



Kagwanja v Juma; Inspector General of Police & another (Interested Parties) (Environment & Land Case E001 of 2023) [2023] KEELC 21153 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E001 OF 2023
LC KOMINGOI, J
OCTOBER 31, 2023**

BETWEEN

PROF. PETER KAGWANJA APPLICANT

AND

DR. MONICA KATHINA JUMA DEFENDANT

AND

INSPECTOR GENERAL OF POLICE INTERESTED PARTY

HERBIVORA INDUSTRIES LTD INTERESTED PARTY

RULING

1. This is the Notice of Motion dated 6th July 2023 and amended on 17th July 2023. It is brought under;

(Under Article 40 of *the Constitution* of Kenya, Section 3A & B of the *Civil Procedure Act*, Section 152 (F) 1 & 2 (a-d) of the *Land Act*, Order 40 Rule 1 & Order 8, Rule 1 of the Civil Procedure Rules 2010 and All enabling provisions of the Law)

It seeks the Orders;

1. Spent
2. Spent.
3. Spent.
4. That pending the hearing and determination of this suit this Hon. Court be pleased to issue a prohibitory injunction restraining the Defendant/ Respondent from evicting the Plaintiff/ Applicant from Land Title No. Kajiado/Kisaju/2486 pursuant to the Notice of Eviction dated 14th April 2023.



5. That pending the hearing and determination of this suit this Hon. Court be pleased to grant the Plaintiff/Applicant access to, and be allowed to return his livestock and property to the property known as Land Title No. Kajiado/Kisaju/2486.
 - 5a. That pending the hearing and determination of this application this Hon. Court be pleased to issue an order cancelling the Notice of Eviction dated 14th April 2023 issued by the Defendant/ respondent to the Plaintiff in relation to Land Title No. Kajiado/Kisaju/2486
 6. That pending the hearing and determination of this suit the Defendant/ Respondent, her agents, servants and/or employees be ordered to vacate and/ or move out of Land Title No. Kajiado/Kisaju/2486.
 7. That the 1st Interested Party be ordered to give assistance for the purpose of maintaining law and order pending the hearing and determination of this application.
 8. That the 1st Interested Party be ordered to give assistance for the purpose of maintaining law and order pending the hearing and determination of this suit.
 9. That costs of this application be provided for.
2. The application supported by the grounds outlined on the face of the application and in the supporting Affidavit dated 6th July 2023 and the supplementary Affidavit dated 31st July 2023. He states that the suit property measuring approximately 25 acres and registered in the Defendant/Respondent's name is matrimonial property having been acquired in the year 1999 during the pendency of the Plaintiff's/ Applicant's and Defendant's/Respondent's marriage. The Applicant averred that he contributed to its acquisition, improvement, development and maintenance which included fencing it, drilling boreholes, constructing an animal feeds factory, constructing and rearing pigs, poultry, fish and payment of farm workers among others. Adding that it was agreed that the Respondent would hold the property in trust for the Applicant.
 3. The Defendant/Respondent issued an eviction notice upon the Plaintiff/Applicant on 14th April 2023 and upon its lapse on 15th July 2023 a group of about twenty three (23) people and guards belonging to Josam Security Services Company Limited accompanied by a police patrol car invaded the suit property, broke padlocks, forcefully chased out the workers who were employed on the farm and drove out twenty (20) herds of Holstein Fresian cows. One sick cow was left behind and the Defendant/ Respondent had denied any veterinary doctor to access the suit property and treat the cow; 20 flock of chicken, 3 dogs and 5 puppies, two Peking ducks and fish were also left behind without food. The Defendant/Respondent then hired security guards to guard the suit property.
 4. It is his case that, the forceful eviction on 15th July 2023 was illegal because the Plaintiff/Applicant was a lawful occupant of the suit property since 1999 as his matrimonial property. He has thus sought reinstatement to the suit property arguing that he would suffer irreparable loss and damage if not reinstated to his matrimonial property which the Respondent wanted to dispossess him of.
 5. The Defendant/Respondent in her Replying affidavit dated 25th July 2023 confirmed that she legally and lawfully evicted the Plaintiff/Applicant from the suit property but denied that she used 23 people as well as police officers to carry out the eviction. She confirmed that she hired a security company to guard the property to ensure that there were no trespassers. She denied that the suit property was matrimonial property since she purchased it in 1999 whereas she got married to the Plaintiff/Applicant



