



REPUBLIC OF KENYA



Ngewa (Suing on his behalf and on behalf of the Estate of Joseph Ngewa Kilote– Deceased) v Muteti & 10 others (Environment & Land Case 88 of 2017 & 30 of 2018 (Consolidated)) [2022] KEELC 14604 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14604 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 88 OF 2017 & 30 OF 2018 (CONSOLIDATED)
TW MURIGI, J
OCTOBER 26, 2022

BETWEEN

GEOFFREY KITHOME NGEWA (SUING ON HIS BEHALF AND ON BEHALF OF THE ESTATE OF JOSEPH NGEWA KILOTE– DECEASED) APPLICANT

AND

GEOFFREY MWANGANGI MUTETI & 10 OTHERS DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated October 21, 2021 brought under the provisions of section 3A of the *Civil Procedure Act*, order 40 rules 1, 2 and 4 of the *Civil Procedure Rules, 2010* in which the applicants seek the following orders:
 - i) Spent.
 - ii) That the plaintiffs/respondents be compelled to cease any activity and to vacate from the defendants' respective parcels as follows: -
 - a) Katiku Ngite – Makueni/Ikalyoni/1908.
 - b) Francis Mutisya Sila, Paul Wambua Kyengo, Harrison Mutua Nzioka & Joel Malelu Kioko – Makueni/Ikalyoni/1909.
 - c) Mbuli Muia (deceased) & Kyenze Muia – Makueni/Ikalyoni/1910.
 - d) Geoffrey Mwangangi Muteti – Makueni/Ikalyoni/1911, 2216, 2217 and 2215.
 - e) Jonathan Peter Kilonzo – Makueni/Ikalyoni/1912, 2210, 2211, 2212, 2213 and 2212.
 - f) Davis Kivieko Muteti – Makueni/Ikalyoni/2218, 2219, 2220 and 2221.



- g) Muia Kithongo Ngulya (deceased), father to Kyenze Muia – Makueni/Ikalyoni/2222.
- h) Kyenze Muia – Makueni/Ikalyoni/2224.
- iii) That in the alternative an eviction order do issue against the plaintiffs to vacate from the defendants said parcels of land specified in prayer no 2 hereinabove.
- iv) That the officer commanding station, Makueni police station do assist and supervise in the execution of the orders.
- v) That the costs be borne by the plaintiff/respondent.

The applicants case

2. The application is premised on grounds appearing on its face together with the joint affidavit by Geoffrey Mwangangi Muteti and Jonathan Peter Kilonzo sworn on October 21, 2021.
3. The applicants averred that vide a judgment delivered on January 19, 2021, this court struck out the plaintiff/respondent's suit against the defendants on account of being res judicata. The applicants averred that the defendants are the bona fide registered owners of all the titles of land created from the subdivision of the parcel of land formerly known as LR No Makueni/Ikalyoni/1906.
4. The applicants further averred that the plaintiff, despite being aware of the judgment of this court, has threatened that he will not vacate from the defendants' respective parcels of land where he continues to unlawfully trespass, carrying out farming activities and cutting down trees. The applicants argued that unless they are aided by this court, they will not be able to enjoy their properties and that they stand to suffer irreparable loss because they cannot farm their own land for produce.

The respondent's case

5. In opposing the application, the plaintiff/respondent vide a replying affidavit sworn on April 19, 2022, and averred that the application is frivolous and an abuse of court process. He further averred that this court dismissed the defendants' suit No 30 of 2018 where the defendants had sought for orders of injunction, eviction and mesne profits. The respondent contends that this court became functus officio on the issues that were raised by the parties in those suits. he argued that the only avenue available to the defendants is to file an appeal or a review of the judgment delivered on January 19, 2021 which has not been done.
6. The plaintiff further averred that vide the ruling delivered on October 22, 2021 in Nairobi Civil Application No E146 of 2021, the Court of Appeal enlarged time for the plaintiff to file a notice of appeal. He maintains that he is in the process of instructing his advocates to prosecute the appeal on his behalf. The respondent asserts that the application before the court is res judicata since the issues that were raised in ELC Case No 30 of 2018 are the exact replica of the orders that are being sought in the present application. The respondent contends that the applicants were satisfied with the judgment delivered on January 19, 2021 since they had not lodge an appeal against the same.

