



Kilifi Plantations Limited & another v Kilifi Boatyard Limited; Kenya Forest Service & another (Interested Parties) (Environment & Land Case 41 of 2023) [2023] KEELC 20994 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 41 OF 2023
EK MAKORI, J
OCTOBER 23, 2023**

BETWEEN

KILIFI PLANTATIONS LIMITED 1ST PLAINTIFF

DARTSTAR LIMITED 2ND PLAINTIFF

AND

KILIFI BOATYARD LIMITED DEFENDANT

AND

KENYA FOREST SERVICE INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. The Plaintiffs'/Applicants' Notice of Motion dated 31st May 2023 seeks the following Orders:
 - a. Spent.
 - b. Spent
 - c. Pending the hearing and determination of this suit the Court be pleased to grant a temporary order of injunction restraining the Defendant by themselves, their agents, servants, and or any other person acting on their behalf from however trespassing, occupying, operating on or in any other way alienating and dealing with all of the property known as Kilifi L.R Group V/122 situated within Kilifi County
 - d. This Court be pleased to grant any other reliefs and orders this Court shall deem fit to grant that is necessary for the ends of justice to be met.



- e. The costs incidental to this application be in the cause.
2. An affidavit sworn by Betty Bundotich supports the application, and a further auxiliary affidavit by Christopher Dennis Wilson the Managing Director and Director of the 1st plaintiff Company herein respectively.
3. The defendant/respondent opposes the application, and its Director, Peter Bateman, deposes a replying affidavit. The first interested party, through a replying affidavit deposed by one Evans Kegode, Head of Survey and Mapping, opposes the application, as does the second interested party, through a replying affidavit deposed by one Brian Ikol, its Director of Legal Affairs and Dispute Resolution.
4. From the supporting affidavit of the Managing Director of the 1st applicant company, she deposes that the plaintiffs have been in occupation and control of the suit property known as Kilifi L.R Group V/122 for over 40 years and further that it is the holder of a Temporary Occupation License (TOL) over the property issued in 1985. Its Director Christopher Dennis Wilson deposes in his further supporting affidavit that a portion of the suit property is a mangrove forest, which falls within the jurisdiction of the 1st interested party.
5. The TOL still exists and it is the one which the defendant/respondent has been relying on to exist and operate for the last 21 years any attempt to delegitimize via the issuance of a Special Use License (SUL) to the respondent stands illegal null and void hence the current suit and application to put a stop to the trespass being perpetuated by the respondent and the interested parties.
6. The respondent avers that the applicant has not demonstrated how it got the Special Use License (SUV) issued by the 1st interested party.
7. This suit was brought oblivious of other judicial interventions taken so far to secure the interests of the respondent over the use of the portion it's in occupation. There are various rulings attached to the replying affidavit on the subject matter with the applicant attempting in the past and now to negative the respondent's use of the portion it is in occupation, which can be found in the respondent's replying affidavit. The property in dispute is under the domain of the 1st interested party and the decisions from this court support that the portion in use and occupied by the respondent was acquired legally.
8. The 1st interested party contends that plaintiffs/applicants have no right over the subject area being a public forest falling within the jurisdiction of the 1st interested party and which right has been infringed by other parties. This is because the subject area was declared a public forest even before any ownership rights accrued to them and before the alleged TOL was issued. Proclamation No 44 of 1932 declared the area a mangrove swamp forest reserve whose status and interpretation were given effect by the Supreme Court decision in *Pati Limited v Funzi Island Development Limited & 4 others* (Petition 37 of 2019) [2021] KESC 29 (KLR) (16 July 2021).
9. The 1st interested party contends that this is forest land for which the applicant has no claim and therefore injunctive orders cannot be issued at this stage.
10. The second interested party avers that the TOL relied on by the applicants was issued in the year 1985 it was never stamped and executed by the Commissioner of Lands a requirement specified within the license. There was also no proof of payment of Land Rent from 1986 to 2022 which in accordance with the license terms, automatically leads to the cessation of the license.
11. Further admitting sub-leasing to the respondent indicates a breach of the terms of the TOL. Besides, payment for the license renewal on 31st January 2023 cannot be deemed renewal of the license.



