



Mangi & 7 others v Noor & 4 others (Environment and Land Case Civil Suit 5 of 2022) [2022] KEELC 15239 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15239 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND CASE CIVIL SUIT 5 OF 2022

MAO ODENY, J

DECEMBER 6, 2022

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF THE KENYAN PEOPLE

AND

IN THE MATTER OF: ENFORCEMENT OF THE RULE OF LAW, GOOD GOVERNANCE & CONSTITUTIONALISM

AND

IN THE MATTER OF: THE APPLICATION OF ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 23, 24, 25, 27, 35(2), 159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 2(1), 3(1), 10, 28, 29, 31, 35(2) AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: AN APPLICATION UNDER PART AND OF THE IIIIV EVICTIONS AND RESETTLEMENT PROCEDURES ACT, 2012

AND

IN THE MATTER OF: CONTRAVENTION OF SECTIONS 4, 5, 6, 7, 8, 9, AND 11 OF THE EVICTIONS AND RESETTLEMENT PROCEDURES ACT, 2012.

BETWEEN

CHARO KARISA MANGI 1ST APPLICANT

GEORGE KARISA MANGI 2ND APPLICANT

JEFA KARISA MANGI 3RD APPLICANT



KAZUNGU SULUBU MANGI 4TH APPLICANT
STEVEN KAZUNGU MANGI 5TH APPLICANT
DAMA NGOWA 6TH APPLICANT
ROSE KARISA MANGI 7TH APPLICANT
LOICE KADZO 8TH APPLICANT

AND

MOHAMED OSMAN NOOR 1ST RESPONDENT
PAUL MBURU (OCS MALINDI POLICE STATION) 2ND RESPONDENT
LINUS MURITHI (PRISON OFFICER) 3RD RESPONDENT
REGISTRAR OF LAND MOMBASA 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 3rd February, 2022 by the Petitioners seeking the following orders: -
 - a. Spent
 - b. That pending the hearing and determination of the application herein the Honourable Court be pleased to issue an injunction restraining the 1st Respondent, his servants, agents or any one of them to cease from unlawfully evicting the Petitioners and their families out of and/or continued demolition of the Petitioners' houses on the land Portion Number 7652 (original Number 570/3) Majivuni Malindi.
 - c. That pending the hearing and determination of the petition herein the Honourable Court be pleased to issue an injunction restraining the 1st Respondent, his servants, agents or any of them to cease from unlawfully evicting the Petitioners and their families out of and/or continued demolition of the Petitioners' houses on the land Portion Number 7652 (original Number 570/3) Majivuni Malindi.
 - d. In addition, thereto and or in the alternative and without prejudice to the foregoing the Honourable Court be pleased to order that the status quo as of now be maintained pending the hearing and determination of this motion.
 - e. Costs of and incidental to this application be awarded to the applicants.
2. Counsel agreed to canvas the application vide written submissions which were duly filed. The AG indicated that they were not participating in the application hence did not file any submissions.

Petitioners' Submissions

3. The application was supported by the affidavit of CHaro Karisa Mangisworn on 3rd February, 2022 who deponed that on 5th December, 2021, the 1st Respondent with the help of the OCS Malindi Police Station demolished the houses and all properties on the suit premises belonging to the Petitioners with



- the intention of evicting them purportedly effecting an eviction notice emanating from ELC Case No. 296 of 2016 Mohamed Osman Noor vs Charo Kazungu & 6 others to which the Petitioners were neither party to nor were they served with the pleadings thereof.
4. The Applicant further deponed that the property in which the 1st Respondent got eviction orders is plot 7652 situated at Mtangani in Malindi yet the property that they are in possession of is situated at Majivuni Village in Malindi.
 5. The Applicant also stated they have never been evicted from any land as claimed by the 1st Respondent and have been in possession of the said land for more than 40 years. He also asserted that they live in fear that the 1st Respondent may unlawfully use the police to continue with the eviction.
 6. Counsel identified two issues for determination namely whether the Applicant is entitled to the orders sought and who is to bear the costs of the application.
 7. On the issue whether the Applicant is entitled to orders sought, counsel relied on Section 11 of the Evictions and Resettlement Procedures Act, 2012 and Order 40 of the Civil Procedure Rules on the law on grant of interlocutory injunctions.
 8. Mr. Ole Kina submitted on the principles for grant of interlocutory injunctions as were set out in the cases of *Giella vs Cassman Brown* (1973) EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2others*, Ca No. 77 of 2012 and stated that the provisions of Order 40 require proof 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 that the Defendant threatens to remove or dispose the property, that the court in such situation enjoined to grant a temporary injunction to restrain such acts.
 9. On whether there is a prima facie case with a probability of success, counsel relied on the cases of *Mrao Ltd v First American Bank of Kenya Ltd & 2others* (2003) eKLR and that of [*Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another*](#) (1990) eKLR. Counsel submitted that the eviction orders obtained by the 1st Respondent were against Charo Kazungu, Fatuma Mandoro, Katunga Zawadi, Mwalimu Karisa Mangi, Sulubu Karisa Mangi and Kazungu Mangi Kitunga from Land Portion 7652 (Original Number 570/3) Malindi whereby neither the petitioners nor their families were party to ELC Case No. 296 of 2016.
 10. It was Mr. Ole Kina's submission that the Petitioners were not served with the Eviction order as per the mandatory provisions of Section 11 of the Evictions and Resettlement Procedures Act, 2012. Further that the property in which the 1st Respondent got orders to evict is Plot 7652 situated at Mtangani in Malindi yet the property that the Applicants are in possession of is situated at Majivuni Village in Malindi.
 11. According to counsel, the Applicants will suffer irreparable damage which cannot be adequately compensated by an award of damages if the injunction sought is not granted and that the Respondents will not suffer any harm/ damage as a result of the grant of the orders sought since the Respondent has never been in occupation of the suit property. Counsel cited the case of High Court Petition No. E009 of 2021 *Okiya Omtatah Okoiti & Another v The Nairobi City County Assembly & 5 others* and Hon. Mike Sonko Mbuvi and that of *National Commercial Bank Ltd v Olint Corporation* 2009 and submitted that the purpose of interlocutory injunction is to improve the chance of the Court being able to do justice after a determination of the merits at trial.
 12. Counsel therefore urged the court to grant the orders as prayed as the Applicants have equally demonstrated that the balance of convenience tilts in their favour as they have established a prima facie



case and demonstrated the injustice they have suffered and will continue to suffer if the court does not grant the injunction.

