Mwasi & 14 others v Salim & another (Civil Appeal 036 of 2022) [2023] KEELC 16657 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16657 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL APPEAL 036 OF 2022

LL NAIKUNI, J

MARCH 8, 2023

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

IN THE MATTER OF TITLE NO. CR 2006 PLOT NO.MN/II/80

APPLICATION BY:

BETWEEN

BLYTHON TOLE MWASI & 14 OTHERS .... PLAINTIFF

AND

SHEHA KHAMISI SALIM .... 1ST DEFENDANT

HASSAN ABDALLA SAID .... 2ND DEFENDANT

RULING

I. Introduction.

1. The 1st and 2nd Defendants, Sheha Khamisi Salim, Hassan Abdalla Said moved this Honorable Court through a Notice of Preliminary Objection dated 22nd April 2022 against the suit for being in contravention with Sections 10 and 15 of the *Wakf Commissioners Act*. (Hereinafter referred to as "The Act")

2. In an apparent response to the afore stated objection, the 5th Plaintiff/Applicant filed a Notice of Motion application dated 17th May 2022 under the provision of Sections 1A, 1B, 3A, of the *Civil Procedure Act*, Cap. 21, Order 40 Rule 1 (1) (a), (b) and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.

3. It is instructive to note that the Plaintiffs instituted an originating Summons on 7th April, 2022 against the Defendants herein seeking for a claim of title of all that parcel of land known as CR. 2006 Plot No. MN/II/80 (hereinafter known as "the Suit Land") under the Claim of land Adverse Possession

under the provision of Sections 37 & 38 of the *Limitation of Action Act*, Cap. 22 and order 37 rule 3D (1) and (2) of the *Civil Procedure Rules*, 2010. Subsequently the Defendants filed their Replies and the matter should be ripe for taking directions under the provision of Order 37 Rules 16 of the *Civil Procedure Rules*, 2010. But before exhausting that process, the objection and the application which are the subject of this ruling were raised and have to be dealt with as a matter of precedence.

The 5th Plaintiff/Applicant's Case

4. The 5th Plaintiff/Applicant herein sought for the following orders.

    a. Spent.

    b. Spent.

    c. That this Honorable Court be and is hereby pleased to grant a temporary injunction restraining the 1st and 2nd Defendants/Respondents by themselves, their agents and/or agents, proxies from interfering with the quiet possession and enjoyment by the plaintiff/applicant of the suit property pending the hearing and determination of Mombasa ELC No. E036 of 2022 between Blython Tole Mwasi & 14 others v Sheha Khamis Salim & Hassan Abdalla Said.

    d. That the costs of this application be provided for.

5. The application is based on the grounds, testimonial facts and the averments made out under the nine (9) Paragraphed Supporting Affidavit of Blython Tole Mwasi And Salim Seif Salim the 1st and 5th Plaintiffs respectively. They also annexed the three (3) anexetures marked as "BTM – 1 to 3. The 5th Plaintiff/Applicant was the owner of the Swahili house with seven rooms built in block erected on the suit land which the 1st and 2nd Defendants/Respondents had sought to distress. Recently, they came to learn that the 1st and 2nd Defendants/Respondents had proceeded to advertise the said building by way of auction by publishing an advertisement in the daily newspaper of 18th May, 2022. They also averred that the said house was a subject matter in another pending suit ELC Number E036 of 2022 – "Blython Tole Mwasi & 14 Others – v Sheha Khamis Salim & Hassan Adballa Said" which if this orders are not granted may cause the Defendants to execute their threats rendering the said case nugatory. The Plaintiff/Applicant urged the Court to issue an injunction to stop the sale least he suffers irreparable loss and damage, until this case was heard and determined, which he was adamant had overwhelming chances of success.

II. The Responses by the Defendants/Respondents

6. The Defendant/Respondent opposed the application vide a 13 Paragraphed Replying Affidavit dated 8th June 2022 sworn by Sheha Khamis Salim & Hassan Abdalla Said, the 1st and 2nd Defendants/ Respondents herein. They deponed that the 5th Plaintiff/Applicant was in One Hundred and Fifteen Thousand Two Hundred (Kshs 115,200/=) as at November 2021, which was demanded by the Respondents' Advocates vide a letter dated 14th September 2021. The Respondents argue that its within their right as the landlord to levy distress for rent which they proclaimed on 18th November 2021. Before the said sale could take place, the Applicant approached the Respondents to settle the rent through installments which culminated into acknowledgement of the arrears and an undertaking between the Applicant and Respondents on a repayment plan. The Respondents argued that an order of injunction was not warranted since the said undertaking bound them and there was no danger of the house being sold.

