



REPUBLIC OF KENYA



Mbogo & another v Zimman Settlement Scheme Society & 6 others (Environment & Land Case E068 of 2022) [2023] KEELC 16313 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E068 OF 2022
JA MOGENI, J
FEBRUARY 16, 2023**

BETWEEN

RAPHAEL MBUGUA MBOGO 1ST PLAINTIFF

ESTHER NYAGUTHII NDIRANGU 2ND PLAINTIFF

AND

ZIMMAN SETTLEMENT SCHEME SOCIETY 1ST DEFENDANT

FRANCIS KIRIMA 2ND DEFENDANT

MARGARET NJERI WANYOIKE 3RD DEFENDANT

CHARLES MWANGI NGUMI 4TH DEFENDANT

CHARLES NYAMWENGE 5TH DEFENDANT

PETER NDUNG’U MUTHIKA 6TH DEFENDANT

BERNARD MUNYUIRA 7TH DEFENDANT

RULING

1. The 3rd, 4th, 5th and 6th Defendants filed a Notice of Preliminary Objection dated 03/03/2022 opposing the Applicant’s Notice of Motion Application dated 22/02/2022. The plaintiff’s Notice of Motion application seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. This court be pleased to grant a temporary injunction restraining the Defendants/ Respondents whether by themselves, their legal representatives, agents and/or servant howsoever from trespassing, subdividing, charging, selling, transferring, wasting, constructing



on, alienating or otherwise interfering or dealing or in any manner interfering with the plaintiffs/applicants peaceful occupation of parcels of land ground No. 151,152, 155 of the Zimman Settlement Scheme Society at Zimmermann Estate, Kasarani within Nairobi County Settlement Scheme Society at Zimmerman Estate, Kasarani within Nairobi County along Thika Super Highway pending the hearing and determination of this application.

2. This court be pleased to grant a temporary injunction restraining the Defendants/Respondents whether by themselves, their legal representatives, agents and/or servant howsoever from trespassing, subdividing, charging, selling, transferring, wasting, constructing on, alienating or otherwise interfering or dealing or in any manner interfering with the plaintiffs/applicants peaceful occupation of parcels of land ground no. 151,152, 155 of the Zimman Settlement Scheme Society at Zimmermann Estate, Kasarani within Nairobi County Settlement Scheme Society at Zimmerman Estate, Kasarani within Nairobi County along Thika Super Highway pending the hearing and determination of this suit.
3. The Officer Commanding Kasarani Police Station and DCIO, Kasarani do enforce compliance of the orders above.
4. The costs of this application be provided
5. The Application is supported by the Affidavit sworn on 22/02/2022 by Raphael Mbugua Mbogo the 1st Plaintiff.
6. The grounds upon which the application is brought are: that the applicants are husband and wife and members of the 1st defendants/respondents who were allocated in 2004 plot nos. 151,152 and 155 and issued with certificates of ownership; the applicants fenced the allocated plots; but on 06/02/2022 they visited their plots and realized that plot no. 151 was under construction by the 3rd defendant/respondent; they also visited on 09/02/2022 the offices of the 1st and 2nd defendants/respondents and found out that the management of the 1st defendant split into two groups having different offices and officials have disposed off the member plots without approval and or knowledge; one group is led by the 2nd respondent and the other by the 3rd and 4th defendants; due to the wrangles the 6th respondent and other officials fraudulently disposed plot no. 151 to the 7th defendant/respondent and approved development of the said plots; at a meeting however the 1st defendant confirmed that the plot nos. 151 and 152 were allocated to 1st plaintiff/applicant and plot nos. 155 to the 2nd plaintiff/applicant and additionally he stated that records show every persons who was allocated a plot.
7. The plaintiff/applicants state that they have proved a prima facie case with high chances of success stating that they stand to suffer irreparable loss that cannot be compensated by an award of damages.

Preliminary Objection

8. The 1st and 3rd to 7th Respondents have opposed the notice of motion through a preliminary objection dated 03/03/2022 and the plaintiff's entire suit on the following grounds:
 - i. That plot Nos. 151, 152 and 155 hereinafter "the Plots" are all within all those parcels of land known as Land Reference Number Nairobi Block 123/1-279- hereinafter "the Properties".
 - ii. That the Plots and by extension of the Properties are also the subject of Nairobi ELC No. 346 of 2002 (Mungai & Others -versus-Zimman Settlement Scheme Society & Others) in which this court is set to determine the legality of all the titles relating to the properties.
 - iii. That this court on the 28th day of August, 2014 gave orders in the said ELC No. 346 of 2002 restraining any dealings in the properties until the said suit is heard and determined.



