



REPUBLIC OF KENYA



KENYA LAW
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**Baringo County Government v Boiwo (Environment and Land Appeal
14 of 2022) [2023] KEELC 16564 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 14 OF 2022**

**L WAITHAKA, J
MARCH 24, 2023**

BETWEEN

BARINGO COUNTY GOVERNMENT APPELLANT

AND

FRANK K BOIWO RESPONDENT

(Being an appeal against the Ruling of P. C Biwott SPM Kabarnet delivered on 16th July, 2019)

JUDGMENT

Background

1. By a plaint dated April 25, 2019, the appellant herein instituted a suit in the lower court to wit Kabarnet PMCC ELC Case No.10 of 2019 seeking to restrain the respondents, his agents and/or servants from interfering with plot No.048 Marigat (hereinafter referred to as the suit property).
2. The appellant's suit is premised on the grounds that it is the owner of the suit property; that the respondent has trespassed into the suit property and began erecting illegal structures thereon.
3. Simultaneously with the plaint, the appellant filed a notice of motion of an even date seeking a temporary injunction to restrain the respondent from entering, erecting structures, fencing or interfering in any way with the suit property pending the hearing of the application and the suit.
4. By a ruling delivered on 16th July 2019, the Trial Magistrate (TM) dismissed the appellant's application. In dismissing the application, the TM observed/stated:-

“...The defendant told the court that the mother plot No.048 comprised of the old cemetery land but was divided into 20 plots of 50x100ft” each. That he bought plot No.036 allocated to one Jane Kamuren. He relied on minutes of 28/2/2001 Min CCB6/2001, County Council of Baringo. He annexed them to his reply. That he bought the parcel from Jane



Kamuren and had been occupying it from 30.3.07 to date. That having allocated the plots to private individuals, the parcel ceased to be plaintiff's land. He took issue with the deponent in the plaintiff's Verifying Affidavit. That she had no capacity to swear the affidavit.

The two sides filed submission in the application as directed by court. The plaintiff relied heavily on the Physical Planning Act. That defendant is building on the parcel without having complied with procedures. That parcel No.036 was strange to them. The plaintiff has not disowned the minute from the former County Council of Baringo for 28/2/2001. The former County Council allocated the plot to one Jane Kamuren on 30/3/2017. Jane Kamuren sold the parcel to the defendant for Kshs. 600,000/-. At the moment the defendant is the proprietor of the parcel in question. Having allocated the parcel to Jane Kamuren the Plaintiffs ceased to own it. The offer to Kamuren was never revoked. She complied with payments called. The defendant is an innocent purchaser. The plaintiff is no longer the owner of the parcel as claimed. There is no prima facie case with likelihood of success guided by the principles laid down in the famous case of Giella vs. Cassman Brown. I see no point in belaboring into the question of loss that may be suffered by the Applicant in the event I deny them the prayer. I will not even go to the question of balance of convenience.

Having found that the parcel in question is now held by defendant a purchaser, he should however develop it following the requirement under the Physical Planning Act and necessary approvals by the relevant departments.....

Thus as I conclude, I find that the applicant's application dated 25/4/2019 is without merit. It must fail. I proceed to dismiss it with costs to the defendant/respondent."

5. Aggrieved by the decision of the lower court, the appellant appealed to this court on the grounds that the TM erred by:-
 1. Determining that the appellant had ceased to own plot No.36 without hearing both parties in the main suit;
 2. Determining that the defendant is the owner of plot number 36 marigat;
 3. Ordering the respondent to proceed with development of the suit property before hearing both parties in the main suit;
 4. Disregarding the facts of the case and the submissions of the plaintiff and dwelling on extraneous issues;
 5. Arriving at a finding not supported by law;
 6. holding that a letter of offer is ownership document;
 7. failing to find that plot number 36 does not exist on the ground and allowing the respondent to proceed with construction on a public utility.
6. Pursuant to directions given on 10th November, 2022 the appeal was disposed of by way of written submissions.