12. With the breaches aforesaid, the 2nd interested party is of the view that there will be nothing to protect by issuing injunctive orders at this stage.
13. The issue that falls for this court's determination is whether, at this juncture, this court can issue injunctive orders.
14. Parties were directed to file written submissions. The applicants, the respondent, and 1st interested parties did comply.
15. The parties referred me to authorities that would guide the court on whether to grant a temporary injunction at this stage. The leading decisions cited were - *Giella v Cassman Brown Co. Ltd* [1973] EA 358, *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125, and *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014]eKLR.
16. The applicant also referred me to several other decisions, vide *Vivo Energy Kenya Ltd v Maloba Petrol Station Ltd & 3 Others* [2015] eKLR, enunciating that the court should not delve into the merits of the suit at this stage but rather address itself as whether the case is arguable. *Niaz Mohammed Janmohammed v Commissioner for Lands & 4 Others* [1996]eKLR, *Said Ahmed v Manasseh Benga & Another* [2019] eKLR and *Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd* - elucidating that monetary compensation should not be considered as a remedy when a person's rights have been infringed and that once a right has crystallized an injunction should be the appropriate remedy. The applicant finally cited the case of *Brayan Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another* [2019] eKLR, which dwelt with the balancing act the court needs to undertake in deciding to grant an injunction.
17. The respondent quoted the cases in *DPP v Justus Mwendwa Katbenge and 2 Others* [2016] eKLR, on the need to preserve the subject matter until the legal rights of the parties were settled and *Kenya Commercial Finance Co, Ltd v Afraba Education Society* [2001] 1 EA 86, where the court held that a party needs to establish the three conditions for grant of injunction sequentially. That is where a party proves a prima facie case, that does not permit 'leap-frogging' by the applicant to the injunction directly without crossing the other hurdles in between.
18. The 1st interested party cited the case of *Pati Limited v Funzi Island Development Limited & 4 others* (Petition 37 of 2019) [2021] KESC 29 (KLR) (16 July 2021) as having affirmed by the Supreme Court the legal status of Proclamation No. 44 of 1932. The 1st interested party also quoted the case of *Kondoo Centre Self Help Group Suing Through Officials Namely James Maina, Daniel Mwangi Gikonyo, Ben Kiplagat Kangogo, Daniel Chege v Attorney General & 5 others* [2014] eKLR, stressing that mere disgruntlement cannot merit an award of an injunction. Finally, the 1st interested party stated to this court the decisions in *Nawaz Abdul Manji & 4 Others v Vandeeep Sagoo & 8 Others* [2017] eKLR and *Karen Bypass Estate Ltd v Print Avenue* [2014] eKLR, which cases dealt with the irreparable injury the applicant may suffer that cannot be compensated by way of damages if no injunction is issued at this stage. The sequential proof of the three conditions set in the *Giella case* (supra).
19. I have considered the materials and submissions placed before me. The cases quoted by the parties on the subject matter were appropriate. The threshold to achieve before the grant of an injunction is as held in the *Giella Case*:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated



by damages and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”

20. The first issue to determine then is whether the applicant has proved a prima facie case with the probability of success as held in *Mrao v First American Bank Of Kenya & 2 others* [2003] KLR 125 as follows:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

21. Betty Bundotich the Managing Director of the applicants deposes that the applicants have been in occupation and control of the suit property known as Kilifi L.R Group V/122 for over 40 years and further that it is the holder of a Temporary Occupation License (TOL) over the property issued in 1985. Christopher Dennis Wilson shareholder and Director of the applicant-deposes in his further supporting affidavit that a portion of the suit property is a mangrove forest, which falls within the jurisdiction of the 1st interested party. The jurisdiction emanates from Proclamation No 44 of 1932, Which declared mangrove swamp forest reserves as follows:

“All land between high water and low water marks (ordinary spring tides) in the localities as described below, viz on the mainland and islands adjacent to the coast from the mouth of the northern Kilifi River in the north, to Ras Ngomeni in the south. In the following creeks and all branches thereof;- Mida (Uyombo), Kilifi (southern), Takaungu, and Mtwapa. Provided that any areas that lie within the foregoing boundaries which may have been, or maybe, declared private property under Crown, are excluded from the forest reserves.’