- iv. That the Plots and the Properties are also the subject of ELC No. 2363 of 2007 in which this court on 17/07/2008 restrained the Respondent herein from interfering with the members of 1st Defendant herein until the said suit is heard and determined.
 - v. That all the parties herein are members and officials of the Zimman Settlement Scheme Society, the 1st Defendant herein that is party in all the two cases outlined hereinabove.
 - vi. That this suit and ELC No. 346 of 2002 and 2363 of 2007 are therefore between the same parties or parties under whom they claim and it is over the same matter and therefore offends the mandatory provisions of Section 6 of the *Civil Procedure Act*.
 - vii. That the suit is therefore an abuse of the court process and should therefore be stayed pending the hearing and determination of ELC No. 346 of 2002 and ELC No. 2363 of 2007.
9. The Notice of Preliminary Objection is supported by an affidavit sworn on 03/03/2022 by Peter Ndung'u Mutiga the 6th Defendant/ Respondent

Pleadings

10. By a plaint dated 22.02.2022, the 1st plaintiff states that he has been the beneficial owner of parcel nos. 151 and 152 while the 2nd plaintiff was the beneficial owner of the parcel of land number 155 of the Zimman Settlement Scheme Society all situated at Zimmermann Estate, Kasarani which were allocated to them by the 1st defendant society by virtue of them being members and fully contributed and paid towards acquisition of the said plots.
11. The 1st plaintiff states that the 1st defendant society issued the 1st plaintiff the certificate of ownership for plot no 151 and 152 dated 27/07/2004 being certificate No. 0465 and 0464. The certificate No. 0463 was issued to 2nd plaintiff on the even date and the 1st and 2nd plaintiffs fenced off the suit properties.
12. The 1st plaintiff avers that the management of the 1st defendant society split into two groups one led by the 2nd defendant/respondent and the other led by the 3rd defendant resulting into officials fraudulently disposing off the member's properties without their knowledge nor consent.
13. The plaintiff noted that the 7th defendant was constructing on the suit property and visited the offices of the 2nd defendant and lodged a complaint and the 7th defendant/respondent was summoned and he alleged that he bought plot No. 151 which he was constructing but could not produce certificate No. 60 which he said he had been issued with.
14. The 1st plaintiff avers that during follow up meetings they discovered that due to the wrangles in the management of the 1st defendant/respondent, the 6th defendant/respondent who is the ground manager colluded and conspired with other officials and fraudulently transferred and or disposed off the 1st plaintiff's parcel of land No. 151 to the 7th defendant/respondent and approved the development plan without the 1st plaintiff's knowledge nor approval.
15. The 3rd to 7th Defendant has raised various grounds in the preliminary objection which are summarized as follows: that the application is an abuse of the court process; the plots and properties are also subject of ELC 2363 of 2007 where there the respondent therein was restrained from interfering with the members of the 1st defendant until the suit is heard, that all parties herein are members and officials of the Zimman Settlement Scheme Society, that this suit and ELC No. 346 of 2002 and ELC 2363 of 2007 are therefore between the same parties and therefore the suit offends the mandatory provisions of Section 6 of the *Civil Procedure Act* and therefore this suit should be stayed pending the hearing and determination of ELC 346 of 2002 and ELC 2363 of 2007.



16. Both the plaintiffs/applicants and defendant/respondents filed their submissions. The plaintiff/applicant filed their submissions in respect to the Notice of Motion dated 19/05/2022 and the 1st, 3rd-6th defendant/respondent filed their submissions to the application dated 1/07/2022

Analysis and Determination

17. Having considered the application by the plaintiffs, the replying affidavit by the respondents, the supporting affidavit by the plaintiffs and the 3rd to 7th defendant's/respondents preliminary objection, and the submissions of the parties the following issues arise for determination:
- a. Whether the preliminary objection by the 3rd to 7th defendants/respondents is sustainable?
 - b. Whether the plaintiffs have satisfied the conditions for granting a temporary injunction to warrant grant of interim injunction pending the hearing of the main suit?.

