



REPUBLIC OF KENYA



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Kiplagat v Cabinet Secretary Land and Physical Planning & 3 others (Environment and Land Appeal E004 of 2023) [2024] KEELC 1449 (KLR) (4 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

L WAITHAKA, J

MARCH 4, 2024

BETWEEN

HENRY KIPTIONY KIPLAGAT APPELLANT

AND

**CABINET SECRETARY LAND AND PHYSICAL PLANNING 1ST
RESPONDENT**

DISTRICT LAND REGISTRAR-KOIBATEK 2ND RESPONDENT

NANCY RUTH CHELAGAT 3RD RESPONDENT

GEORGE GATHENYA 4TH RESPONDENT

(Being an Appeal from the Ruling of Hon. A Towett PM in Eldama Ravine SPM ELC E003 of 2023 delivered on 26th July 2023)

JUDGMENT

Background

1. By a plaint dated 21st February 2023, the plaintiff (now appellant) instituted a suit in the lower court to wit Eldama Ravine E003 of 2023 seeking judgment against the defendants for inter alia an order of permanent injunction to restrain the defendants by themselves, their servants, agents, employees or any one working under them from entering, transferring and/or interfering with his quiet and peaceful enjoyment of all that parcel of land known as Eldama Ravine Township Block 1/656 measuring 0.1482 hectares (suit property).
2. Simultaneously with the plaint, the plaintiff filed a notice of motion application of an even date seeking to inter alia restrain the 2nd defendant, the District Land Registrar, Koibatek, by herself, her agents and/or employees or any other person working under her from expunging the lease and lease records of the suit property as per the letter of the 1st respondent dated 26th July 2021 pending the hearing



and determination of the suit. The plaintiff also sought to restrain the 3rd and the 4th respondents by themselves, their agents, servants and/or employees from entering, ploughing, tilling, trespassing and/or in any other way interfering with his quiet enjoyment of the suit property pending the hearing and determination of the suit.

3. The application was opposed by the 3rd and the 4th respondents on the grounds that it is res judicata Nakuru ELC Judicial Review Cause No.E008 of 2021; that the plaintiff is guilty of material non disclosure and that it is incurably defective, misconceived and an abuse of the court process.
4. The respondents contended that the plaintiff does not have a good title to the suit property; that the orders sought cannot issue as the actions sought to be restrained have already been done and that the plaintiff has not demonstrated any wrongdoing on the part of the defendants to warrant issuance of the orders sought.
5. The respondents further contended that the plaintiff's claims are speculative and not backed by any evidence and that they would be prejudiced if the orders sought are granted.
6. Upon considering the cases urged by the parties, the learned trial magistrate inter alia held/observed:-

“... from the facts adduced it is apparent that the 3rd and 4th defendant were allocated the suit property in the year 1997 and 1995 respectively. The plaintiff/applicant has not disputed this assertion.

The 3rd defendant has annexed payment records having been paying land rent and rates from 1998 to 2021.

From the material presented to this court and specifically allotment letters and certificate of lease as annexed in the replying affidavit, I am not persuaded that the plaintiff/applicant has established a prima facie case with a probability of success.

Having found that the plaintiff/applicant has not established a prima facie case, I find that it will not be necessary to consider the two remaining conditions for granting orders of injunction...as the three conditions must be fulfilled before an order of injunction can be granted ...

From the above analysis I find that the application for injunction is not merited and therefore proceed to dismiss the application with costs.”

Appeal

7. Aggrieved by the decision of the learned trial magistrate, the appellant appealed to this court on seven (7) grounds which can be reduced to two broad grounds namely, the learned trial magistrate erred by failing to restrain the 2nd respondent from expunging his lease from the land records pending the hearing and determination of the suit and by failing to preserve the status quo pending the hearing and determination of the suit.
8. The appellant faults the learned trial magistrate for having based her decision on the merits of the suit instead of limiting herself to the application for interlocutory injunction.
9. The appellant urges the court to allow the appeal as prayed.
10. Pursuant to directions given on 30th November 2023, the appeal was disposed by written submissions.



