



**Siri Gurdwara Ramgarhia Railway, Nairobi Registered Trustees
v Hussein & 2 others (Environment & Land Case E163 of 2022)
[2022] KEELC 13256 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E163 OF 2022
EK WABWOTO, J
SEPTEMBER 27, 2022**

BETWEEN

**SIRI GURDWARA RAMGARHIA RAILWAY, NAIROBI REGISTERED
TRUSTEES PLAINTIFF**

AND

ENGLAND ADAM HUSSEIN 1ST DEFENDANT

ABDULLAHI IBRAHIM ALI 2ND DEFENDANT

JAMES MWANGI KAGUCHA 3RD DEFENDANT

RULING

1. This ruling is in respect to three applications which include the Plaintiff's applications dated 5th and May 16, 2022 and the Defendants application dated July 14, 2022.
2. The Plaintiff herein commenced this suit vide a plaint dated May 5, 2022 seeking for various reliefs. Contemporaneously to the filing of the instant suit, the Plaintiff also filed a Notice of Motion application dated May 5, 2022 wherein they sought injunction orders against the Defendants pending the hearing and determination of the application and the suit. The injunction orders that were sought were in respect to restraining the Defendants from trespassing, entering or interfering in any manner with the Plaintiff's ownership, quiet possession, fencing and use of the property known as LR/No 209/12596 and further from alienating or otherwise dealing in any other manner whatsoever with the said land pending the hearing and determination of this suit. The application was supported by grounds stated on its face as well as the supporting affidavit sworn by Gamdoor Singh Panesar on May 5, 2022.
3. The 2nd application was the application dated May 16, 2022 which sought inter alia an order withdrawing and transferring to this court the proceedings in respect to Milimani Commercial Court



ELC case No E486 of 2021 Shane Jophil Mwangi Mwirereri & 7 others vs Siri Gurdwara Railway Trustees & 4 others which was being conducted before Hon AN Makau (PM). The said application was also supported by the Affidavit sworn by Gamdoor Singh Panesa on May 16, 2022.

4. In response to the two applications, the Defendants filed a Replying Affidavit sworn by England Adam Hussein the first Defendant herein on May 24, 2022. In the said affidavit, the 1st Defendant averred that the suit property was set aside for general public use as a parking space for the shopping center and that the intended development by the Plaintiff on the suit property will unfairly deny not only the members of the public but also the business community who use the space as a loading and off-loading zone and including the children who are utilizing part hereof as 'waiting bay point' to be picked up by their parents from the primary school at the vicinity known as 'Andalucia Academy.'
5. The Defendants also filed an application dated July 14, 2022 which application sought for joinder of Nairobi City County, The Registrar of Titles and National Land Commission as the intended 4th, 5th and 6th Defendants as well as Kenya Rural Roads Authority (KERRA) as the Interested party. The application also sought an injunction against the Plaintiff from inter alia dealing with LR NO 209/12596 NAIROBI reserved for use as parking space, loading and off loading zone pending the hearing and determination of the application and the suit. The said application was supported by the Affidavit sworn by England Adam Huseein on July 14, 2022.
6. Pursuant to the directions issued by this court on May 26, 2022, the court directed all the three applications to be heard together and parties were at liberty to file their written submissions.
7. The Plaintiff filed their written submissions in respect to the Defendant's application dated July 14, 2022. The submissions were dated August 31, 2022. Counsel outlined four issues for consideration by the court;
 - i. Whether Nairobi City County, the Registrar of Titles, National Land Commission and Kenya Rural Roads Authority and ought to be joined as Defendants and Interested parties respectively in this suit.
 - ii. Whether the Defendants are entitled to the injunction reliefs sought.
 - iii. Who should bear the costs of the application.
8. Counsel submitted that save for the Registrar of Titles, there was no need to include Nairobi City County, National and Commission And Kerra as parties to this case since they had not done anything on the Plaintiff's land to warrant their inclusion. Counsel cited the case of *Lucy Nungari Ngigi & 128 others -Vs- National, Bank of Kenya Limited & Another (2015) eKLR, Arkay Industries Limited - Vs- Diamond Trust Bank & Another, Mega Wholesalers Limited (2022) eKLR* in support of his sentiments.
9. On whether the Defendants are entitled to the injunctive reliefs sought, Counsel submitted that Defendants are trespassers by law since they had left their own distinct and separate parcels of land namely LR No 209/5109 LR No 209/5110, LR No 209/5866 and moved into the Plaintiff's suit land LR No 209/12596 and even hired goons to cause wanton destruction on the same. Counsel argued that this was in contravention of Articles 40 and 64 of the *Constitution* as read with Section 24, 25 and 26 of the *Land Registrar Act* 2012.
10. Counsel also submitted that equity does not suffer a wrong to be without a remedy and also equity follows the law. Counsel cited the case of *Munyu Maina -Vs- Hiram Gathina Maina (2013) eKLR, Giella -Vs- Cassman Brown & Co Ltd (1973) EA 358, Keiyan Group Ranch -Vs- Samuel Onita & others (2022)* and *Peter Gicheru Mungai -Vs- Land Line Quests Limited (2021) eKLR*.