- under customary law in 2001. However in 2020, the Applicant deserted the Defendant/Respondent and the marriage was terminated on 25th July 2022.
6. She stated that prior to 2002 she had no joint ventures with the Plaintiff/Applicant and therefore she was not holding the suit property in his trust as alleged. She went on to state that the infrastructure and development on the suit property such as fencing, drilling boreholes, electrification, tree planting, pig farming, irrigation were all undertaken by her with little or no contribution from the Plaintiff/Applicant as alleged adding that he did not have proof of the alleged contribution. And that all the developments have since stalled or were in dilapidated condition. She also indicated that she had initially consented and allowed the Plaintiff to use the property but that consent was revoked vide the notice issued on 10th November 2022. She went on to point out that in 2014 she started a pig farming project and the Plaintiff/Applicant became part of it by virtue of visitation and supervision since she was away but the project was eventually run down.
 7. She deponed that in November 2022 in the company of a friend, they visited the suit property and were informed that the Applicant had never been on the property for over a year and the workers had also been without pay from January 2022. They took note of the condition of the property and on 10th November she issued the Plaintiff/Applicant a 30 day notice seeking vacant possession of the suit property which he did not honour. Consequently, she issued an eviction notice on 14th April 2023 and on 13th July 2023 she authorised her agents to remove the Plaintiff's/Applicant's livestock from the suit property.
 8. She indicated that on 9th July 2023 she visited the property to confirm whether the Plaintiff/Applicant had vacated but learnt that he/ his agents had delivered some little hay to the suit property. She also noted that cows were dying due to inadequate food pointing out that when she visited the suit property in November there were about 47 cows but on that day only 20 cows were remaining and there were carcasses everywhere. It is her case no risk of any loss or irreparable damage would be suffered by the Applicant since his livestock and other goods had been cleared out of the property and handed to the care of his employees. But should the Applicant be allowed back to the suit property, she is the one who would suffer loss and damage because she would not be in a position to utilise her property. She added that she was ready to supervise and facilitate the removal of any other property belonging to the Applicant such as trucks and machines.
 9. She stated that the suit was an abuse of the court process and ought to be dismissed with costs since the Applicant had from November 2022 which was over nine (9) months to seek court's redress on the eviction. And the Applicant's intention was to reap where he did not sow and was not a beneficial owner of the suit property in any way.
 10. The Applicant in his Supplementary Affidavit dated 31st July 2023 restated that he got married to the Defendant in 1999 and outlined this in great lengths. He also outlined how the suit property was acquired in 1999 and once again reiterated his contribution.
 11. On the 26th July 2023 the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Plaintiff's/ Applicant's submissions

12. Counsel for the Applicant submitted that whereas Sections 152A, 152B, 152E and 152G of the *Land Act* provided for eviction of people from private property, the suit property was the Applicant's matrimonial property from 1999 and the parties have equal rights to it. On the issue of grant of interlocutory injunction counsel made reference to *Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014]eKLR* submitting that the said eviction was also not conducted as stipulated in Section 152G



because the eviction was forceful and the Applicant's other farm equipment were still on the suit property which were at risk of being wasted away.

13. On whether to grant a mandatory injunction counsel while making reference to the Court of Appeal's case of *Kenya Breweries Limited & another v Washington O. Okeyo* [2002]eKLR which provided that a mandatory injunction ought not be granted in absence of special circumstances, counsel submitted that failure to reinstate the Applicant to the suit property would be allowing the Respondent to steal a march by excluding her husband from their matrimonial property which he was rightfully entitled to. As such, counsel prayed that the suit land be subdivided into two equal portions and the Applicant be allowed to use the demarcated portion or alternatively the Defendant does compensate the Applicant for his portion of land together with all the developments and investments.

