Oike Keenyokie Suswa Trust Registered Trustees v County Government of Narok & 2 others (Environment & Land Case E003 of 2022) [2022] KEELC 2657 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2657 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE E003 OF 2022

CG MBOGO, J

JULY 26, 2022

BETWEEN

OIKE KEENYOKIE SUSWA TRUST REGISTERED TRUSTEES ..... PLAINTIFF

AND

COUNTY GOVERNMENT OF NAROK ..... 1ST RESPONDENT

COUNTY LAND REGISTRAR NAROK ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

1. Before this court for determination is the notice of motion application dated April 8, 2022and expressed to be brought under Section 1A ,1B and 63 C of the *Civil Procedure Act*, Order 40 Rule 1 & 2 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders: -

    1. spent

    2. spent

    3. That pending the hearing and determination of this suit, a temporary injunction be issued directed to the defendants restraining them, whether by themselves, their agents, servants, employees or otherwise whosoever from entering into, occupying, constructing any other structure whatsoever, using or abusing howsoever or otherwise interfering with or doing anything in any manner whatsoever and howsoever that may prejudice the plaintiff's interest in and quiet possession of Title Number Cis Mara/Suswa Kitet/2.

    4. That costs of this application be provided for.

2. The application is premised on the grounds on the face of it and in the supporting affidavit of Livingstone Musanka Kisotu sworn on even date. In his supporting affidavit, the applicant deposed

that onJuly 25, 2000a request was made to the then Narok County Council (now the 1st respondent) requesting for grant of title No. Cis Mara/Suswa Kitet/2- the suit property to the Keekonyokie community to enable it start various community-based projects and that through the meeting it was resolved that land referred to as holding ground be granted to the applicant subject to the conditions that a trust be formed by the applicant and that the suit property should not be subdivided.

3. The applicant further deposed that pursuant to the resolution and conditions of the meeting, the applicant incorporated a trust and a certificate of incorporation was issued on September 24, 2001.On March 22, 2022, the applicant conducted an official search which established that the 1st respondent had registered the suit property in its name whereupon, they reported fraudulent acts at Nairagie Enkare Police Station.

4. The applicant deposed further that the 1st defendant obtained the title and registration of the suit land illegally, fraudulently and un-procedurally the same being in breach of the its legitimate expectation and by reason of that the applicant has suffered injury and damage and fear of being evicted and dispossessed and also anxiety that the suit land may be alienated and acted upon in a manner that is injurious to the livelihood of the applicant. Further that the actions of the respondents are a breach of legitimate expectation of the applicant which will affect the applicant's right to plan its life and the life of its beneficiaries with a sense of certainty, trust, reasonableness and reasonable expectation. As it is now, the respondents are in the process of subdivision and acting on the land in a manner that is detrimental to the interests of the applicant.

5. The 1st respondent filed a replying affidavit in opposition to the application sworn on June 8, 2022 by Elizabeth Sanangoi Lolchoki, the County Secretary. She deposed that the application is frivolous, vexatious, bad in law, meritless and an abuse of the court process and is meant to challenge the constitutional mandate of the 1st defendant to hold land as enshrined under Article 63 (2) (d) (iii) as well as Article 63 (3) of *the Constitution* and, for the reason that the suit land is registered in its name and has reserved the same for use of the community living there as holding ground. The 1st respondent further deposed that it beats logic for the applicant who was registered in 2001 to claim ownership whereas it did not make deliberate efforts to register the suit property for 22 years now and its claim is a mere afterthought and a mischievous and malicious act perpetrated by the persons controlling the affairs of the applicant with the intention to engage in fraudulent activities on the suit property.

6. The 1st respondent further deposed that it denies knowledge of the minutes of the full meeting of July 25, 2000 as it does not appear in any records inherited by the 1st respondent from the defunct Narok County Council and which does not bare (*sic*) any letter head, does not indicate where the meeting was held and does not indicate any deliberations made concerning the registration of ownership and title to the suit property in the name of the applicant. Further the application is founded on fabricated and unsubstantiated narratives and does not present a genuine and arguable case. The application also does not show a clear and unmistakable infringement of a right and /or threat of violation of a right ought to be protected by an order of injunction. Further, the 1st respondent deposed that the applicant has not demonstrated how it will suffer harm and or injury if the orders sought are not granted and for this reason it has failed to show a prima facie case with a probability of success.

