



Kiiru & 2 others v Gakuya & 4 others (Environment & Land Case E399 & E053 of 2021 (Consolidated)) [2022] KEELC 15634 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 15634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E399 & E053 OF 2021 (CONSOLIDATED)**

LN MBUGUA, J

JUNE 9, 2022

BETWEEN

ENG JOSEPH KARANJA KIIRU 1ST PLAINTIFF

PROF. NANCY NJARUA KARANJA 2ND PLAINTIFF

AND

HON. JAMES MWANGI GAKUYA APPLICANT

AND

HON. JAMAES MWANGI GAKUYA DEFENDANT

AND

ENG. JOSEPH KARANJA KIIRU 1ST RESPONDENT

PROF. NANCY NJARUA KARANJA 2ND RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI 3RD RESPONDENT

LANDS AND PHYSICAL PLANNING 4TH RESPONDENT

RULING

Background

1. The suit ELC 399 of 2021 (Eng Joseph Karanja Kiiru & Prof Nancy Njarua Karanja vs Hon James Mwangi Gakuya) was filed vide a Plaint dated November 22, 2021 in which the Plaintiffs aver that they are the registered owners of the suit Parcel LR No 12672/14 but they came to learn that Defendant had invaded the property. They therefore sought orders inter-alia, a declaration that they are the sole and legal proprietors in the leasehold interest in the suit property, eviction of the defendant, a permanent injunction restraining the Defendant and his agents from trespassing and/or interfering with the suit



land as well as a mandatory injunction compelling the Defendant to restore the suit property to the same condition it was before the trespass and/or encroachment.

2. The Plaintiff also filed an application contemporaneously with the suit seeking temporary orders of injunction. Apparently, when the said application was served upon the Defendant, he resulted to filing his own suit ELC. No 053/2021(OS) (Hon James Mwangi Gakuya vs Eng Joseph Karanja Kiiru, Prof Nancy Njarua Karanja, The County Government of Nairobi & The Registrar of Titles) vide an Originating Summons dated December 8, 2021. In the said suit, he is seeking temporary orders of injunction against the Plaintiffs in 399 of 2021 as well asserting his claim of adverse possession in the suit land.
3. Thus the protagonists desire to have orders of injunction against each other. The court had on different dates reserved the rulings in respective of the two files for delivery on February 9, 2022. However, after perusing the records in the two files, I have found it expedient to deliver just one ruling while at the same time consolidating the two files for reasons to be given herein.

Settlement ADR

4. On February 9, 2022 when the ruling in both files was scheduled to be delivered, the advocates for the parties informed the court that they were exploring Alternative Dispute Resolution Mechanisms (ADR) prompting the court to suspend the rulings. The court gave a mention date of May 10, 2022. Come the date of May 10, 2022 and the advocate for the parties could not agree on whether there was a settlement, prompting the court to schedule a date for delivery of ruling which had earlier on been put on hold.

Consolidation

5. It is not fathomable indeed it is absurd and messy for the court to entertain parallel proceedings in which the parties are more or less the same, the subject matter is the same and they are seeking more or less the same prayers (well at least in so far as the prayers for injunction orders are concerned). This court has a constitutional mandate to ensure that justice is not delayed and that justice is administered without undue regard to procedural technicalities in line with the provisions of Article 159 (2)(b&d) of the Constitution. The court also invokes the provisions of Section 3A of the Civil Procedure Act which stipulate that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

6. I find that the filing of the suit ELC No 053 of 2021(OS) is an impediment to the expeditious and harmonious administration of justice and amounts to an abuse of the court process since the plaintiff therein could have filed his pleadings in the existing suit no ELC 399 of 2021.
7. In the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, it was held that;

“The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black’s law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of



court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - c. Where two similar processes are used in respect of the exercise of the same right.....”
8. Having come to the conclusion that the existence of the two parallel suits does not augur well in the administration of justice, I then proceed to have the two suits consolidated. To this end, I make reference to the case of *Korean United Church of Kenya & 3 Others vs Seng Ha Sang* (2014) eKLR cited in *Selecta Kenya Gmbh & Co KG v Chase Bank Kenya Limited & 2 others* [2018] eKLR, where it was stated that;
- “consolidation of suits is done for purposes of achieving the overriding objective of the *Civil Procedure Act*, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”
9. For purposes of the prosecution of the two suits, good order and Active Case Management, the lead file shall be ELC E399 of 2021 which happens to be the older suit. The parties shall be identified as Eng Joseph Karanja Kiiru and Prof Nancy Njarua Karanja as the claimants while Hon James Mwangi Gakuya is the Counter-claimant in so far as the current applications are concerned.

