Washiraka v District Land Registrar Kitale & 2 others (Environment and Land Miscellaneous Application 22 of 2022) [2023] KEELC 17550 (KLR) (15 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17550 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 22 OF 2022

FO NYAGAKA, J

MAY 15, 2023

BETWEEN

BOAZ ANYANGU WASHIRAKA ..... PLAINTIFF

AND

DISTRICT LAND REGISTRAR KITALE ..... 1ST DEFENDANT

DISTRICT SURVEYOR KITALE ..... 2ND DEFENDANT

ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

1. Right from the placement of this matter before me for further directions, and upon parties failing to appear two times to either prosecute or oppose it, there appeared to me something absolutely wrong or and fishy about this matter. Even at the tail end of its life, I still find as much. How I wish that a law could be enacted to inflict a more painful sting on parties who deliberately move to court to vex it!

Background:

2. On December 22, 2022 the Applicant herein filed under one certificate of urgency two applications dated the same date, that is to say, December 19, 2022. Both were duly paid for but one was a Chamber Summons and the other a Notice of Motion. Apart from the convention format of drawing a Chamber Summons and a Notice of Motion at the introductory part of the body immediately after the designation on whether it is either of the two formats, that is to say, Let All Parties Concerned... and Take Notice That... Shall Be Moved..., respectively, all the prayers, the grounds in support of each, and the supporting Affidavits were exactly the same in content.

3. When the applications were placed before this Court a day after the filing, the duty Judge did not find any urgency in them and directed that they be served within seven (7) days and responses be filed and served within 14 days of service. The matter was to be mentioned on January 23, 2023.

4. The Notice of Motion was not brought under provisions of any law while the Chamber Summons was brought under

> "Under the *Judicature Act* Cap 8, the High Court (Practice and Procedure Rules 1 & 2 and all enabling rules (sic)."

As stated above, the prayers sought were a replica of the others in either application. Thus, I list them as follows:-

1. ...spent
2. That this honourable Court be pleased to issue an injunction on land known as Waitaluk/Kabonde/Block 13/Bikeke/73 restraining the respondents from demolishing any structures, buildings, cutting/ uprooting trees and setting boundaries on the said land until the correct acreage and boundaries are confirmed and determined by this honourable court as indicated on the title deed.
3. This honourable Court be pleased it issue orders for confirmation of accurate measurements of acreage and boundaries of land on the land known as Waitaluk/Kabonde/Block 13/Bikeke/73 as reads on the share certificate and the title deed of the applicant who is the legally registered owner.
4. Costs be in the cause.

5. The Applications were based on eight grounds which can be summarized as follows: that the applicant was the registered owner of the land in question. The applicant annexed to the ground as BAW-001 a copy of the title in issue to evidence that fact. The other ground was that the 1st and 2nd Respondents had constantly invaded the land and wanted to give it to the proprietor of Waitaluk/Kabonde/Block 13/Bikeke/74. That the 1st and 2nd Respondents had trying to use the offices of the 3rd Respondent's agents, namely, the Assistant County Commissioner, the police and assistant chief to evict the Applicant from his land. That the applicant was the owner who was old, frail and sickly and the constant threats from those named were a threat to his health which therefore required proper boundaries and acreages given. He attached and marked as BAW-002 a copy of the title deed.

6. His other grounds were that the local area chief who was an agent of the 3rd Respondent in the company of the police and goons had on several occasions

> "invaded the home of the applicant and terrorized his family and destroyed his property..."

That the Court had jurisdictional powers to compel the respondents to comply with orders issued. There was other matter filed in any court between the applicant and the respondents over the same subject. Lastly, it was in the interest of justice for the orders sought to be granted.

7. As for the Notice of Motion, only the second last ground was changed from referring to "matter" to "Application". As for the supporting Affidavit, it repeated the contents of the grounds of the application but in deposition form. I do not have the luxury of time to restate the contents of the Certificate of Urgency: it was to say the least unintelligible.

8. Come the date of inter partes mention, the parties were absent and the Court gave a further mention date of February 23, 2023. On that date learned counsel for the state intimated intention to come on record for the Respondents since the Attorney-General had been served. He also raised two concerns, namely that the office had been served with the two applications seeking similar orders and filed by the same party hence was at a loss as to which one to respond to. He also submitted that the application

did not have any legal basis in law as it sought an injunction against an undisclosed individual who was then allegedly destroying the applicant's property and the applicant had sought the orders on a baseless application since there was no suit to firm such orders or even to give a period they would last if granted.

9. Learned counsel for the Applicant submitted on his part that indeed there were two applications on the record and that indeed applications for injunction ought to have been founded on a cause of action brought by way of substantive pleadings. He sought time to obtain further instructions on them and which one to proceed with. The Court fixed the matter for a further mention on March 20, 2023 on which date, the Court fixed the applications for hearing on April 27, 2023. On the latter date only learned counsel intending to come on record for the Respondents attended, and left it for the Court to decide what to do. The Court gave a ruling date of May 18, 2023.

