



Dikir v Maasai Mara Wilderness Lodge Limited (Environment and Land Appeal E005 of 2022) [2023] KEELC 20164 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E005 OF 2022
EM WASHE, J
SEPTEMBER 26, 2023**

BETWEEN

KORINKO OLE PIRIAS DIKIR APPELLANT

AND

MAASAI MARA WILDERNESS LODGE LIMITED RESPONDENT

JUDGMENT

1. The Appellant herein being aggrieved by the Ruling and Order of Hon. R. M. Oanda (Senior Principal Magistrate) dated and delivered on the 21st of January 2021 in the proceedings known as Kilgoris ELC case No 27 of 2020 filed a Memorandum of Appeal dated 15th February 2022 with the following grounds;-
 - i. The Learned Trial Magistrate erred in fact and in law in finding and holding that the Respondent herein had proved its claim as against the Appellant, to warrant granting of the orders sought.
 - ii. The Learned Trial Magistrate erred in fact and in law in granting the order(s) of permanent injunction at interlocutory stage.
 - iii. The Learned Trial Magistrate erred in fact and the law in granting the said orders of permanent injunction against the fact that the Appellant is staying on LR No Transmara/Kerinkani/67.
 - iv. The Learned Trial Magistrate erred in fact and law by dismissing the Preliminary Objection on points of law.
 - v. The Learned Trial Magistrate erred in fact and the law by failing to take into consideration the size of the suit property and its value and therefore ousting its jurisdiction in determining the said suit thereby making an erroneous determination.



- vi. The Learned Trial Magistrate erred in law and fact in failing to appreciate the legal position that the question concerning special damages can only be determined during plenary hearing.
 - vii. The Learned Trial Magistrate failed to appreciate the tenor and/or extent of the legal conditions under which a permanent injunction can be issued.
 - viii. The Learned Trial Magistrate erred in law in failing to consider and analyse the fact that by granting an order of permanent injunction against the Appellant herein, it amounts to an eviction from his duly registered suit property. Consequently, the decision of the Trial Magistrate has occasioned a miscarriage of justice.
 - ix. The Learned Trial Magistrate erred in law in failing to assign any credible and/or valid reason(s) whatsoever for making such a decision. Consequently, the decision of the Trial Magistrate Court is erroneous and legally untenable.
 - x. The Learned Trial Magistrate erred in law and fact for failure to consider and take into account the apparent discrepancy on the part of the Respondent who requested for an order of permanent injunction at interlocutory stage. Consequently, the Trial Court arrived at a passionate and biased conclusion contrary to the evidence on record.
 - xi. The decision by the Learned Trial Magistrate is unbalanced, perfunctory, passionate and substantially irregular and legally untenable. Consequently, the decision herein is wrought and/or fraught with errors of fact and law.
2. On the basis of the Grounds of Appeal outlined hereinabove, the Appellant is seeking for the following Orders-
- a. The Appeal herein be allowed and the Ruling and Order of the Trial Magistrate dated 21st day of January 2021 vide Kilgoris ELC Case No 27 of 2020 Be Set-aside, Reviewed And/or Varied And/or Quashed.
 - b. The Honourable Court be pleased to substitute thereof an Order of dismissing the Respondent's Notice of Motion dated 10th day of September 2020 vide Kilgoris ELC Case No 27 of 2020.
 - c. Such further and/or other relief(s) be granted as the Court may deem expedient.
 - d. Costs of this Appeal and costs incurred in the Lower Court be borne by the Respondent.
3. The Appellant herein is seeking to invoke the Appellate jurisdiction of this Honourable Court as the first Appellate Court regarding the Ruling and Order of the Trial Magistrate delivered on the 21st of January 2022.
4. In the case of *Selle & another v Associated Motor Boat Co.ltd & others* (1968) EA 123 where the Court observed as follows:-
- “A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”



