Maangi & 178 others v B2 Yatta Ranching Co-operative Society (Environment & Land Case E002 of 2021) [2022] KEELC 14856 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14856 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT & LAND CASE E002 OF 2021

LG KIMANI, J

NOVEMBER 15, 2022

APPLICATION DATED 16.12.2021 AND AMENDED ON 19.1.2022

BETWEEN

MUANGE NZONGOI MAANGI & 178 OTHERS ..... APPLICANT

AND

B2 YATTA RANCHING CO-OPERATIVE SOCIETY ..... RESPONDENT

RULING

(Application dated December 16, 2021 and Amended on January 19, 2022)

1. Before the court is the amended notice of motion dated December 16, 2021 and amended on January 19, 2022 which seeks the following orders:

    1. Spent.

    2. Spent

    3. Thata temporary injunction be issued restraining the defendant either by himself, agents, servants and/or employees, proxies and servants from trespassing, fencing, intruding, beaconing, alienating, selling, claiming ownership and/or interfering with land parcel Kanyonyoo11802 located within Kitui county pending the hearing and determination of this suit.

    4. That OCS Kanyonyoo police station do ensure compliance

2. The grounds in support of the application are that the respondent is the registered proprietor ofland parcel Kanyonyoo11802 located within Kitui county while the applicants claim they have been in possession, use and enjoyment of the said land for a period in excess of twenty five years and have thus acquired ownership by way of adverse possession and their rights should be protected pending hearing

and final determination of this suit. The applicants also aver that the respondent will not suffer any prejudice if these orders are granted.

3. The application is supported by the affidavit of the 1st applicant Muange Nzongoi Maangi who averred that he has been authorized to swear the affidavit on behalf of the other applicants who he claims are his neighbours on the suit property.

4. The applicants stated that in the year 1967, their parents were members while some were also employees of the defendant whose sole business was rearing of beef animals for domestic and foreign market. That by 1990, the society had run into difficult financial crisis as a result of which most of the employees resorted to settling at various points within the larger land parcel LR 11802 where they engaged in peasant economic farming as well as setting up homes. By 2001, they had established permanent homes with each member having identified and marked their respective areas of occupation. The applicants further claim that they have developed communal facilities such as churches, schools and roads. They have also panted perennial weeds and buried their relatives on the land. They claim that their occupation of the suit parcel of land has been peaceful, open, exclusive, public, notorious, continuous and uninterrupted with the knowledge of the defendant and that they have effectively dispossessed the defendant from the suit property.

5. The applicants claim that the plaintiff in ELC No1159 of 2000 has obtained eviction orders against the defendants in that suit and the applicants are afraid that in the process of evicting some of the defendants who are their immediate neighbours they might interfere with their evidence that they have accumulated over the last two decades and put their case in jeopardy.

6. It is the applicants' averment that the respondent herein has never taken any action to assert their right of ownership to the suit parcel of land.

7. The applicants obtained interim orders of injunction on December 16, 2021 and later filed an application for contempt of court against certain officials of the respondent for disobeying the court's orders.

The Applicants' Submissions

8. The applicants submissions reiterate the contents of the supporting affidavit and the supplementary affidavit and claim ownership of the suit land by way of adverse possession. They submitted that the respondents failed to prove that the suit property was leased to them by the county government of Kitui since they did not annex the lease document.

9. The applicants submitted that they demonstrated that they have been in exclusive control of the property by developing on the said suit property while being in open, exclusive, actual public, continuous and uninterrupted occupation to the knowledge of the respondent. They therefore submit that they have established a *prima facie* case which has a high chance of success and the application should be allowed. They relied on the cases of *Giella V Cassman Brown* (1973) EA 358 and *Mrao Ltd VS First American Bank of Kenya Ltd* (2003) eKLR

10. On irreparable damage, the applicants have submitted that the respondent has threatened the applicants with unlawful eviction from the suit property and threatened to destroy their permanent houses and properties. They relied on the case of *Pius Kipichirchir Kogo v Frank Kimel Tenai*(2018)eKLR where the court stated that irreparable injury means that the injury must be one that cannot be adequately compensated for in damages. In evicting and destroying their properties, the applicants will be rendered homeless. They also submitted that the balance of convenience falls in favour of the applicants.

