Talai & another v Kipchumba (Environment & Land Case 19 of 2020) [2023] KEELC 17639 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17639 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 19 OF 2020

EO OBAGA, J

MAY 25, 2023

BETWEEN

NANCY JEPKURUI TALAI ..... 1ST PLAINTIFF

JASHUA TALAI KIBOR ..... 2ND PLAINTIFF

AND

HON. SUDI OSCAR KIPCHUMBA ..... DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 24/3/2023 in which the Plaintiffs/Applicants seeks the following orders: -

    1. Spent.

    2. That this Honourable court be pleased to issue an order directing the Officer Commanding Police Station, (OCS, Kesses Police Station) to assist in enforcement of the court's orders given May 28, 2020, by stopping the defendant (sudi Oscar Kipchumba) from fencing the disputed suit land being the suit property herein known as LR. 7991, Kesses, situated at Kesses next to Moi University.

    3. That in the event the defendant (Sudi Oscar Kipchumba)has successfully fenced the disputed suit land known as LR 7991 situated at Kesses next to Moi University, this Honourable court be pleased to issue an order directing the officer commanding police station (OCS, Kesses Police Station) to assist by providing security to the Applicants herein to remove/uproot the entire fence erected thereon.

    4. Costs be in the cause.

Background;

2. The Applicants are among the administrators of the Estate of Kibor Arap Talai who is the registered owner of LR. No. 7991 (suit property) which is situated next to Moi University. The process of administration and distribution of the Estate is going on at Eldoret under Eldoret HC Succession Cause No 50 of 2014.

3. On 8/4/2020, the Applicants filed an application for injunction. This application was fully heard and an injunction was granted on 28/5/2020 restraining the Defendant from interfering with the suit property until the hearing and determination of the suit.

4. The Applicants did not take any step to prosecute their suit. On 9/11/2021, the court issued notice to show cause why the suit should not be dismissed. The notice to show cause came up on 29/11/2021 when the Applicant's counsel explained why the Plaintiffs had not prosecuted their case.

5. The court spared the suit from dismissal and directed that the matter be mentioned before the Deputy Registrar for parties to confirm compliance with pre-trial requirements. On 2/2/2022, the Plaintiff's counsel confirmed to court that they had complied. The Defendant who had not complied was given time to do so. The matter was fixed for mention on 16/3/2020. Come 16/3/2022, the Defendant had not complied. The Defendant was given a last chance to comply. The matter was fixed for mention on 30/3/2022. Nothing happened thereafter until the present application was filed.

Applicants' contention;

6. The Applicants contend that despite the defendant being restrained from interfering with the suit property, he has continued to fence a portion of the suit property. It is on this basis that they seek the orders set out in paragraph 1 hereinabove.

Respondent's contention;

7. The Respondent opposed the Applicants' application based on grounds of opposition dated 26/4/2023 and a replying affidavit filed in court on 9/5/2023. The Respondent contends that the orders which are sought to be enforced are nonexistent as the same lapsed on 27/5/2021 pursuant to the provisions of order 40 rule 6 of the *Civil Procedure Rules*.

8. The Respondent states that the Applicants never moved the court to extend the injunctive orders. The Respondent denies ever fencing any portion of the suit property and says that if there was any fencing, the fencing must have been done by Eunice Talai long before the filing of this suit.

9. The Respondent argues that the Applicants have come to court with unclean hands in that they have failed to disclose that they are facing criminal charges as a result of destroying fences belonging to other beneficiaries; failed to disclose that they have filed a constitutional petition in the High Court seeking similar reliefs and failed to disclose that the succession court has ordered that the land occupied by each beneficiary be re-surveyed.

10. The Respondent contends that he Applicants' application is an abuse of the process of court which should be dismissed.

Analysis and determination

11. The Applicants filed their submissions on 16/4/2023. The Respondent filed the submission on 9/5/2023. I have considered the Applicant's application, the opposition to the same by the Respondent as well as the submissions by the parties herein. The issues which emerge for determination

are firstly whether there are any orders of injunction capable of being enforced by the OCS Kesses Police Station and secondly, whether there is any fence which has been put up on any portion of the suit property and whether orders should issue for its demolition.

12. There is no contention that there were injunctive orders which were given on 28/5/2020. The injunctive orders having been given on 28/5/2020, the Applicants were under obligation to prosecute their suit within 12 months failing which the orders of injunction would automatically lapse.

13. Order 40 rule 6 of the *Civil Procedure Rules* provides as follows:-

> " Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

14. It is clear that the Applicants' suit was not determined within 12 months' from 28/5/2020. The was no application made for the extension of the injunctive orders. It therefore means that the orders lapsed on 27/5/2021. There are therefore no orders in place as to call for their enforcement by the OCS Kesses Police Station.

