Wyanyang v Lempong & 2 others (Environment & Land Petition 5 of 2021) [2022] KEELC 2498 (KLR) (19 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2498 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND PETITION 5 OF 2021

FO NYAGAKA, J

JULY 19, 2022

BETWEEN

ADOMONYANG WYANYANG .... PETITIONER

AND

CHEPTUKECH LEMPONG .... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

RULING

The Application.

1. The Notice of Motion Application before me is dated October 5, 2021. It was filed by the Petitioner on October 5, 2021 pursuant to Article 22 (1), 23 (3) (a) and (b) of *the Constitution* of Kenya, Rule 19 (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and all other enabling provisions of the law. It seeks the following reliefs:

    1. ...spent
    2. ...spent
    3. THAT pending the hearing and determination of this petition, a permanent injunction be and is hereby issued restricting the 1st Respondent, his agents and/or servants from trespassing and/or otherwise dealing with Land Registration Number 564 Chepareria, West Pokot County;
    4. THAT this Honorable Court be (sic) do issue an order of judicial review in terms of Certiorari to bring into this Honorable Court and quash the decision of the 2nd Respondent dated 07/02/2018;

5. THAT this Honorable Court do issue an order of judicial review in the nature of Prohibition to stop the 2nd Respondent from registering half of Land Registration Number 564 in the name of the 1st Respondent;

6. THAT the costs be provided for.

2. The Application was premised on the grounds espoused in the Application and further supported by the Petitioner's Affidavit and statutory statement annexed to the Petition. The main stay of the Application is that the Petitioner became the proprietor of Land Registration Number 564 Chepareria, West Pokot County in 1972 adjacent to Land Registration Number 562 belonging to his sister, Chepocheu. However, in his Affidavit, he deposed that Chepocheu is the 1st Respondent's sister. Upon her relocation to Ortum, the 1st Respondent became the caretaker of his sister's parcel of land.

3. In 2008, it came to the attention of the Petitioner that the 1st Respondent had encroached on his land. The 1st Respondent placed a restriction on the suit land. This prompted the Petitioner to file a complaint with the Adjudication Officer. After hearing both parties, the Adjudication Officer ruled in favor of the Petitioner. The 1st Respondent, being dissatisfied with the said decision, appealed to the 2nd Respondent.

4. By a Judgment of the Court delivered on February 7, 2018, the 2nd Respondent ordered that the suit property be shared equally between the Petitioner and the 1st Respondent. In the Petitioner's view the orders were issued bereft of reason and contrary to the provisions enshrined in Article 40 of *the Constitution*. The Petitioner accused the 2nd Respondent of bias and casting aspersions on him. The decision was annexed to the Affidavit and marked as AW.

5. The Petitioner was aggrieved by the said decision. He holds the 2nd Respondent culpable for disturbing his legitimate expectation and constitutional right to ownership of property and acting ultra vires the Constitutional dictates. In view of the foregoing, the Petitioner advanced that he would stand to suffer prejudice if the orders sought were not granted. Finally, he added that it was in the interest of justice that the orders sought are granted.

The Response

6. The Application was opposed by the 1st Respondent. He accused the Petitioner of forum shopping as the subject matter had been litigated upon in other fora that included the "Arbitration Tribunal", the Minister (supposedly in charge of land and settlement), which was sued through the 2nd Respondent and the Kapenguria SPM Court. He deposed that the Petitioner could not challenge the decision of the 2nd Respondent. He averred that the law relating to adjudication of disputes stated that the decision of the 2nd Respondent was final pursuant to Sections 26 and 29 of the *Land Adjudication Act* Cap 284 Laws of Kenya.

7. The 1st Respondent posited that the Petitioner had filed SPMCC ELC No. 7 of 2018 wherein the Court dismissed the suit on the strength of his Preliminary Objection. While the 1st Respondent indicated that he annexed a copy of the ruling marked CL1, he did not. He deposed that decision of that Court had never been disturbed.

8. The 1st Respondent interpreted this Petition as an appeal against the decision of the 2nd Respondent. He argued further that the issues raised by the Petitioner fell within the ambit of Judicial Review which the Petitioner had failed to pursue. The 1st Respondent challenged the Petition in totality stating that the issues were in the nature of an appeal but craftily guised as a Constitutional Petition. He stated that

the Petition was guilty of material non-disclosure. Finally, he deposed that the Petition lacked merit and was for dismissal.

