalties owed to its contractors who are already on site to carry out the construction project.
 4. That the Plaintiff herein is not in a position to compensate the 2nd Defendant for the losses it has incurred and continues to incur due to the injunctive orders granted.
 5. That the 2nd Defendant had already been granted development approvals by the Nairobi City County Government to commence building on the suit property and had already begun construction on the suit property before the injunctive orders were issued by this Honourable court.
 6. That the suit property has already been excavated which poses a serious danger of death to the public and destruction of other adjacent properties. This danger has been exacerbated by the continuing rains which poses a serious structural risk to adjacent properties neighbouring the suit property thereby exposing the 2nd Defendant to enormous legal liability.
 7. That this Honourable court should take judicial notice of the fact that several buildings have collapsed on account of heavy rains and the government directive that all excavated properties should be constructed for safety of adjacent buildings.
 8. That the dispute in this suit is not about ownership of the suit property and that the Plaintiff has no valid claim against the 2nd Defendants title to the suit property.
 9. That the Plaintiff only has a claim of breach of contract against the 1st Defendant which can be adequately compensated by way of damages.
 10. That the Plaintiff will not suffer any prejudice if the prayers herein are granted.
 11. That the injunctive orders granted in favour of the Plaintiff does not meet the test of granting injunctive orders as stated in the cases of *Giella V Cassman Brown and Co Ltd* 1973 E.A 360, *Mrao V First American Bank of Kenya Ltd and 2 others* 2003 klr 125, and *American Cynamid co v Ethicon* 1975 1 All E.R
 12. That the grant of injunctive orders in favour of the Plaintiff violates the 3 test principles as set in *Giella V Cassman Brown and Co Ltd* 1973 E.A 360: (a) an applicant must show a *prima facie* case with a probability of success (b) In an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not



be adequately compensated for by damages. (c) And if in doubt in any of the above conditions the court will decide then on a balance of convenience.

13. That the Plaintiff didn't satisfy any of these requirements for the grant of injunctive orders.
 - a) The Plaintiff didn't satisfy the requirement of establishing a *prima facie* case with a probability of success as the Plaintiff is not the registered owner of the suit property and does not make any claim of ownership of the suit property. Conversely the 2nd Defendant is the registered owner and warrants protection of its proprietary rights established under Article 40 of the Constitution of Kenya 2010.
 - b) The Plaintiff can be adequately compensated by way of damages as the Plaintiffs claim in this suit is for breach of contract against the 1st Defendant. While in the contrary the injunctive orders granted against the 2nd Defendant has adversely resulted in the 2nd Defendant incurring daily costs of Kshs 500,000 arising from losses and penalties due to its contractors who are already on site to carry out the construction project which the Plaintiff cannot pay to the 2nd Defendant.
 - c) The balance of convenience in this suit lies against the granting of the injunctive orders against the 2nd Defendant as the 2nd Defendant is likely to suffer greater harm if the suit is to be decided in its favour.
 14. That the injunctive orders granted in favour of the Plaintiff is akin to arbitrarily depriving the 2nd Defendant of its constitutionally guaranteed right under Article 40 of the constitution to the use and enjoyment of its proprietary rights in the suit property.
3. The application was further supported by the affidavit of Bashir Abdi Mohamed a Director of 2nd Defendant sworn on the 23rd November 2022.
 4. On 23rd November 2022, when the application was placed before this Court, it was directed that the said application be canvassed by way of written submissions upon which the court would render its ruling. Save for the 1st Defendant, the other parties complied. The 1st Defendant filed written submissions dated 25th November 2022 and further submissions dated 7th December 2022. The Plaintiff filed written submissions dated 2nd December 2022.
 5. In its submissions, the 2nd Defendant outlined five issues for determination. These were as follows;
 1. Whether the Plaintiff had a *prima facie* case with a probability of success for the grant of the Interlocutory Injunction.
 2. Whether the Plaintiff would have suffered irreparable harm which would not be adequately compensated for by damages if the interlocutory injunction was not granted.
 3. Whether the balance of convenience was in the favour of granting the Interlocutory Injunction in favour of the Plaintiff.
 4. Whether the Application is *Res judicata*.
 5. Whether the application is bad in law, vexatious and an abuse of the court process.
 6. It was submitted that the Plaintiff did not have a *prima facie* case with a probability of success to warrant the grant of the interlocutory injunction. Reliance was made to the cases of Mrao Limited v First American Bank of Kenya & 2 others [2003] eKLR and Peter Kaime Gitu v KCB Bank Kenya Limited & Another [2021] eKLR.