7. The 1st Plaintiff responded to the issued raised in the Notice of Preliminary Objection vide a Supplementary Affidavit dated 6th July 2022. He deponed that the suit property was not Wakf within

the meaning of *Wakf Commissioners Act*, which made it mandatory for all Wakf properties to be registered. He maintained that the suit property was not registered as provided under the provision of Sections 3 and 10 of the said *Act*, hence the Wakf was invalid for reason of non - compliance with registration. He deponed that the suit property did not comprise of the registered Wakf that were listed in the Report of the Taskforce of the review of the *Wakf Commissioners of Kenya Act*, 1951 (see annexture marked as "BTM – 1"). He deponed he confirmed from the Wakf commissioner's secretariat vide their letter dated 30th May 2019 that the suit property had not been registered with them (see annexture marked as "BTM – 2").

8. The deponent maintained that he and other Plaintiffs had acquired title to the suit property by way of Land Adverse Possession and that he had tenants at the exclusion of the Defendants who paid rent to him (see annexture marked as "BTM -4"). He contended that the Defendants were in breach of the interim orders of this Court by inviting the telecommunication company trading in the name and style of "Airtel Limited" to install fibers and network towers on the suit property (see annexure marked "BTM – 5"). The deponent argued that since they had acquired title by Land Adverse Possession the Defendants were subjected to their overriding interest. That the Defendants were statutory barred to distress for rent after six (6) years as per the provision of Section 8 of *Limitations of Actions Act*, Cap. 22 of the Laws of Kenya.

III. Submissions

9. On 25th may, 2022 while all the parties were present in Court, they were directed to canvass both the Preliminary Objection dated 22nd April, 2022 and the Notice of Motion Application dated 17th May, 2022 by way of written submissions. Pursuant to that all the parties complied accordingly. Thereafter, the Honorable Court reserved a date for the delivery of the ruling on these issues on notice.

A. The Written Submissions by the Plaintiffs.

10. On 6th July, 2022 the Learned Counsels for the Plaintiffs the Law firm of Messrs. K. Lughanje & Co Advocates filed written submissions on behalf of Plaintiffs dated even date in support of the application dated 17th May 2022. Mr. Lughanje Advocate submitted on two main issues. Firstly, on the granting of interlocutory injunction orders and Secondly, on whether the distress was lawful.

11. Regarding the first issue, the Learned Counsel argued that the Plaintiffs/Applicants had "a prima facie" case with a high probability of success having been in occupation of the suit property for over fourty (40) years and adversely since the year 1999 when they stopped paying rent. The Learned Counsel argued that non - payment of rent established the element of dispossession and also marked the beginning of time running against a registered owner in a claim for Land Adverse possession. The Learned Counsel contention was that unless the Defendants were restrained they would dispose off the suit by way of public auction which would cause the Plaintiffs/Applicants irreparable injury that could not be adequately compensated in monetary value. He held that the Plaintiffs/Applicants had sentimental value attached to the suit property where they had built permanent houses and ran their business. On the balance of convenience, the Learned Counsel submitted that the Defendants would suffer no prejudice if the orders were granted as prayed, since they could be compensated by way of costs, yet the Plaintiffs/Applicants who stood to suffer a greater loss if the orders were not granted. In conclusion on the first issue, the Learned Counsel urged the Honorable Court to find that the scaled of justice tilted in favour of the Plaintiffs/Applicants.

12. On the second issue, the Learned Counsel submitted that the Defendants were limited by the provision of Section 5 of the *Distress for Rent Act*, *Limitation of Actions Act* as well as the provision of Section 28 of the *Land Registration Act*, No. 3 of 2012. The Learned Counsel submitted that the distress for

rent had to be undertaken within 6 months after the last rent, during the continued title of a landlord and which the Defendants were said to be lacking. The Court was informed that there was no remedy for distress for rent against an owner of land by way of Land adverse possession. To buttress on this point, the Learned Counsel relied on the Court of Appeal's decision in case of:- "*C.YO Owayo v George Hanninton Zaphana Aduda* (2007) eKLR, where it was held that:-

> " an action for distress cannot be brought and may not be made, to recover arrears of rent or damages after the end of six years from the date on which arrears became due."

Hence, it was the contention by the Learned Counsel that rent became due back in the year 1999 and the six (6) years' grace period the Defendants had to recover rent had lapsed by virtue of the provision of Section 8 of the *Limitation of Actions Act*, cap. 22 but failed to do so and hence they were barred to distress for rent now. As a Court of equity, the Learned Counsel urged the Honorable Court not to aid the indolent who slept on their rights for over twenty (20) years but rather to allow the application filed by the Plaintiffs/Applicants as prayed with costs.

