Ogutu v Milungi (Enviromental and Land Originating Summons E001 of 2023) [2025] KEELC 5043 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5043 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023

FO NYAGAKA, J

JUNE 18, 2025

BETWEEN

DANCAN OGUTU ..... APPLICANT

AND

LEOKADIA ATIENO MILUNGI ..... RESPONDENT

RULING

1. This Court delivered a ruling in respect of the application dated 8th March 2024 on12th November 2024. By the said ruling, the Court found that the application was allowed partially in terms of prayer number 2 and the costs were to be in the cause. This sets ground for another application: the instant one. When the handwritten summary of the Ruling is compared with the printed copy in the file, there is a clarity on the orders granted application. The learned judge stated at paragraph 20 of the Ruling that the application was partially merited. He therefore granted prayers 2, 5, and 6. He clarified further that the prayers granted were captured in paragraph *1*(b), (e) and (f). Indeed, they were similar prayers as given in the body of the application.

2. Following the ruling, the Defendant/Applicant was directed to file a response to the Originating Summons within 14 days from the date of the Ruling and the plaintiff to file and serve the rejoinder within seven (7) days of service. The Notice of Motion was then fixed for further directions on the 18th of February 2025. On that date the Respondent confirmed that he had filed a Replying Affidavit out of time. It was struck out for reason of it not being in compliance with the orders pf the Court. The Respondent was leave of the court to file another one within seven days and serve. The Applicant was to file a Supplementary Affidavit, if there was need, within 14 days of service.

3. It is instructive at this stage to examine the prayers in the Application dated 8th March 2024 to understand the import of the ruling delivered on 12th November 2024. This can only be deduced from the content of the application in relation to the prayer granted. The prayers in the application were that:

1. The court be pleased to set aside the proceedings taken ex parte in the matter before the court.

2. The Court be pleased to allow the respondent in the originating summons to file a response and participating in the matter.

3. The Court be pleased to make orders varying and or setting aside the orders of stay of proceedings in Mbita Court case number E015 of 2023 to enable the Defendant herein Leokadia Atieno Milungu who was the plaintiff in the Mbita file to proceed against the rest of the Defendants except the plaintiff in the matter.

4. The Court to make orders that the proceedings against the rest of the Defendants in the abovementioned Mbita case to proceed because the plaintiff therein had already withdrawn her case against Duncan or Ogutu the 4th defendant in it.

5. That Court to issue an order directing the respondent to serve their applicant or respondent with all the pleadings and documents to enable the applicant or respondent draft and file a substantive response thereto.

6. The costs of the application to be in the cause.

4. It is clear to me from the prayers in the previous application and the ruling delivered thereto that the honorable court granted leave to the Respondents in the Originating Summons to file a response and participate in the matter. It basically meant that the rest of the prayers were not to be canvassed later: they lapsed with the conclusion of the application. That notwithstanding the Judge directed that the Notice of Motion was to be mentioned on 18th February 2025 for further directions. While the Respondent's counsel, on the subsequent mention dates, was of the view that his client was at liberty to participate in the Originating Summons learned counsel for the Applicant thought otherwise.

5. However, the totality of the Ruling, as read with the prayers in the application, is that when the Respondent in the originating summons was granted leave to file a response it meant that she was automatically permitted to participate in the proceedings in the matter. Further, she could not participate in the proceedings without the initial proceedings either being set aside reopened for the purposes of the Respondent cross examining the witnesses who already testified, and adducing evidence on his behalf. Therefore, it is my humble view that, to correct the absurdity in the interpretation of the import of the ruling, and in the interest of justice, the rest of the prayers in their application dated 8th March 2024 were granted. What was not merited was the prayers for setting aside orders of staying the proceedings in the Mbita case.

6. Additionally, given the restatement by the Court of Appeal on the law on the (lack of) jurisdiction of the Magistrate Courts in adverse possession claims in the Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment) , it is undoubtedly clear to me that whether the matter in the Mbita Law Courts proceeds or not, the court (and the parties) therein have to grapple with the issue of jurisdiction first if the issue therein is raised by the parties. Furthermore, the instant suit is between the Plaintiff who was the 4th Defendant in Mbita SRMCC No. E015 of 2023 which was filed in May 2023 and summons issued on 29th May 2023 while the instant suit was filed on 01/09/2023 which was about four months later. Even then, the Plaintiff in the Mbita Suit has since withdrawn the claim in the Mbita suit against the 4th Defendant. Thus, the 4th Defendant is no longer a party to the said suit in the lower court hence for this Court to maintain orders of stay of proceedings in a matter

unrelated to the instant one it prejudicial to the parties in the other unrelated matter and it is an error apparent on the record.