7. The 2nd Defendant contended that the Applicant is the registered owner of the suit property known as L.R. No. 209/4194/38 and that there is no dispute as to ownership of the suit property and that the Plaintiff doesn't claim ownership of the said suit property or any beneficial interest.
8. On irreparable harm, the 2nd Defendant contended that the Plaintiff was only a tenant on the suit property and that the 2nd Defendant had purchased it from the 1st Defendant for valuable consideration and that in the likely event that the Plaintiff's claim is upheld, the compensation by payment of damages would be an adequate remedy. It was also submitted that the interlocutory injunction issued by this court has resulted in the applicant to suffer irreparable injury amounting to daily costs of Kshs 500,000/- arising from losses and penalties due to its contractors who are already on site to carry out the construction project which the Plaintiff has no capacity to pay to the 2nd Defendant herein.
9. It was also stated that the suit property had already been excavated which poses a serious danger of death to the public and destruction of other adjacent properties neighbouring the suit property thereby exposing the 2nd Defendant to enormous legal liability.
10. On whether the balance of convenience was in favour of granting the interlocutory injunction in favour of the Plaintiff, the 2nd Defendant contended that the balance of convenience lies against granting the interlocutory injunction as the 2nd Defendant stood to suffer the greater harm than the Plaintiff since the 2nd Defendant is the bonafide, legal and registered owner of the suit property.
11. On the issue of the application being *res judicata*, the 2nd Defendant contended that an interlocutory temporary injunction granted by the court as provided by Order 40 of the [Civil Procedure Rules 2010](#) is not a final and conclusive decision of the court and hence therefore the same cannot be *res judicata*.
12. It was contended that the application was in no way an abuse of the court process since it seeks to set aside the orders of this court issued on 28th July 2022 that has resulted in the defendant continues incurring of daily costs of about Kshs 500,000/-
13. The Plaintiff in her submissions dated 2nd December 2022 reiterated that the application was *res judicata* and also an abuse of the court process for the reasons that various applications have been filed seeking similar orders. The court was urged to dismiss the application with costs.
14. The jurisdiction of the court to set aside an or vary an order of injunction is outlined under Order 40 Rule 7 [Civil Procedure Rules](#), 2010 which provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
15. A court may set aside and or vary its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders
16. In the instant application, the 2nd Defendant has raised issues to the effect that they are incurring losses of about Kshs 500,000/- and that the Plaintiff has no financial capability to pay the said damages in the likely event the suit is dismissed. The 2nd Defendant also raised issue to the effect that the suit property had already been excavated which poses a serious structural and environmental danger to the public and other adjacent properties. These are weighty issues which unfortunately have not been controverted by the Plaintiff. In view of the above and having considered the facts in support of the application and in opposition thereto, I am satisfied that the 2nd Defendant has met the threshold to warrant review and or variation of the orders issued on 28th July 2022 in respect to Land Reference number 200/4194/38.



17. In view of the foregoing and also considering the need to avoid wasting away of the suit property and while doing substantive justice to all the parties, this court is inclined to vary and review its orders issued on 28th July 2022 in line with certain conditions.
18. In view of the foregoing, the application dated 23rd November 2022 is partially granted albeit in the following terms: -
- i) That pending the hearing and determination of the suit, the 2nd Defendant shall proceed with the proposed development on the suit property in accordance with the existing development approvals on condition that it avails and deposits with this court a bank guarantee in the sum of Kshs 5,000,000/- within 30 days from the date hereof.
 - ii) That in default to deposit the bank guarantee stated in order (i) within the stated timelines, the orders issued hereof shall automatically lapse.
 - iii) Parties be at liberty to apply where appropriate.
 - iv) Costs of the application to abide outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Munyabu holding brief for Dr. Khaminwa for the Plaintiff and also appearing with Mr. Mr. Nyakundi for the Plaintiff.

Mr. Mwihuri for the 1st Defendant.

Mr. Mura for the 2nd Defendant.

Court Assistant – Caroline Nafuna.

E.K. WABWOTO

JUDGE