5. This being the case, this Honourable Court is required to look at the Application that was considered by the Trial Court, the Responses thereof, the submissions by the parties and arrive at its own decision on the same.
6. The Application that was under consideration by the Trial Court is the Notice of Motion Application dated 10th September 2020 by the Respondent herein.
7. The Notice of Motion Application dated 10th September 2020 was seeking the following Orders;-
 - i. That this Application be certified urgent and heard ex-parte in the first instance during the Court Vacation.
 - ii. That pending the hearing of this Application, this Honourable Court be pleased to issue a temporary injunction to restrain the Respondents by themselves, through family, relatives, agents, servants, members of the local community, any one authorized by them or claiming under them from in any manner or otherwise howsoever, from entering or trespassing into the land parcels LR No Transmara/ Keriakani /67, 68 and 69 in any manner whatsoever for whatever purposes.
 - iii. That the OCS Kilgoris and Angata Police Stations be directed to ensure enforcement of the Orders granted by this Honourable Court.
 - iv. That pending the hearing of this suit, this Honourable Court be pleased to issue a permanent injunction restraining the Respondents by themselves, their family, relatives, agents, servants, members of the local community, any one authorized by them or claiming under them from in any manner or otherwise howsoever, from entering or trespassing into the land parcels LR No Transmara/ Keriakani /67, 68 and 69 or in any way Interfering with the Applicant's right to quiet and peaceable enjoyment of the properties.
 - v. That costs of this Application be provided for.
8. The prayers outlined hereinabove were then supported by grounds provided in the body of the Application as well as the supporting affidavit of one John Smith sworn on the 10th of September 2020.
9. In a summary, the Applicant's grounds can be summarised as follows;-
 - a. The Applicant is the registered and beneficial owner of a Lease Agreement over the suit properties and therefore entitled to quiet and peaceful occupation of the same.
 - b. However, the Respondent have been attacking, harassing, intimidating, threatening and/or interfering with the Applicants occupation on the Leased suit properties to his detriment.
 - c. That unless the Orders sought in the Application were granted, then the Respondent would continue to interfere with the Applicant's quiet occupation on the suit properties and thereby deprive it of its proprietary rights as provided for in the Lease Agreements.
10. The Application was served on the Respondent who responded by filing a Statement of Grounds of Opposition dated 28th September 2020.
11. The Respondent's Statement of Grounds of Opposition dated 28th September 2020 in summary raised the following issues about the Application before the Trial Court;-
 - a. The aggregate monetary value contained in the Lease Agreements executed between the Appellant and the Respondent exceeded the pecuniary jurisdiction of the Trial Magistrate.



- b. As a result of the pecuniary jurisdiction exceeding the Trial Magistrates jurisdiction, the Trial Court did not have the jurisdiction to hear and determine either the Application and/or the substantive suit thereof.
 - c. Further to that, the Appellant stated that the Lease Agreements which were granted to the Respondent had since lapsed and therefore, the Respondent did not have any legal rights over the suit properties as alleged.
 - d. As regards the Application, the Appellant pleaded that the Respondent had not established any prima facie case warranting of any injunction either on an interlocutory basis or permanent basis.
 - e. In conclusion, the Appellant submitted that the Respondent was simply abusing the Court process and the Application as well as the substantive suit should be dismissed.
12. In addition to the Statement of Grounds of Opposition dated 28th September 2020, the Respondent also raised a Preliminary Objection through its Amended Statement of Defence dated 16/03/2021.
 13. The said Application was then canvassed through written submissions with the Respondent filing theirs on the 4th of June 2021 while the Appellant filed theirs on 14th October 2021.
 14. This Honourable Court has gone through the pleadings outlined hereinabove and in its considered view, the issues for determination in the Application dated 10th September 2020 are as follows;-
 1. Did the trial court have jurisdiction to entertain the said application and/or suit filed by the respondent?
 2. Was the respondent entailed to a permanent injunction against the appellant?
 3. Is the appeal merited?
 4. Who was to bear with the costs of this appeal?
 15. This Honourable Court having identified the issues for determination, the same will now be discussed as hereinbelow;-

Issue No 1- Did The Trial Court Have Jurisdiction To Entertain The Said Application And/or Suit Filed By The Respondent?

16. The first issue for determination in the Application dated 10th September 202 is whether the Trial Magistrate had the jurisdiction to entertain the suit and/or application.
17. The Appellant submits that the Respondent was granted 3 separate Leases over the suit properties as follows;-
 - a. Lease over LR No Transmara / Kerinkani /67 dated 8th April 2011 was over the entire property measuring approximately 37.65 Hectares for a period of 70 years at an annual rent of Kshs 1,202,000/-.
 - b. Lease over LR No Transmara/ Kerinkani/68 dated 24th August 2006 over a portion of 33 acres out of the total acreage of 79.20 Hectares for a period of 70 years at an annual rent of Kshs 686,000/-.