11. On costs of the application, Counsel submitted that the same be awarded to the Plaintiff.
12. Counsel also filed written submissions in respect to the Plaintiffs application dated May 16, 2022. The submissions were dated July 8, 2022. In the said submissions, Counsel outlined the following two issues for determination.
 - i. Whether this court can call for Milimani CMCC File Case No E486 of 2021 to be placed before it for further direction and determination.
 - ii. Who should bear the costs of this application.
13. Counsel made reference to Section 18(1) (6)(1) of the *Civil Procedure Act* and Article 165 (7) & (8) of the *Constitution* of Kenya and submitted that this court is clothed with Supervisory jurisdiction over the subordinate court and it is in light of these provisions, that the Applicant seeks the transfer of Milimani Commercial Court in ELC Case No E486 of 2021 Shane Japhil Mwangi Mwirereri & 7 others –Vs- Sin Gurdwara Railway Trustees & 4 others to be placed before this court for direction and determination. Counsel submitted that the Plaintiff had filed a Preliminary Objection upon which the Magistrate court considered and delivered a ruling on May 4, 2022 striking out the suit however under mysterious circumstances, on May 10, 2022 the Magistrate then re-opened the suit and went ahead to issue exparte orders. Counsel argued that this was an action that warranted the intervention of this court. Counsel equally prayed for costs of this application to be granted to the Plaintiff.
14. In respect to the application dated May 5, 2022, Counsel filed submissions dated July 8, 2022 in support of the said application. Counsel submitted on the following issues: -
 - i. Whether the Plaintiff/Applicant is the legal and registered owner of LR No 209/12596 and has absolute proprietary rights.
 - ii. Whether the Applicant is entitled to interim injunction orders.
 - iii. Who should bear costs of the application.
15. Counsel submitted on how the Plaintiff had in the Supporting Affidavit dated May 5, 2022 provided a history on how it legally acquired the property known as LR No 209/12596 in 1995 and even produced evidence of ownership. Counsel argued that the Plaintiff being the owner of the suit property, it ought to be protected from actions of interference and trespass by the defendants and as such prayed for the grant of the injunctive orders and costs as prayed for in the said application.
16. Counsel for the Defendant filed written submissions dated August 2, 2022. In the said submissions, Counsel outlined three issues for consideration.
 - i. Whether the Plaintiff or Defendants are entitled to injunctive orders.
 - ii. Whether the Plaintiff has demonstrated reasons to warrant transfer of Chief Magistrate Civil Case Number E486 of 2021 to the Environment and Land Court.
 - iii. Who should incur cost of this application.
17. It was submitted that the Plaintiff obtained proprietorship of the suit property irregularly and as such they are estopped from denying that the suit property was reserved as public parking space. In submitting the Plaintiff does not deserve to be granted the injunction orders sought, counsel cited the cases of *Lucy Wangari Gachara –Vs- Minudi Okemba Lore (2015) eKLR*, *Kenya Commercial Fianance Co Ltd –Vs- Afraba Education Society (2001) Vol I EA 86*, *Joyce Sarange Kenyatta –Vs- Lucas Nyambegera Nyangweso (2015) eKLR*, *Kenya Anti- Corruption Commission –Vs- Lima Limited &*