7. Moreover, under Section 6 of the *Civil Procedure Act* the law is to the effect that where there are two suits filed between same parties over the same subject in different courts, the latter is stayed pending the hearing and determination of the previous one. Therefore, if one of the suits between the parties herein is to be stayed, the instant one having been filed later than the Mbita SRMCC No. E015 of 2023 it is the one that ought to be stayed and not the previous one. But this court has not been asked to stay proceedings in the instant suit. Thus, to stay the proceedings in the Mbita Court suit would achieve no better purpose than to clog the court system. The parties ought to decide what to do with the suit in the lower court, hence the stay of proceedings order granted therein is set aside. Further, for this Court to issue an order that the lower court suit proceeds against the rest of the Defendants it would be superfluous. Lastly, this Court notes that on 21/02/2025 the Respondent filed a response to the Originating Summons herein. She titled the document "Further Replying Affidavit". It was filed after the Court struck out, on 18th February, 2025, a Replying Affidavit that was filed without leave of the Court.

8. Thereafter the Plaintiff filed a Notice of Motion dated 10th March 2025. He brought it under Certificate of Urgency. He brought it under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010. He sought the following orders:

    1. ...Spent

    2. ...Spent

    3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendant/Respondent by herself, her agents, servants, assigns, employees, from interfering with the suit in issue.

9. It was based on the ground that in early March 2025 the Defendant, her servants and agents violently invaded the suit land and started ploughing the entire parcel of land thereby threatening the Applicant's peaceful use of the land. He added that he and his children and younger siblings had depended on the land for long and would be rendered destitute if he was dislodged from the land. Further, that they had been in open, continuous, uninterrupted and exclusive occupation of the land for over 50 years and had thereby developed interest in the land under the doctrine of adverse possession. Further, the Defendant's interference would cause harm, loss, and damage to him. He had done extensive development and subsistence farming on the land. If the Defendant is left to alienate, charge or lease the land, the applicant would be causing irreparable harm and damage. To let him to be evicted from the land would defeat his suit for adverse possession. The Respondent neither lived on the land nor worked on or used it. It was important to preserve the status quo pending the hearing and determination of the suit. Further, the Respondent came onto the land in early March and had since wrongfully and unlawfully remained on the land. The said Respondent without lawful excuse encroached onto and started tilling and cultivating the land with maize.

10. He supported the application with an Affidavit that he swore on the same date as the application. He repeated the contents of the application but in deposition form. He added a bundle of photographs showing the ploughing and marked them as annexture DO 01a, b, c and d.

11. When the application was placed before the Court for consideration, it was of the view that the application having been brought two years into the filing of the Originating Summons caused curiosity as to how the parties would have suddenly changed their position openly and without regard that there were ongoing proceedings over the subject matter. It therefore sought the establishment of the facts

alleged, through an independent party, the office of the local administration as a neutral party. Thus, it directed as follows:

1. "The Application is NOT certified urgent.
2. The Applicant to serve the Application together with these Directions on the Respondent by 11:00 AM of 13th March 2025.
3. ...
4. ...
5. These directions be served too on the Area Chief and Assistant Chief of the area in which the land is situate and they are summoned to attend court virtually on the 19th March 2025 at 08:30 AM to state the position of the suit land as at the time.
6. ..."

12. On the 19th March 2025 the Area Assistant Chief, one Enock Odiwuor Ochiri in charge of the Sumba West Sublocation of Kaksingri East Location in Suba Central Subcounty of Homa Bay. He appeared virtually and testified on oath that he knew both parties and the suit parcel of land very well. He stated that the parcel of land belonged to the late Milungi since demarcation upon adjudication. When he died, his wife Leokadia took out letters of administration and had since been using it. Then in February 2023 he received a complaint from the Defendant that the Plaintiff was evicting him from the land. He held a meeting with the parties and their families on 20th February 2023 whereupon the Defendant stated that he had been on the land for six years. The Assistant Chief added that the Defendant had not built on the land: it was bare and only used for farming.