B. The Written Submissions by the Defendants.

13. On 4th July, 2022 the Learned Counsel for the Defendants, the Law firm of Messrs. N.A Ali & Company Advocates filed their written submissions on behalf of the Defendants and in support of their filed Notice of Preliminary Objection dated 22nd April, 2022. M/s. Natasha Ali Advocate submitted that the suit being one of Land adverse possession, the Plaintiffs had admitted that the Defendants were the registered owners of the suit property. From the Entry No. 9 on Certificate of the Title deed for the suit property, it was evident that it was a Wakf property and the provision of Section 15 of the *Wakf Commissioners Act* insulated the suit property from a claim of Land Adverse Possession as provided for by statures. To support their case they also relied on the decision of "*Independent Electoral & Boundaries Commission v Jane Cheperenge & 2 Others* (2015)"

14. On the merit of the Notice of Motion application dated 17th May 2022 filed by the Plaintiffs, the Learned Counsel submitted that the Defendants were entitled to levy distress onto the 5th Plaintiff who owned the Swahili house (Semi permanent structure) on the suit property. The Counsel argued that the 5th Plaintiff had not established any "prima facie case" since the Defendants could prove that the 5th Plaintiff/Applicant had not paid his ground rent and the Defendants as the landlords were entitled to levy for distress for rent. Further he maintained that the Plaintiff/Applicant had not demonstrated they would suffer any irreparable loss that could not be compensated by an award of damages as the status of tenant and landlord never changed unless there was a termination of the tenancy agreement. It was urged that incase the rent was wrongfully levied the same could be refunded to the Plaintiff/Applicant herein. Lastly, on the issue of the balance of convenience, the Learned Counsel contended that the beneficiaries of the Wakf were the ones who stood to suffer prejudice if the injunction was granted and it would be rewarding the Plaintiffs/Applicants for not praying their rent. To buttress their case they cited the following cases: "*Christopher Kitur Kipwambok v Vipul Ratilal Dodhia & 3 Others* (2013) eKLR; and *Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 Others* (2018) eKLR; and In the long run, the Court was urged to find the application had no merit and dismiss the same with costs.

III. The Responses to the Preliminary Objection by the Plaintiffs.

15. On 6th July, 2022, the Learned Counsel for the Plaintiffs, the Law firm of Messer. K. Lughanje & Co advocates also filed their written submissions on behalf of Plaintiffs dated 5th July, 2022 in opposition of the Defendants' Preliminary objection. Mr. Lughanje Advocate submitted that the said objection failed to adhere to the definition of what a Preliminary objection was as stated out in

case of: "*Mukisa Biscuit Manufacturers Limited v West End Distributors Ltd* (1969) EA 696, and "*Independent Electoral & Boundaries Commission* (*supra*) that all facts pleaded ought to be correct. The Learned Counsel submitted that the suit property was not registered as a Wakf as required by the provision of Sections 3 and 10 of the *Wakf Commissioners Act*. Thus, he urged the Honorable Court to dismiss the preliminary objection for failing to be anchored on pure points of law but rather facts that needed to be ascertained during a full trial.

IV. Analysis and Determination

16. I have critically considered the filed Notice of Preliminary objection dated 22nd April, 2022 by the Defendants herein, the Notice of Motion application dated 17th May, 2022, the annextures by the Plaintiffs/Applicants herein, the written submissions, cited authorities by the parties and the appropriate provisions of the statures. To reach an informed, reasonable and just decision in the subject matters, the Court has framed three (3) issues for its determination. These are:-

    a. Whether the notice of preliminary objection dated 22nd April, 2022 by the Defendant herein meets the threshold for objections based on Law and precedents.

    b. Whether the Notice of Motion application dated 17th May, 2022 by the Plaintiffs/Applicants herein has met the threshold for granting an order of temporary injunction.

    c. Who will bear the Costs of the Objection and the application

ISSUE No. a). Whether the notice of preliminary objection dated 22nd April, 2022 by the Defendant herein meets the threshold for objections based on Law and precedents.

17. A preliminary objection was described in the now famous case of "*Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA 696, by LAW J.A on page 700 thus:-

    > " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit." Sir Charles Newbold P, on page 701 observed that:-
    >
    > > " The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop."

18. Accordingly, the Defendants herein objected to the suit herein in its entirety for contravening the provisions Section 10 of the *Wakf Commissioners Act*. The section provides that:-

    1. The Wakf Commissioners shall keep, in such form and containing such particulars as may be prescribed, a register of all property the subject of a Wakf.

