



Yaa alias Bengi & 42 others v Ziro alias Kibogoyo & 18 others (Environment & Land Petition 11 of 2021) [2022] KEELC 2679 (KLR) (15 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2679 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 11 OF 2021
MAO ODENY, J
JULY 15, 2022
IN THE MATTER OF: THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ARTICLES 2 &3 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF: THE BILL OF RIGHTS, BEING CHAPTER
FOUR OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 19, 20,
21, 22, 23, 25, 27, 28, 29, 30, 39, 40, 43 & 47 OF THE CONSTITUTION
AND
IN THE MATTER OF: CHAPTER FIVE OF THE CONSTITUTION OF
KENYA, 2010, ARTICLES 60, 61 AND 64 OF THE CONSTITUTION
AND
IN THE MATTER OF: THE COMMUNITY LAND ACT, 2016
BETWEEN
ELISHA YERI YAA ALIAS BENGI & 42 OTHERS PETITIONER
AND
KAMBI ZIRO ALIAS KIBOGOYO & 18 OTHERS RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 10th June, 2021 by the Petitioner/Applicants seeking the following orders: -

1. Spent



2. That this Honourable Court be pleased to issue a temporary Injunction restraining the Respondents and/or their agents and/or employees and/or servants and/or relatives or any other person(s) acting on the Respondents' behalf from entering and/or invading and/or trespassing and/or erecting any structures and/or selling the suit premises or evicting the 1st to 37th Petitioners/ Applicants from the said suit premises, being a parcel of land measuring approximately 100 acres described as a parcel of land , stretching from Midzichenda Uniform College to Opposite Kenya Women Finance Office on the North to Kabelengani Primary School on the West to Bimzhoga Dam on the South, to Katsungwini, next to Yeri Majuta's home on the South- East, to Michael Ganje's residence on the East, and back Midzichenda Uniform College within a parcel of land registered as Plot No. Kilifi/ Biryaa/38, the suit premise herein owned communally by members of the Biryaa Group Ranch, including the Petitioners/Applicants herein and/or dealing with the suit land in any manner, whatsoever detrimental to the rights and interest of the Plaintiffs/ Applicants herein, pending the hearing and determination of this application.
 3. That this Honourable court be pleased to issue a temporary Injunction restraining the Respondents and/or their agents employees and/or servants and/or relatives or any other person(s) acting on the Respondents' behalf from entering and/ or invading and/or trespassing and/or erecting any structure(s) and/or selling the suit premises or evicting the 1st to 37th Petitioners/ Applicants from the said suit premises, being a parcel of land measuring approximately 100 acres described as a parcel of land , stretching from Midzichenda Uniform College to Opposite Kenya Women Finance Office on the North to Kabelengani Primary School on the West to Bimzhoga Dam on the South, to Katsungwini, next to Yeri Majuta's home on the South- East, to Michael Ganje's residence on the East, and back Midzichenda Uniform College within a parcel of land registered as Plot No. Kilifi/ Biryaa/38, the suit premise herein owned communally by members of the Biryaa Group Ranch, including the Petitioners/Applicants herein and/or dealing with the suit land in any manner, whatsoever detrimental to the rights and interest of the Plaintiffs/ Applicants herein, pending the hearing and determination of this Petition.
 4. That an injunctive order does issue against the 11th to 13th Respondents restraining them from transacting any business and/or dealings that require the approval of two-thirds of the entire adult membership of the Biryaa Group Ranch including matters relating to the Biryaa Group Ranch land pending the hearing and determination of the Petition filed herein.
 5. That an injunctive order does issue against the 14th to the 18th Respondents, restraining them from hearing any land dispute involving either the suit premises or any other portion of land forming part of the Biryaa Group Ranch land pending the hearing and determination of the Petition filed herein.
 6. That the OCS, Bamba Police Station to ensure compliance with the Orders issued herein.
 7. That costs of the application be borne by the Respondents.
2. Counsel agreed to canvas the application vide written submissions but counsel for the 14th to 19th Respondents stated that they had filed a replying affidavit to the petition and were not participating in the application as it does not affect them. It is only the petitioners who filed submissions