7. The applicant filed a supplementary affidavit in response thereto sworn on June 13, 2022.The applicant while reiterating the contents of its supporting affidavit, deposed that the allegation that the suit property is community land held in trust by the 1st defendant pursuant to Article 63 of *the Constitution* is incorrect and unfounded for the reason that the before procedural and legal allocation of the same to the applicant, it was trust land allocated to it by the Narok County Council and it ceased to exist as any other land holding tenure and became private land that was held by the applicant upon

incorporation of a trust and that the law recognises that after the said allocation, the applicant could hold the suit property and other properties in its own name and such properties so held under private land tenureship and not community land.

8. The applicant further deposed that allocation took place in the year 200 prior to coming into force of the *Community Land Act* and that Sections 46 (1) and (2) of the *Community Land Act* provides that any interest accrued or acquired before coming into force of the *Community Land Act* shall continue to exist and therefore its ownership interests in the suit property arose and has been in existence before the *Community Land Act*.

9. The applicant further deposed that the only reason why the applicant was registered as a trust was because the then Narok County Council gave an unequivocal condition that the applicant be registered as a trust for the suit property to be granted to it. The applicant further deposed that the 1st respondent cannot feign ignorance of the full Narok County Council Meeting held on July 25, 2000 for the reason that the exhibit annexed is only an extract of the meetings and was given to it in short and summary form and it believes there were other deliberations made by the then Narok County Council and that was the only resolution that was of importance to them. Further that through a letter dated February 6, 2014, written to the District Land Registrar by the then Narok County Council, it indicates that the 1st respondent was aware that the suit property was allocated to the applicant.

10. The 1st respondent filed a further affidavit sworn on June 22, 2022 in response thereto. While reiterating the contents of it replying affidavit, the 1st respondent further deposed that there is no evidence that the suit property was ever allocated to the applicant and the same is not private land and at all times it will remain for the benefit of the Keekonyokie community and not the applicant. The 1st respondent further deposed that this court should take notice of that the procedure for allocation of land is well settled under the Physical Planning Act and ownership could only vest on any individual over land under the Narok Town Council regime upon compliance of the procedure listed therein.

11. The applicant filed written submissions dated June 13, 2022.The applicant has raised one issue for determination which is whether the applicant has satisfied the principles of injunction laid down in *Giella versus Cassman Brown Limited* (1973) E.A 358.The applicant submitted that the application is anchored on the fraudulent, illegal and unprocedural actions and inactions of the 1st respondent in registering the suit property in its name with the knowledge that the same was allocated to the applicant and that based on the material before it, there exists a right which has been infringed which call for an explanation or rebuttal. The applicant relied on the case of *Mrao Limited versus First American Bank Kenya Limited & 2 Others* and as such, it has established a prima facie case.

12. The applicant further submitted that the law under the *Trustees (Perpetual Succession) Act* recognises that the applicant can hold the suit land and various other properties in its own name and such properties so far held fall under private land tenureship and not community land. The applicant relied on the case of *Bahola Mkalindi versus Michael Seth Kaseme & 2 Others* [2013] eKLR and submitted that once trust land was allocated, the same was transformed into private land.

13. The applicant further submitted that the 1st respondent has not discharged its burden of proof to show that the extract of the minutes of the meeting held on July 25, 2000 were not authentic and did not originate from it as required under Section 107, 108 and 109 of the *Evidence Act*. The applicant relied on the case of *Waso Trading Company Limited & Another versus County Government of Meru & 4 Others* E027 of 2021.

14. The applicant further submitted that the 1st respondent's replying affidavit sworn by the County Secretary is perjury and amounts to serious disrespect of this court and the sanctity of the rule of law to lie that it has no knowledge of the meeting that was held on July 25, 2000.

