Sakaja & 2 others v Mariga & 2 others (Environment & Land Case 13 of 2023) [2023] KEELC 19251 (KLR) (10 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19251 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 13 OF 2023

FO NYAGAKA, J

AUGUST 10, 2023

BETWEEN

JOHN SAKAJA .... 1ST PLAINTIFF

PASTOR GEORGE ODERA .... 2ND PLAINTIFF

GODFREY OJILO .... 3RD PLAINTIFF

AND

NYOKABI MARIGA .... 1ST DEFENDANT

SCHOLASTICA MUDHAI .... 2ND DEFENDANT

PETER WILSON .... 3RD DEFENDANT

RULING

1. Before me was a Notice of Motion dated 07/03/02023 filed 10/03/2023. After it was filed and a response thereto given by the 3rd Defendant, the said Defendant raised a Preliminary Objection to the entire suit. The objection was finally dismissed on 20/06/2023 upon which the Court fixed the application for inter partes hearing. The Application sought Orders, inter-alia:

    1. ...spent

    2. ...spent

    3. That this Honourable Court be pleased to issue a temporary injunction against the Defendants/Applicants (sic) by themselves, agents, servants, employees and/or assigns from Further interfering (sic) and/ or dealing in any way with the reserved area meant for excision to expand the existing access road on their respective parcels of land L.R. No. 2073/14/1, L.R. No. 2073/13/1 and LR No. 2073/13/2 respectively until the hearing and determination of the suit herein.

(4) That costs of the Application be provided for.

2. The Application was brought under Sections 3, 3A, 63(e) of the *Civil Procedure Act*, Order 40 Rule 1 and 51 Rule 1 of the *Civil Procedure Rules*, the *Constitution* of Kenya, and "all enabling provisions of the law".

3. It was based on three grounds and supported by the Affidavit of one John Sakaja, the 1st Plaintiff. It was sworn on 07/03/2023. In summary, the grounds were that the survey map of 1952 showed the existing access road which should have been expanded from several plots which included the Defendants'/ Respondents' parcel of land L.R. No. 2073/14/1, L.R. No. 2073/13/1 and LR No. 2073/13/2. The existing road was 6 metres wide and was to be expanded as per the Government Survey of 1952 to 12 metres, a fact alleged to be within the knowledge of the Defendants. That the facts notwithstanding the Respondents had gone ahead and removed beacons on the reserved area where excision was to take place and cultivated and/or leased to other people the said area. That the removal of the beacons was a clear intention by the Respondents to convert the reserved area hence if allowed to continue it would be impossible to smoothly access the Kitale-Webuye main road through the access road that served 50 families. That it was in the interest of justice that a temporary injunction be issued because the removal of beacons, ploughing and cultivating the road reserve was an encroachment on the reserved area which was public land and would lead to blockage of the expansion of the access road.

4. In the Supporting Affidavit which the Applicant swore he deponed that it was done on behalf of the 3rd and 2nd Plaintiffs who had given authority the Applicants. He deponed that he was the owner of land parcel Nos. LR. 2073/16 and 17 measuring 102 acres. He allegedly bought the parcel from one James Cahnam in 1980 and had been living on it for 42 years. He deponed that he was conversant with the facts in issue and competent to swear to the facts in issue and for over 50 interested parties who were farmers living along the encroached road.

5. The deponent repeated in deposition the contents of the grounds in support of the Application. He annexed and marked as JS1 copies of photographs showing the activities of the Respondents on the area in issue. He annexed and marked as JS2 a copy of the map of the area as provided to show the road in issue. He swore that the reserved area was provided for on the map and a public road. That it was in the interest of all the farmers in the area for the road to be preserved until the issue before the Court was resolved.

6. The Application was opposed through a Replying Affidavit sworn by the 3rd Defendant on 14/03/2023. It was filed on 27/03/2023. He deponed that the 1st Plaintiff was the owner of land parcel No. LR./2073/16 (sic) and 17, having purchased it in 1980. But he refuted that the said Plaintiff purchased the land from Canham but rather from on Edward Kwalwenge. He deponed that he was privy to the agreement because all the Defendants had been neighbours to him since the 1980, a period of over 40 years.

7. He deponed that he had been living on the Wilson property since 1960s hence all the time he knew the road was 12 feet. He deponed that he did not know the acreage of the property owned by the 1st Plaintiff, one Sakaja.

8. He swore that he was the administrator of the estate of his late father Gerald Carl Osbourne Wilson who was the proprietor of LR. 2073/13/2. He stated that the 2nd and 3rd Plaintiffs were joyriders in the suit as they were not registered owners of any property and had not sworn any Affidavit to support the Application.

