



Darbiya v Dayah Construction Company Limited & 5 others (Environment & Land Case E450 of 2021) [2023] KEELC 17037 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEELC 17037 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E450 OF 2021
EK WABWOTO, J
MARCH 29, 2023**

BETWEEN

IBRAHIM MOHAMOD DARBIYA PLAINTIFF

AND

DAYAH CONSTRUCTION COMPANY LIMITED 1ST DEFENDANT

PATRICK KARIGE MUNGE 2ND DEFENDANT

ICON AUCTIONEERS 3RD DEFENDANT

GARUN INVESTMENT LIMITED 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. The Plaintiff claims to have entered into a Sale Agreement dated 20th August 2013 for the sale of LR No 19952/4 and LR No 19952/5 situated in Nairobi County. The Plaintiff filed a Notice of Motion Application dated 30th January 2023 which was accompanied by a Supporting Affidavit sworn by Ibrahim Mohamad Darbiya. In the said application he sought the following orders:
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of this Application, this Honourable Court be pleased to grant an order of temporary injunction barring the Icon Auctioneers, their agents, partners, employees or anyone under their instructions from carrying out the planned auction of the properties known as Grant No 153627 LR No. 19952/4 and LR No 19952/5 Grant No. 153528 slated for 2nd February 2023 at 10am at Tembo Co-op House, Moi Avenue.



- iv. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of temporary injunction barring the 2nd Proposed Defendant Icon Auctioneers their agents, partners, employees or anyone under their instructions from carrying out the planned auction of the properties known as Grant No 153627 LR. No 19952/4 and LR No 19952/5 Grant No 153528 slated for 2nd February 2023 at 10am at Tembo Co-op House, Moi Avenue.
 - v. That costs of this Application be provided.
2. The Application was made on the grounds that:
- i. The Applicant and Respondent entered into a Sale Agreement dated 20th August 2013 for the sale of Grant No 153627 LR No 19952/4 and Grant No 153628 LR No 19952/5 situated in Nairobi County.
 - ii. That should the 2nd proposed Respondent be allowed to proceed with the planned auction, the Applicant will lose his interests in the suit properties and will render this suit as an academic exercise and thus moot.
 - iii. It has come to the attention of the Applicants herein that there exists another case Nairobi ELC No 238 of 2016: *Patrick Karige Munge v Garun Investments & Others* where the properties known as Grant No 153627 LR No 19952/4 and LR No 19952/5 Grant No 153528 have been put up for auction by the proposed 2nd Defendant on 2nd February 2023.
 - iv. That the Applicant is apprehensive that without the orders of this Honorable Court barring the planned auction the 2nd Defendant will proceed to auction the suit properties thus defeating the purpose and intent of the orders currently in force.
3. On 20th February 2023, the matter came up for hearing of the said application in which the Plaintiff submitted that he does have legitimate interest in the property and the auction would prejudice the Applicant.
4. In a Replying Affidavit dated 1st February 2023, sworn by the 2nd Defendant (Patrick Karige Munge), it was argued that following a consent judgement in ELC 238 of 2016 the orders to recover debt vide auction was granted on 21st October 2021 by Lady Justice Komingoi. It was submitted that alleged payment of Ksh 70 million as averred by the Plaintiff was not backed by any evidence and hence the same was misleading to the Court. Additionally, the Plaintiff ought to deposit an amount equivalent to the unpaid sum together with auctioneer cost as condition to stop the intended sale.
5. I have considered the application and respective submissions. In my view, the issue that arise for determination is whether the Plaintiff has met the threshold to be granted the temporary injunction order.
6. Section 63 of the *Civil Procedure Act* and Order 40(1) of the *Civil Procedure Rules* stipulates 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 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.[Emphasis Mine]

7. The principles to determine the threshold for temporary injunction are well outlined in *Giella v Cassman Brown* [1973] EA 358 to the effect that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
8. This position was also reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, Ca No. 77 of 2012, where the Court stated that:

“In an interlocutory injunction application, the applicant has to satisfy the three 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”
9. In the instant case, the 2nd Defendant is not in possession of the suit property and only wishes to dispose of the same for recovery of debt. The issues raised by the Plaintiff are serious that unless they are properly interrogated at a full trial, serious injustice may be occasion to the Plaintiff. On whether the Plaintiff will suffer irreparable harm if the interim orders are not issued, the answer is in the affirmative. There is an impending auction in respect to the sale of the properties. If the orders are not granted, he would have been dispossessed of his property and rights of third parties may kick in thus compounding the matter.
10. I have considered the fact that the Plaintiff was not a party in ELC 238 of 2016 and should therefore have his day in court. For these reasons, the Court must not only balance the rights of the parties but also preserve the property.
11. In the foregoing, this Court finds that the Plaintiff has established a prima facie case and therefore the Notice of Motion application dated 30th January 2023 is allowed in the following terms:
 - i. That pending hearing and determination of the main suit a temporary order of injunction is hereby issued against the 2nd, 3rd and 4th Defendants their agents, partners, employees or anyone under their instructions from carrying out the planned auction of the properties known as Grant No 153627 LR. No 19952/4 and LR No 19952/5 Grant No 153528.
 - ii. Costs will abide the determination of the main suit.
15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MARCH 2023.

E. K. WABWOTO

JUDGE

In the presence of: -



Ms. Shikali h/b for Mr. Chebeiyego for the Plaintiff and Mr. Mutunga for the 1st Defendant.

Ms. Kipkemboi h/b for Mr. Kimathi the 2nd Defendant and the 3rd Defendant.

N/A for the 4th Defendant.

N/A for the 5th Defendant.

N/A for the 6th Defendant.

Court Assistant; Caroline Nafuna.

