



Kulet v Sansora Limited & another (Environment and Land Appeal E10 of 2022) [2022] KEELC 12821 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 12821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E10 OF 2022
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

PARSALUNYE OLE KULET APPELLANT

AND

SANSORA LIMITED 1ST RESPONDENT

LEIYTON ENTERPRISES LIMITED 2ND RESPONDENT

RULING

1. This is a ruling in respect of the appellant's notice of motion application dated April 12, 2022. It has been brought under section 10 of the Judicature Act, rules 2(2)a, 3(1) and 3(2) of the High Court Practice Rules and section 3A of the Civil Procedure Act which seeks the following orders;
 - a. ...Spent
 - b. ...Spent
 - c. ...Spent
 - d. That this honorable court be pleased to grant an injunction to restrain the respondents by themselves, their agents and/or any other persons acting under their authority from entering, trespassing into, planting and or the usage of that leased portion on the suit land parcel LR No 8668 pending the hearing and determination of the suit in the lower court.
 - e. The honorable court be pleased to grant further and/or other orders as it may deem just, appropriate, equitable and expedient.
 - f. Costs of this application do abide in the cause.
2. The application is supported by the grounds on the face of the application and the affidavit sworn by Parsalunye Ole Kulet, the appellant herein. He deposed that on April 4, 2022 the court dismissed the



application dated August 8, 2021; that the dismissal of the applicant's application posed a threat to the well-being of his livestock which were on the grazing fields that the applicant had leased for three years from the respondents; that he had paid a sum of Kshs 110,000/= as annual rent for the year 2022-2023 and he stands to be disadvantaged as the livestock business is his only source of income that pays for the lease, his children school fees and his livelihood; that having paid for this year's lease and without alternative grazing fields, he stands to suffer irreparable damage should the court not issue an interim order of injunction against the respondents as he risks losing his livestock to the persisting drought, diseases and stock theft; that the respondent assessed the damages it has suffered at Kshs 80,000/= which amount was paid in full; that the present application was made without unreasonable delay after the impugned ruling was delivered on April 4, 2022; that he ought to be allowed to pursue the intended appeal without the same being rendered nugatory and that it is in the interest of justice that his application be allowed.

3. In response to the application, the respondents filed a replying affidavit sworn on May 27, 2022 by Boniface Kinyua who deposed that he is authorized to swear the affidavit on behalf of the respondents; that the application has been overtaken by events as the appellant is no longer on the suit property and the suit property has already been cultivated and cannot therefore cannot be utilized for grazing by the appellant which renders the present application an academic exercise; that the appellant is in arrears, having failed to pay the full consideration for the year April 2021 to March 2022 as he only paid Kshs 88,000/= out of the agreed sum of Kshs 156,000/= and never made any further payment; that the appellant did not produce any evidence to show the payment of Kshs 110,000/= as alleged; that the main suit is yet to be heard and determined and therefore there are no costs to be executed as alleged by the appellant; that the appellant is guilty of material non-disclosure by failing to disclose to the court the reason for the termination of the lease agreement; that the appellant had disregarded the respondents proprietary rights over the suit property by continually encroaching and trespassing over the defendants' other property that was not part of the leased land with his livestock, interrupting farming activities and occasioning damage thereon despite numerous warnings to stop; that he has been the farm manager of the 1st respondent and has witnessed the appellant's disregard for the 2nd respondent's land by trespassing and grazing; that the payment made by the appellant was for the damage caused and does not mean that the appellant is entitled to the suit property in any way; that it is just in the circumstances that the court dismisses the application with costs.
4. The application was canvassed by way of written submissions. The respondents filed their submissions dated August 25, 2022 on September 6, 2022 while the appellant did not file any submissions. The respondents submitted that the appellant is not seeking for any orders pending the hearing and determination of the appeal but rather pending the hearing and determination of the lower court suit which means that the applicant does not have an intention of pursuing the appeal should the orders sought be granted.
5. The respondents further submitted that the appeal and the application have already been overtaken by events as the appellant is not in possession of the suit property as it has already been cultivated by the respondent and the same cannot be used for grazing. The respondents relied on the case of *Kalya Soi Farmers Cooperative Society v Paul Kirui & another* [2013] eKLR and submitted that the applicant is not entitled to the orders sought as he has not met the threshold for granting of an injunction.
6. The respondents also relied on the cases of *Giella v Cassman Brown Brown & Co Ltd* [1973] EA 358, *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 Others* [2015] eKLR and submitted that the appellant has not established a *prima facie* case with a probability of success and has not advanced any justifiable reason why the orders sought should be granted. The respondents also



submitted that the lease was terminated solely because of the appellant's actions and further that he has failed to prove that he will suffer irreparable harm if the temporary injunction is not granted.

7. The respondents concluded their submissions by stating that appellant failed to meet the third pre-condition of balance of convenience and sought that the appellant's application be dismissed because costs as it lacks merit.

Analysis and Determination

8. After considering the application, affidavits and the submissions, the only issue that arises for determination is whether the court should issue an injunction pending the hearing and determination of the suit in the lower court.
9. It is quite interesting that the appellant has approached this court for orders but has failed to comply with the order on filing of submissions by means of which the application would be deemed prosecuted. I would have been inclined in other circumstances to dismiss the application for want of prosecution upon that default but owing to the nature of this matter that involves livelihood I will delve into its merits.
10. The appellant herein appealed to this court *vide* the memorandum of appeal dated April 12, 2022 against the ruling of the learned magistrate court delivered on April 4, 2022.
11. In the application whose ruling is being appealed against, the appellant had sought the following order which the learned magistrate dismissed:
 - “ d. That pending the hearing and determination of the suit, the honorable court be pleased to restrain the defendants by themselves, their employees, agents and or any other persons acting under their authority from entering, trespassing into, planting and or usage of any and all the leased portion on the suit land parcels LR No 8668.”
12. It is the denial of the orders in the interlocutory application before the trial court that prompted the present appeal. The appellant's main interest in the present appeal is therefore to have the decision of the trial court examined for its legality or correctness. In the meantime, the appellant is seeking in this court an injunction against the respondent pending the hearing and determination of the suit in the lower court. It is my view that the orders sought in the present application are the same as the orders that were sought in the lower court that were dismissed.
13. In my view any reversal of the trial court's findings must emanate from a substantive appeal and not an interlocutory application. It is in the hearing of the appeal that the reasoning of the trial court will be subjected to scrutiny which it may fail or pass. It needs no overemphasis that if this court issues such orders in an interlocutory application and not a substantive appeal it would be short-circuiting the appeal process; it would be tantamount to taking over the case before the trial court, shunting aside the orders that it has made and substituting this court's decision therefor without any substantive appeal having been heard and determined which would be highly irregular. The logical thing for the appellant to have done is to have sought an injunction pending the hearing and determination of the appeal.
14. It is therefore plain to see that the orders the appellant seeks cannot be issued at this stage of the proceedings but in the appeal decision itself as was submitted by the respondents herein.
15. Based on the foregoing, this court finds that the appellant's application dated April 12, 2022 lacks merit and the same is hereby dismissed with costs to the respondents.



DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