9. He deponed that there was a 6 metre road which had been in use for over 40 years. He deponed that at no point in time had there been a complaint raised regarding the existence of the 6 metre road other than that of the 1st Plaintiff and the 2nd and 3rd joyriding Plaintiffs. He deponed that in support of the fact of there being no complaint the first owner of the property now belonging to the 1st Plaintiff never raised an issue about the access road and neither did Edward Kwalwenge and that it had taken the Plaintiff over 40 years to complain about the issue. He also stated that there was no document to show that the 2nd and 3rd Defendants owned any property touching the access road.

10. He refuted on oath the Plaintiff having brought the suit on behalf of 50 others and no authority had been filed by any of such persons. He deponed further that the 1st Plaintiff was tagging along other unsuspecting people into the suit. He swore that the Plaintiffs had stated that the road was 'proposed for excision'. He denied removing any beacons and termed it perjury.

11. The 3rd Respondent deponed further that he had not ploughed an access road and he was not even aware of any reserved area which the Plaintiffs referred to. He deponed that the Plaintiffs had failed to disclose that there was (Kitale) ELC No. 4 of 2021 *George Hopf v Director of Survey and Cabinet Secretary Ministry of Housing and Urban Development* wherein the same road was the very subject. He deponed that the instant suit was sub judice and ought to await the outcome of the George Hopf case. He deponed further that the Map relied on was alien and that the Plaintiffs sought an injunction over proposed new beacons hence they did not have a prima facie case with any chance of success. He deponed that he would suffer irreparable loss if the orders were granted. He stated that the Plaintiffs brought an application which ran afoul the doctrine of exhaustion because the issue fell under the jurisdiction of the land registrar.

12. The 3rd Defendant swore that the 1st Plaintiff had brought (presumably to court) fabricated documents against him as a neighbor of 40 years and it was in bad faith to do so. He deponed that for the Plaintiffs to ask the expansion of the 6 meter road to 12 metres they sought to make a "highway" to their residence at his expense. He stated that the 6 metre road was still accessible and all his neighbours were using it.

13. On 30/06/2023 the 3rd Defendant filed a Supplementary Affidavit sworn on 30/06/2023. He deposed in it that in the course of the proceedings the 1st Plaintiff had caused changes to the access road which was the subject of the instant proceedings. He denied ever ploughing the road reserve. He deponed that the 1st Plaintiff had gone ahead and clandestinely caused the road to be graded. He annexed and marked as PW A photographs of the road.

14. He reiterated that he did not remove any beacons since the existing beacons had always been on the land and that it was the 1st Plaintiff who had tampered with the said beacons' location. He deponed on the existence of a procedure in law regarding sale of property. He swore that when an owner sells a "land locked" (sic) property to a buyer he has to provide an access road to the purchaser. He denied ever selling land to the Plaintiffs so as to grant them access to their property.

15. He deponed that the Plaintiffs were using the Court process through interim orders to cause the expansion of the current access road from 6 metres to 12. He stated that neither the Director of Surveys nor the Land Registrar were parties to the suit and the issues raised by the Plaintiffs could be well determined by a court supervised visit (sic).

16. The 1st Plaintiff swore another Affidavit on 07/06/2023 and filed it on 15/06/2023. It was in answer to the 3rd Defendant's Replying Affidavit. He repeated the deposition that he was owner of 102 acres for over 43 years having bought it from James Carnham who effected transfer in his favour. He annexed and marked as JS1 a copy of the said transfer.

17. He deponed that since he bought the land the access road they have been using was wide enough to allow farm machineries moving from different directions to pass each other without hindrance and was more than 12 metres wide. That the road had since been reduced to about 6 meters when the 3rd Defendant subdivided their land in 1983 and leased it to farmers who started ploughing the road. He stated that the 2nd and 3rd Plaintiffs were members of the family of Omaido who owned land parcel LR. 2073/15 measuring 40 acres and the two were not joyriders.

18. He deponed that the Director of Survey was the custodian of all maps in Kenya and had, through the County Surveyor Trans Nzoia, produced in court and the High Court the 1952 map Ref. No. LR/62/98 which showed that the road of access was 40 metres (12.92 metres) wide hence the 6 metre one produced by the 3rd Defendant was not shown in the government survey maps and should not be admitted. He deponed that he sought the authority of the 50 members whose List and their parcel numbers he produced in Court.

