



**Mulili v Mbithi & another (Environment & Land Case
E020 of 2020) [2022] KEELC 2788 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E020 OF 2020**

**TW MURIGI, J
JUNE 29, 2022**

BETWEEN

THOMAS KYONZE MULILI PLAINTIFF

AND

JACKSON MUIA MBITHI 1ST DEFENDANT

LAND REGISTRAR, MAKUENI COUNTY 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 15th of October 2021 brought pursuant to Order 40 Rule 2(1) and (2) of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the Applicant is seeking for the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to issue an interim order of injunction restraining the Defendants/Respondents by themselves, their employees, servants and/or agents or any other person claiming under them from entering upon or evicting, directing, harassing or in any other manner interfering with the Plaintiff's quiet possession of the property known as Makueni/Wautu/3774 pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to issue an interim order of injunction restraining the Defendants/Respondents by themselves, their employees, servants and/or agents or any other persons claiming under them from entering upon or evicting, directing, harassing or in any other manner interfering with the Plaintiff's quiet possession of the property known as Makueni/Wautu/3774 pending the hearing and determination of the main suit herein.
 4. Spent.
 5. That the costs of his application be awarded to the Plaintiff/Applicant.



The Applicant's Case

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on the even date.
3. A summary of the grounds and the averments is that the 1st Defendant is the registered owner of the suit land which was hived off from the family land parcel number Makueni/Wautu/344. The Applicant averred that during the adjudication process of Wautu Adjudication Section, his father objected to the hiving of the suit land from land parcel number Makueni/Wautu/344 since it took away some of their settlements and developments.
4. The Applicant stated that he pursued the objection from the Committee level all the way to filing an Appeal before the Minister which was yet to be heard and determined.
5. The Applicant further averred that while the Appeal was still pending for hearing and determination, he established from the Lands Office that the 1st Defendant had been issued with a certificate of title to the suit land which prompted him to write to the Land Registrar to rectify the omission but the same was not done.
6. That instead of rectifying the omission, the Land Registrar summoned him together with 3 other adjacent land owners to attend a meeting so as to point out the boundaries. He contends that the dispute at hand is on ownership and not on a boundary dispute.
7. He further averred that after the Land Adjudication Officer visited the suit property, she wrote a letter to the 1st Defendant advising him to utilise the portion of land that was not in dispute since she observed that the 1st Defendant did not have any developments on the suit property. The Applicant contends that an order of injunction is imperative so as to restrain the Defendant from interfering with the settlements and developments pending the hearing and determination of this suit.

The 1st Respondent's Case

8. Opposing the application, the 1st Respondent vide his replying affidavit averred that the Applicant had not filed an Appeal since the document annexed as a copy of the Appeal was a copy of a letter dated 19/09/2021 by the Applicant's Counsel to the Land Registrar, while a copy of the summons annexed were objection proceedings. He further averred that the document annexed as the copy of the ruling was a letter from the District Land Adjudication and Settlement Officer advising him to work on the area that he had been working on prior to being awarded the suit land.
9. He further averred that Appeal No 358 of 2012 filed by Philip Munuve Mutiso on his own behalf and on behalf of the Applicant was the only Appeal filed against him before the Minister's Tribunal. That after the hearing and determination of the said Appeal, the judgment was forwarded to the Land Registrar who upon verification, issued him a certificate of title on 01/08/2022.
10. The 1st Respondent contends that the issue of fraud was neither here nor there as the Applicant had lost in the Appeal. The 1st Respondent argued that the Applicant having failed to file a Judicial Review could not file a suit before Court. He contends that the only outstanding issue was the identification of boundaries of each of the affected parties.
11. The 2nd Respondent, though served did not file an appearance or respond to the application.
12. The application was canvassed by way of written submissions.