11. The applicants submitted that there is need to preserve the *status quo* as it is more convenient than otherwise.

Analysis and Determination

12. It is noted that the only affidavit on record filed by the advocates for the respondent is a joint replying affidavit filed by Nicholas Muli Kakungi, Dennis, Mbaangu, Jackson Kamba, Paul Cheruiyot and Wilson Kibaara which specifically states that it is in response to the application for contempt dated January 20, 2022. No reply was filed to the application for injunction and the respondent did not make any submissions on it. However in my view the contents of the said affidavit cannot be completely ignored since it raises issues pertinent to the application presently under consideration.

13. I have considered the notice of motion application amended on January 19, 2022, and find the following issues arise for determination:

    a. Whether the plaintiff/applicant's application has met the threshold established for grant of orders of injunction as prayed

    b. What orders should the court make?

a. Whether the Plaintiff/Applicant's Application has met the threshold established for grant of orders of injunction as prayed

14. The application herein is brought under order 40 of the *Civil Procedure Rules* and section 1A, 1B and 3A of the *Civil Procedure Act*. Order 40 rule 1 of the *Civil Procedure Rules* provides for cases in which temporary injunction may be granted and states as follows;

> " Where in any suit it is proved by affidavit or otherwise—
>
> a. that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

rule 2 provides

> " In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right."

15. The applicants' complaint is that there is a suit Machakos ELC No 1159 of 2000 and an order of eviction against the defendants in that suit have been issued, and they fear that the respondent

might in the process of evicting the said defendants in that case interfere with evidence that they have accumulated over the years. They further claim to have been threatened with eviction and destruction of their homes. It is noted that the applicants have not attached a copy of the pleadings in the said suit and neither have they attached a copy of the order issued. However, the respondent has not denied the existence of the said suit and the orders alluded to and the threat to evict the defendants in the said suit.

16. Further to this, the joint replying affidavit filed by Nicholas Muli Kakungi, Dennis, Mbaangu, Jackson Kamba, Paul Cheruiyot and Wilson Kibaara allude to another suit Machakos ELC 78 of 2019 where an order of eviction of the defendants in the said suit was issued on September 30, 2020. The above two cases do not display all the respondents in the suits and it is impossible to tell the parties that are bound by the said order of eviction from the suit land. The applicants deny knowledge of the court orders issued in Machakos ELC 78 of 2019 and also being parties to the suit.

17. The conditions set for consideration in granting an injunction are now well settled in the case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction:-

> " 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."

18. Have the applicants established a prima facie case with a probability of success? *Black's Law Dictionary* 11th Edition defines a *prima facie* case as "the establishment of a legally required rebuttable presumption. A parties production of enough evidence to allow the fact –trier to infer the fact at issue and rule in the party'gs favour"

19. A *prima facie* case was explained as follows in the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

> " In Habib BankAG Zurich v Eugene Marion Yakub,caNo 43 of 1982 this court considered the role of the court when determining whether or not a prima facie case has been made out. The court expressed itself thus:
>
> "Probability of success means the court is only to gauge the strength of the plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."
>
> The court further stated
>
> "A *prima facie* case with a probability of success does not, in my view, mean a case, which must eventually succeed."
>
> Yet again in Agip(K) Ltdv VORA [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this court stated:

20. At this stage of the suit, all the court is required to decide is whether there is a *prima facie* case with a probability of success and it cannot delve into substantive issues and make final conclusions on the dispute or condemn one of the parties before hearing oral evidence.

