



REPUBLIC OF KENYA



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**Kiprono v Chebor & another (Environment and Land Case Civil Suit
73 of 2021) [2022] KEELC 14834 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 73 OF 2021
LA OMOLLO, J
NOVEMBER 17, 2022**

BETWEEN

REGINA CHEPKEMOI KIPRONO PLAINTIFF

AND

LUKA KIPRONO CHEBOR 1ST DEFENDANT

EVANS KIPKOSGEI KURGAT 2ND DEFENDANT

RULING

Introduction

1. This ruling is in respect of the defendants/applicants notice of motion application dated April 21, 2022. The application is expressed to be brought under order 40 rule 7 of the *Civil Procedure Rules* and sections 1A, 1B, 3A of the *Civil Procedure Act*.
2. The application seeks the following prayers:
 1. Spent
 2. That this honourable court be pleased to vary or set aside the orders herein dated January 17, 2022 pending the hearing and determination of this application.
 3. That this honourable court be pleased to order the plaintiff/respondent by themselves or their agents to stop interfering with, trespassing on land reference number Kakmor/kiprota/221 pending hearing and determination of this application.
 4. That the costs of this application be in the course.



Factual Background.

3. The plaintiff/respondent commenced this suit vide a plaint dated September 6, 2021. In the plaint, she prays for judgement against the defendants for:
 - a. A declaration that the suit property is matrimonial property and the 1st defendant holds 50% of the beneficial interest thereof in trust and for the benefit of the plaintiff.
 - b. An order for equal share of the property in favour of the plaintiff.
 - c. A declaration that the purported sale between the 1st and 2nd defendants entered into on December 22, 2016 is illegal, null and void for breaching the [Matrimonial Property Act](#), the [Land Registration Act](#) and the [Constitution of Kenya](#).
 - d. A permanent injunction restraining the 1st defendant from dealing in any manner whatsoever with the suit property without the consent of the plaintiff.
 - e. A permanent injunction restraining the 2nd defendant whether personally or through agents or servants from interfering with the plaintiff's quiet and/or peaceful enjoyment or user of the suit property.
 - f. Any other relief that this honorable court may deem fit to grant.
4. The defendants/applicants filed their statement of defence dated October 8, 2021 on October 12, 2021. They denied the plaintiff/respondent's claim and stated that the plaintiff has never occupied the suit property and that the 1st defendant/respondent had purchased the property in the year 1984 as an investment to save money for their children's school fees and not to establish a matrimonial home.
5. Together with the plaint, the plaintiff/respondent had filed an application under certificate of urgency seeking for orders of injunction to restrain the defendants/applicants from disposing off, alienating or interfering with the plaintiff/applicant's use and possession of land parcel No Kakamor/Kipropita/221.
6. The court delivered a ruling with respect to that application on January 17, 2022 where a temporary injunction was granted restraining the 1st and 2nd defendants/applicants from disposing off, alienating, transferring and/or interfering with the plaintiff/respondent's possession and use of land parcel No Kakamor/Kiprota 221.
7. The application under consideration seeks to set aside the said orders of injunction granted on January 17, 2022 and further seeks an order to restrain the plaintiff/respondent from trespassing on land parcel No Kakamor/Kiprota 221 pending the hearing of this application.
8. The application first came up before this court on April 22, 2022 when the court ordered the respondents to maintain the *status quo* of the suit property pending the hearing of the application *inter partes*. The application was then scheduled for hearing on May 12, 2022.
9. On May 12, 2022 the application was adjourned to the 23rd day of May, 2022 for the reason that the respondents had not filed their response.
10. On the May 23, 2022 the court issued directions that the application be canvassed by way of written submissions
11. The application was mentioned for submissions on the 30th day of June, 2022. All parties having filed their submissions, the court reserved the matter for ruling.



Defendants/Applicant's Contention.