The applicant's response

7. The applicants filed a supplementary affidavit sworn on May 11, 2021 and averred that the plaintiff misapprehended the law by stating that the court is functus officio since the defendants' counterclaim was not determined on merit. He further averred that the plaintiff was not interested in pursuing the appeal since he failed to comply with the order of the Court of Appeal which granted him 30 days within which to file a notice of appeal. That this court having found that the suit parcels belong to



the defendants who have respective titles in their names, it will be fair and in the interest of justice to grant the orders as prayed.

The submissions

8. The application was canvassed by way of written submissions.
9. The defendants'/applicants submissions were filed on May 13, 2022. Learned counsel for the applicants submitted that the defendants are the registered owners of the suit properties. Counsel went on to submit that the defendants ownership over the suit properties was upheld by this court in its judgment which is still in force. Counsel contends that the plaintiff is not justified to continue occupying the suit properties as the defendants are the registered owners of the same. Learned counsel further submitted that the defendants have met the threshold for the grant of the orders sought.
10. The plaintiff/respondent's submissions were filed on July 6, 2022. Learned counsel for the respondent raised the following issues for the court's determination: -
 - i. Whether this application is properly before the court.
 - ii. Whether the applicants are entitled to the orders sought.
11. Counsel submitted that this court became functus officio after it delivered its judgment. The respondent argued that the defendants did not appeal against the judgment delivered on January 19, 2021 hence the application offends the principle of finality. To buttress his submissions on this point counsel cited the following authorities: -
 - 1) [*Election Petitions 3, 4 & 5 Raila Odinga & Others v IEBC & Others \[2013\] eKLR.*](#)
 - 2) *Jersey Evening Post Limited v Al Thani JLR 542 at 550.*
12. Counsel went on to submit that the application is improperly before the court as the applicants are seeking for orders in a matter that this court issued its final judgment on January 19, 2021. That in the said judgment, the respondents suit in ELC Case No 88 of 2017 was struck out on account of being res judicata while the applicants suit in ELC Case No 30 of 2018 was dismissed by the court. Counsel argued that the applicants are inviting this court to assume appellate jurisdiction over its own decision. Furthermore, counsel argued that the court did not in its judgment grant an order of eviction to the applicants as sought in the present application. Counsel contends that the applicants have not demonstrated that the plaintiff was in contempt of the judgment delivered on January 29, 2021. In this regard, the respondents relied on the [*Black's Law Dictionary 9th Edition*](#) to define contempt of court and in the case of [*Gatharia K Mutitika v Baharini Farm Limited \[1985\] KLR 227.*](#)
13. Lastly, it was submitted that there were no orders which required the plaintiff to vacate the suit properties and thus the application is an abuse of the court process and should be dismissed with costs.
14. The plaintiff relied on the case of [*ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba \[2020\] eKLR*](#) in support of his submissions.

Analysis and determination

15. Having considered the pleadings, the application, the affidavits and the rival submissions, I find that the only issue that arises for determination is whether the defendants/applicants are entitled to the orders sought.



16. The defendants are seeking for a mandatory injunction, for the eviction of the plaintiff from the suit properties.

17. The circumstances under which a court may grant a mandatory injunction was stated by the Court of Appeal in the case of [*Maber Unissa Karim v Edward Oluoch Odumbe \[2015\] eKLR*](#), as follows: -

' The test for granting a mandatory injunction is different from that enunciated in the *Giella v Cassman Brown* case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the court of appeal in the case of *Kenya Breweries Ltd v Washington Okeyo [2002] EA 109* had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was correctly stated in Vol 24 of Halsbury's Laws of England 4th Edition paragraph 948 which states as follows;

'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'

18. It is trite law that a mandatory injunction, being final in nature can only be granted in very clear cases. The Court of Appeal in the case of [*Kenya Breweries Limited v Washington Okeyo \[2002\] 1EA Page 110*](#) set out the threshold of granting mandatory order and held as follows;

' A mandatory injunction ought not be granted on an interlocutory application in the absence of 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 easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction.'