2 others (2019) eKLR and Kenya Anti-Corruption Commission –Vs- Online Enterprises Limited & 4 others (2019) eKLR.

18. On whether the Plaintiff has demonstrated reasons to warrant transfer of Chief Magistrate’s Civil Case Number E486 of 2021 to the Environment and Land Court, Counsel argued that a review application had been filed in respect to the ruling made by the Learned Magistrate. Counsel also argued the court to grant them costs of the application.
19. The court has carefully considered the applications as well as the parties’ rival affidavits and written submissions that were filed and in my humble view the main issues for determination are as follows: -
 - i. Whether the Plaintiff and Defendants herein have established and made out a case for grant of injunction orders sought to either of them.
 - ii. Whether this court should transfer Chief Magistrate’s Civil Case Number E 486 of 2021 to the Environment and land Court.
 - iii. Whether the Defendants have made out a case for joinder of Nairobi City County, Registrar of Titles, National Land Commission as 4th, 5th and 6th Defendants respectively and Kenya Rural Roads Authority (KERRA) as the Intended Interested party.
 - iv. Who should bear the costs of the application.
20. Both the Plaintiff and Defendants herein are seeking for grant of injunction orders against each other as prayed for in their respective applications. Given that both parties are seeking for an order for temporary injunction, they are therefore enjoined and or obliged to establish and prove specific condition, which are pertinent before a court of law can proceed to grant the order sought.
21. One of the prerequisite conditions that must be established and proved is the existence of a prima facie case with overwhelming chances of success. In this regard, both parties herein were obliged to prove this particular condition.
22. Before venturing to ascertain and/or interrogate whether the parties have established a prima facie case in this matter, it is imperative to discern the meaning and import of what constitutes a prima facie case. In this regard, the definition of what constitutes a prima facies case was supplied by the court of appeal in the case of *Mrao Ltd V First American Bank of Kenya Ltd & 2 others [2003] KLR*, where the Court held as follows:

' In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.'
23. Other than the foregoing decision, the meaning, scope and tenor of what constitutes prima facie case, was revisited in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR*, where the court observed as hereunder;

' Prima facie' is a Latin phrase for 'at first sight', whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like 'a serious question to be tried', 'a question which is not vexatious or frivolous', 'an arguable case' have been adopted to describe the burden imposed on the applicant to demonstrate the existence



of prima facie case. The leading English House of Lords case of the American Cyanamid Co Ethicon Ltd [1975] AC 396 is a case in point. The meaning of 'prima facie case', in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V Republic [1957] EA 332.

24. Having appreciated and correctly understood the meaning and import of what constitutes a prima facie case, it is now appropriate to undertake the interrogation of the parties cases.
25. The Plaintiff have provided a history on how they legally acquired the property known as LR No 209/12596 in 1995 and even produced evidence of ownership and further proving that they the current owner of the suit property and also in current occupation. In the circumstances it is the finding of this court that the Plaintiff has established a prima facie case and ought to be protected from actions of interference and trespass by the defendants.
26. On the other hand, the Defendants herein have no business in interfering with the Plaintiff's actions being undertaken in property known as LR No 209/12596. The Defendants property know as LR No 209/5109, LR No 209/5110 and LR No 209/5866 are distinct and separate from the Plaintiff's property. No evidence was shown of any interference by the Plaintiff's or trespass to the Defendants property and as such it is the finding of this court that the Defendants have not made out a prima facie case to warrant the grant of injunctive orders as sought by them against the Plaintiff.
27. Other than the requirement to prove and established the existence of a prima facie case, a claimant for an order of temporary injunction, must also prove that same is disposed to suffer irreparable loss if the order sought for are not granted.
28. Essentially, no order of temporary injunction can issue and/or be granted if the imminent loss if one that is quantifiable, ascertainable and capable of compensation in monetary terms. Premised on the foregoing, it was therefore incumbent upon the parties to also prove and/or place before the honourable court credible evidence pertaining to the nature of irreparable loss that may accrue and/or arise.
29. What then constitutes irreparable loss. To this end, it is imperative to take cognizance of the definition supplied vide the holding in the case of Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] eKLR, where the Honorable Court observed as follows;