12. Both the 1st and 2nd defendants/applicants swore affidavits in support of the application.
13. The 2nd defendant/applicant contends that he read and understood the orders issued on January 17, 2022 against him in favor of the plaintiff/respondent.
14. The 2nd defendant/applicant further contends that he is in actual possession of the suit property where he has put up his home and keeps cattle.
15. The 2nd defendant/applicant also contends that the plaintiff/respondent gave false evidence to the court about possession of the suit property thereby misleading the judge to issue confusing orders that they are unable to comply with.
16. It is his contention that the plaintiff/respondent and her son Morgan forcefully entered the suit property and removed his cows and are now threatening to evict him.
17. It is further his contention that he is unable to comply with the said orders of the court because the injunction restrains him from interfering with the plaintiff/respondent's quiet possession of the land when it is on record that she has never lived or utilized the land.
18. The 2nd defendant/applicant also contends that he is undergoing severe mental anguish from the violent attacks on his property and verbal abuses by the plaintiff/respondent.
19. The 2nd defendant/applicant further contends that he will comply with the first part of the court order directing him not to sell, alienate, dispose or transfer the land pending the hearing and determination of the matter.
20. The 2nd defendant/applicant concludes his deposition by stating that it is on this premise that he seeks the intervention of the honorable court to vary or set aside the injunction to allow them to have a peaceful mediation process as they pursue justice in the matter.
21. The 1st defendant/applicant also filed an undated supporting affidavit wherein he contends that he has read and understood the orders issued on January 17, 2022 against him in favor of the plaintiff/respondent.
22. The 1st defendant/applicant contends that the defendants/applicants have been unable to comply fully with the orders of the court especially the part of the order directing them to give quiet possession and use of the land to the plaintiff/respondent herein because the plaintiff/respondent is not in possession and that she has never used the land in any way.
23. It is the 1st defendant/applicant's contention that they noticed that the plaintiff/respondent made false statements in her pleadings and submissions to the court thereby misleading it to issue confusing orders.
24. The 1st defendant/applicant contends that the 2nd defendant/applicant has been put on the receiving end of a family dispute for the reason of being an innocent purchaser.
25. The 1st defendant/applicant further contends that he received information that the plaintiff/respondent and their sons have taken the law into their own hands and forcefully entered into the land destroying the 1st defendant/applicants property and threatening to evict him and are now putting up a house on the suit property to mislead the court that they have been in possession.



26. The 1st defendant/applicant ends his deposition by stating that for the above reasons they seek the intervention of the honorable court to vary or set aside the injunction and also stop the plaintiff/respondent and her sons or agents from interfering with or trespassing on the 2nd defendant/applicant's property.

Plaintiff's Response to the Application.

27. The plaintiff/respondent filed a statement of grounds of opposition dated May 11, 2022 on May 12, 2022 as follows:
- a. That difficulty in compliance with court orders is not a ground for setting aside.
 - b. That it is not open to a party to litigation to cherry pick and decide for himself/herself which orders are favourable for compliance and disregard the unfavourable orders.
 - c. That when the honourable court issued its ruling on January 17, 2022, it was a conscious decision made after review of all the facts presented to it by all the parties to the case including the contention that the 2nd defendant is in occupation. Therefore, there cannot be said to exist any error to warrant review/setting aside and the only remedy available to a dissatisfied party is to appeal the decision of the honourable judge. Thus, for this honourable court to entertain this appeal disguised as application for setting aside is to invite the court to sit on her own appeal contrary to the law.
 - d. That all the issues raised in this application were verbally raised from the bar on February 22, 2022 and the honourable judge was categorical, and rightly so, that having made a conscious decision in the matter after inter-partes hearing, she could not revisit the issue unless parties agreed by consent to vary the orders of the court.
 - e. That this honourable court referred this matter for court annexed mediation on February 22, 2022 unconditionally and the contention by the applicant that the exercise is now in jeopardy as a result of the orders of January 17, 2022 is mischievous, if not contemptuous of the court process and the same should be rejected.
 - f. That by referring this matter to mediation, the honourable court did not divest itself of the jurisdiction to handle the matter and if mediation cannot proceed for one reason or another, the honorable court is still at liberty to adjudicate the dispute, so the threat to terminate the mediation process cannot be used as a dangling carrot to arm twist the honorable court into entertaining an appeal disguised as review while the jurisdiction to determine the appeal of this honorable court's orders lie elsewhere.
 - g. That obedience to court orders is not discretionary, it is obligatory on the parties to a dispute unless and until the orders are set aside on appeal or review and the applicants herein, especially the 2nd applicant has not shown any willingness to obey the orders of this court.
 - h. That the application is generally meritless and the same is a red herring meant to vex and abuse the process of this honorable court.

