



REPUBLIC OF KENYA



KENYA LAW
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**Kimuya v Mohammed & another (Environment & Land Case
144 of 2017) [2022] KEELC 2264 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 144 OF 2017**

TW MURIGI, J

JUNE 15, 2022

BETWEEN

LYDIA MUKULU KIMUYA APPLICANT

AND

SALIM MOHAMMED 1ST RESPONDENT

MUSYOKA HAMADI 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 1st of October 2021 brought pursuant to Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40 Rule 1, 2, 3 and 4 of the [Civil Procedure Rules](#) and all other enabling provisions of the law, the Applicant is seeking for the following orders: -
 1. Spent.
 2. That a temporary order of injunction do issue restraining the Defendants/Respondents, their agents, servants or any one acting or claiming through them from entering, trespassing upon, excavating, constructing and or in any other manner interfering with the Plaintiff's parcel of land number Makindu Township 921 pending the hearing and determination of this application.
 3. That a temporary order of an injunction do issue restraining the Defendants/Respondents, their agents, servants or any one acting or claiming through them from entering, trespassing upon, excavating, constructing and or in any other manner interfering with the Plaintiff's parcel of land number Makindu Township 921 pending the hearing and determination of this suit.
 4. That the costs be borne by the Defendant.



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 same day.
3. A summary of the grounds and the averments is that the Applicant is the registered owner of land parcel number Makindu/Township/921 which borders a Muslim cemetery to the western side. The Applicant averred that on 16th of May 201, she was issued with a certificate of lease by the Land Registrar Makueni County.
4. That around August 2017 the Respondents trespassed on the Applicant's land and started building a perimeter wall claiming that the property was a Muslim cemetery to the detriment of the Applicant. The Applicant contends that unless the Respondents are restrained by an order of an injunction, she will suffer irreparable loss.

Respondents Case

5. Opposing the application, the Respondents vide the 2nd Respondent's replying affidavit sworn on 24th of November 2021 averred that the application was an abuse of the Court process as the orders sought were similar to the orders sought in the application dated 01/09/2016 which was dismissed for want of prosecution.
6. He further averred that the Applicant's suit was equally dismissed for want of prosecution but later reinstated on 12/04/2018. He averred that the Applicant without leave of the court sought for the hearing of the dismissed application which prompted his Advocate to file grounds of opposition to reinstate the dismissed application. That Applicant failed to file a response to the grounds of opposition despite being granted leave by the court to do so. He further averred that they had not trespassed on the Applicants land.
7. The Respondents further averred that the certificate of title issued to the Applicant was illegally obtained since the survey of the suit land was not conducted. The Respondents contends that the department of lands allocated the suit land to the Muslims residing in Makindu to be used as a cemetery. He argued that if the orders sought are granted, the demolition of the tombs and the exhumation that would follow would distress the families of the deceased persons buried therein. He further averred that the office of the Chief had confirmed that the extension of the Makindu Muslim cemetery has always been in possession of the Madina.
8. The application was canvassed by way of written submissions.

Submissions

9. The Applicant's written submissions were filed on 18th of February 2022.
10. Counsel for the Applicant submitted that for an order of an injunction to issue, the Applicant, the must satisfy the conditions laid down in the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 which were later emphasized by the Court of Appeal in Civil Appeal No 4 of 2015 *Lucy Wangui Gachara v Minuudi Okemba Lore* (2015) eKLR.
11. Counsel submitted that the Applicant has established a prima facie case as she had demonstrated that she was in the possession of the land and that she had received the lease to the suit land. Counsel went on to submit that the Respondents' had trespassed on the suit property had not produced any documents



- to demonstrate that they are the owners of the suit land. Counsel placed reliance on the following authorities in support of his submissions.
- a. Mombasa Court of Appeal C.A. No 39 of 2002 *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR.
 - b. *Alwalaa Construction Company Ltd v Synergy Industrial Credit Limited & Another* (2014) eKLR.
12. On the second limb, Counsel submitted that the Applicant would continue to suffer irreparable loss as the Respondent's continue to trespass the suit land and build the perimeter wall. To buttress his submissions on this point, Counsel relied on the case *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR.
 13. As regards the balance of convenience, Counsel submitted that it tilts in favour of issuance of the orders so as to preserve the suit property. Reliance was placed on the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* (2016) eKLR.
 14. The Respondents written submissions were filed on 13th of April 2022.
 15. Counsel for the Respondents raised the following issues for the Court's determination: -
 - i. Whether the application is an abuse of the Court process, frivolous, vexatious and a waste of the court's time.
 - ii. Whether the Applicant has met the threshold for the grant of an injunction.
 16. In answer to the first issue, Counsel submitted that the orders sought in the present application were similar to the orders sought in the application dated 01/09/2016 which was dismissed for want of prosecution. That the suit was equally dismissed on 12/04/2018 but later reinstated upon the application of the Applicant.
 17. Counsel submitted that the Applicant sought to reinstate the application dated 01/09/2016 through mischief which necessitated the Respondents to file grounds of opposition. That the Applicant failed to reply to the grounds of opposition despite being granted leave to do so. Counsel submitted that the application is therefore an abuse of the Court's process. Reliance was placed on the case of *Nicholas Bongu Ngong'a v Joseph Hanington Oluoch*, Kisumu High Court Civil Case No 3 of 2007.
 18. As regards to the issue as to whether the Applicant has met the threshold required for the grant of an injunction, Counsel submitted that the Applicant had not established a prima facie case as she was not the owner of the suit property.
 19. Counsel submitted that the Respondents had not trespassed on the suit property as it was allocated to Makindu Muslim Cemetery vide a letter of allotment dated 14th of October 1995 and that the Respondents were in possession and use of the suit property. Counsel argued that the lease issued to the Applicant was illegally and irregularly obtained as the suit land was not surveyed.
 20. On the second limb, Counsel submitted that the Applicant would not suffer irreparable loss as the suit land had always been used as a community cemetery. Counsel submitted that the Applicant had not demonstrated that she was developing the land as the document presented by the Applicant was a PDP plan and not a development plan. Counsel placed reliance on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR.
 21. As regards the balance of convenience, Counsel submitted that it tilts in favour of maintaining the status quo of the suit property.