Case for the Claimants

10. The Claimants filed their application dated November 22, 2021 seeking the following orders:
- “Pending the hearing and determination of this application interpartes and the suit, this honourable court be pleased to issue a temporary injunction restraining the Defendant by himself, his personal representatives, his servants agents and/or employees or any other person or entity from trespassing encroaching, erecting buildings, selling, transferring, leasing out, alienating or in any other way dealing with all the property known as LR Numbers 12672/14 IR Number 88453 measuring 0.199500Ha, and that the OCS Gigiri police station be directed to ensure compliance of the orders herein.”
11. The Claimants aver that they purchased the suit property on December 18, 2006, they were registered as the owners of the land in year 2007 and that they have been in peaceful and quiet possession of the property for the last 24 years.
12. They state that on November 13, 2021, they discovered that the Counter-Claimant had trespassed onto the suit property and started to develop it by putting up a perimeter wall around it and was putting up a permanent building. They therefore desire to have the injunctive orders issued against the Counter Claimant.



Case for the counter claimant

13. When the matter came up before me on December 6, 2021, Counsel for the Counter-Claimant stated that they would not file a response to the application dated November 22, 2021, instead, they drew the attention of the court to their documents which they had filed namely:
 - A preliminary objection dated December 6, 2021
 - An application dated December 6, 2021
14. Counsel further stated that the Counter-claimant is in occupation of the suit land.
15. The Counter-Claimant's preliminary objection dated December 6, 2021 is raised on the following grounds:

“ That the Applicants’ supporting affidavit of the notice of motion application and verifying affidavit of the plaintiff both dated the November 22, 2021 have been irregularly signed purported with an electronic signature that falls short of the standards set in law to wit, Sections 2, 830, 83P and 83R of the *Kenya information and Communications Act* thus the affidavits are fatally and incurably defective, hence the notice of motion application and plaint dated the November 22, 2021 ought to be struck out”
16. The orders sought by the Counter-Claimant in his application dated December 6, 2021, are more or less similar to what is contained in the preliminary objection.
17. A perusal of the file reveals that the counter claimant had also filed a notice dated December 6, 2021 to cross-examine the Claimants and a certain advocate.
18. A further perusal of the digital file reveals that the Counter claimant had filed a chamber summons application dated December 20, 2021 seeking orders that;

“ the court be pleased to hear and make an appropriate directions on the notice of motion application joined to this chamber summons.”
19. For reasons that the court has not fathomed, the counter Claimant uploaded the said Chamber Summons application a record 6 times! in the digital CTS System. However, no notice of motion was attached to the said chamber summons. I however discern that the Counter Claimant desired that the issue of cross-examination be dealt with by the court.
20. The Counter Claimant also filed his Originating Summons suit (ELC E056 of 2021) dated December 8, 2021 in which he is seeking temporary orders of injunction against the claimants while at the same time asserting his claim of adverse possession on the suit property.
21. On December 6, 2021 the court gave directions for the application by the Claimants dated November 22, 2021 and the preliminary objection and application by the Counter Claimant both dated December 6, 2021 to be heard simultaneously of which the respective parties were to file and serve their submissions within 14 days. I have only seen submissions of the Claimant.

Submissions

22. The Claimants aver that the preliminary objection raised by the Counter Claimant does not raise pure points of law and that the responses thereto invites factual responses as the assertions by the Counter Claimant were that electronic signatures were lifted and placed onto affidavits of the Claimants. The



Claimants relied on the cases of *Samuel Waweru v Geoffrey Muband Mwangi* (2014)eKLR, *Daylight Drycleaners Limited v Samchi Telecommunications Limited & Another* (2015) eKLR, *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* (1980) eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent electoral and boundaries Commission & 6 Others* (2013) eKLR.

23. On injunction, the Claimants aver that they are the lawful owners of the suit property and that the Counter Claimant has not controverted this assertion. Thus they have established a prima facie case. It is further contended that the continued trespass is causing significant change on the suit property hence they have met the criteria for issuance of injunctive orders.

Determination.