19. He deponed that the 1952 map produced by the government surveyor was the only Government map which was used to issue all farmers with title including the 3rd Defendant's which he inherited from the late father. That the 1952 survey map shows that land parcel No. LR. 2073/13/2 has a total of 107.2 acres of which 4.1 acres is meant for two roads on the northern side beginning with beacon M34 and ending at beacon No. 36 and the southern one from beacon M12 to M43.

20. That the information about 4.1 acres meant for the two roads has been erased in the map produced by the 3rd Defendant when presenting his Affidavit in Misc. Civil Application No. 2 of 2016. He attached and marked as JS3 a copy of the map allegedly changed. He stated that there were beacons put in place before the Court issued an order of injunction in the George Hopf case. The 3rd Respondent was aware of the existence of the access road, having sued the Director of Survey, the Cabinet Secretary and Urban Development, the Attorney General and him in the 2016 Miscellaneous Application. He attached and marked as JS4 a copy of the verifying Affidavit in relation to Misc. Civil Application No. 2 of 2016.

21. The deponent stated further that the Kitale ELC No. 4 of 2021 was different from the instant case because the Defendants herein are sued for leasing to and allowing people to plough their respective lands up to the road reserve area meant for expansion. He repeated that the injunction was meant to preserve the user of the road reserve. That the denial of the existence of an access road between the 1st Plaintiff's land and the 3rd Defendant's father's was a lie since beacons showed differently as per the map of 1952 of which the 1st Plaintiff had no role in preparation. He attached and marked as JS5 a picture of the road of access.

22. He deponed, in comparison with the Misc. Civil No. 2 of 2016, that the 3rd Defendant misled the Court in the Verifying Affidavit he filed therein when he deponed that there was no access road between his father's and the 1st Plaintiff's parcels of land. He annexed and marked as JS6 a copy of a sketch plan for the area. He stated that 3rd Defendant submitted in the Miscellaneous Case a copy of an altered map without the road extending all the way to the end yet in the instant case he admitted there was a 6 metre road of access. He deponed that the 3rd Defendant was taking the Court in circles about the access road and its size. He deponed that the 3rd Defendant was silent about the 4.1 acres meant for the access road.

Submissions

23. The Application was deposed by way of written submissions. The Plaintiffs filed theirs dated 29/06/2023 on 30/06/2023. The 3rd Respondent filed his dated 30/06/2023 on the same date.

24. On their part the Applicants, after summarizing the prayers, argued that the court ought to consider the areas reserved for excision of the road. They stated that both Kitale ELC No. 4 of 2021 and Kitale Misc. Civil Application No. 2 of 2016 touched on the same areas. They contended that the 1952 survey of the area provided for the access road under Section 2 of the *Public Roads and Roads of Access Act*, Chapter 399 of the Laws of Kenya and the road of access was to be 12 metres wide yet the Defendants had reduced it to 6 only.

25. They submitted that the Respondents were aware of the existence of the road and that was why the 3rd Respondent sued the Director of Survey, Cabinet Secretary for Lands and Urban Development in Kitale Misc. Civil Appl. No. 2 of 2016 about the 4.1 acres to be excised from the parcels of land in issue. They then stated that theirs was a matter of public interest suit since the Defendants had ploughed, planted on and/ or leased the areas reserved for excision hence making it difficult to access the area. They submitted that since there was already an injunction in Kitale ELC No. 4 of 2021 a similar order does issue herein.

26. On his part, the 3rd Defendant began his submissions by giving an introduction about the suit, the brief facts of it in which he repeated the admission by the Plaintiffs that the Defendants were the owners of the suit properties, being LR. Nos. 2073/14/1, LR. No. 20173/13/1 and LR. No. 2073/13/2. He submitted that during the course of the suit the 1st Plaintiff had caused the access road to be graded hence no party had been cultivating the access road as alleged by the Plaintiffs. He set out only one issue for determination, namely, whether the application satisfied the elements for grant of an injunction.

27. On the issue, the 3rd Respondent relied on the case of *Giella v Cassman Brown*, Civil Appeal No. 51 of 1972 (sic) which set forth three elements. He followed that with the analysis that the Plaintiffs did not have a prima facie case since none of the defendants had cultivated the road of access. He relied on the photos that were annexed to both the Plaintiffs' and his Affidavits to show that there was a road of access in place.

28. He submitted that the Plaintiffs relied on maps not certified by the custodians of the records they were for. He stated the allegation of removal of beacons by the Defendants was a matter of evidence which required proof at the hearing. He argued that the 2nd and 3rd Defendants had not sworn affidavits to support the application hence the 1st Plaintiff was being mischievous and the suit was only intended to benefit him only by creating a "highway" to his private residence.