' 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.'
30. Having considered that fact that the Plaintiff have established a prima facie case herein, I am afraid that the Defendants have not placed before the court any evidence of irreparable loss. In this regard, there being no evidence of such loss, an order temporary injunction cannot certainly issue in favour of the Defendants.



31. Lastly as regards the issue of balance of convenience, I associate myself 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.'

32. In light of my findings above, I am satisfied that the balance of convenience lies in favour of the Plaintiff who has satisfied the conditions necessary for the grant of the injunctory orders sought.

33. On whether or not the following parties can be joined as parties to these proceedings, Order 1 Rule 10, (2) of the *Civil Procedure Rules*, which provision states as follows;

' The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'

34. Essentially therefore, any person who, though not a party to proceedings pending in court and has an interest in the subject matter of such proceedings to the extent that they will be affected by the decision of the court whichever way the decision goes, then such person qualifies to be termed as a necessary party and ought to be allowed to join such proceedings.

35. I have considered the Defendant's averments that the intended parties have a crucial mandate that would be for the best interest of justice to have them joined as necessary parties to this suit and I am convinced that their presence in this suit is necessary to enable the court to effectually and completely adjudicate upon and settle all issues arising herein.

36. On whether or not this court should transfer Chief Magistrate's Civil Case Number E 486 of 2021 to the Environment and Land Court, the power to transfer a suit is discretionary. The burden of providing sufficient reasons of the transfer rests with the Applicant. Section 13(4) of the *Environment and Land Act* sets out appellate jurisdiction over decisions of subordinate court with respect to matters falling within its jurisdiction. I take note that the prayer to transfer the suit from the Magistrates Court is done while an application for review is pending. Not only do I consider the review application due process but also stand guided that this Court (read Environment and Land Court) would strictly be called upon as an appellate court when handling the orders and proceedings in Chief Magistrates Court Case Number E486 of 2021 and as such it would not be in the best interest of justice to transfer the said suit to this court at this stage. In the circumstances I am unable to grant the orders sought in the application dated May 16, 2022 at this stage being the application that had orders seeking for transfer of the said suit.



Final orders

37. Consequently, the Plaintiff's Application dated May 5, 2022, May 16, 2022 and the Defendants Application dated July 14, 2022 are disposed in the following terms: -

- i. That the following parties are hereby joined to this suit as follows:- Nairobi City County as 4th Defendant, The Registrar of Titles as 5th Defendant, National Land Commission as 6th Defendant and Kenya Rural Roads Authority as the Interested Party.
- ii. That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the Defendants/Respondents whether by themselves or through their servants, employees, agents or anyone acting at their behest or whatsoever from trespassing, entering into or interfering in any manner with the Plaintiff's ownership, quiet possession, fencing and use of the property known as LR No 209/12596.
- iii. The orders sought in the application dated May 16, 2022 are declined.
- iv. Each party to bear own costs of the three applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2022.

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. T. Odera for the Plaintiff.

Ms. Mohamed holding brief for Mr. Lakicha for the Defendants.

Courts Assistant – Caroline Nafuna

E.K. WABWOTO

JUDGE