Preliminary objection

18. The nature and basis of a preliminary objection was well laid down in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the court held:-

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

19. In the judgment of Sir Charles New Bold in the same case he stated thus:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued in the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

20. It is evident that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any fact has to be ascertained from elsewhere or when the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd..Vs..Kenya Railways Corporation*, Kisumu HCCC No. 22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

21. It is evident that a Preliminary Objection, must stem from the pleadings and should raise pure point of law. See the case of *Avtar Singh Bhamra & Another... Vs...Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”



22. Does the Notice of Preliminary Objection, herein satisfy the ingredients of a Preliminary Objection? This Court will be persuaded by the findings in the case of Oraro... Vs...Mbaja (2005) 1KLR 141, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

23. In the instant case the 3rd to 7th respondents have pleaded the suit is subjudice to the proceedings in ELC 346 of 2002 and ELC 2363 of 2007. The principle of subjudice is provided for under Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya which provides:-

“6. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigation under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.” (Emphasis mine).

24. For the subjudice rule to apply as envisaged in under Section 6 of the Civil Procedure Act above it has to be demonstrated that there is in existence a previous suit where the subject matter is directly and substantially similar as in the subsequent suit and that the parties in the subsequent suit are the same as in the previous suit and further that both courts involved have jurisdiction to grant the relief sought.

25. In the case of Albert Kigera Karume & 2 Others v Kungu Gatabaki & Margaret Nduta Kamithi (sued as trustees of Njenga Karume Trust) & 5 Others the court held:

“For the principle of subjudice to apply, several requirements must be met. There must be in existence a previous suit or proceeding; the subject matter in question must be directly and substantially in issue in both proceedings, the proceedings must be between the same parties or parties under whom any of them claim; the parties must be litigating under the same parties or parties under whom any of them claim. The parties must be litigating under the same title and finally, both courts must have jurisdiction to grant the relief sought.”

26. In the case of Wanga v Mugambi & Another EALR [2013] EA 474, Odunga J. observed as follows: -

“Therefore where a party decides to file the suit between the same parties with the same cause of action with either an intention of vexing or annoying his opponent and without pursuing the first suit in the production line to its logical conclusion, amount to an abuse of the process of the court...”

27. At page 485: Odunga J states:-

“It is not the form in which the suit is framed that determines whether it is subjudice but the substance of the suit...”.

28. In the present case the 3rd to 7th respondents have pleaded that the present suit is subjudice to the proceedings in ELC 346 of 2002 and ELC 2363 of 2007. The 3rd to 7th defendants have argued that the dispute in the instant suit relates to the issues in ELC 346 of 2002 and ELC 2363 of 2007 where they stated that the court has issued orders on 28/082014 and 17/07/2008 respectively.



29. For the Court to determine whether the issues herein were directly and substantially in issue with the other suits, the Court will have to ascertain facts and probe evidence. Further the issue on whether or not the same is Subjudice, facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts. Therefore, this Court holds and finds that the issue of subjudice as raised by the Defendants/ Respondents does not amount to a Preliminary Objection, and does not qualify to be determined as Preliminary Objection.
30. Therefore, it is my holding and finding that the instant suit is not subjudice and hence the preliminary objection is not sustainable on that ground.