29. On irreparable harm, he submitted that there was none because there was already an access road in use. On the balance of convenience, he submitted that it did not favour the Plaintiffs because they are guilty of non-disclosure of the existence of Kitale ELC No. 4 of 2021 where the 1st Plaintiff is an interested party and the same road is the subject therein.

30. The 3rd Respondent prayed for a stay of the proceedings herein pending the determination of Kitale ElC No. 4 of 2021. Lastly, he submitted that the Plaintiffs had introduced in their submissions new issues which were not in the application before the Court. He prayed for the dismissal of the application.

Issues, Analysis and Determination

31. I have considered the application, the affidavits in support thereof and all the annextures thereto. I have also given due regard to the Replying Affidavit and Supplementary Affidavit together with the annextures thereto. I have also deeply reflected on the submissions be both learned counsel for the Applicant and the 3rd Respondent.

32. In the submissions the 3rd Respondent restated the principles or elements in *Giella v Cassman Brown and Co. Ltd*(1973) EA 358 and submitted that the Applicants had had no prima facie case with high chances of success. They also stated that no substantial loss would result against the Applicants if the injunction was not granted and that the balance of convenience favoured them. Having considered the entire Application, I find two issues for determination herein. They are:

    1. Whether the applicants satisfied the principles for the grant of a temporary order of injunction.

    2. Who to bear the Costs of the Application.

33. At the onset, I remind the parties that it is important to bring an application, pleading or even opposition to an application based on the law as supported by facts. Laws of procedure were not made in vain but for orderliness, focus and guided proceedings, and much as they may not go to the substance of the case, they play a big role on aiding the realization of justice. Therefore, they are not to be ignored, slighted or down-trodden, and they can and often go into determining an issue depending on the gravity of the failure to follow them. Not in all cases does Article 159(2)(d) of the *Constitution* of Kenya whitewash the infractions thereof.

34. In the instant case the Applicants relied on what they referred to "all enabling provisions of the law." This is a phrase this court has time and again found to be meaningless, hollow and of no avail and has advised parties to refrain from "flashing" it around without any clarification as to its relevance. Similarly, Sections 3, 3A and 63(e) of the *Civil Procedure Act* have their place in application other than in applications for injunctions. It behooves a party to explain to the Court the relevance of the provisions they rely on in any matter, objection or application they bring to Court.

1. Whether the applicants satisfied the principles for the grant of a temporary order of injunction

35. Having said the above, the law on grant temporary injunctions is now settled. But starting from the basic law of evidence, it is trite law that he who alleges the existence or non-existence of a fact must prove it. Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya provides as much.

36. Courts have emphasized, and it is true, that the remedy of orders of injunction is an equitable one. The Court exercises discretion in granting it. But discretion should be exercised judiciously as was stated in the case of *Kahoho v Secretary General, EACJ* Application No. 5 of 2012.

37. Additionally, the exercise of that discretion, in *Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others* [2016] eKLR Justice S. Munyao stated as follows,

    > "… the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously."

38. For a Court to be said and indeed be seen to be judicious it must take into account all the facts and circumstances of the case before it and make a decision that is not plainly wrong. The act of balancing the interests of the parties and justice is very delicate: no wonder it calls for intelligent sagacious minds to be judges and judicial officers.

39. It is a settled principle that in order for a party to be granted a temporary injunction a party must pass the test three-tier sequential set out in the case of *Giella v Cassman Brown* [1973] EA 358 wherein the specific elements:

    (a) Whether the applicant has established a prima facie case

(b) Whether the he or she would suffer irreparable loss that may not be compensated by damages and

(c) That if the court is in doubt, it may rule on a balance of convenience.

40. Again, the Court of Appeal has restated these principles in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where it held as follows:

> "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

41. I now proceed to consider whether the Applicants, in the instant case, have met these conditions. Regarding the first limb, it is not in dispute that the Plaintiffs and the Defendants are alleged respective owners of the stated parcels of land or are representatives of the estates of deceased owners as pleaded. It is also clear that there is an existing road of access that is adjacent to the respective parcels of land and that at present the same is said to be approximately six (6) metres wide.

42. What is in dispute is simple: The Applicants allege that the Defendants have cultivated, planted on or leased to other people the area adjacent to the access road, and that the same was reserved for excision of the road of access. Further, they contend that the Defendants had removed beacons marking the road of access and the reserved area in order to carry out the alleged farming activities. They allege that the activities of the Defendants have made the road of access virtually difficult to use by narrowing it to the extent that only one vehicle can use the road rather than two. They attached to the Affidavits evidence by way of photographs to demonstrate the case.