The Appellant's Submissions

7. In its submissions filed on December 2, 2022, the appellant has given an overview of its case as pleaded and the cases urged by the parties in the application dated April 25, 2019. It is pointed that through the affidavit of Hellen Juma, the town administrator Marigat, the appellant deponed that the respondent had forcefully entered into its plot No.048 and had started working on it without following the laws



- of the land; that the deponent of the supporting affidavit categorically stated that the defendant never owned plot No. 048 Marigat and neither had he submitted any physical planning documents for approvals and/or acquired the consent to erect any structure thereon.
8. It is pointed that the respondent filed a replying affidavit, sworn on April 30, 2019 in which he deponed that he is aware that Jane Kamuren is a beneficiary of plot number 036/opposite Marigat Sub District Hospital. In support of that contention the respondent attached copies of the allotment letter and county council miscellaneous receipts dated March 22, 2007 marked FB2 (a) and (b).
 9. Terming the documents relied on by the respondent in support of his claim to the suit property suspicious, the appellant points out that plot number 036 does not feature anywhere in the meeting of February 28, 2001. The meeting talks about people who beaconed opposite Marigat Sub-District Hospital current site.
 10. The appellant states that he does not know whether the beaconing was lawful or not.
 11. According to the appellant, there are no minutes as regards the allotment of plot No.036 to Jane Kamuren. The letter of allotment dated March 22, 2007 (annexture FB2(a) is said to be not a genuine document. It is further pointed out that the receipt dated 22nd March 2007 (annexture FB2(b) does not bear a plot number and that it was for search of plot records. It is pointed out that the results of the search was not presented before the court. Terming the issues it raised concerning existence of plot number 036 and ownership of the suit property as very weighty issues for determination upon hearing the case on its merits, the appellant faults the TM for having made conclusive findings of facts and law regarding possession and ownership of the suit property without having heard the main suit.
 12. The appellant also discusses the duty of this court as a first appellate court espoused in the cases of *Selle & another vs. Associated Motor Boat Co. Ltd & others* (1968)EA 123; *Kwanza Estates Limited v. Dubai Bank Kenya Limited (in Liquidation) & 2 others* (2019)e KLR and frames the following as the issues for the court's determination:-
 - i. Whether the appellant satisfied grounds for injunction at the subordinate court;
 - ii. Whether the appellant's interest over the land was extinguished by the alleged allotment in favour of Jane Kamuren;
 - iii. Whether the defendant's dealings in the land were lawful and further dealings ought to remain unrestrained
 - iv. Whether the court had power to grant final orders at the interlocutory stage.
 13. On whether the applicant established a prima facie case at the sub ordinate court reliance is placed on the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* (2003) KLR 123 on what amounts to a prima facie case and based on the case of *Nguruman Ltd vs. Jan Bonde Nielsen & 2 others* (2014) e KLR where the Court of Appeal rendered itself thus:-

“in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put on a preponderance of probabilities. This means no more than



the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

14. Terming facts on which its case is premised undisputed, that the respondent was erecting structures on the suit property without the requisite consent and approvals from the appellant, the appellants submits that the issue as to whether or not the respondent had title to the suit property was irrelevant as the issue of ownership of the suit property was and is still in disputed by the appellant.
15. The appellant submits that the mere fact that the respondent was erecting structures in the suit property without requisite approvals was enough to demonstrate a prima facie case that his dealing with the suit property were illegal and warranted issuance of the injunction sought. The TM is said to have erred by determining that the respondent had acquired title to the suit property and by allowing exclusive dealing with the suit property when the respondent had not obtained the requisite approvals for the developments he was carrying on in the suit property.
16. It is submitted that by giving the respondent a blanket right to construct on the suit property subject to obtaining requisite approvals, the court acted ultra vires its powers as it is the appellant who has power to give the respondent permission to carry out development in the suit property. the TM is also faulted for determining that the suit property belonged to the respondent and that appellant did not have power to stop dealings or question dealings on the land.
17. Terming the suit property, a town plot, the appellant maintains that any dealings over it were subject to its laws and regulations.
18. It pointed out that the plaintiff's case is in respect of plot number 048 Marigat town and submitted that there is no nexus between plot number 048 claimed by the plaintiff and plot number 036 alleged allocated to Jane Kamuren and later sold to the respondent. The documents relied on by the respondent in support of the claim that he is the owner of the suit property are said to be incapable of supporting that claim or establishing any nexus between the suit property and plot number 036 claimed by the respondent.
19. Concerning the minutes pursuant to which the suit property is said to have been allocated to the respondent's predecessor in claim to plot number 036, it is pointed out that the minutes talk about the decision of the county council to settle displaced persons who had beacons opposite the Sub District Hospital. The appellant submits that there is no indication that Jane Kamuren was settled or allocated plot number 048.
20. Concerning the TM determination that the letter of allotment extinguished the appellant's right or claim to the suit property, it is submitted that a letter of allotment is not a conclusive proof of ownership as its not a certificate of title. It is further submitted that there is no evidence that the conditions of offer were fulfilled. The court is faulted for relying on the respondents annexures in making his conclusions and failed to consider the legal principles that apply to landed property.
21. Based on the case of *Joseph Arap Ng'ok Vs. Justice Moiyo Ole Keiwua* (1997) e KLR where the Court of Appeal stated:-

“it is trite law that such title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provisions of the Act under which the property is held”.