The Defendant's / Respondent's Submissions

14. On whether the Applicant had satisfied court for issuance of temporary mandatory injunction counsel for the Respondent submitted that in 1999 when the suit property was acquired by the Respondent, the two had not been married pointing that in any event, the said customary marriage conducted in 2001 was null and void because the Applicant had no capacity to contract another marriage. This is because the Applicant was still legally married to his former wife until 2009 when their marriage was dissolved. To support this, counsel highlighted the meaning of matrimonial property as espoused in Section 6 of the *Matrimonial Property Act* and made reference to *Khadijah Ali Omar & another v Kaushum Wambui* [2022] eKLR which held that a claim cannot arise out of an illegality and there being no marriage, the properties cannot be shared in accordance with family law. Further, the Applicant had not proved his alleged contribution to the purchase or development of the suit property.
15. Counsel went on to submit that grant for temporary injunction as per Order 40 Rule 1 of the Civil Procedure Rules had not been proved because the required proof that property in dispute would be wasted away, damaged or alienated had not been met citing *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR. Counsel added that the Applicant had over eight months to seek court's redress which he did not
16. On grant of mandatory injunction, counsel while making reference to *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] eKLR (supra) and *Kenleb Cons Ltd vs New Gatitu Service Station Ltd another* (1990) eKLR once again submitted that the Applicant had neither made a case warranting of such orders nor did he have a justifiable claim on the property and should thus be dismissed with costs.

Analysis and Determination

17. I have considered the Notice of Motion, the response thereto, the rival submissions and the authorities cited. The issues for determination are;
 - i. Whether the Plaintiff's/Applicant's application meets the threshold for grant of temporary injunction.
 - ii. Should the court grant a mandatory injunction?
 - iii. Who should bear costs of this application?
18. In their submissions, counsel have substantiated their clients' respective positions stated in their respective affidavits. It is now appropriate to consider the facts that have emerged and the legal principles applicable.



19. The principles were laid down in the precedent setting case of Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358. In the case of Mrao Limited Vs. First American Bank Ltd & 2 Others (2003) KLR 125 the Court of Appeal stated what amounts to a prima facie case.
20. The Plaintiff/Applicant herein states that he should not be evicted from the suit property because it is Matrimonial Property. He has gone to great lengths to show how and why it is Matrimonial Property. It is his case that he contributed to its acquisition and has done several improvements to the suit property. He however, attached no proof to confirm that he contributed to the purchase of the suit property.
21. The Defendant/Respondent on the other hand has maintained that she purchased the suit property in 1999 before they got married. It is her case that she purchased the suit property with no material, financial or the form of support from the Plaintiff/Applicant. I find that the Plaintiff/Applicant has failed to prove that the suit property is Matrimonial Property.
22. From the foregoing I find that the Plaintiff/Applicant has failed to establish that he has a prima facie case with a probability of success at the trial. In the case of Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (2018) eKLR ; the court observed that;

“on whether the Plaintiff has established a prima facie with a likelihood of success, I do find that the Plaintiff has not established any legal right to the property as he is not the registered proprietor of the property and is not claiming beneficial interest. Moreover, the Plaintiff has not established by affidavit that he is likely to suffer any irreparable harm”

Similarly in Robert Mugo Wa Karanja Vs. Eco bank (Kenya) Limited & Another (2019) eKLR; the Court held;

“ 15 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 is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”

23. I also find that the Plaintiff/Applicant has failed to demonstrate that he will suffer irreparably if these orders are not granted. The eviction has already taken place, I am guided by the case of Ooko Vs. Barclays Bank of Kenya Limited (2002) KLR 394 page 398 where Ringera J (as he then was) held;

“The second condition is that an interlocutory injunction will not normally be granted unless the applicant can show he will suffer an irreparable injury which cannot be compensated by an award of damages. The onus is obviously on the applicant to do that. She was content to submit that once a prima facie case has been made it was not necessary to consider any other matters and that the defendant has not shown it could compensate her adequately in damages. To my mind the plaintiff’s submission is misconceived.....”

24. I find that the balance of convenience tilts in favour of the Defendant/Respondent who is the registered owner of the suit property.



25. Courts have held on numerous occasions that a mandatory injunction, ought not to be granted except in very special circumstances. In the case of Kenya Breweries Limited & Another Vs. Washington O. Okeyo (2002) eKLR the Court of Appeal held;

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4th Edn. Para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff.....a mandatory injunction will be granted on an interlocutory application.

Also in Locabail International Finance Ltd Vs. Agro export and others (1986) 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

26. Also in the case of Kenleb Cons Ltd Vs. New Gatitu Service Station Ltd & Another (1990) eKLR the court stated that;

“to succeed in an application of injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

I am not satisfied that the Plaintiff/Applicant herein deserves this kind of protection.

27. In conclusion I find no merit in this application and the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31ST DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. A. Kamunde for the Plaintiff/Applicant.

Ms. Mwanzia for Mr. Kilukumi for the Defendant/Respondent.

Court Assistant – Mutisya.