21. I have considered that from the evidence on record, it appears that the applicants are in possession of some part of the suit property, a fact that the respondent has not denied. The exact part of the suit

land they occupy, the way in which they came into occupation, nature and length of time of the said occupation is not clear and is a matter to be established during trial. It is also clear that the respondents are also in occupation of the suit land as owners and they carry on certain activities on the land. The respondent claim that the applicants are trespassers on the land. Further, the applicants own averments show that apart from the respondent herein, there are other people in occupation of the suit land. The applicants main claim is based on adverse possession of the suit land. The Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR the court stated:

> " Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in section 7 of the Limitation of Actions Act, which is in these terms:-
>
> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

22. The respondent claims that its ownership to the suit land is based on a lease from the county government of Kitui and the same cannot thus be the subject of a claim for adverse possession. It is noted that the lease has not been exhibited. However, it is also noted that the applicants bear the burden of proving the defendants ownership of the suit land in a claim for adverse possession. In the case of *Katana & 29 others v Nathoo* (Environment & Land Case 208 of 2017) [2022] KEELC 2232 (KLR) (29 June 2022) the court found on this issue as follows;

> " The need for production of a form of a copy of title document must be exhibited to indicate that the person sued is the registered owner of the suit land. This can be a copy of an extract of the register or an official search showing the details of the registration."

23. From the foregoing it is clear that the applicant and the respondent lay claim to the suit land under different and distinct legal and factual basis. I have considered the facts canvassed before this court while dealing with the application for contempt of court dated January 20, 2022 and in my view it is imperative that the main suit herein be heard urgently on merit. In the said application there are allegations made by both parties of destruction of property and injury to animals and to persons. Taking the said circumstances into consideration, I am of the view that it would be in the best interest of justice to preserve the property until the final hearing and determination of the suit being careful to ensure that no party suffers irreparable loss and that the balance of convenience is weighed. In my opinion, the only way to achieve this is to make an order that the status quo be maintained since both parties might suffer harm either way. If the injunction is granted, the respondents will be prevented from accessing the suit land and will be able to carry out the grazing and herding activities that they claim they undertake. If the order is not granted, the applicants might lose their claimed possession of the suit land. Indeed, as the court found in the case of *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR where it was held as follows by Warsame, J(as he was then)

> " ...that damages is not an automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to

refuse an injunction. More so a party cannot be condemned to take damages *in lieu* of his crystallized right which can be protected by an order of injunction."

24. I am in agreement with the above case that damages cannot be an adequate compensation of an infringement of a legal right, whether the legal right belongs to the plaintiff or to the defendant. In the case of Nairobi Civil Appeal 33 of 2012 *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the Court held as follows:

> " status quo" in normal english parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events."

25. The prevailing *status quo* must be clearly described with no ambiguity. It was observed by the court in *Thugi River Estate Limited & another v Naitonal Bank of Kenya Limited & 3 others* [2015] eKLR that a status quo order must be specific and clear to the parties. The court observed as follows:

> " status quo" in this respect, as maintained by an injunctive or conservatory or stay order, is the then existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by Lord Diplock in American Cynanid Co v Ethicon [1975] 1 All ER 504 at 511 "where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo....." The second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts' further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved. Ordinarily where it is the court that has prompted a status quo order or has prompted the parties to it, it is more appropriate and exceedingly relevant to describe clearly the state of affairs at the time the order for status quo is issued. It is undesirable to simply make an order of status quo to be maintained without clearly describing the state of affairs then existing and being preserved. Assistance of the counsel should always be sought in such instances otherwise each party may walk away with its own state of affairs in mind."

c. What Orders Should The Court Make?

26. In view of the above, the orders that commend themselves to this court are that;

    1. Pending hearing and final determination of this suit, the prevailing *status quo* in relation to land parcel Kanyonyo11802 be maintained. The parties will agree on what the prevailing *status quo* is failing which the court will determine the same based on the evidence on record.
    2. The parties are ordered to cease all hostilities towards each other.
    3. The OCS Kanyonyoo police station to ensure compliance.
    4. The suit herein to proceed to full trial forthwith; the respondent to file and serve replying affidavits to the originating summons within 14 days from the date hereof.

5. The applicant is at liberty to file and serve a supplementary affidavit within 14 days from the date of service of the replying affidavit.

6. The matter to be listed for confirmation of the *status quo* and further directions on December 5, 2022.

DELIVERED, DATED AND SIGNED AT KITUI THIS 15TH DAY OF NOVEMBER, 2022.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Ruling read in open court in the presence of-

Musyoki Court Assistant

Kalwa Advocate for the Plaintiff/Applicant

Odhiambo Advocate for the Defendant/Respondent