22. The case of Wreck Motors vs. Commissioner of lands relied on by the respondent is said to have been distinguishable as the court was faced with titles and had to determine the owner of the Government land.
23. The TM is faulted for failing to consider the appellant's claim and for being persuaded by irrelevant and misleading depositions in the respondent's responses to the appellant's application.
24. Since the existence and ownership of plot number 036 was in issue, it is submitted that it would have been prudent for the trial court to stop/prevent or bar any dealings with plot no. 048 until the issue of ownership is resolved.
25. In view of the foregoing, it is submitted that the appellant met the threshold for granting an order under the provisions of order 40 of the *Civil Procedure Rules* erecting structures on the suit property, which is for public use, was an action that caused waste and damage to the land and was against the laws of the land. Reliance is placed on the case of *Robert Mugo Wa Karanja v. Ecobank (Kenya) Limited & another* (2019)e KLR where it was stated:-

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court in such situation is enjoined to grant a temporary injunction to restrain such acts.....”
26. The TM is also faulted for having failed to consider the other tests for granting a temporary injunction espoused in the cases of *Giella vs. Cassman Brown* and *Nguruman Ltd vs. Jan Bonde Nielsen & 2 others* (2014) e KLR.
27. As to whether the appellant stood to suffer irreparable loss, reliance is placed on the case of *Pius Kipchirchir Kogo V. Frank Kimeli Tenai* (2018) e KLR for definition of what amount to irreparable loss, and submitted that unless the impugned constructions are stopped the appellant and the wider public residents of Baringo County stand to suffer irreparable loss as the residents continue to be denied benefits of a public land within the plans of the Government at the behest of some private interests.
28. Terming the conduct of the respondent of disobeying enforcement orders issued by the appellant an act of impunity requiring to be nipped and discouraged by this honourable court, the appellant maintains that it will suffer irreparable loss and damage if the respondent is allowed to continue developing the suit property which is public land.
29. On balance of convenience, it is submitted that the balance of convenience tilted and still tilts in preserving the suit property by restraining further constructions on it. The TM is faulted for having failed to consider the wider interest of the public and that appellant's action were within the land and its mandate. Reliance is placed on the cases of *Bryan Chebii Kipkoach v. Barbanas Tuitoek Bargoria & another* (2019)e KLR and the case of *Amir Suleiman vs. Amboseli Resort Limited* (2004) e KLR for additional principles that the court should consider in granting interlocutory injunctive reliefs.
30. As to whether the appellant's interest over the suit property was extinguished by allotment, the appellant submits that the respondent's interest to the suit property are unknown and awaiting determination. It is reiterated that an allotment letter is not evidence of title or proof that the conditions of offer were fulfilled. It is submitted that the respondent did not demonstrate title to the suit property in rebuttal to the appellant's prayer for injunction.



31. The appellant maintains that the respondent's dealings with the suit property were in breach of County Government regulations and laws, particularly the Physical Planning Act, thus warranting immediate stoppage.
32. On whether the TM had power to grant final orders at interlocutory stage based on the cases of *Olive Mwihaki Mugenda & Another Vs. Okiya Omtata Okoiti & 4 Others* (2016) eKLR; *Symon Gaturu Kimamo & 587 Others vs East African Portland Cement Company Ltd* (2011) eKLR; *Gorvas Holding Ltd vs. Kensalt Limited & 4 others* Nairobi E & L Division Civil Case No.493 of 2012 and the Case of *Ashok Kumar Bajpai V. Dr. (Smt) Ranjama Baijai*, AIR (2004) All 107, 2004(1)AWC88, it is submitted that the TM erred by determining the ownership of the suit property prematurely and by failing to take into account that the object of a temporary injunction is to preserve the subject matter and also balance the risks of the parties while opting for the least harm.
33. The appellant further submits that the TM did not exercise the discretionary power granted to him within the law as he made conclusive findings based on disputed facts.
34. Arguing that land reserved for public use cannot and should never be diverted for private or other use, the appellant urges this court to allow the appeal with costs and to restrain the respondent from dealing with the suit property pending the hearing and determination of the suit pending before the lower court.