15. The applicant submitted that it is settled law that the 1st respondent being a level of government is bound by its promises, resolutions, declarations and or representations based on the concept of legitimate expectation and for this reason the 1st respondent has reneged on its resolution and proceeded to fraudulently and illegally register the suit property in its name. The applicant relied on the case of *Diana Kethi Kilonzo & Another versus Independent Electoral & Boundaries Commission & 10 Others* [2013] eKLR.

16. On whether the applicant will suffer irreparable injury, the applicant submitted that it has developed and built schools, dispensaries, churches, cattle dips, homes and other infrastructures and as such the suit property risks being interfered with in a manner that is prejudicial to the interests of the 1st respondent. Further, that the number of the applicant's members who are in thousands depend on the suit property for their social, economic and religious welfare and this court should protect them from any disruptions.

17. Finally, the applicant submitted that under paragraph 12 of the 1st respondent's replying affidavit, an injunction would not affect the 1st respondent in any manner whatsoever.

18. The 1st respondent filed written submissions dated June 22, 2022.The 1st respondent raised two issues for determination which are whether the plaintiff has met the threshold in law to entitle her to the orders it seeks and what orders should be as to costs.

19. The 1st respondent submitted that an injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles as was in the case of Giella versus Cassman Brown [1973] EA 358, *Nguruman Limited versus Jan Bonde Nielsen & 2 Others* [2014] eKLR and *Mrao Limited versus First American Bank of Kenya Limited* [2003] KLR 125.The 1st respondent submitted that the issues herein revolve around Article 63 of *the Constitution* and relied on the case of *Mohammed Hussein Yakub & 5 Others versus County Government of Mandera & 5 Others* [2020] eKLR and submitted that as at the date the title was issued in favour of the 1st respondent, the suit property remain unregistered and the 1st respondent simply exercised the obligation prescribed by Article 63 (3) of *the Constitution* and is holding the suit land on behalf of the local inhabitants of the area.

20. The 1st respondent further submitted that it is trite law that in cases where fraud and/or embezzlement is alleged, it is not enough to simply infer fraud from the facts as they are serious allegations which require proof beyond that of a balance of probabilities. The 1st respondent relied on the case of *Bruce Joseph Bockle versus Coquerro Limited* [2014] eKLR, *Nancy Kahoya Amadiva versus Expert Credit Limited & Another* [2015] eKLR and *Trust Bank Limited versus Ajay Shah & 3 Others* [2019] eKLR.

21. Further that in so far as the applicant asserts injury on account of the title to the suit property being in the name of the 1st respondent, the instant application is replete with false assertions and speculations about how it will suffer harm or injury if the orders it seeks are not granted. The applicant regrettably fails to show by way of evidence the specific nature and extent of any irreparable harm or injury it is likely to suffer. While buttressing this submission, the 1st respondent relied on the case of *Jagjivan Singh & Another versus Southern Credit Banking Corporation Limited* [2009] eKLR and *Emmanuel Kuria Gathoni versus Constituency Development Fund Board & 2 Others* [2015] eKLR.

22. The 1st respondent further submitted that the balance of convenience lied with the 1st respondent as the title holder of the suit property pursuant to Article 63 of *the Constitution* and shall continue to hold the suit property in public interest for the benefit of all communities living on the suit property.

23. On the issue of costs, the 1st respondent submitted that it should be awarded costs for the reason that it has been re-hauled to the seat of justice by the applicant in circumstances for which it is not responsible for.

24. I have carefully analysed the application, the replies thereof and the written submissions and the issue for determination is whether the applicant has established a prima facie case to warrant grant of the orders sought by this court.

25. In order for a party to be granted a temporary injunction he must pass the test set out in the case of Giella -vs- Cassman Brown [1973] EA 358 which is:

    (a) Whether the applicant has established a prima facie case;

    (b) Whether the he or she would suffer irreparable loss that may not be compensated by damages; and

    (c) That if the court is in doubt, it may rule on a balance of convenience.

26. In the instant case, it was imperative that the applicant proves that it was allocated the suit property which is yet to be registered in its name. The applicant stated that by a meeting held on July 25, 2000, a request was made to the then Narok County Council and in the said meeting it was resolved that all land referred to as holding land be granted to the applicant on the condition that a trust is formed. I have looked at the extract of the minutes of the said meeting dated 25th July, 2000.I tend to believe that it was on the basis of the minutes that the applicant incorporated a trust dated September 24, 2001.Uppon conducting an official search dated March 22, 2022, the applicant discovered that the same had been registered in the name of the 1st respondent. The applicant has also annexed copies of photographs which appear to have taken of the suit property which it alleges that its members have developed and have used the same for their social and economic welfare. In its supplementary affidavit, the applicant has annexed a copy of a letter dated 6th February, 2014 drawn by the 1st respondent and addressed to the 2nd respondent. In the letter, the 1st respondent alludes to the request following the full council meeting held on July 25, 2000 and further sought that the 2nd respondent to re-establish the external boundaries and beacons to enable it begin the exercise of hiving off 500 acres. On the other hand, the 1st respondent denied any knowledge of the alleged minutes of the meeting held on July 25, 2000 and also categorically stated that the suit property is not community land. The denial by the 1st respondent of the existence of the meeting held on July 25, 2000 and in the same breadth relying on the minutes of the said meeting vide its letter dated February 6, 2014 creates doubt as to the correctness of the averments raised by the 1st respondent.

27. As to whether the applicant will suffer irreparable loss if the orders are not granted, the applicant submitted that its members have developed the suit property by building schools, dispensaries, homes and other various projects which they risk lose. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR Justice Munyao stated as follows: “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.” (emphasis mine)

28. I have weighed the circumstances of the parties and the genesis of the dispute. Doing the best I can, I am of the view that since the applicant has shown that it has an identifiable interest as to the ownership of the suit property, the balance of convenience tilts in favour of the applicant. The Giella Case gives the court this third limb which should be applied as the court exercises discretion. That where the court is in doubt, it should rule on a balance of convenience.

29. I will also place reliance in the case of *Susan Wangari Mburu & 5 Others versus Eldoret Water And Sanitation Company Limited & Another* [2020] eKLR, Odeny J, stated that;

> " Apart from the three principles set out in the Giella case, the court should also look at the circumstances of each case as was held in the case of *Jan Bolden Nielsen V Herman Philliipus Steya Also Known As Hermannus Phillipus Steyn & 2 others* (2012) eKLR, where Mabeya J, remarked as follows:
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> 'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In *Suleiman vs Amboseli Resort Ltd* (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself, thus:
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> "... Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in Giella –vs- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover Internationale made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:
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> " A fundamental principle of ....that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been 'wrong'..."
>
> Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella vs Cassman Brown, the court has had to consider the following questions before granting injunctive relief.
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> i. Is there a prima facie case....
>
> ii. Does the applicant stand to suffer irreparable harm...
>
> iii. On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....
>
> When dealing an application for injunction you must consider which option has a lower risk of injustice for a party. Would it be in the interest of justice to grant an order of injunction or decline to do so. Looking at the surrounding circumstances of the case would it be in the interest of justice to stop a sewer line being used by the greater or larger public to stem breakout of disease? The answer would be that the public interest would take a center stage as opposed to the individuals in the name of the applicants herein...."

30. I find the instant case to be one of those cases where it is necessary for the parties to present their cases by giving evidence in a trial so as to sufficiently address the issues arising. The suit property involves a huge parcel of land with public interest at the centre of it and it would be in the interest of justice that the suit property is preserved.

31. Arising from the above, I find that the notice of motion application dated April 8, 2022has merit and the same is allowed in terms of prayer 3. Costs shall abide the outcome of the substantive suit. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 26TH JULY, 2022.

Mbogo C.G

Judge

26/7/2022

In the presence of: -

CA: Timothy Chuma