    2. Every trustee of property the subject of a Wakf shall, within two months from the date of the making of the Wakf, apply to the Wakf Commissioners to register it; and every application shall

be in such form and shall contain such particulars and be accompanied by such fee as may be prescribed.

3. All fees for the registration of property the subject of a Wakf shall be credited by the Wakf Commissioners to a fund to be known as the general administration fund.

4. Any trustee who fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding six months.

19. The 1st Plaintiff claim that though the suit property was registered in the title document as a Wakf, it had not been registered as one by the Wakf Commissioners of Kenya as required by the provisions of Section 10 as seen above. In support of his claim the 1st Plaintiff in his Supplementary affidavit attached a letter dated 30th May 2019 from the Wakf Commissioners of Kenya which stated that Plot No. 80/II/MN - the suit property herein was not registered with the Wakf Commissioners of Kenya. The Defendants on the other hand insisted that the suit property was a Wakf property and thus could not be claimed by way of Land adverse possession as per the provision of Section 15 of the *Wakf Act*. Section 15 of the *Act* provides that:

> Notwithstanding anything to the contrary in any *Act* or law for the time being in force, no title to any property the subject of a Wakf shall, after the commencement of this *Act*, be acquired by any person by reason of that person having been in adverse possession thereof or by reason of any law of prescription.

20. From the face value of the filed Notice of Preliminary objection, clearly and in all fairness, the Defendants are inviting the Honorable Court to cause for intensive interrogation and critically call for empirical both oral and documentary the evidence on record to determine whether or not the suit property complies with the provisions Sections 10 and 15 of the *Wakf Commissioners Act*. Certainly, these are matters of facts and circumstances to be adduced 'Viva voce" that would require the Honorable Court to weigh and exercise its discretion upon conducting a full trial. It follows therefore, that the principles set out in famous case of *Mukisa Biscuit* (*supra*) limits a preliminary objections to matters of pure points of law such as jurisdiction, time limitation, locus standi and so forth and not facst per se. Therefore, it goes without saying that the Preliminary objection as raised by the Defendants fails to meet these basic dictums of law. It is not capable of disposing the matter preliminarily without the Court having to consider and ascertain the facts from elsewhere through a trial. By all standards, this is not a pure point of law stemming from the pleadings only. For these reasons, therefore, the Preliminary Objection raised by the Defendant fails in its entirety with no order as to costs.

ISSUE No. b). Whether the Notice of Motion application dated 17th May, 2022 by the Plaintiffs/ Applicants herein has met the threshold for granting an order of temporary injunction

21. Under this sub title, the issue to consider is whether to grant the temporary injunction orders or not under the provisions of Order 40 Rules 1, 2, 3 of the *Civil Procedure Rules*, 2010. The power of Court in an application for interlocutory injunction is discretionary. The discretion is judicial and is exercised on the basis of law and evidence. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in 'the Locus Classicus" case of:- "*Giella v Cassman Brown & Co. Ltd* [1973] EA 358, set out the three (3) requirements that has to be satisfied in an interlocutory injunction application. The applicant has to established without being able to be compensated by an award of damage his case only at "a prima facie" level, to demonstrate whether he/ she will suffer irreparable injury if a temporary injunction is not granted and where the Court has any doubts, it will be decided on a balance of convenience.

22. The Court of Appeal in the case of "*Mrao Ltd. v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 defined a prima facie case is. It held:

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

The court went further to hold that

> " A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant case upon trial. That is clearly a standard which is higher than an arguable case."

23. The Plaintiffs need to demonstrate that they not only have an arguable case, but one which has a good probability of success at trial. A preliminary assessment at this interlocutory stage should direct the mind of the court to preserving the suit property pending the hearing and determination of the suit on its merit. The Plaintiffs herein claim land parcel Title No. CR 2006 Plot No. MN/II/80 by way of Land adverse possession having occupied the suit property for over twelve (12) years in an open, peaceful and continuous possession to the exclusion of the Defendants. They claim that time started running against the Defendants in year 1999 when the Plaintiffs stopped paying ground rent and their possession of the suit property became hostile and adverse to the Defendant's title.

24. The Plaintiff's claim of adverse possession is a clear admission that the Defendants are the absolute and legally registered owners of the suit property with the proprietary and indefeasible rights, title and interest vested in them by law as stated out in the provision of Section 25 of the *Land Registration Act*, No. 3 of 2012. So far, the Plaintiffs have not established any legal rights to the suit property in order to claim beneficial interest to it. Further to this, the Plaintiffs claim their possession onto the suit property began in the year 1999 when they stopped paying the ground rent. However, no such evidence has been placed before court to demonstrate they were paying ground rent before year 1999 as would have been expected from them taking that these is information within their possession. Additionally, they also never provided to Court at what specific time did their occupation become hostile. Without the Court to be seemingly holding a mini trial at this interlocutory stage, the Court has looked at the rights the Plaintiffs claim to be violated by the Defendants and none seem to be established at "a prima facie case" at this interlocutory stage.