Submissions

Appellant's Submissions

11. In his submissions, the appellant makes reference to the cases of *Giella vs. Cassman Brown & Co. Ltd* (1973)EA 358 and *Mrao vs. First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 and based on the affidavit evidence he adduced showing that he is the registered owner of the suit property, submits that the learned trial magistrate erred by determining that he had not established a prima facie case with probability of success.
12. It is pointed out that in arriving at the impugned decision, the learned trial magistrate relied on the affidavit evidence of the 3rd and the 4th respondents to the effect that the suit property was as a result of amalgamation of land parcels number Eldama Ravine Block 1/638 and 640 which are registered in their name.
13. Faulting the learned trial magistrate for relying on contested issues of facts to determine that the plaintiff/applicant had not established a prima facie case with probability of success, the appellant submits that there was need to grant an order of injunction to prevent the documents in his favour from being expunged until the contentious issues were determined by the court.
14. Arguing that the evidence before the trial court showed that the properties in question were different, the appellant asserts that the learned trial magistrate erred by determining that he did not establish a prima facie case with a probability of success.
15. On whether the plaintiff/applicant would suffer irreparable harm unless the order sought is granted, the appellant submits that he would suffer as the threat he presented was that the respondents would tamper with the records at the land registry before the dispute before the court is heard and determined.
16. It is the appellant's case that by expunging the documents given by the lands office validating his claim to the suit property, the loss and damage he would suffer would not be capable of being compensated by an award of damages.
17. The appellant further submits that the 3rd and 4th respondents did not demonstrate that they were on the suit property but merely described how the land was.
18. On balance of convenience, the appellant submits that the balance of convenience tilts in his favour.
19. Arguing that the question as to whether his title in respect of Eldama Ravine Township 1/656 is as a result of amalgamation of the parcels of land claimed by the respondents is a question of fact to be determined by the trial court, the appellant asserted that the balance of convenience tilted in his favour since he was the registered proprietor of the suit property.
20. In the event that the court finds that he did not make up an order for being granted an order of injunction pending the hearing and determination of the suit, the appellant urges the court to grant an order of maintenance of status quo on his records pending the hearing and determination of the suit.
21. Reliance is placed on the case of *Mugah vs. Kunga* (1988) KLR 748 where the Court of Appeal stated: -

“Status quo orders should always be issued for purposes of preserving the subject matter. This court's practice direction vide gazette notice 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”



3rd and 4th Respondents Submissions

22. In the 3rd and 4th respondent's submissions dated 15th January 2024 and filed on an even date, the following are identified as the issues for the court's determination:-
 - i. Whether the applicant/appellant satisfied the conditions for grant of a temporary injunction;
 - ii. Whether the court ought to interfere with the lower court's exercise of discretion in dismissing the application for injunction and allow the appeal.
23. On whether the applicant/appellant satisfied the conditions for grant of a temporary injunction, reference is made to the cases of Giella and Mrao supra and submitted that the plaintiff/applicant failed to place material evidence before the court disputing the ownership of the suit property by the 3rd and the 4th respondents.
24. Based on the affidavit evidence they produced before the learned trial magistrate, the 3rd and the 4th respondents submit that their evidence, which was not controverted, showed that they are the owners of the suit property.
25. The 3rd and the 4th respondents acknowledge that the plaintiff/applicant tendered documents showing that he is the registered owner of the suit property, hence the prima facie owner of the suit property, but submit that proof of a prima facie case is not sufficient on its own to warrant grant of an order of temporary injunction.
26. It is the 3rd and the 4th respondents' case that the court must be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. It is the respondent's case that the inconvenience to the applicant if an injunction is refused would be balanced and compared with that of the respondent.
27. The learned trial magistrate is said to have properly directed herself when she held that the plaintiff/applicant having failed to establish a prima facie case with probability of success, it was not necessary to consider the two remaining conditions for granting an order of temporary injunction. In that regard, reference is made to the case of Nguruman Limited v. Jan Bonde Nielsen & 2 others (2014)e KLR.
28. It is further submitted that the plaintiff/applicant did not prove that he would suffer irreparable injury if the orders sought were denied.
29. Terming the plaintiff/applicant's case speculative and pre-emptive, the 3rd and 4th respondents submit that no evidence was adduced to show that there was any risk of interference with the suit property from any of the respondents.
30. The plaintiff/applicant is said to have demonstrated unfounded fear and apprehension that the 2nd respondent would proceed to expunge his lease from the record and render the suit nugatory.
31. It is further submitted that the plaintiff/appellant did not prove that the balance of convenience tilted in his favour.
32. Regarding the concept of balance of convenience, reference is made to the case of Kogo v. Frank Kimeli Tenai (2018) e KLR.
33. On whether the court ought to interfere with the lower court's exercise of discretion in dismissing the application for injunction and allow the appeal, it is submitted that the plaintiff/appellant has not demonstrated that the learned trial magistrate exercised her discretion wrongly when she dismissed the plaintiff/appellant's application for injunction. It is further submitted that the learned magistrate



- could not direct the 2nd respondent on performance of her statutory and discretionary function unless she acted in bad faith and that no evidence of bad faith on the part of the 2nd respondent was tendered.
34. The court is urged to dismiss the appeal as granting the orders sought would be tantamount to interfering with the 2nd respondent's statutory mandate.
35. It is further submitted that it would be prejudicial to the 3rd and 4th respondents (3rd and 4th respondent will suffer loss of income and are apprehensive that the appellant will continue to violate their rights to property).
36. Based on the decision in the case of Elwak Water Supply Association & 17 Others vs. County Government of Mandera & Another (2019) e KLR, it is submitted that a temporary injunction is not a matter of right, even where irreparable injury is likely to result to the applicant but rather a matter of sound judicial discretion.