The Injunction Application

31. The plaintiffs' application being one for a temporary injunction, the same shall be considered on the well-established principles enumerated in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. For the plaintiffs to succeed in the present application, they have to satisfy the court that they have a prima facie case with a probability of success and that unless the orders sought are granted, they will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience.
32. The plaintiffs' case is based on fraud. The plaintiffs' contention is that land parcel Nos. 151, 152 and 155 belonged to the 1st and 2nd plaintiffs by virtue of their membership and contribution as members of the 1st defendant. It is the plaintiffs' contention that due the wrangles of the 1st defendant management, the 6th defendant and other management officials fraudulently transferred and or disposed the 1st plaintiff's plot no. 151 to the 7th defendant.
33. However, the 6th respondent has averred in the replying affidavit on behalf of the 3rd to 5th defendant that parcels nos. 151, 152 and 155 are plots within the larger parcel of land occupied by squatters which parcel of land is managed by the 1st defendant. Further that their records do not anywhere reflect that the applicants are members of the 1st defendant.
34. In this matter there are two parties claiming ownership of the same parcel of land. The plaintiffs/applicants claim ownership through membership and have attached their certificates, yet the 7th defendant's ownership is averred through the replying affidavit of the 6th defendant who states that all the defendants/respondents are all officials of the 1st defendant. However, there is no document attached to show how the officials of the 1st defendant acquired the suit property. It does appear there is some explanation to be done and that gives some credence to the plaintiffs'/applicants' assertion that they are the bonafide owners of the suit property.
35. In an interlocutory application, the applicants have the onus to prove a prima facie case with a probability of success; that they will suffer irreparable damage should the court not grant the orders sought and lastly that the balance of convenience tilts in favour of granting the injunction sought.
36. Order 40 Rule 1 of the *Civil Procedure Rules* grants the court powers to issue temporary injunction where it is proved by affidavit or otherwise that any property in dispute is in danger of being alienated or is wrongfully about to be sold.
37. The 6th respondent has admitted that the 7th respondent is in possession of the suit property parcel No. 151 and therefore they contend that the 7th respondent is the bonafide owner of the suit property which is also being claimed by the plaintiffs/applicants.
38. In *Mrao Ltd -s- First American Bank of Kenya Ltd & 2 Others* [2003] eKLR the court held a prima facie case is a genuine and arguable case on the material presented to 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 explanations or rebuttal from the latter.

39. Noting the concern of the plaintiffs/applicants it is evident from the attachments they put on their application that the 7th respondent has excavated and continues to construct. They will therefore suffer irreparable loss, it is clear that if the defendants jointly or severally interfere with the land, then the plaintiffs/applicants stands to lose their land and may suffer loss that may not be compensable by an award of damages. Even if I was to consider the balance of convenience, it tilts towards preserving the property, and stopping any dealings in the register of the suit property, until this case is heard and determined.
40. The plaintiffs in my view have demonstrated an arguable case and I hold the plaintiffs have a prima facie case with a probability of success.
41. In the instant case Plot No. 151 is alleged to be owned by the plaintiffs by virtue of membership and contribution to the 1st defendant. However, the 6th respondent claims that the 7th defendant was allocated the same plot and he is in occupation as a squatter. Only the plaintiffs have attached copies of their membership certificates which are disputed by the 6th defendant. These are issues that require further interrogation and/or explanation which can only be done at the trial.
42. Though the 3rd to 7th defendants/respondents through the replying affidavit sworn by the 6th defendant have forcefully argued and submitted that they are owners of the suit property having been settled on the property as squatters, the court cannot make such definitive findings at this interlocutory stage. The plaintiffs have alleged that the sale of the suit property to the 7th defendant was irregular and fraudulent and have sought the intervention of court to find that the allocation of the suit property to the 7th respondent was irregular. Under Section 26 (1) (a) and (b) of the [Land Registration Act, 2012](#) the title of a registered proprietor can be challenged on:
 - a. On the ground of fraud and misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
43. Fraud has to be proved by evidence and that can only be done at the trial when parties tender their evidence and are subjected to cross examination.

Disposal Orders

44. Having regard to all the evidence and material placed before the court, I am persuaded that the plaintiffs' case is arguable and has a probability of succeeding. However, I am not persuaded I should grant orders of injunction in the terms sought. Instead the order that commends itself is to direct and order, which I hereby do,
 - a. That the parties maintain the status quo whereby there will be no dealings with the suit property relating to either subdivision, sale and/or transfer and/or charging of the properties, trespassing, wasting, constructing on, further construction, or otherwise interfering or dealing or in any manner interfering with the parcel of land ground No. 151 of the Zimman Settlement Scheme society at Zimmermann Estate, Kasarani within Nairobi County along Thika Super highway pending the hearing and final determination of the suit.
 - b. That the Officer Commanding Kasarani Police Station and DCIO, Kasarani do enforce compliance of the orders above.



- c. Taking into consideration the nature and circumstances of the matter I order that each party shall bear their own costs for the preliminary objection and the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIVASHA THIS 16TH DAY OF FEBRUARY, 2023.

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MOGENI J

JUDGE

In the virtual Presence of;-

Ms Githinji holding brief for Mr Mugo for Plaintiff

Mr Kimathi for the 1st and 2nd Respondent

Mr Omondi holding brief for Mr Kenyatta for 3rd to 13th Respondent

Court Assistant: Sagina

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MOGENI J

JUDGE