- c. Lease over LR No Transmara. Kerinkani/69 dated 24th August 2002 over a portion of 33 acres out of the total acreage of 31.04 Hectares for a period of 70 years at an annual rent of Kshs 686,000/-.
18. The Appellant's position is that the value of the three Lease Agreements outlined hereinabove exceeded the pecuniary jurisdiction of the Trial Court Magistrate and therefore both the Application and the suit should be dismissed.
19. In response to the Appellant's issue of pecuniary jurisdiction, the Respondent submitted that the cause of action in this suit or the orders sought in the Application did not relate to any monetary compensation.
20. The Respondent submitted that Section 9 of the *Magistrates Court Act*, No 26 of 2015 granted jurisdiction to hear and determine issues of trespass over land.
21. This Honourable Court has perused the Further Amended Plaintiff dated 4th December 2020 and observes that the Respondent is seeking for injunctive orders against the Appellants as well as special damages of Kshs 4,163,638/-.
22. The provisions of Section 26 of the *Environment and Land Court Act*, No 19 of 2011 as read with Section 9 of the *Magistrates Court Act*, No 26 of 2015 clearly confers jurisdiction to the Magistrates Courts to deal with proceedings relating to injunctions before it.
23. Similarly, Section 7(1)(b) of the *Magistrates Court's Act* No 26 of 2015 provides that Senior Principal Magistrates have a pecuniary jurisdiction of up to Kshs 15,000,000/-.
24. In the present suit, the Applicants are claiming special damages of Kshs 4,163,638/- as pleaded in the further Amended Plaintiff dated 4th December 2020.
25. In essence therefore, this Honourable Court is of the considered view that the Trial Magistrate has jurisdiction both in terms of pecuniary and/or otherwise to hear and determine the suit and application filed by the Respondents herein.

Issue No 2- Was the Respondent entitled to a permanent injunction against The Appellant?

26. The second issue for determination is whether the Respondent was entitled to a permanent injunction as sought in prayer No 4 of the Application dated 18th March 2021.
27. The Respondent submitted that it has valid Lease Agreements over the suit property and therefore is entitled to quiet and exclusive possession over the same.
28. Unfortunately, the Appellants had been trespassing onto the Respondent Leased portions and thereby interfering with the quiet and exclusive possession of the Leased Properties.
29. The Respondent's prayers was that the Appellants should be permanently enjoined from trespassing and/or interfering with the Leased properties and/or their portions thereof in compliance with the Lease Agreements.
30. The Appellant first and foremost stated that he did not have any lawful Lease Agreements with the Respondent on the grounds that the earlier Leases executed were extinguished by virtue of breaches in the performance of the said terms therein.
31. Consequently therefore, there were no legal rights owned by the Respondent to create a foundation to institute any suit or apply for any orders.



32. Secondly, the Appellant submitted that the prayer of Permanent Injunction can not be granted at an interlocutory stage as sought and therefore the same should be dismissed forthwith.
33. Indeed, Prayer No 4 in the Plaintiff/Applicant's Application dated 10th September, 2020 seeks for a Permanent Injunction.
34. This prayer is also recaptured in the Further Amended Plaint dated 10th September, 2020 amongst over prayers.
35. In the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* (2008) eKLR, the Honourable Court made the finding:-

“ a permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and it thus a decree of the Court. The injunction is granted upon merits of the case after evidence in support of and against the claim has been tendered.”

36. This Honourable Court totally concurs with the above finding and reconfirms that a permanent injunction is one that is perpetual and final in nature and therefore cannot be issued in an Interlocutory Application.

Issue No 3- Is The Appellants Appeal Merited?

37. Based on the determination of the Issues No 2 and 3 hereinabove, the Honourable Court is of the considered view that the Appellant has been partially successful in this Appeal only in terms of the legality of the permanent injunction issued on the 21st of January 2021.

Issue No 4- Who is to bear with the costs of this Appeal?

38. The last issue for determination is who is to bear the cost of this Appeal.
39. In the Honourable Court's considered view, the costs of the Application in the lower Court as well as the costs of this Appeal should follow the outcome of the substantive suit herein.

Conclusion.

40. In conclusion therefore, the Honourable Court hereby makes the following Orders as appertains the Memorandum of Appeal filed on the 15th February 2022:-
 - a. The Senior Principal Magistrates Court has the Statutory and Pecuniary Jurisdiction to hear and determine the proceedings known as Kilgoris SPM ELC case No 27 of 2020.
 - b. The Permanent Injunction issued in favour of the respondents over the properties known as LR No Transmara/Kerinkani/67,68 and 69 against the appellant be and is hereby vacated and/ or set-aside forthwith.
 - c. The Costs of this appeal and the application in the trial court shall abide by the outcome of the substantive suit.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 26TH SEPTEMBER, 2023.

EMMANUEL.M.WASHE

JUDGE



In the presence of:

Court Assistant: Mr. Ngeno

Advocate For The Appellant: Mr. Ochwangi

Advocate For The Respondents: Mr. Odero