The Respondent's submissions

35. Overview of the case urged by the parties to the appeal before the lower court is given and the following issues identified as the issues for the court's determination:-
 - i. Whether or not the trial court based its decision on evidence before it?
 - ii. Whether or not the trial court was right in dismissing the application dated 25th April, 2019?
 - iii. Who bears the costs of the appeal and the application?
36. On whether or not the trial court based its decision on evidence before it, it is submitted that the respondent had demonstrated before the trial court that he was the beneficial owner of plot with a provisional number 036 within plot number 048 Marigat having purchased the same for value from Jane Kamuren who had been allocated the same by the then County Council of Baringo. In that regard, it is stated that the respondent had attached a copy of the minutes by the then County Council of Baringo which had allocated the suit property to Jane Kamuren vide MIN.WTPMC.77/2001(K) (C) of February 28, 2001 and MIN.CCB6/2001(11)(C) of April 27, 2001 and demonstrated that the minutes had not been contested by the appellant in its application dated April 25, 2019 and the supplementary affidavit dated June 24, 2019.
37. It is submitted that based on the documents relied on by the respondent in support of his case, it was evident that Jane Kamuren was one of the beneficiaries of plots under people whose plots had been beaconed, 50 by 100ft, opposite Marigat Sub district Hospital. It is pointed that the respondent also relied on copy of an allotment letter issued to Jane Kamuren, receipt for search of plots and sale agreement which documents the appellant is said to have failed to challenge and submitted that the respondent demonstrated his proprietorship of the suit property.
38. The respondent supports the TM's determination that the respondent was a purchaser for value of plot number 036 within the suit property, plot number 048 Marigat.



39. It is further submitted that the appellant did not demonstrate a prima facie case with probability of success hence the TM was right in dismissing the application.
40. It is further submitted that upon allocation of the suit property to private citizens by the County Council of Baringo, the suit property became private land.
41. With regard to the contention that the respondent failed to adhere to the enforcement notice issued by the appellant or obtain development approvals from the appellant, the respondent submits that he had adhered to rule of law and in particular the Physical Planning Act before he developed the suit property.
42. The development effected on the suit property is said to have been carried out after the trial court dismissed the appellants application and that the law was complied with in effecting it. It is further contended that there is no evidence that the respondent breached any law in carrying out the impugned development
43. The respondent maintains that the trial court was right in dismissing the application.
44. On costs, it is submitted that the appeal should be dismissed with costs to the respondent.

Analysis and determination

45. As the first appellate court, it is the duty of this court to examine and re-evaluate the evidence on record, assess it and make it's own conclusion, bearing in mind that this court has neither seen nor heard the witnesses and make due allowance for that. This court has also to take into account the circumstances upon which this court may differ with the Trial Court on findings of fact namely, if it appears either that the Trial Magistrate has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistency with the evidence in the case generally. See *Selle & another v. Associated Motor Boat Co. Ltd and others* (1968) EA 123.
46. As pointed out in the introductory section of this ruling, the Appellant instituted a suit in the lower court seeking to restrain the respondent from interfering with the parcel of land known as 048 Marigat on the ground that it is public land. The appellant also accused the respondent of defying enforcement orders issued by the appellant stopping him from carrying out development in the suit property without its approval and/or consent. Simultaneously with the plaint, the appellant instituted the notice of motion dated April 25, 2019, seeking a temporary injunction to restrain the respondent from dealing with the property pending the hearing of the application and the suit.
47. That application was dismissed by the trial court on the ground that the appellant did not demonstrate a prima facie case with a probability of success.
48. A review of the ruling of the TM shows that his decision was premised on the determination that the respondent had proved that he was the owner of the suit property having bought it from Jane Kamuren who had acquired it from the predecessor of the appellant, County Council of Baringo.
49. I have gauged that determination vis a vis the case urged by the respective parties before the lower court which shows that the issue of the ownership of the suit property is the main issue in contention in the appellant's suit which suit is yet to be heard on its merits against the applicable legal principles. My view of the matter is that the TM erred by conclusively determining the issue of ownership of the suit property in an interlocutory application. Having considered the issues raised in the suit and the application, I am of the considered view that the application before the TM is not one of the kind where the court could determine the serious issues raised therein preliminarily and without affording parties an opportunity to present evidence in support of their cases during trial.



50. Noting that besides urging its case on the ground that the suit property is public land, the appellant also urged its case on the ground that the respondent was carrying out development in the suit property without obtaining requisite development approvals from the appellant, which issue appears not to have controverted by the respondent. I am of the considered view that the TM ought to have determined that the respondent had made up a case for restraining the respondent from carrying out development in the suit property without first obtaining development approvals from the appellant.
51. The upshot of the foregoing is that the appeal has merit. Consequently, I allow the appeal, set aside the decision of the lower court and substitute it with an order allowing the appellant application dated 25th April, 2019. I award the costs of the appeal and the application before the lower court to the appellant.
52. Orders accordingly.

JUDGMENT READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 24TH DAY OF MARCH, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mrs. Rop for the appellant

Mr. Opar for the respondents

Christine Towett: Court Assistant