Petitioners/Applicants' case

3. The application is supported by the Affidavit of Elisha Yeri Yaa alias BENGI sworn on the 10th day of June, 2021 where he deponed that the 2nd to 37th Petitioners are about to be evicted from a parcel of land that they have occupied for decades as members of Biryaa Group Ranch within a parcel of land registered as Plot No. Kilifi/ Biryaa/ 38. That the 11th to 13th Respondents have either let people or members of the group ranch or by themselves allowed non-members of the group ranch to erect structures and/or houses on the group ranch land on the basis of sale transactions, yet the said transactions are in violation of Section 15 (5) of the Community Land Act of 2016 which forbids such transactions unless sanctioned by two thirds of the registered adult members of the group ranch.
4. The Applicant deponed that the Petitioners risk being evicted from the suit land by the Respondents, yet they are entitled to it by virtue of occupation and/or possession as well as being bona fide and/or registered members of the Ranch while the 38th to 43rd Petitioners/Applicants are specifically angered by the manner in which the 11th to 13th Respondents are managing the affairs of the ranch and the involvement of the Provincial Administration in hearing land disputes. The entire membership of the ranch has been adversely affected by this conduct, hence this application to preserve the subject matter of the Petition.
5. It was the Applicant's case that the 2nd to 37th Petitioners have lived on the suit land since 1899 within a parcel of land registered as Plot No. Kilifi/ Biryaa/ 38 which said group ranch was originally governed by the Land (Group Representatives) Act. That the 1st to 10th Respondents laid a claim on their parcel of land prompting the 4th Petitioner to file a claim at the Lands Dispute Tribunal, Bamba, which claim was heard and determined against him prompting the filing of an Appeal before the Provincial Lands Appeals Committee- Coast.
6. He asserted that the 1st to 10th Respondents in violation of the law started selling portions of land on the suit premises without involving the membership of the group ranch and that the 1st to 10th Respondents have laid a claim on the suit premises in violation of the Constitution and the Community Land Act 2016 by depriving them of their ownership and/or occupational rights over the suit premises by selling to other persons, portions of land on the suit premises including their homesteads.
7. The Applicant urged the court to grant an order of injunction restraining the Respondents from interfering with the ownership and/or occupational rights of the 1st to 37th Petitioners and further construction of any structure on the suit premises.
8. In response to the 14th, 15th, 16th, 17th and 18th Respondents filed a Replying Affidavit through the 14th Respondent who deponed that resolution of conflict with regard to the group ranches were handled by the Group Ranches Committees assisted by the various Land tribunals. That the conflict begun in 2009 when KETRACO did a major power transmission line cutting through the division all the way to Lamu with several groups being affected.
9. He further deponed that KETRACO paid all the affected land owners through their Group Ranches Management committees which squandered the monies paid as compensation and that the 1st to 21st Petitioners are insincere in the quest to stop the chiefs and the office of the Assistant County Commissioner from interfering with the issues since they are the same people who requested their intervention in their conflict with the Michael Ganje family.
10. The Respondent stated that the Petitioners claim under paragraph 6, 18 and 19 of the supporting Affidavit to the Petition is frivolous, scandalous, vexatious made in bad faith to tarnish the office holders of the 14th to 18th Respondents names.



Petitioners' submissions.

11. Counsel submitted that the instant application is premised on the provisions of the Constitution of Kenya, the Community Land Act and the Civil Procedure Act which provide for access to justice and the procedures on how to access such justice. According to Counsel, Article 22 as read with Article 23 (3)(b) of the Constitution empowers the court to issue injunctive orders whose threshold and applicable principles are outlined in the Giella -vs- Cassman Brown case.
12. Mr. Kenga relied on the following documents which were annexed to the supporting affidavit in respect of the application for injunction: -
 - a) A certified copy of an authority to act and/or plead and/or appear dated 7th June, 2021 as annexure EYY-1.
 - b) A certified copy of the title deed of the suit premises as annexure EYY-2 dated 25th September, 1979, appearing on pages 38 and 39.
 - c) A certified copy of Birya Group Ranch Register compiled in March, 2012 as annexure EYY-3, appearing from pages 40 to 56.
 - d) A Certified copy of the Constitution and Rules of Birya Group Ranch as annexure EYY-4, appearing from pages 57 to 63.
 - e) Certified copies of an award dated 27th August, 2002 by Bamba Land Disputes Tribunal as annexure EYY-5, appearing from pages 64 to 66 and attached to it, is an agreement dated 28th July, 1994, appearing on page 67 and proceedings of 6th September, 2001 by the said tribunal on page 68.
 - f) Certified copies of proceedings dated 23rd February, 2011 by the Provincial Lands Appeals Committee- Coast as annexure EYY-6, appearing on pages 69 and 70.
 - g) A certified copy of a letter dated 5th May, 2009 by the 11th Respondent as annexure EYY-7, appearing on page 71.
 - h) Certified copies of proceedings conducted by the 11th to 13th Respondents on 29th July, 2011 and an invitation for a Ruling dated the same day as annexure EYY-8, appearing from pages 72 to 79.
 - i) Certified scanned copies of photographs of houses built and/or under construction on the Petitioners'/Applicants' homestead (encroachment) by the 1st to 10th Respondents as annexure EYY-9(a), appearing from pages 80.
 - j) Certified scanned copies of photographs taken at the Petitioner's/Applicants' homestead, evidencing their occupation as well as illegal encroachment of the homestead as annexure EYY-10(a), appearing from pages 88 to 93 and a certified copy of an agreement dated 10th October, 2012 by the 11th to 13th Respondents for leasing the Ranch's land for charcoal production is produced as annexure EYY-10(b) on pages 94 and 95, thereof.
 - k) Certified copies of proceedings and letters by the 14th to 18th Respondents, purporting to hear and determine land disputes within the Ranch are produced collectively as annexure EYY- 11 from pages 96 to 120.
 - l) A certified copy of a demand letter dated 22nd May, 2020 addressed to the 14th to 18th Respondents is produced as annexure EYY-12, appearing from pages 121 to 123.