1st Respondent's Submissions

13. The 1st Respondent filed a Replying Affidavit sworn by Mohamed Osman Noor sworn on the 23rd February, 2022 whereby he deponed that he is the registered owner of parcel Number 7652 (original number 570 Malindi) and that since he purchased the suit land, his title has never been challenged by the Petitioners and/or any other person. He also deponed that sometime in the year 2014 he visited the suit property and found that it had been invaded by strangers.
14. The Respondent further deponed that he instituted a suit against the strangers in Malindi ELC Case No. 286 of 2016 where the Defendants were duly served with summons but they never honoured the said summons which suit was heard and determined in his favour directing the Defendants to be evicted from the suit property.
15. That on 5th December, 2021 with the assistance of the OCS Malindi Police Station, the Defendants and their families were evicted from the suit property and that the present Petitioners are members of the families of the Defendants in Malindi ELC No. 286 of 2016.
16. Counsel identified two issues for determination namely, whether the eviction order has already been effected and whether the Petitioners have established a prima facie case with a probability of success.
17. On the 1st issue as to whether the eviction was effected, counsel submitted that the 1st Respondent obtained a decree for eviction against the Defendants and their families in ELC Case No. 286 of 2016 which decree was effected on 5th December, 2021. It was his contention that the Applicants herein are family members of the Defendants in the mentioned suit.
18. It was counsel's further submission that there is nothing to be stopped since demolition has already taken place and the Petitioners have vowed, they shall not vacate the suit property and have commenced reconstruction of semi-permanent dwelling structures on the suit property.
19. Counsel also submitted that injunctive orders are issued to restrain an event which has not happened and which is in the process of happening and if the event happens it shall injure the other party and relied on the cases of *Morris & Others vs Crown Office* 1970 pg 122 and *Benson Mbithi Wambua & 7 Others vs Sheraton Apartments Ltd & 5 others* ELC Case No. 385 of 2019. Counsel therefore urged the court to dismiss the application with costs.

Analysis and Determination.

20. This is an application for interlocutory injunction by the Petitioners against the 1st Respondent. The issues for determination in an application for injunction are as were stipulated in the case of *Giella vs Cassman Brown & Company Limited* (1973) EA 358 and were restated in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, Ca No. 77 of 2012, where the court expressed itself as follows: -

“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.



21. If an Applicant meets the above threshold, then the court should grant the orders of injunction as prayed. The first question that the court must answer is whether the Applicant has a prima facie case with a probability of success against the 1st Respondent.
22. This application is in respect of land known as Plot No. 7652 situated at Mtangani Village Malindi which is the subject of ELC Case No. 286 of 2016 whereby judgement was delivered on 21st February 2019.
23. The current petition challenges the legality of the eviction pursuant to the judgment of the court on the grounds that the Petitioners were neither served with the pleadings nor were they party to the case. The Petitioners further submit that the property that the 1st Respondent got orders of evict was plot No. 7652 situated at Mtangani in Malindi while the Petitioners are in occupation of property in Majivuni Village in Malindi.
24. The Applicants have not stated which plot within Majivuni Village they are in occupation of. The Applicants also deponed that they have never been evicted from the land and in the same breath they depone that the current state of affairs is that the take shelter in tents and temporary structures that they have constructed after the unlawful demolitions that took place. Further that they have neither vacated the suit property nor do they intend to vacate.
25. The court is cognizant of the fact that at an interlocutory stage, the court is not required to make final findings of contested facts but to weigh the relative strength of the parties' cases. The principle was considered and Lord Diplock made the following observation in *American Cyanamid Co. v Ethicon Limited* (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510.

“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

26. As earlier stated that this case emanates from a Judgement of the court whereby execution has already been effected in a separate suit. The Applicants must establish that they have a prima facie case against the Respondents.
27. I also note that the petition seeks a declaration that by virtue of the Petitioners 'possession of the suit land, the 1st Respondent's title has been extinguished. The purpose on injunction is to preserve the substratum of the case and to prevent wastage of the suit land or prevent the happening of a certain event. If that event has already occurred, then an order of injunction cannot issue.
28. In the case of *Kalya Soi Farmers' Cooperative Society v Paul Kirui & another* [2013] eKLR, the court observed as follows:

“An injunction is an equitable remedy to which the principles of equity apply. The Court of Appeal at Nairobi in *Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others* Civil Application No.20 of 1994 (12/94 UR) addressed itself to the issue of grant of an injunction where the action sought to be restrained has already taken place and the application of the equitable principle that equity does not act in vain as follows-

“An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim,



courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”

29. It is on record that the judgment in ELC No 286 of 2016 had already been executed and evictions done on 5th December 2021 which judgment has neither been appealed against nor set aside.
30. The court comes to the conclusion that the Applicants have not met the threshold for grant of interlocutory injunction but in the interest of justice the court orders that a ground report by all the parties to the suit be produced in court to ascertain the status within 30 days from the date of this ruling. Parties to fast track the hearing of the petition. The application is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF DECEMBER, 2022.

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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.