Analysis and determination

37. It is not in dispute that the plaintiff is the registered owner of the suit property. By dint of the provisions of section 26(1) of the *Land Registration Act*, until and unless the certificate of lease held by the plaintiff/appellant is impeached by way of evidence showing that the certificate of lease was either obtained by fraud or misrepresentation to which the plaintiff/appellant is proved to be a party or that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme, the court is obligated to treat the registered proprietor as the absolute and indefeasible owner of the land. In that regard, see the said provision of the law which provides as follows: -
- “26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except-
- a. on the ground of fraud or 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”.
38. It is the considered view of this court that in the circumstances of this case, where the plaintiff/appellant proved that he is the registered proprietor of the suit property, the learned trial magistrate erred by holding that the plaintiff/applicant had not established a prima facie case with a probability of success.
39. It is the considered view of this court that on account of plaintiff/appellant being the registered proprietor of the suit property, the learned trial magistrate ought to have determined that the plaintiff had made up a prima facie case with a probability of success and proceeded to consider the other conditions that undergird grant of a temporary injunction namely whether unless an order of temporary injunction is granted, the applicant may suffer injury incapable of being compensated by way of damages and if in doubt, determine the matter on a balance of convenience. In that regard, see the case of Giella vs. Cassman Brown supra.
40. Having determined that the learned trial magistrate ought to have considered the other conditions for grant of injunction, I proceed to consider them with a view of determining whether the plaintiff/



applicant has made up a case for interference with the decision of the lower case, in the circumstances of this case.

41. In this regard, regarding the question as to whether unless a temporary injunction is granted the applicant may suffer injury incapable of being compensated by way of damages (irreparable injury), the subject matter of this suit being land which the plaintiff claimed was threatened with interference by the defendants/respondents, it is the view of this court that if the same is interfered by way of expunging the records from the land register, the same may be rendered unavailable to the plaintiff if he succeeds in his suit or its character may be changed thereby occasioning the plaintiff/applicant irreparable injury.
42. As to whether the balance of convenience tilts in favour of granting the orders sought or denying them, despite the plaintiff having produced evidence showing that he is the registered proprietor of the suit property, the defendants/respondents inter alia contended that they held title documents for the same parcel of land although registered using a different parcel number; that the orders sought could not be granted because what was sought to be restrained had already been done. Those averments by the defendants were not controverted by the plaintiff/appellant. That being the case, it is evident that ownership of the suit property was in contention between the plaintiff/appellant and the defendants/respondents. Both the plaintiff and the defendant had documents in support of their respective claims.
43. Whereas the plaintiff/appellant claimed that he had lawfully acquired the suit property, that contention was disputed by the defendants/respondents who accused him of having fraudulently acquired title to the suit property.
44. In support of their claim, the defendants/respondents annexed to their replying affidavit a lease issued to the 4th defendant/respondent in respect of land parcel number Eldama Ravine Block 1/638 which they claimed to be one and the same parcel as the suit property on the ground.
45. The mere fact that the plaintiff was the registered proprietor of the suit property did not entitle him being granted the order sought. The learned trial magistrate needed to determine whether the circumstances presented before him called for granting the orders sought or denying them.
46. Noting that the plaintiff/appellant did not controvert the defendant/respondent's contention that the actions sought to be restrained had already been performed thereby rendering the orders sought incapable of being issued, I am of the considered view that the learned trial magistrate cannot be faulted for refusing to grant the orders sought.
47. Whilst the case presented before the court called for an order of maintenance of status quo pending the hearing and determination of the suit, the learned trial magistrate cannot be faulted for having failed to grant such an order as it was not one of the orders sought by the parties.
48. The upshot of the foregoing is that the appeal is found to be lacking in merits and is dismissed.
49. As the appeal was partly caused by the trial court's failure to properly direct himself on whether the plaintiff had made up a prima facie case with probability of success, I order that parties bear their own costs of the appeal.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 4TH DAY OF MARCH, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms. Wangari for the Appellant



Ms. Koross holding brief for Ms. Cheruiyot for the 1st and 2nd Respondent

Mr. Lemaiyan for the 3rd & 4th Respondents

Court Asst.: Daisy