13. Counsel submitted that the allegations raised through the Respondent's Replying affidavit to the effect that the 14th to 18th Respondents only hear and determine land cases upon invitation by Ranch members are false as there is no evidence to prove that they were invited to hear the land cases mentioned in the application through annexure EYY-11, appearing on pages 96 and 120 of the application.
14. Mr. Kenga also submitted that the Petitioner/Applicants have made out a case for the grant of the injunctive orders sought for herein as they are in occupation and/or possession of the suit premises, having resided thereon for many years and further being registered members of Birya Group Ranch and by operation of Sections 30 and 42 of Community Act of 2016. That the Petitioners cannot be compensated adequately by way of damages if they lose their land since that is the only place, they call home.
15. Counsel therefore urged the court to allow the application as the balance of convenience lies in favour of the Petitioners as they are the lawful owners of the suit premises and are in actual and/or physical occupation or possession of the same.

Analysis and Determination

16. The issues for determination in an application for injunction are well settled as per the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 where it was held that the applicant has to satisfy the following conditions; -
 - a. The applicant has to establish a prima facie case
 - b. The applicant must show that if the order sought is denied he/she would suffer irreparable damage that cannot be adequately compensated by damages
 - c. Should the court be in doubt as to whether the applicant has satisfied the foregoing ingredients, then it will decide the application on a balance of convenience.
17. Similarly, in the case of *Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & another* (2019) eKLR where the court held that; -

circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”
18. Once an Applicant satisfies the principles enunciated above, then the court can grant orders of injunction to preserve the substratum of the suit. The Applicants annexed documents in support of the application and the Petition namely: a copy of a title deed of the suit premises showing that the parcel of land is owned by Birya Group Ranch and headed by the 11th to 13th Respondents on behalf of the Petitioners, a certified copy of Birya Group Ranch register and *the Constitution* and Rules of Birya Group Ranch. This shows that the Applicants have a prima facie recognizable interest on the suit land.
19. On the second issue as to whether the Applicants will suffer irreparable harm which cannot be adequately compensated by way of damages, the Applicants submitted that they have been in occupation of the suit premises since 1899 and that is the only place they call home. The Applicants being in occupation and possession of the suit land, it would be in the interest of justice to preserve the



substratum of the suit land pending the hearing and determination of the Petition. The land involves communities who should live in harmony to avoid conflict and security lapses as has been deponed by the Respondent.

20. On the issue of balance of convenience the court in the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) eKLR stated that; -

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them be greater than that which may be caused to the defendants inconvenience be equal, it is the plaintiffs who suffer.

21. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

22. The Respondents did not participate in this application but it should be noted that orders of injunctions are equitable remedies that a party seeking such orders must come to court with clean hands. The court has discretion to either grant or decline to grant such orders but the discretion must be exercised judiciously.

23. In the case of *Ochola Kamili Holdings Ltd vs Guardian Bank Ltd* [2018] eKLR, the court stated that; -

The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

24. I have considered the application and submissions by counsel and find that the Applicants have proved a prima facie case with a probability of success and grant orders of injunction to perverse the substratum of the case pending the hearing and determination of this petition.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