Issues for Determination.

28. The defendants/applicants filed their submissions on June 29, 2022 dated June 6, 2022 where they submit that difficulty to comply with a court order is a valid ground for seeking the setting aside or review of the order and cited the decision in the case of *Republic vs Principal Secretary, Ministry of Defence, Ex parte George Kariuki Waithaka*, Misc Application No 276 of 2015.



29. The defendants/applicants also submit that they will suffer irreparable injury if the injunction sought is not granted and there is no other remedy open to them by which they will protect themselves from the consequences of the apprehended injury.
30. The defendants/applicants further submit that since the orders of injunction of January 17, 2022 were granted, the plaintiff/respondent and her agents have taken the law into their own hands and have violently entered into the suit land and destroyed the 2nd defendant/applicant's property.
31. They rely on the decision in *B vs Attorney General* [2004] 1 KLR 431 and submit that the plaintiff/respondent has used the order to waste and damage the defendants/applicants land and unless restrained, she is likely to cause irreparable damage thereby rendering the outcome of this case nugatory.
32. The defendants/applicants conclude their submissions by seeking that the court restrains the plaintiff/respondent and her agents from trespassing and causing more damage to the 2nd defendant/applicant's property until the court hears and determines the application.
33. The plaintiff/respondent in her submissions identified the following issues for determination:
 - a. Whether the defendants application dated April 21, 2022 is competent?
 - b. Whether the defendants/applicants have made out a case for setting aside the orders of January 17, 2022?
 - c. What orders commend itself to the defendants in the circumstances?
34. On the first issue, the plaintiff/respondent submits that on the face of the notice of motion application dated April 21, 2022, the orders sought are of a temporary nature as they are sought pending inter partes hearing of the application.
35. The plaintiff/respondent went on to submit that when the matter was presented to the judge ex parte on April 22, 2022, the substratum of the application was dealt with and nothing was left for determination inter partes.
36. The plaintiff/respondent therefore prayed that the court dismisses the defendants/applicants application and stated that for the purposes of argument only, she would submit on the substantive merits of the application.
37. On the second issue the plaintiff/respondent submit that setting aside of court orders is at the discretion of the court and referred to the decision in the case of *James June Muchemi and Partners Limited vs Barclays Bank of Kenya & another* (Nairobi HCCC No 399 of 2011) [2012] eKLR.
38. The plaintiff/respondent went on to submit that each case turns on its own facts as was observed by the High Court of Delhi at New Delhi on February 26th, 2007 WP (C) No 6254/2006, *Prashantvats vs University of New Delhi & another*.
39. The plaintiff/respondent also referred to the decision in *Leah Nyambura Mbutu vs Barclays Bank of Kenya Ltd* [2012] eKLR and submitted that the court can only set aside injunctive orders in instances where the court was misled by the applicant on some material facts and on the conduct or behavior of the applicant post the order.
40. On the third issue, the plaintiff/respondent submitted that she has been using the suit property for grazing her animals and that the said use was interrupted when the 2nd defendant/applicant evicted her from the suit land while the defendants/applicants submitted that the land had been vacant until the



year 2015 when the 2nd defendant/applicant took possession and allegedly put up a fence and other structures.