22. In the case of *Pati Limited v Funzi Island Development Limited & 4 others* (Petition 37 of 2019) [2021] KESC 29 (KLR) (16 July 2021), the Supreme Court in affirming the legal status of Proclamation No. 44 of 1932 held as follows:

“The appellant relies on the provisions of the Forest Act, cap 385 as read with its Subsidiary Legislation and section 5 of the Revision of Laws Act, set out above, to urge that Proclamation No 44 of 1932 ceased to have effect after the enactment of the Forest Act cap 385, as the latter omitted the content of the Proclamation. However, it should be noted that Proclamation No. 44 of 1932 was not made under the Forest Act cap 385. The Proclamation was made under the provisions of the Forests Ordinance Cap 176, which is not one of the laws repealed by the Forest Act Cap 385, the Forest Act No 7 of 2005, or the *Forest Conservation and Management Act* No 34 of 2016. Of significance, is the fact that the Minister never degazetted the suit land as a mangrove forest. A clear reading of section 5 of the Revision of Laws Act, leaves no doubt that Proclamation No 44 of 1932 could not have formed part of the contents of that which was omitted by section 4 of the Forests Act, cap 385 of the Laws of Kenya. 55. Besides, the Forests Act No. 7 of 2005 at section 65 and the *Forest Conservation and Management Act* No. 34 of 2016 at section 77, provide (d) that, notwithstanding the repeal of the preceding Act, ‘any land which, immediately before the commencement of the subsequent Act was a forest or nature reserve under that Act, shall be deemed to be a state or local authority forest or nature reserve, as the case may be, under the succeeding Act.’ Section 77 of the *Forest Conservation and Management Act* specifically sets out that all gazetted or land registered as a forest reserve in its Third Schedule or under any other relevant law shall be deemed to be a public forest under the Act. The Third Schedule



identifies mangrove swamp forests as land declared under Notice No 44 of 1932. Although the word ‘Proclamation’ is not used, we have no doubt that the ‘Notice’ referred to, can only be “Proclamation No 44 of 1932”. The conclusion, to which we must therefore arrive, is that the legal status of mangrove forests as declared in Proclamation No. 44 was saved by the Third Schedule of the *Forest Conservation and Management Act*.”

23. From the preceding, it is evident that the plaintiffs/applicants have no right over the subject area being a public forest falling within the jurisdiction of the 1st interested party and which right has been infringed by other parties. This is because the subject area was declared a public forest even before the title was issued to them and before the alleged Temporary Occupation License (TOL) was issued over forest land.
24. The applicants have not established the legal rights that stand to be infringed since the land is forest land. From the abovementioned, the plaintiffs/applicants have failed to demonstrate that they have a prima facie case with a probability of success.
25. Under the second guiding principle in the Giella case, the applicant must demonstrate that he might otherwise suffer irreparable injury which would not be ordinarily and adequately compensated by an award of damages. The purported sub-lease of the suit property by the applicant is devoid of any proof even at this stage, and further, it is only the 1st interested party that can grant authorization for occupation and use of the subject area. However, if the injunction is granted then the obligations of the licensee in ensuring the sanctity of the mangrove forest will remain suspended for the duration of the injunction thereby occasioning loss that cannot be adequately compensated by an award of damages. The harm to the environment far outweighs the harm to the plaintiffs/applicants as held in the case of *Nawaz Abdul Manji & 4 others v Vandeeep Sagoo & 8 others* [2017] eKLR, where the Court held:

“I have balanced the two concerns and do find that though the falling trees are a threat to the golf course users, it will lead to irreparable harm in clearing portions of the forests without consulting the trustees who are vested with both movable and immovable property of the Club. The harm on the trees far outweighs the harm on humans as the trees are beneficial to a large population and that if the plaintiffs succeed ultimately there will be no trees and that damages will not be adequate compensation.”

The second principle thus is not met by the plaintiffs/applicants to satisfy this court to grant an injunction.

26. The principles stated in Giella’s case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraba Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”.

The plaintiffs/applicants’ have failed to shoulder the burden of satisfying the first two principles.

27. The balance of convenience is in favour of the respondent who is a licensee of the 1st interested party and is in occupation of a gazetted forest. The conditions for issuance are as depicted in the SUL issued pursuant to the determination by the 1st interested party primarily for the purposes of those activities listed in the First Schedule to the license. No person can claim proprietary rights over a gazetted forest that was never available for allocation in the first place. The plaintiffs’/applicants’ application dated 31st May 2023 is hereby dismissed with costs.



**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
23RD DAY OF OCTOBER 2023**

E.K. MAKORI

JUDGE

In the presence of:

M/s Akwana for the Defendant

Mr. Mwai for the Plaintiff

Mr. Munga for the 1st Interested Party

Mr. Kilu for the 2nd Interested Party

Clerk: Happy