Submissions

The Applicant's Submissions

13. The Applicant's written submissions were filed on 3rd of March 2022.
14. Counsel for the Applicant submitted that the Applicant had satisfied the conditions for the grant of an injunction as laid out in the case of *Giella Vs Cassman Brown Co. Ltd* [1973] EA 358. Counsel further submitted that the Applicant had established a prima facie case with a probability of success as the Appeal to the Minister dated 14th of September 2012 was yet to be heard and determined.
15. Counsel argued that the adjudication process in respect to the suit land was not completed and thus the issuance of title to the 1st Respondent was premature. Counsel further submitted that vide a letter dated 20th of July 2012, the DLASO required the Respondent to utilise the land that he was using since the Appeal was yet to be heard and determined. Counsel further submitted that a ruling by the DLASO dated 23rd of August 2012 confirmed the status quo on the ground at the time of adjudication. To buttress this point Counsel placed reliance on the case of [*Bryan Chebii Kipkoeb Vs Barnabas Tuitoek Bargoria & Another*](#) (2019) eKLR.
16. On the second limb, Counsel submitted that the Applicant stood to suffer irreparable loss which cannot adequately be compensated by an award of damages if the orders sought are not granted since he would be evicted from the suit property and as consequence, he would lose his farms, other developments and valuable farming time.
17. On the third limb, Counsel submitted that the balance of convenience was in favour of the Applicant since he had demonstrated that he had a prima facie case with a high probability of success and that he would suffer irreparable loss which cannot adequately be compensated by an award of damages. Reliance was placed on the case of [*Margaret Njambi Kamau Vs John Mwatha Kamau & Another*](#) (2019) eKLR.

The 1st Respondent's Submissions

18. The 1st Respondent's written submissions were filed on 24th of March 2022.
19. Counsel for the 1st Respondent gave an elaborate history of the suit land and submitted that it emanated from ancestral land. Counsel submitted that during the adjudication process, the entire land was given no P/No. 344 Wautu Land Adjudication Section out of which the Applicants got 27 acres while the Respondents got 24 hectares. That later, the Defendant filed a Committee case desiring his father's portion to be excised from land parcel 344. He stated that the Wautu Adjudication Section Committee in its decision made on 24/04/2003 split land parcel number 344 in two portions. Counsel went on to submit that the Applicant and his relatives retained parcel No. 344 Wautu Adjudication Section while the Respondent retained the other portion which was named parcel No. 3774 Wautu Adjudication Section.
20. Counsel submitted that the Plaintiff being dissatisfied, appealed against the decision by the Committee to the Board and thereafter to the Land Adjudication Officer and both Appeals were dismissed on 24/08/2011. That being dissatisfied with the decision by the Land Adjudication Officer, the Applicant appealed to the Minister on 14/09/2012. Counsel submitted that the Appeal is an illegality since it was filed out of time and in contravention of Section 29(1) of the [*Land Adjudication Act*](#).
21. Counsel further submitted that the Applicant had failed to disclose the fact that Appeal No. 255 filed by Philip Mutiso and Appeal No 475 filed by the Applicant were consolidated and heard as one Appeal



and later on dismissed, while Appeal no 358/2012 filed by Philip Masavu Mutiso on his own behalf and on behalf of the Applicant was heard and determined. Counsel argued that the Plaintiff lost in the Appeal, hence the present Appeal is res judicata.

22. Counsel submitted that even if the Plaintiff has a separate Appeal before the Minister, he ought to have obtained consent from the Land Adjudication officer to file the present suit or wait until the register is finalized.

Analysis and Determination

23. Having considered the application, affidavits and the rival submissions, I find that the issue for determination is;

Whether the Applicant has met the threshold for the grant of an order of injunction.

24. The law that governs applications for injunction is premised under Order 40 Rule 1 of the [Civil Procedure Rules](#) 2010 which provides as follows: -

1. Where in any suit it is proved by affidavit or otherwise-
 - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

25. Both parties made reference to the case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 which lays down the principles applicable in an application for an injunction as follows: -

- i. First the Applicant must show a prima facie case with a probability of success.
- ii. Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
- iii. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

26. The first issue for determination is whether the Applicant has made out a prima facie case with a probability of success to warrant the grant of an order of an injunction.

27. A prima facie case was defined by the Court of Appeal in [Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others](#) (2003) eKLR 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 or rebuttal from the latter.”