Analysis And Determination

22. Having considered the application, affidavits and the rival submission, I find that the issues for determination are;
 - i. Whether the application is an abuse of the court process.
 - ii. Whether the Applicant is entitled to the orders sought.
23. This Court is called upon to first determine whether the application is an abuse of the Court process. Learned Counsel for the Respondents submitted that the application is an abuse of the Court process as the Applicant had sought for similar orders in an application dated 01/09/2016 which was dismissed for want of prosecution.
24. It is evident from the Court record that the Applicant, in her application dated 1st of September 2016 sought for the following:-orders: -
 - a. That this application be certified urgent, service dispensed with and the same to be heard ex-parte in the first instance.
 - b. That this Honourable Court do issue an order for temporary injunction restraining the 1st and 2nd Defendants by themselves, their agents, servants and/or employees from trespassing upon, depositing building materials, digging, excavating, constructing or in any other manner howsoever interfering with the Plaintiff's land parcel number Makindu Township/921 pending the hearing of this application inter partes.
 - c. That this Honourable Court do issue an order of a temporary injunction restraining the 1st and 2nd Defendants by themselves, their agents, servants and/or employees from trespassing upon, depositing building materials, digging, excavating, constructing or in any other manner howsoever interfering with the Plaintiff's land parcel number Makindu Township/921 pending the hearing and determination of the main suit.
 - d. That the costs of the application be provided for.
25. The record shows that when the application came up for hearing on 26th of October 2016, Mr. Jamaa learned Counsel for the Defendant informed the Court that he was ready to proceed. There was no appearance on the part of the Plaintiff/Applicant or her Counsel. The Court having established that the hearing date was taken by consent of the parties, dismissed the application for want of prosecution.
26. This matter came up for hearing On the 12th of April 2018. Ms Mbuvi learned counsel for the Defendants was present in court while the Plaintiff and her Counsel were absent. The Court having established that service of the hearing notice had been effected upon the Plaintiff dismissed the suit for nonattendance.
27. It is evident from the court record that the Applicant filed an application dated 7th of May 2018 and sought for the following orders: -
 - a. That the Honourable Court be pleased to reinstate this suit and set aside the orders of dismissal issued on 12th of April 2018.
 - b. That leave be granted to the Plaintiff to comply with Order 11 of the [Civil Procedure Rules](#) to file witness statements, list of witnesses and list of documents.
 - c. That cost be provided for.



28. On 31st of May 2108, the Court allowed the application to reinstate the suit on the grounds that it was unopposed.
29. I have read the defendants grounds of opposition dated 5th of October 2018 and I note that they are with respect to the Plaintiff/Applicant's application dated 1st September 2016 which was dismissed on 26th of October 2016 and not an application to reinstate the application.
30. Upon perusal of the Court record, I have not come across an application to reinstate the application dated 1st of September 2016. Having established that the Applicant has not filed an application to reinstate the application dated 1st of September 2016, this Court is called upon to determine the question whether the present application is an abuse of the court process.
31. Discussing what constitutes abuse of the Court process, the Court of Appeal in the case of *Muchanga Investment Limited v Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No 25 of 2002 (2009) eKLR stated that;

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bonafides and frivolous, vexatious or oppressive.”
32. The Applicant instead of filing an application to reinstate the application dated 1st of September 2016, filed the present application seeking for the same prayers. Having filed an earlier application which is similar to the present application, it is the finding of this court that the filing of the application dated 1st of October 2021 is an abuse of the court process and the Court cannot allow the same.
33. Having found that the instant application is an abuse of the court process, I find that the application must fail in its entirety. In the end, the application dated 1st of October 2021 is dismissed with costs to the Respondents.
34. The parties herein are directed to comply with Order 11 of the *Civil Procedure Rules* within the next 30 days.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF JUNE, 2022.

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi

Kithuka for the Applicant

Jamaa for the Respondent