19. Vide a plaint dated November 8, 2016, the plaintiffs in ELC Case No 88 of 2017 sought for the following orders against the defendants: -

- 1) An order declaring the registration of the suit properties herein in favour of the defendants illegal, null and void and further directing that the register be rectified to remove the defendants as proprietors thereof and instead revert ownership of the plaintiff's herein.
- 2) An order upholding the boundaries as per the judgment of June 26, 1969.
- 3) An order of permanent injunction restraining the defendants whether by themselves, their servants or agents or otherwise from trespassing, occupying the suit land herein.
- 4) Cost of this suit plus interest thereon.
- 5) Any other or further relief as the honourable court may deem fit to grant.



20. In ELC No 30 of 2018 the plaintiffs vide a plaint dated April 19, 2018 sought for the following orders against the defendants: -
- a) A mandatory injunction compelling the defendants to stop trespassing into and to remove the illegal structure they have put up on the plaintiff's parcels of land known as;

Makueni/Ikalyoni/1911, Makueni/Ikalyoni/2215, Makueni/Ikalyoni/2216, Makueni/Ikalyoni/2217, Makueni/Ikalyoni/1912, Makueni/Ikalyoni/2210, Makueni/Ikalyoni/2211, Makueni/Ikalyoni/2212, Makueni/Ikalyoni/2213, Makueni/Ikalyoni/2214, Makueni/Ikalyoni/1908, Makueni/Ikalyoni/1909, Makueni/Ikalyoni/1910, Makueni/Ikalyoni/2224, Makueni/Ikalyoni/2222, Makueni/Ikalyoni/2218, Makueni/Ikalyoni/2219, Makueni/Ikalyoni/2220, Makueni/Ikalyoni/2221.
 - b) In the alternative an order for demolition of the said structures and eviction therefrom.
 - c) Mesne profits till the date the defendants shall remove the illegal structures and vacate from the properties or till they shall be evicted.
 - d) Costs of the suit and interests.
21. The plaintiffs in ELC Case No 88 of 2017 were the defendants in ELC Case No 30 of 2018, while the plaintiffs in ELC Case No 30 of 2018 were the defendants in ELC Case No 88 of 2018. By a consent dated October 29, 2021, ELC cases numbers 88 of 2017 and 30 of 2018 were consolidated and were to be heard together.
22. The matter proceeded for hearing and thereafter the court rendered its judgment on January 19, 2021. In its judgment dated January 19, 2021, the court struck out the plaintiffs suit in ELC Case No 88 of 2017 with costs to the 1st -10th defendants on account of being res judicata. As regards ELC Case No 30 of 2018, the court in part of the judgment stated as follows: -
- ' It is my finding that the 1st to 10th defendants have not discharged the burden of proof on a balance of probabilities in their counter claim and their claim must also fail. Having noted that both parties constructively abandoned the said suit, I direct that each party will bear their own costs. In the circumstances the 1st to the 10th defendants case is dismissed.'
23. In its judgment dated January 19, 2021, the court did not grant the plaintiffs the orders sought in ELC Case No 30 of 2018. The 1st - 10th defendants case was dismissed. This court finds and holds that the applicants cannot file an application seeking for a mandatory injunction as there is no suit pending before this court in which this application can be hinged on. The suit having been dismissed, the 1st -10th defendants application dated October 21, 2021 has no legs to stand on. The application is a nullity for the reason that there is no suit in existence.
24. In light of the foregoing, the application dated October 21, 2021 is devoid of merit and the same is dismissed with no orders as to costs.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF OCTOBER, 2022.

IN THE PRESENCE OF: -



Court assistant – Mr. Kwemboi

Ms Chelagat holding brief for Nzavi for the Defendant/Applicant.

Ms Kyalo holding brief for Kithuka for the Plaintiff/Respondent.