41. The plaintiff/respondent further submits that based on the rival submissions the court gave a lengthy and detailed ruling that carefully analyzed the issues presented and gave the orders that the defendants/applicants seek to set aside.
42. In this matter, the plaintiff/respondent submitted that there was no non-disclosure of material facts as the court had the benefit of the rival submissions before granting the injunction and therefore there is no basis for setting aside the said injunction and that the only remedy available to the applicants would be to appeal the decision of the court.
43. The plaintiff/respondent relies on the decision in *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR and *Perpetua Mponjiwa vs Elius Okumu Otieno and 3 others* [2017] eKLR in support of their arguments.
44. The plaintiff/respondent also relies on the decision in *Leah Nyambura Mburu vs Barclays Bank of Kenya (supra)* and concluded her submissions by stating that the application has no merit and should be dismissed with costs.
45. Upon perusal of the application, supporting affidavits, grounds of opposition and the submissions the only issue that arises for determination is whether the defendants/applicants application has merit.

Analysis and Determination.

46. The defendants/applicants in their application seek the following orders:
 - a. Spent
 - b. That this honorable court be pleased to vary or set aside the orders herein dated January 17, 2022 pending the hearing and determination of this application. (Emphasis is mine)
 - c. That this honorable court be pleased to order the plaintiff/respondent by themselves or their agents to stop interfering with, trespassing on Land Reference Number Kakamor/Kiproita/221 pending hearing and determination of this application. (Emphasis is mine)
 - d. That the costs of this application be in the cause.
47. As pointed out by the plaintiff/respondent, the orders sought by the defendants/applicants are of a temporary nature pending the hearing and determination of the application. There is nothing left for determination *inter partes*.
48. The defendants/applicants ought to have sought orders for the court to vary or set aside the orders dated January 17, 2022 pending the hearing and determination of the suit but instead sought that the orders be granted pending the hearing and determination of the application.
49. The defendants/applicants have failed to move the court for appropriate reliefs. They did not seek leave to amend the said error during the hearing of the application.
50. Pleadings are intended to ensure that litigants come to court with all issues clearly defined and further to prevent cases being expanded or grounds being shifted during trial.
51. The object of pleadings is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration.



52. The plaintiff/respondent has observed, and rightly so, that what the defendants/applicants presented to the judge ex parte on April 22, 2022 was the substratum of the application, it was dealt with and there was nothing left for determination inter partes.

53. In *Issa Ahmed & 15 others vs Mohamed Al-Sawae* [2021] eKLR the learned judge when faced with circumstances such as the ones presenting in this application stated thus;

“The object and purpose of pleadings is to ensure that litigants come to court with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. The pleadings are meant to give each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

A court cannot assume or infer a case by referring to a stray sentence here and a stray sentence there in the pleading. A court cannot exercise its judicial position to grant a relief which is not even sought by parties in their pleadings as granting the same would lead to a miscarriage of justice.”

54. In the case of *Protus Oduor Malala vs Wanyangu Livingstone Onjala* [2021] eKLR the Court of Appeal was faced with an application for stay of execution. The superior court dismissed the suit with costs and stated thus:

“We come to the conclusion that the applicant’s motion is incompetent as without any positive orders, there is nothing to be stayed. The prayers sought even if granted would be no more than hot air, and a court of law cannot grant orders in vain.”

55. In the same breath, the prayers sought by the defendants/ applicants are incapable of being granted. Any attempt to do so would be tantamount to granting orders in vain.

Disposition.

56. In view of the foregoing, I find that the defendants/applicants notice of motion application dated April 21, 2022 lacks merit and is dismissed with no orders as to costs.

57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17TH DAY OF NOVEMBER, 2022

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Defendants/Applicants

Mr Alusa h/b for Mr Akango for the Plaintiff/Respondent

Court clerk. Miss Monica Wanjohi.