9. In their joint Grounds of Opposition, the 2nd - 4th (sic) Respondents maintained that the Application failed to enunciate the reasons that this Court ought to invoke its discretionary powers. They added that the Application sought substantial and final orders at an interlocutory stage. They pitted against that the Application was untenable as there was no violation of constitutional rights. They urged this court to dismiss the Application with costs.

Further Affidavit

10. The Petitioner's further Affidavit filed on April 8, 2022 reiterated the contents in the Petitioner's supporting grounds and his Affidavit thereof. Additionally, the Petitioner admitted that he was time barred from filing Judicial Review proceedings but through no fault of his own. He accused the 2nd Respondent of failing to inform him when its decision was delivered. That notwithstanding, the Petitioner propounded that the Constitutional Petition lay a remedy available to him since it raised the issue concerning fair administrative action, due process and forceful acquisition of land and undue process by the 2nd Respondent that violated his constitutional rights under Articles 40, 47 (1) and 50 of *the Constitution*.

Submissions

11. The Petitioner filed his submissions on November 1, 2021. He urged this Court to allow the Application as the Petitioner had effected proper service on the Respondents. He lamented that the 1st Respondent ought to have been cross-examined by the 2nd Respondent in the course of the proceedings. As a result of the failure to cross-examine, the 2nd Respondent was openly biased to the Petitioner. The actions of the 2nd Respondent, he submitted, were a breach of his constitutional rights. Finally, he submitted that he had met threshold set out in the locus classicus case of *Giella v Cassman Brown & Co. Limited* [1973] EA 358 for injunctive relief.

12. In his submissions, the 1st Respondent filed on April 13, 2022, reiterated the contents in his Replying Affidavit. He added that the Petitioner was estopped from blaming the 2nd Respondent for poor communication that underpinned his contest to the 2nd Respondent's decision delivered four (4) years ago. He submitted that the Petitioner's only remedy lay in Judicial Review per Section 29 of the *Land Adjudication Act*. Since no breach of constitutional rights had been demonstrated, the 1st Respondent urged this court to dismiss the same with costs.

13. The 2nd and 3rd Respondent's joint submissions were filed on May 9, 2022. They submitted that the Petitioner had failed to meet the threshold for the grant of injunctive relief. On whether he had established a prima facie case with probability of success, the Respondents submitted that the Petitioner failed to demonstrate that he was a registered proprietor of the suit land and was likely to be evicted from the suit premises. On whether the Petitioner would suffer irreparable harm, it was submitted that Petitioner did not elucidate any harm or imminent threat that he was likely to suffer. Finally, on the last limb, the balance of convenience shifted in favor of denying the injunction.

14. Next, the Respondents further discussed the legality of the grant of prerogative writs that the Petitioner sought. According to the Respondents, since judicial review is a remedy that is concerned with the decision-making process, the same was not the remedy in this instance as the Petitioner was asking this Court to sit as an appeal against the 2nd Respondent's decision. That the grounds in support of the Petition concluded that the 2nd Respondent erred in its decision making thus invited an appellate audience. They further dismissed allegations of bias as unsupported and unmerited. Additionally,

legitimate expectations were aptly met and no prejudice was occasioned upon the Petitioner. They suggested that the Petitioner ought to have sought a mandamus remedy. Regarding prohibition, they stated that the same was untenable as the prohibited acts had already occurred. Their conclusion was that the Petitioner was not deserving of the judicial review remedies that he sought.

Further Submissions

15. The Petitioner responded to the submissions by the Respondents. He filed them on April 8, 2022. He remained emphatic that the 2nd Respondent violated Articles 23 (1) and 47 (1) of *the Constitution* of Kenya. Following then, he was deserving of the orders sought in the Application. Also, that since the 2nd Respondent violated his constitutional rights, this Court was vested with jurisdiction to interfere with that decision. Finally, he submitted that he had disclosed all material facts appurtenant to the present Petition.

Analysis and Determination

16. I considered the Application, the Affidavits filed in support and opposition to the Motion. I also considered the submissions filed by both parties. In my view, the instant Application is an interlocutory one. Once it is determined the Petition has to be listed for determination on merits. Thus, the grant of a prayer that is tantamount to determining or pre-empting the merits of the Petition would render it superfluous. Such a prayer cannot be granted at the interlocutory stage. At best, it should be denied or refused.