43. The 3rd Defendant on the other hand disputes this fact. He deponed that for many years no one has ever complained about the width of the road of access and that by the Applicants arguing that it needs expansion the 1st Defendant wishes to make a "highway" to his home. At first the 3rd Defendant denied the issue of a reserve area for the access road. He also denied having removed the beacons that demarcated the access road and the reserve area. But in the latter Affidavit he swore on 30/06/2023 he deponed that it was not the Defendants but the 1st Plaintiff who had tampered with the said beacons' location. This admission on oath indeed shows that there must have been in existence of beacons demarcating the road of access, and that either of the parties may have tampered with them. That being the case, it then is clear that the extent of the road of access and the area reserved for its expansion has been affected by the activities of the Defendants. Further, the fact that the Kitale ELC Misc. Application No. 2 of 2016 and Kitale ELC No. 4 of 2021 cases touch on the use and extent of the road of access, and the 3rd Defendant was the one who brought the former while the Applicants are interested parties in the latter, it is my finding that the applicants have made out a prima facie case with a probability of success.

44. The next question is whether the Applicants may suffer irreparable injury or loss which cannot be compensated by way of damages. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR http://kenyalaw.org/caselaw/cases/view/156488/ the trial judge described irreparable injury as follows: "Irreparable injury means that the injury must be one that cannot be adequately compensated for

in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

45. The Plaintiffs allege irreparable loss by way of making it difficult to access their homes. The 3rd Defendant argues that the road is still able to serve the homes and that instead the 1st Plaintiff wants to use the Court to create a "highway" to his home, and that for his, the 6 metre road of access has been in use since 1980s and should remain so. He argues further in the Supplementary Affidavit sworn on 30/06/2023 that the 1st Applicant has clandestinely caused the access road to be graded in the course of the matter.

46. It is this Court's view that I am convinced that the Applicants are likely to suffer irreparable injury of the order sought are not granted because the alleged activities if not stopped could lead to closure of the road of access or narrow it to the extent of causing unforeseen damage and dangers such as frequent accidents that may lead to loss of lives or properties. In any event, the Defendants ought to know that respect of property interests be they of the public or private is of paramount importance. Greed and avarice should not overshadow respect of property. In any event, the Bible says (commands), "thou shalt not covet your neighbour's house" (or property even when it is lying idle (see, Exodus 20:17). Additionally, if the road becomes impassable by virtue of further narrowing and near closure, accessing the main road would by difficult and such losses as failure to transport food crops or hindered fast movement in case of danger are injuries that may not be compensated easily by damages.

47. Lastly, in my view the balance of convenience tilts to the continued use of the public road and the reverse area as public property and not as a contrivance to benefit private interests. Public good surpasses private narrow interests. Consequently, I find that the entire application succeeds.

2. Who to bear the Costs of the Application

48. Regarding costs, they follow the event but since only the 3rd Respondent opposed the application, I order that he be the only one to bear the costs of the instant application.

49. Thus, I hereby issue an injunction against the Defendants/Respondent by themselves, agents, servants, employees and/or assigns from further interfering and/ or dealing in any way with the reserved area meant for excision to expand the existing access road on their respective parcels of land L.R. No. 2073/14/1, L.R. No. 2073/13/1 and LR No. 2073/13/2 respectively until the hearing and determination of the suit herein.

50. For avoidance of doubt and in the interest of justice, the Defendants, their servants and or agents are only given chance to harvest crops that may have been planted or exist on the area reserved for the road of access during this season. They should not plough, cultivate, plant, weed or in any way do anything on the reserved area than only harvesting the crops already planted and growing thereon this season only, after which they vacate until the determination of this suit.

51. Lastly, in order to determine the extent of the area reserved for the excision or expansion of the road of access, the Applicants and the Defendants are ordered to engage the Surveyor or Office of Survey in-charge of the Trans Nzoia County to survey, determine the boundary and beacons of the road of access and the reserved area and the encroachment thereon, if any, in relation to land parcel Nos. LR. 2073/14/1, LR. No. 20713/1, and LR. No. 2073/13/2, LR. No. 2073/16, LR. No. 2073/17, LR. No. 2073/15/10 and LR. No 2073/15/1, at the cost of the parties herein, within a period of 30 days, and the said office files a report in this Court on the same. Each party is at liberty to engage at his own cost a private surveyor to work with the Government surveyor during the exercise.

52. In order to fast track this matter, the parties are directed to prepare trial bundles and exchange them within 30 days for the mention of the matter on 25/09/2023 for compliance.

53. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 10TH DAY OF AUGUST, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE