



REPUBLIC OF KENYA



**Kahindi & another v Dyeka & 6 others (Environment & Land Case
82 of 2019) [2022] KEELC 163 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 82 OF 2019**

MAO ODENY, J

MAY 11, 2022

BETWEEN

KADZO KAHINDI 1ST PLAINTIFF

FURAHA KAHINDI KARISA 2ND PLAINTIFF

AND

FURAHA KATANA DYEKA 1ST DEFENDANT

CHARO KATANA DYEKA 2ND DEFENDANT

KADZO KATANA DYEKA 3RD DEFENDANT

ZAWADI KATANA DYEKA 4TH DEFENDANT

SAFARI KATANA DYEKA 5TH DEFENDANT

KAINGU KATANA DYEKA 6TH DEFENDANT

REHEMA KATANA DYEKA 7TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 13th October 2021 by the defendant/applicants seeking the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this Application there be a temporary injunction restraining the Plaintiffs herein their family, relatives, agents, servants, employees or any other person acting under their instructions from constructing, developing, building, selling, leasing, transferring and/or dealing in any manner whatsoever with the suit property known as Kilifi/ Ngerenyi/19 within Kilifi County.



- c. That pending the hearing and determination of this entire suit there be a temporary injunction restraining the Plaintiffs herein their family, relatives, agents, servants, employees or any other person acting under their instructions from constructing, developing, building, selling, leasing, transferring and/or dealing in any manner whatsoever with the suit property known as Kilifi/Ngerenyi/19 within Kilifi County.
 - d. Costs be provided for.
2. The application was supported by the affidavit of Charo Katana Dyeka, the 2nd Defendant who deponed that he was aware that the Plaintiffs had initially filed an application for injunction on the 3rd October, 2019 which was dismissed and no appeal was lodged on the said ruling. Further that the Plaintiffs have not taken steps to set the matter for hearing and that they have instead commenced construction works on the suit property which construction they have been doing to defeat justice.
 3. In response to the application the plaintiffs filed a Preliminary Objection dated 1st November, 2021 based on the following grounds:
 1. That the application dated 13th October, 2021 is res judicata as the application dated 3rd October, 2019 was heard and determined by the ruling of Mr. Justice J. O. Olola on the 16th day of July, 2021 and is therefore an abuse of the court process.
 2. The application has been filed contrary to Section 7 of the Civil Procedure Act and the court lacks jurisdiction to grant the orders sought as the same was subject matter in the Plaintiff's application dated 3rd October, 2021 which was heard and determined on merit by this Honourable Court.
 3. The application violates the provisions of Order 2 Rule 6 of the Civil Procedure and an application under Order 40 of the Civil Procedure is untenable, misplaced and incompetent.
 4. The application is an abuse of court process as an interlocutory injunction cannot be granted unless there is either a counter claim or a prayer for injunction in the statement of defence dated 17th October, 2019.
 4. Counsel agreed to canvas both the preliminary objection and the application vide written submissions which were duly filed.

Defendant/applicants' submissions

5. It was counsel's submissions that the plaintiffs had previously filed an application for injunction which application was dismissed and upon dismissal the plaintiffs commenced construction works and that since dismissal of the Plaintiffs' application for injunction no steps have been taken to set down the suit for hearing.
6. Mr Nyanje stated that the plaintiffs have not filed any replying affidavit and therefore it is not in dispute that the Plaintiffs have commenced construction works on the suit property.
7. Counsel identified two issues for determination as follows: whether there is a proper and competent Preliminary Objection before court and whether the Applicants herein have met the threshold set in the Giella vs Cassman Brown case.
8. Counsel relied on the Section 7 of the Civil Procedure Act and the case of *Mukisa Biscuits Manufacturing Co. Ltd -Vs- West End Distributors Ltd* (1969) EA 698 on preliminary objections and submitted that the fact the plaintiffs' application dated 3rd October, 2019 for injunctive orders was



dismissed does not mean that the defendants are barred from filing a similar application under section 7 of the *Civil Procedure Act*. That it is the Plaintiff who is barred from bringing another application based on the same set of facts, should circumstances and new facts arise.

9. Mr Nyanje also submitted that the doctrine of res judicata is defeated where there is development of fresh circumstances or upon discovery of facts which entirely change the aspects of the case and which could not have been discovered with reasonable diligence when the first application was made and relied on the case of *Siri Ram Kaura vs M. J. E. Morgan* CA 71/1960 (1961) EA 462.
10. Further that by the time the plaintiffs sought for injunctive orders they had not commenced construction works on the suit property and there is now construction works hence the need to preserve the suit land pending the hearing and determination of the case.
11. Counsel submitted that the Plaintiff's argument that the defendants did not file a claim for a permanent injunction is not correct as the Defendants at paragraph 9 of the Plaintiff's averrs that the suit is time barred which he stated that the same is a counterclaim capable of extinguishing the Plaintiff's title.
12. Mr Nyanje relied on the case of *Gulam Miriam Noordin v Julius Charo Karisa* [2015] eKLR where a claim of adverse possession was raised in the defence, and the Court dismissed the objection
13. On whether the applicants have met the threshold for grant of injunctions, it was counsel's submission that the respondent did not file any replying affidavit hence it is deemed that the Plaintiffs have admitted the facts as pleaded and only challenged the present application on points of law.
14. On the issue as to whether the applicants have established a prima facie case counsel submitted that it is not in dispute that the Defendants herein are the children of the late Katana Dyeka who was the brother to the Plaintiffs predecessors in title and that the Defendants have been in occupation over the suit property for a long time. That by the plaintiffs commencing construction works is meant to interfere with the suit land during the pendency of this suit as the plaintiffs have filed many suits which have been unsuccessful.
15. Mr Nyanje therefore stated that the balance of convenience tilts in favour of the defendants to preserve the subject of the suit property.

Plaintiff/respondents' submissions

16. Counsel for the Plaintiffs submitted on the following issues; whether the application is res judicata, whether the application is sustainable in terms of Order 2 Rule 6 and Order 40 of the Civil Procedure Rules and whether the threshold for injunctions have been met under *Giella v Cassman Brown*.
17. On the first issue, counsel relied on Section 7 of the *Civil Procedure Act* and submitted that the application for injunction and the issues thereunder were litigated in the Plaintiff's application of 3rd October, 2019 which was heard and determined hence the court has no jurisdiction to entertain this application.
18. On whether the orders of injunction can be granted in vacuo Mr Atian'g cited the cases of *Josephine Chebet Ruto vs Stanley K. Chepkwony & another* (2017) eKLR and *Ngorika Farmers Co-Operative Society Ltd v John Kiarie & 2 Others* (2006) eKLR.
19. Mr Atian'g urged the court to dismiss the application with costs as it has not met the threshold for grant of injunctions and uphold the preliminary objection as prayed.



Analysis and Determination.

20. There is a preliminary objection and an application for injunction. I will therefore deal with the preliminary objection first of which if upheld there will be no need of dealing with the application for injunction
21. The preliminary objection is based on the doctrine of res judicata and whether the defendants can seek an order of injunction and yet they have not sought for it in their pleadings.
22. It is on record that the plaintiffs filed an application dated 3rd October 2019 for injunction which was heard and determined by this court and the same was dismissed. Upon the dismissal the plaintiffs have not taken any action to fix this matter for hearing but it is deponed by the defendants that the plaintiffs are actively engaged in construction works on the suit land.
23. The doctrine of res judicata is anchored in Section 7 of the *Civil Procedure Act* which bars the court from hearing matters which meet the following ingredients:
 - a. The suit or issue raised was directly and substantially in issue in the former suit.
 - b. That the former suit was between the same party or parties under whom they or any of them claim.
 - c. That those parties were litigating under the same title.
 - d. That the issue in question was heard and finally determined in the former suit.
 - e. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
24. The application dated 3rd October 2019 was by the plaintiffs and not the defendants. As much as the court frowns upon multiple applications which can be avoided and the real issues be heard and determined in the full hearing, there are certain acts that must be stemmed by injunctions to preserve the substratum of the case.
25. If it was the plaintiff filing the current application, the court would declare it an abuse of court process and dismiss it in the first instance, but the application is by the defendants who want to preserve the suit land pending the hearing and determination of the case.
26. I find that the said limb of the objection lacks merit and is therefore disallowed.
27. On the second limb whether the defendants can seek an injunction without filing a counterclaim, in the case of *Josephine Chebet Ruto v Stanley K. Chepkwony & another* [2017] eKLR the court held that:

"I now turn to the second issue which is whether an injunction can be issued in vacuo. In determining this issue, I rely on the case of *James Archimedes Gichana V Pyrethrum Board of Kenya Nakuru HCCC No. 237 of 2007* where the court held as follows:

"Both rules 1(a) and 1(b) of Order 40 have been judicially considered to require a clear indication or prayer in the suit seeking such an injunction. Where an applicant for injunction fails to demonstrate that he sought an order of permanent injunction in his suit, his application is said not to sound with rule 1a or 1b of order 40 and will be deemed to be incompetent. The reason for this is clear. It is found in order 2 rule 6 of the Civil Procedure Rules that no party may in his pleadings make an allegation of fact or raise any new ground of claim inconsistent with his pleadings. No party can depart from his pleadings



whether in evidence or in an interlocutory application. To do so, a party must first amend his pleadings.”

28. In the case of *B.F. Varghese v. Joseph Thomas*, AIR 1957 TC 286 while answering the question whether the defendant can move the court for an injunction against the plaintiff without filing a counter-claim, the court answered in the affirmative in the light of authorities in English Law and held that it can only be in a case where the defendant’s claim arises out of the plaintiff’s cause of action or is incidental to it, that they can ask for a temporary injunction against the plaintiff which view has been followed by many High Courts.
29. It is on record that the defendant has no counterclaim as they only filed a defence with general denial of the plaintiffs’ claim. A party is bound by their pleadings and as such no party should be allowed to ambush another by departing from their pleading unless they first amend such pleadings. The defendant’s claim arises from the plaintiff’s cause of action and the need to preserve the substratum of the case,
30. The only relief that the court can grant is that the status quo obtaining as at the time of this ruling be maintained to preserve the substratum of the suit and pending the hearing and determination of this suit. Parties to comply with Order 11 within 30 days and fix this matter for hearing

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