17. Therefore, from my analysis of the instant Application, other than the prayers that were already spent, the others were in their nature those seeking final orders. I say so because if the Application is found to be with merit, the same will in their nature determine the suit in its entirety. I thus reserve myself to establish whether such orders can be granted at an interlocutory stage. I am guided by the definition of an interlocutory order as demystified in *Witmore Investment Limited v County Government of Kirinyaga & 3 others* [2016] eKLR where the Court pronounced itself as follows:

> "An interim or interlocutory order is normally issued on a basis of an interlocutory application which is defined under the same Black's Law Dictionary as "a motion for equitable or legal relief sought before a final decision." So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such."

18. As stated earlier, I find that the orders sought by the Petitioner are final in their nature. The question that falls for this court's consideration is whether such orders can be granted at this interim stage. The Court of Appeal in *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR had this to say on this issue:

> "Analysis of the persuasive decisions from India shows that if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated. In the Indian case of Deoraj -v- State of Maharashitra & others, Civil Appeal No. 2084 of 2004, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. In the Indian case, it was stated that a court could grant such final interlocutory orders if failure to do so would prick the conscience of the court resulting in injustice being perpetrated throughout the hearing and at the end, the court would not be able to vindicate the cause of justice. In the case of Ashok Kumar Bajpai - v Dr. (Smt)

Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:

> " ...It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."

Applying the decisions of this Court in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR and *Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola* [2009] eKLR it has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage... This position was also affirmed by the Court of Appeal in *Kenya Breweries Ltd & another v Washington O. Okeya* [2002] eKLR, where the court stated as follows as regards mandatory injunctions: -

> "A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

19. I have carefully analyzed the Application in its entirety. It can only become clear that the prayers sought at the interlocutory stage are of a permanent nature if each is once again reproduced and given a plain grammatical textual meaning to find their import. In summary, Prayer 3 is for "a permanent injunction against the 1st Respondent, his agents and/or servants from trespassing and/or otherwise dealing with" suit land. Prayer for permanency if granted would seal the Petition and cause it unnecessary to determine it. Prayer 4 was for "an order of judicial review in terms of Certiorari to bring into this Honorable Court and quash the decision of the 2nd Respondent dated February 7, 2018". If the decision is quashed at the interlocutory stage, the question that remains is, what is left to be considered in the merits of the Petition? Lastly, Prayer 5 was for "an order of judicial review in the nature of Prohibition to stop the 2nd Respondent from registering half of Land Registration Number 564 in the name of the 1st Respondent." Similarly, if the order is granted without it being predicated on the outcome of some event, in this case the Petition, then there would be no need for the Petition to be determined on merits.

20. While such orders such as mandatory injunctions are capable of being granted at an interim stage, a party must demonstrate that special circumstances subsist to warrant the grant of the said orders. The bar is higher than where temporary orders preventing an action from taking place are sought. The present Application being one of interlocutory nature poses no demonstration of special circumstances to warrant the issuance of the orders which are of final nature. Therefore, I find no justification in granting the reliefs sought.

21. I further take note that majority of the prayers sought in the Application were also the very ones prayed for in the substantive Petition. It would be in the parties' best interest that the Petition be canvassed altogether as the grant of the orders at this stage will determine the Petition. I am guided by the decision of the court in *Mwangaza Humanitarian Assistance v National Environmental Management Authority & another* [2013] eKLR where Lenaola J (as he then was) held:

> " I have perused the orders sought in the Application before me and also the Petition dated January 23, 2012 and I notice that the orders sought are similar. In the circumstances, I am in agreement with the 1st Respondent that if this Court determines the merit of the Application as framed, it would in essence mean that the Petition has been determined at the interlocutory stage. Article 159(1) (b) of *the Constitution* provides that in exercising judicial authority Courts shall ensure that justice is not delayed. It is therefore in the wider interests of justice to let the parties set the Petition herein for hearing on a priority basis and all issues in contest can then be resolved."

22. The upshot of the above is that the Application dated October 5, 2021 lacks merit. It is hereby dismissed with costs. I also order that the parties herein comply with the filing of the paginated indexed and cross-referenced trial bundles and the Petition be mentioned on September 28, 2022 for confirmation of compliance and directions on how to dispose of the Petition.

    Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 19TH DAY OF JULY, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.