15. In the case of *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another* (2018) eKLR the Court of Appeal stated as follows:-

> " The appellant asserted that the orders issued on February 22, 2011 automatically lapsed after 12 months by effluxion of the law, as per the provision of order 40 rule 6. That Rule states as follows:
>
> "Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."
>
> A plain reading of order 40 rule 6 shows that the Rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse. Therefore, the question we address is whether the words "pending the hearing and determination of
>
> this suit" created a sufficient reason within the Rule so that the interlocutory injunction does not automatically lapse after 12 months.
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> We have perused the ruling made by the High Court on 22nd February, 2011. In the first place we note that the 1st Respondents' notice of motion dated 26th August, 2008 that was subject of that ruling was brought under order 39 rules 1, 3, 5 and 9. Rule 1 of that order specifically gave the court power to:
>
> "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."
>
> Under the 2010 edition of the *Civil Procedure Rules*, order 39 rule 1 became order 40 rule 1 in exactly the same terms, but there was the introduction of order 40 rule 6 limiting the order of interlocutory injunction for a period of 12 months. Thus, the order granted by the court issuing the interlocutory injunction "pending the hearing and determination of this suit" can only be read within the context of order 40 Rule 1. In other words, the court was not addressing itself to order 40 Rule 6 and providing sufficient reason for the order of

injunction to remain in force for more than 12 months, but was merely issuing an order of temporary injunction to preserve the suit property during the pendency of the suit.

The order made by the court on February 22, 2011 remained subject to Order 40 Rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such an extension cannot be done by wav of a blanket order at the time the interlocutory order is issued. The need for the extension must be addressed by the court and justified at the opportune time.

We take note of the fact that in applying the *Civil Procedure Rules* the High Court was obligated under section 1A and 1B of the *Civil Procedure Act*, to be guided by and to further the overriding objective of the *civil Procedure Act* and *Rules* which includes to facilitate the just determination of the proceedings; the efficient disposal of the business of the court; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. The importance of order 40 rule 6 of the *Civil Procedure Rules* in furthering the overriding objective was underscored by the High Court (Gikonyo J) in *David Wambua Ngii v Abed Silas Alembi & 6 others* [20141 eKLR:

"It is important to first deal-with the scope and purpose of order 40 Rule 6 of the *Civil Procedure Rules* on lapse of an injunction. Order 40 rule 6 of the *Civil Procedure Rules* Could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure. "

This court expressed similar sentiments in *Nguruman Limited v Jan Bonde Nielsen & 2 others* 2014 eKLR;

"Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs Various machinations to delay the disposal of the suit. Rule 6 of order 40 was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuses of injunctive orders."

It is not disputed that as at the time when the Appellant purported to issue a notification of sale and a 45 days redemption notice dated 16th April 2014, a period of three years and two months had lapsed from the time that the orders of interlocutory injunction were issued on 22nd February 2011. No attempt was made to have the orders extended by the court and therefore the court had no opportunity to consider whether there was any sufficient reason to extend the order of interlocutory injunction beyond the 12 months. We reiterate what this Court stated in *Erick Kimingichi Wapang'ana & another v Equity Bank Limited & another* 2015 eKLR that:

"Rule 60 order40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless", as the Rule provides, 'for any sufficient reason the court orders otherwise... In this case there was no subsequent order extending the injunction. Having been issued on October 11, 2011, the injunction lapsed on October 12, 2012"

> As we have demonstrated the words, "pending the hearing and determination of this suit" could not have constituted sufficient reason to justify the extension of the interlocutory injunction beyond the period of 12 months. This is clearly a situation where the 1st Respondent was content to rest on his laurels for more than three years, and made no attempt to have the injunction extended. Nor did he appear anxious to have the substantive suit expeditiously disposed of."

16. The Applicants contended that the Respondent had put up a fence on part of the suit property. A look at the supporting affidavit to the Applicants' application shows that they have deponed to events which occurred in 2020. There is no mention of any fence which was put up in 2023 or is being put up. No wonder that is why the Applicants have couched their prayer that in the event the fence has been completed, they be allowed to demolish the same.

17. There is therefore no evidence that the Respondent has put up any fence. This being the case, the court cannot give orders where even the Applicants themselves do not know if a fence has been put up or not. Infact even if the orders of injunction were to be in force, the manner in which the enforcement is sought is a clear abuse of the process of court.

Disposition

18. It is clear that the applicants' application is devoid of merit. The same is dismissed with costs to the respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF MAY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Jaoko for Plaintiffs.

Mr. Tororei for Defendant.

Court Assistant –Akidor

E. O. OBAGA

JUDGE

25th MAY, 2023