28. On the issue as to whether the Applicant has established a prima facie case with a probability of success, the Applicant's claim over the suit property is anchored on an Appeal that is pending before the Minister's Tribunal. The Applicant averred he pursued the objection from the committee level all the way to filing an Appeal to the Minister. He further averred that being dissatisfied with the decision made by the Land Adjudication Officer, they filed an Appeal which was yet to be heard and determined.
29. I have carefully looked at annexure TKM-1 in the Applicant's supporting affidavit and I find that it is an Appeal dated 14th of September 2012 against the decision of the Land Adjudication Officer Machakos District to the Minister of Lands Settlement and Physical Planning. From the Appeal, it is evident that the Applicant is appealing against the decision by the Land Adjudication Officer who pursuant to Section 29(1) of the *Land Adjudication Act*, dismissed the Applicant's objection against the register in respect to land parcel number 3774 resulting to a new parcel from the sub-division of parcel number 344.
30. The Applicant averred that he has established a prima facie case since the Appeal before the Minister was yet to be heard and determined. Counsel submitted that the adjudication process with respect to suit property was not completed hence the issuance of the certificate of title to the Defendant was premature. On the other hand, Counsel for the Respondent submitted that the Applicant had not established a prima facie case since the Appeal to the Minister was an illegality as it was filed out of time. Counsel further submitted that the Appeal was filed 386 days after the decision of the Land Adjudication Officer which was contrary to the provisions of Section 29(1) of the *Land Adjudication Act*. Counsel went on to submit that the Applicant had not obtained the necessary consent from the Land Adjudication Officer to institute the present suit in Court.
31. The *Land Adjudication Act* deals with matters pertaining to land adjudication. In its preamble, it states that it is an Act of Parliament to provide for the ascertainment and recording of rights and interest in Trust Land, and for purposes connected therewith and purposes incidental thereto.
32. My interpretation of Sections 26 to 29 of the Act is that it provides for a situation where a party decides to follow all the appellate processes under the Act until they are exhausted.
33. In accordance with the provisions of Sections 26 to 29 of the Act, the Applicant instituted his case before the Adjudication Committee and opted to follow the appellate process provided under the Act. The Plaintiff being aggrieved with the findings of the Land Adjudication officer filed an Appeal before the Minister challenging the decision of the Land Adjudication officer.
34. Section 29 of the *Land Adjudication Act* provides that;
 1. Any person who is aggrieved by the determination of an objection under Section 26 of this Act may within sixty days after the date of the determination, appeal against the determination to the Minister by;
 - a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the orders shall be final.



2. The Minister shall cause copies of the order to be sent to the director of Lands Adjudication and to the Chief Lands Registrar.
 3. When the appeals have been determined, the Director of Lands Adjudication shall;
 - a. Alter the duplicate adjudication register to conform with the determinations; and
 - b. Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alteration and a copy of the certificate to the Chief Lands Registrar, who shall alter the adjudication register accordingly.
35. Section 30(1) provides that;
- Except with the consent in writing of the adjudication officer, no person shall institute and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.
36. The Plaintiff submitted that he had established a prima facie case since there was an appeal pending before the Minister which was yet to be heard and determined. He further submitted that the adjudication process with respect to parcel number 344 Wautu Adjudication Section had not been completed hence issuance of the title to the Defendant was premature.
37. Section 30 of the Act applies where a party opts not to exhaust all the processes under the Act but instead, to obtain a consent from the Land Adjudication Officer and move to Court before the register is made final.
38. Section 30(1) of the *Land Adjudication Act* provides that;
- “Except with the consent in writing of the adjudication officer, no person shall institute and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.”
39. The wordings in Section 30(1) of the Act are mandatory. It sets out the conditions under which a party can approach the Court before the adjudication process is complete. The said condition is that consent must be obtained from the Land Adjudication Officer. The requirement for consent to be granted by the Land Adjudication Officer before a suit can be filed is a statutory requirement.
40. In the case of *Benjamin Okwaro Estika Vs Christopher Anthony Ouko & Anor* [2013] eKLR the Court of Appeal held that: -
- “That being so, the mandatory requirement of Section 30(a) had to be complied with i.e. consent of the Land Adjudication Officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”



41. Counsel for the Applicant submitted that the Adjudication process with respect to the suit property was not completed. It is evident that the Plaintiff did not obtain consent from the Land Adjudication Officer to file a civil suit claiming for an interest in land as required. The Applicant did not obtain consent before he filed the present suit.
42. I find that the Plaintiff did not comply with the mandatory provisions of Section 30(1) of the [Land Adjudication Act](#) before approaching the Court. Having failed to comply with provisions of Section 30(1) of the Act, I find that the Plaintiff is not properly before the court.
43. As regards the issue whether the Appeal before the Minister is valid or not or whether the Appeal is res judicata, I find that it is not in the province of this Court to make that declaration on matters that are still pending before the Minister.
44. Consequently, I find that the Applicant has not established a prima facie case with a probability of success. Having so found, this Court will not go into the merits as to whether the Applicant has satisfied the other two conditions required for the grant of an injunction.
45. In the end, I find that the application dated 15th of October 2021 is devoid of merit and the same is dismissed with costs to the Respondent.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JUNE, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms. Kalinga for the Plaintiff/Applicant