Determination

10. As this court embarks on preparing this decision, I must note, as I have stated in many other matters, that the quality of drawing documents filed by parties in a number of them is extremely wanting. For instance, in this matter, not only did the applicant file similar applications, purporting to communicate that one was for prayers for being heard during the vacation but he totally failed to cite the provisions under which he sought to bring the two applications. Where he did, that is to say in relation to the Chamber Summons, he failed miserably. There is a paucity of drafting skills in the legal practice in Kenya. It is worsened by the inadequacy of proper or good advocacy skills. If only law schools and the professional body would emphasize these!

11. That said, strangely, and it will forever remain a puzzle to this Court and the whole world, it appears that after the Court gave a ruling date, the 'parties' entered into a 'written' consent to withdraw the application. As to which application the purported consent referred to, it is not clear, as at the time of writing this ruling.

12. I must start to say that not only did this Court find the 'consent' strangely sneaked into the record after the file had been placed before be in the chamber for preparation of this ruling, but that it was not even a consent properly so called, as I will explain hereinafter. Also, it did not refer to a specific application of the two. Moreover, it was purported to be signed by a representative of the office of the Attorney General who was not only unnamed by whose signature this Court is unfamiliar with, of all the learned state counsel who usually sign documents from the Eldoret office that was to represent the Respondents. I find the purported consent suspicious and the signature thereon as much. Besides it being signed on behalf of the Respondents in a manner only a layman can do yet the respondents were to be represented by learned counsel acting on behalf of the Attorney General, it is filed contrary to the Rules of procedure. Again, it purports to have been filed immediately after the Court handled the application and gave a date for ruling yet counsel who appeared for the respondent did not indicate at all that a consent was forthcoming otherwise the Court could not have fixed the application for ruling. That is why I hold the suspicion that the signing and uttering thereof as a public document to a public officer ought to be investigated by the government agency responsible for determining whether or not a crime may or may not have been committed by the applicant or his learned counsel herein.

13. Having considered the applications before me and the law, I find three issues for determination. First is whether the document filed on April 27, 2023, titled "consent order" amounts to a consent. Second, whether the applications are incompetent, and three, who to bear the costs of the applications.

14. Beginning with the first issue, after the Court gave indications of its intention to deliver the ruling herein, the parties purported to enter into and file an undated document on the material date. The document was titled "consent order". Its terms were that

> "1 By the consent of the parties herein the application dated December 19, 2022 be and is hereby withdrawn. 2. Costs of this application be in the cause. Signed by Kwatenge Wafula & Co Advocates for the Applicant, and Hon Attorney General for the Respondents."

15. The document purports to conclude the matter but it did not amount to one that can be adopted as a consent of the parties. It was full of many defects. First, it was not dated. Second, it referred to one application yet there were two applications dated and filed the same date. Three, it purported to have been signed by an agent or counsel purporting to act on behalf of the Respondents yet the agents or learned counsel never filed appearance or defence whatsoever in the matter.

16. Order 9 Rule 1 of the *Civil Procedure Rules* provides for the manner any appearance or representation on behalf of the Government may be made. It is to the effect that either the Attorney General or other person duly authorized in writing to deputize him can do so. For that to be, where the matter is of such a nature as the application before me, the Attorney General or the duly authorized deputy should have first filed the appearance before taking any further steps, which as of necessity include entering into a consent, oral or written, with any other party.

17. It is noteworthy that at no point in time did the Attorney General file any documents to act for the respondents. Even the opposition that the learned counsel purported to mount by raising the defectiveness of the applications or not was neither here nor there. Thus, the document purporting to be a consent was none at all.

18. The next issue is whether or not the applications are incompetent. Both applications prayed for an injunction to be issued over the suit land named in the prayers and the body. The other prayer was for the Court to order confirmation of boundaries of or accurate measurements of acreage and boundaries of the land known as Waitaluk/Kabonde/Block 13/Bikeke/73 as reads on the share certificate and the title deed.

19. Starting with the latter prayer, the law is that matters that are contested and which require evidentiary proof and which tends to settle fully the rights of the parties on an issue that is in contention as between them can only be determined when the evidence is tendered, and of course the other party has been given an opportunity to be heard and either utilizes it or not. As it is the prayer above seeks to determine with finality at the interlocutory stage the issues alleged to be between the parties. It is therefore prematurely sought and incompetent.

20. Regarding the prayer for a temporary injunction, it is clear that such orders are granted by a court, at the interlocutory stage, in a discretionary matter but solely for the purpose of preserving the property in dispute in a suit, and, with finality, at the end of when the rights of the parties have been adjudicated and settled in favour of the party to whom they are. They cannot be granted in a vacuum. Order 40 Rule 1 (a) of the *Civil Procedure Rules* provides that,

> "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..."

21. Clearly, for an injunction to issue, there must be an existing suit which must form the backbone of the issuance of either the temporary or final orders of injunction. In the instant application there is no suit. The application is bare, and based on no ground at all. It cannot stand on its own. It is therefore wholly incompetent and can only be for dismissal.

22. For the above reasons I find the application before me absolutely incompetent and it is hereby dismissed with costs, and the file returned to the registry for closure.

23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 15TH DAY OF MAY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE