



Mufumala v Situma (Being Sued as the Legal Representative of the Estate of Tolokwa Malele (Deceased)) (Environment & Land Case E001 of 2022) [2022] KEELC 3573 (KLR) (19 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E001 OF 2022**

BN OLAO, J

JULY 19, 2022

BETWEEN

GEORGE WALUBENGO MUFUMALA APPLICANT

AND

SIMON WERUNGA SITUMA RESPONDENT

**BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
TOLOKWA MALELE (DECEASED)**

RULING

- [1] If Mr D. Were and Ms P. L. Natwati (Counsel for the parties herein) and their clients spare some time and meet over a cup of tea at the nearby County Comfort Hotel just a few minutes' walk from this court, or better still, drive to the beautiful Hunters Paradise Cottages a few kilometres away for a sumptuous lunch washed down with some sweet wine, beer or a cup of tea, they will certainly resolve this dispute in less than 10 minutes. I have faith in them and their clients.
- [2] The dispute involving George Walubengo Mufumala (applicant) and Simon Werunga Situma (respondent) over the ownership of a portion of land measuring 4 acres out of the land parcel No West Bukusu /east Siboti/865 (the suit land) is really a matter which, in my considered opinion, can and should be settled out of court. Although Judicial authority vests in the courts, parties are encouraged to always explore other avenues of Alternative Dispute Resolution mechanisms (ADR) and approach the court as a last resort. The Court of Appeal captured this well in the case of *Karen Blixen Camp Ltd v Kenya Hotels and Allied Workers Union* 2018 eKLR when it said: -

“The primary mechanism for resolution of disputes is the courts and tribunals established by or under the *Constitution*. That is article 159(1) which relates to judicial authority. That is why all other mechanisms are “alternatives.” Nevertheless, ADR is now in vogue since the



Supreme law itself in article 159(2) (c) commends its promotion in all its various forms. It abounds in all spheres of human interaction including family matters, commercial matters, employment and labour matters among others.”

[3] Many litigants labour under the misconception that their disputes can only be resolved in the court. Hence the common niche “lets Meet In Court.” A good percentage of the cases in our courts can however be amicably resolved through alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional resolution mechanisms – article 159(2)(c) of the Constitution. Advocates play a vital role in guiding their clients in that respect. That is the challenge that I am now throwing to Mr Were, Ms Natwati and the parties herein.

[4] The suit land is registered in the name of Tolokwa Malele (the deceased) whose Estate is represented by the respondent. On May 24, 1976, the applicant purchased 4 acres out of the suit land from the deceased and immediately took possession thereof. The respondent has however invaded it and is now forcefully cutting down trees and cultivating it. The applicant has now approached this court seeking orders that he had acquired 4 acres out of the suit land by way of adverse possession.

[5] Simultaneously with the Originating Summons, the applicant moved this court vide his Notice of Motion dated April 1, 2022 seeking the following orders:-

1. Spent
2. Spent
3. Spent
4. Spent
5. That a temporary injunction be and is hereby issued to restrain the respondent acting either by himself and/or through his agents, servants and/or family members from entering, taking possession of, utilizing and/or in any other manner whatsoever dealing with the 4 acres out of the land parcel No West Bukusu/east Siboti/865 that the applicant is in occupation of pending the hearing and determination of this suit.
6. That in the alternative, the status quo prevailing on the land parcel No West Bukusu/east Siboti/865 be maintained pending the determination of this suit.
7. That costs of this application be provided for.

Annexed to the application are photographs of men ploughing land and a copy of a letter from Counsel for the Applicant addressed to the Officer Commanding (ocs) Bumula Police Station requesting for Police assistance to restrain strangers who have invaded the suit land.

[6] The application is opposed and the Respondent filed a replying affidavit dated May 9, 2022 in which he describes it as bad in law, defective and incompetent and which should be dismissed with costs. He goes on to add that he is the Administrator of the deceased’s Estate and during the confirmation process, the applicant was recognized as a beneficiary of 4 acres out of the suit land. The respondent then makes the following averments in paragraphs 8, 9, 10, 17, 18, 19, 20, 21, 22 and 24 of the replying affidavit which are very germane to the matter herein: -

8: “That it’s true that the applicant herein purchased land measuring 4 acres from the deceased one Tolokwa Malele (my grandfather) that was to be extracted from land parcel No West Bukusu/e. Siboti/865 (annexed hereto and marked SWS – 2 is a copy of the land sale agreement.”



9: “That my late grandfather Tolokwa Malele passed on before issuing a title deed to the applicant herein.”

10: “That it is also true that the applicant has been in possession of the 4 acres of land comprised in the subject of land herein which he is entitled to and nobody has interfered with his peaceful occupation of his 4 acres that he purchased in 1976.”

17: “That I am not in dispute that the Applicant herein purchased land measuring 4 acres from land parcel No W. Bukusu/e. Siboti/865.”

18: “That I see no pressing reason that has prompted the applicant to bring this suit against me and yet it is within his knowledge that he was allocated the said claim and or share in Sirisia Senior *Resident Magistrate Succession Cause No 68 of 2018.*”

19: “That I have never declined to execute the transfer documents to vest the adversely possessed land measuring 4 acres by the applicant into his names.”

20: “That there is no cause of action that has prompted the applicant to bring this application I don’t dispute his claim.”

21: “That the applicant has been and is still in occupation of the 4 acres that he purchased from Tolokwa Malele and nobody has even interfered with his occupation and as a matter of fact he had disposed part of his share to different purchasers but as Administrator am desirous to transfer the 4 acres he purchased from Tolokwa Malele as I know he owns the 4 acres from Tolokwa Malele.”

22: “That at no given point have I ever interfered with his occupation of the 4 acres of land that he has been in occupation for the past 45 years and neither have I in any way been wanting to dispose the applicant’s land since I know that it’s against the law.”

24: “That during the survey, the applicant herein was given his 4 acres that he purchased, boundaries were erected by the said County Surveyor making it different for any beneficiary including myself to interfere with each other’s land parcel.”

[7] When the application was placed before me for directions on April 4, 2022, I directed that it be canvassed by way of written submissions. These have been filed both by MR D. WERE instructed by the firm of Were & Company Advocates for the applicant and by MS P. L. Natwati instructed by the firm of P. L. Natwati & Company Advocates for the Respondent.

[8] I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel.

[9] The applicant seeks a temporary injunction restraining the respondent acting either by himself or through his agents, servants or family member from entering taking possession of, utilizing or in any other manner whatsoever dealing with the 4 acres out of the suit land which the applicant is in occupation of pending the hearing and determination of this suit. In the alternative, that the status quo prevailing on the suit land be maintained pending the hearing and determination of this suit.

[10] The principles that guide a court considering an application of this nature are clearly set out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at page 360 as follows: -

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of



damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (e.a *Industries v Trufoods* [1972] EA 420).”

In the circumstances of this case, I do not really see the need to further interrogate this application and the legal precedents applicable. This is because, from the relevant paragraphs of the replying affidavit which I have set out above, the applicant’s ownership and occupation of the 4 acres out of this suit land is admitted. Indeed, those same averments are repeated in the Respondent’s replying affidavit filed in response to the main Originating Summons. And since the respondent in the paragraphs cited above has admitted that the applicant indeed purchased and is in occupation of the 4 acres out of the suit land and has gone further to depone that at no time has he ever interfered with the applicant’s occupation of the said 4 acres, a consideration of the principles set out in *Giella v Cassman Brown & Co Ltd (supra)* is not necessary and will be a waste of Judicial time and resources. And since the Applicant seeks an alternative order for the maintenance of the status quo, I shall be making appropriate orders shortly.

[11] What, in my view, is most crucial at this point, is a revisit of my opening remarks at the start of this ruling. As is now very clear from the respondent’s replying affidavit, the applicant’s occupation and possession of the 4 acres out of the suit land is conceded. Indeed, in paragraph 24 of his replying affidavit filed in response to the Originating Summons, the respondent makes the following profound averment: -

24 “That this suit is a waste of court’s prime time and the court should make orders ab initio that the land Surveyor visits the subject land herein, conduct survey exercise and hive off the applicant’s 4 acres of land and facilitate the transfer of the same in the names of the applicant at his expense.”

In order therefore to promote the expeditious disposal of the main suit, I shall also be making appropriate orders towards an out of court settlement of this dispute.

[12] Ultimately therefore and having considered the Notice of Motion dated April 1, 2022, I make the following orders: -

1. An order preserving the status quo on the land parcel No West Bukusu/east Siboti/865 is hereby issued. The Respondent, his agents, servants or any one acting through him shall not enter, interfere or take possession of the 4 acres occupied by the Applicant pending the hearing and determination of this suit.
2. Costs shall be in the cause.
3. Meanwhile, I encourage the parties and their Counsel to meet and see if they can arrive at an out of court settlement over this dispute in view of the observations made above.
4. The matter shall therefore be mentioned on July 27, 2022 to find out if such consent will have been arrived at and to make any further necessary orders.

Boaz N. Olao.

J U D G E

19th July 2022.

RULING DATED, SIGNED AND DELIVERED ON THIS 19TH DAY OF JULY 2022 AT BUNGOMA BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 4TH APRIL 2022.

BOAZ N. OLAO.



J U D G E

19th July 2022.