13. The Assistant Chief referred them to the Assistant County Commissioner, one Mr. Mwenda who against referred them back to the area assistant chief for mediation. In the mediation exercise conducted on 3rd September, 2023 Mr. Duncan, the Defendant, agreed to vacate after that planting season since he had invested by cultivating the land using a tractor. It seems he did not.

14. The evidence of the Assistant Chief was the land belonged to the Milungi family of which the Plaintiff was the legal administrator.

Issue And Determination

15. This Court has considered the application, the law and the submissions of the parties on the same. It is of the view that the only issues for determination are whether the application is merited or not and who to bear the costs thereof.

16. First, it is important to note that the instant matter is not an appeal. Thus, for one to rely on Order 42 Rule 6 of the Civil Procedure Rules to bring the application of this nature is to use wrong provisions of the law. Nevertheless, Order 51 Rule 10 of the Civil Procedure Rules and Article 159(2)(d) of *the Constitution* come to the aid of the applicant when they provide respectively that no application shall be defeated for reason of citing wrong provisions, and that the court should not rely on technicalities to determine a matter.

17. That said, this Court has considered the application. It has consistently stated that the remedy of an order of injunction is an equitable one. The court exercises discretion when issuing it and should be judicious. This Court refers to the case of Kahoho v Secretary General, EACJ Application No. 5 of 2012.

18. Also, in Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR http://kenyalaw.org/caselaw/cases/view/118862 Munyao J. stated as follows,

> "... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously." I need not explain what it means by a Court being judicious but it suffices to say that in so doing it must take into account all the facts and circumstances of each case and make a decision that is not plainly wrong. It is a delicately balance of the interests of the parties and justice."

19. In an application of this nature, for it to succeed, it must pass the test set out in Giella -vs- Cassman Brown [1973] EA 358. It is a three-pronged one which is as follows:

(a) Whether the applicant has established a prima facie case

(b) Whether the he or she would suffer irreparable loss that may not be compensated by damages and

(c) That if the court is in doubt, it may rule on a balance of convenience.

20. It is now settled that whenever an applicant sets to prove that he/she is entitled to a temporary injunction, he/she should prove these conditions sequentially. Refer to the case of Nguruman Limited v Jan Bonde Nielsen & 2 others, *CA No. 77 of 2012*; [2014] eKLR/ Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR), the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a. establish his case only at a prima facie level,
>
> b. demonstrate irreparable injury if a temporary injunction is not granted, and
>
> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

21. Therefore, in like manner, the Applicant herein ought to do so establish the three conditions as obtaining in her case. In the instant case, it is now clear from both the affidavit in support of the application and the evidence of the Assistant Chief, Mr. Enock Odiwuor Ochiri, that besides the Plaintiff being the registered owner of the land by way of transmission, she had been using it since the husband acquired it at the time of demarcation. Furthermore, the applicant admitted before his that he had moved onto the land six years before but not with peacefulness. Again, that he had, during the mediation meeting held on 3rd September, 2025, undertaken to vacate the land. This was contrary to the Defendant's evidence that he had been using the land for many years and had even built on it.

22. In the circumstances, and taking into account the law on injunctions as summarized above, it is my finding that the Plaintiff has not established a prima facie case warranting the grant of an order of injunction. The Respondent is on the land, but for this season. Thus, an injunction shall not issue as prayed since it would remove him from the land before the season is over, as he undertook before the

Assistant Chief. This order may be reviewed upon the expiry of planting season, given the evidence of the Assistant Chief that the Respondent had not been on the land for years, the land was not his, and even then that he had undertaken in the mediation of 3rd September to vacate the after the seasonal crop harvest. Therefore, the dismissal is not a leeway for him to be on the land for longer than the seasonal crop harvest.

23. As of now, the Application dated 10th March 2025 is dismissed with costs to the Respondent.

24. This matter shall be mentioned on 2nd July 2025 for directions.

25. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 18TH DAY OF JUNE 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of

Achola Advocate for the Respondent

Jack Otieno Advocate for the Applicant