25. It follows therefore the Plaintiff/Applicant has failed to satisfy the first limb of the triple requirements in an interlocutory injunction application, yet the three requirements ought to be applied separately and distinctly. The Court would not proceed to consider the other two requirements as they are all treated in sequential order. The Court of Appeal in the case of:-"*Nguruman Limited v Jan Bonde Neilsen & 2 others* (2014) eKLR held:

> " If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit leap-frogging by the applicant to injunction directly without crossing the other hurdles in between."

26. It is not enough for the Applicant to merely state he has a prima facie case, the same has to be established by placing material before Court to lay a basis for seeking a temporary injunction orders. As it is in the instant case, the Plaintiffs/Applicants have not demonstrated to the Honorable Court that they have "a prima facie case" with a probability of success hence failing to made a case for a grant of the

interlocutory injunction they seeks. For these reasons, therefore, the application must fail from the very onset. However, taking Judicial notice that there are several suits including this one over the same subject matter pending hearing and final determination, its important and based on the doctrine of "Lis Pendens" that there be preservation of the suit property avoiding any anticipated disposal of the suit property before the case is heard until the matter is heard and determine. (See the Cases of *Mawji v United States International University & another* (1976)"; *George Kadenge Ziro v Azzuri Limited* (2020) eKLR; and *Nafutali Ruthi Kinyua v Patrick Thuita Gachure & Ano*" (2021) eKLR) Thus, the Court shall order that there be "status quo to be maintained' meaning to remain as it is before the filing of the case.

ISSUE No. c). Who will bear the Costs of the Objection and the Application.

27. It is trite law that Costs is an issue of the discretion of the Court. Costs means any award which is awarded to a party at the conclusion of a legal action or process or proceedings in any litigation. The Proviso of the provision of Section 27 (1)of the *Civil Procedure Act*, cap. 21 holds that costs follow the events (See the Supreme Court case of "*Jasbir Rai Singh v Trachalon Singh*" (2014) eKLR and the Court of Appeal case of *Mary Wambui Munene v Ihururu Dairy Co – operatives Societies Limited*" (2014) eKLR). By events it means the result of the legal action, process or proceedings thereof.

28. In the instant case, both the Preliminary Objection raised by the Defendant and the application filed by the Plaintiffs/Applicants have not been established and thus are not successful as per the required legal dictum and standards clearly stated out in this ruling herein. . For these reasons, therefore, both the Defendant and the Plaintiff/Applicants will each bear the costs of the objection and the application accordingly.

V. Conclusion & Disposition

29. Consequently, having conducted an intensive analysis of the framed issues herein, the Honorable Court on a preponderance of probability arrives at a conclusion that both the preliminary objection and the application are not meritorious and hence cannot succeed in the given circumstance. Thus, I proceed to order as follows:-

    a. That an order made that the Preliminary Objection by the 1st and 2nd Defendants through a Notice of Preliminary objection dated 22nd April, 2022 be and is hereby dismissed for lack of merit.

    b. That an order made that the Notice of Motion application dated 17th May 2022 by the 5th Plaintiff/Applicant be and is hereby dismissed for lacks of merit.

    c. That for expediency sake, this matter to be heard and determined within the next one hundred and eighty (180) days from the date of the delivery of this Ruling from a hearing date of 25th July, 2023 and a Mention on 8th may, 2023 for Pre – Trial Conference and taking direction on the Originating Summons dated 6th April, 2022 pursuant to the provisions of order 11 and 37 rule 11 of the *Civil Procedure Rules*, 2010.

    d. That in the meantime and based on "the Doctrine of Lis Pendens"under the provision of Section 52 of the Transfer Act,an order of Status quo to be maintained meaning the suit property to remain as it was before the filing of this suit until the suit is heard and determined.

    e. That the Costs of the Objection to be borne by the 1st and 2nd Defendants and while the 5th Plaintiff/Applicant bears the costs for the application herein.

It is so Ordered Accordingly

RULING DELIVERED THROUGH MOCROSOFT TEAM VRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF MARCH, 2023.

HON. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:

a) M/s. Yumnah, the Court Assistant.

b) M/s. Mkungu Advocate holding brief for Mr. Nyanje Advocate for the Plaintiffs/Applicants.

c) M/s. Natasha Ali Advocate for the Defendants.