24. The issues for determination are;whether the supporting and verifying affidavits of the Claimants should be struck out along with their application and the suit.Whether the injunctive orders should be granted in favour of the Claimants or Counter Claimants.
25. On the issue of striking out the affidavits, the Counter claimant simply made a sweeping statement that the electronic signature were lifted upon the aforementioned documents. That is not a pure point of law and does not meet the criteria set out in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696. As pointed out earlier in this ruling, the provisions of Article 159(2) (d) of the *Constitution* implore this court to dispense justice without undue regard to procedural technicalities. The Counter claimant has not pointed out a clear procedural lapse that goes into the substantive root of the matter to warrant the striking out of the aforementioned affidavits.
26. This court is also at a loss as to why the Counter-Claimant is filing the preliminary objection only to assert the same issues in the application of December 6, 2021 not to mention that he has filed a further application of December 20, 2021 touching on the same issues.
27. The provisions of Section 1B of the *Civil Procedure Act* stipulate that:
- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology
28. While Section 1A(3) thereof provides that:
- “ A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act.....”.
29. This court has a duty to apply active case management so as to ensure that focus is on the substantive issues which ought to be canvassed in the main suit and not in interlocutory applications and preliminary objections.



30. In the case of *Lawrence Kinyua Mwai v Nyariance Farmers Co Ltd & Another* (2019) eKLR, I emphasized the need for Active Case Management in the following words:

“Active Case management enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts.

Active Case management is also the effort by courts to handle cases in such a manner that they are resolved fairly and as promptly and economically as is reasonable in the circumstances of the case. The fairness part can be found within the notion of procedural justice while the promptness and economics part of the case management can be found within the notion of the efficiency of justice” .

31. All that I am stating is that the filing of a plethora of applications and preliminary objection by the Counter Claimant is uncalled for as the net effect is to derail the prosecution of the main suit(s).

32. All in all, I find that both the preliminary objection and the application dated December 6, 2021 are not merited. The same are dismissed with costs to the Claimants.

33. On the issue of injunction, this court has keenly gone through the pleadings of the rival parties. The Claimants aver that they are the registered owners of the suit land. The Counter claimant is staking a claim of adverse possession.

34. I note that in paragraph 16 of the plaint in ELC 399 of 2021 and in paragraph 15 of the supporting affidavit of Eng. Joseph Karanja, the Claimants aver that they have been in peaceful occupation of the suit property for the last 24 years, but the nature and extent of that occupation has not been explained. It is clear that one of the major relief's sought by the Claimants in their pleading is the eviction of the Counter Claimant.

35. When the matter came up before me on December 6, 2021, the advocate for the Claimants confirmed that indeed the Counter Claimant is the one on the suit land.

36. Thus if this court was to grant injunctive orders sought for by the Claimants at this interlocutory stage, it would be tantamount to granting one of the major reliefs sought in their suit. In the case of *Daniel Atibu Jasimba v Ainea Sandanyi Magana* [2013] eKLR, the court had this to say in respect of a prayer relating to a major relief;

“Since the Plaintiff's suit is for eviction of the defendant from the said residence, such an injunction will amount to granting a major relief in the suit without the benefit of a hearing”.

37. Does this give the Counter-Claimant a blank cheque to deal with the suit property? as he wishes. Certainly not. While the court does not wish to deal with contested issues at this interlocutory stage, I must at the same time give orders appertaining to the preservation of the suit land. I have perused the material presented before me, particularly the photographs availed by the Counter Claimant as Anneture “JMI”. I see a large storey house which is in the process of construction. It is obviously not occupied. The other structures are recently built with the heap of left over building materials visible next to what appears to be a gate house. The shrubs, trees and or flowers are young. I conclude that although the Counter Claimant is the one in control of the suit premises, the said premises were in the process of construction hence unoccupied.



38. In that regard, the appropriate orders to give is the maintenance of status quo. What does that mean? In *Daniel Kinyanjui Gitau & 227 others v Mary Ruguru Njoroge* [2020] eKLR, the court cited the Court of Appeal case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR where “*stautus quo*” was defined as follows:

“Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the Court order.”

39. I discern the status quo on the land to mean that the Counter Claimant has put up a storey building on the land, but the same is incomplete and unoccupied. In that regard, I proceed to give final orders as follows;

1. The application and preliminary objection dated December 6, 2021 filed by the Counter Claimant James Mwangi Gakuya are dismissed with costs to the Claimants. (Josph Karanja Kiiro & Nancy Njarua Karanja).
2. The application dated November 22, 2021 is disallowed and instead, the court gives an order of maintenance of status whereby;
 - i. No further constructions are to be carried out in the suit property by the Counter claimant.
 - ii. The premises are not to be occupied.
 - iii. The suit land is not to be alienated.
3. The two suits ELC. E399 of 2021 and ELC E053 of 2021 (OS) are hereby consolidated and the former suit shall be the lead file.
4. The costs of the application dated November 22, 2021 shall abide the outcome of the suit(s).

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Muringe Njage for the Plaintiff

M/S Ondanga holding brief for Shadrack Wambui for the Defendant/Respondents

Court Assistant: Eddel Barasa

