Mwania v Koronya & 2 others (Environment and Land Case E026 of 2022) [2025] KEMC 178 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEMC 178 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

ENVIRONMENT AND LAND CASE E026 OF 2022

YA SHIKANDA, SPM

JULY 29, 2025

BETWEEN

JULIUS NDUU MWANIA .... APPLICANT

AND

JULIUS MIKWA KORONYA .... 1ST RESPONDENT

MRS CECILIA KORONYA .... 2ND RESPONDENT

EAGLE RISE CHRISTIAN CHURCH .... 3RD RESPONDENT

RULING

THE APPLICATION

1. The application before me is dated 26/10/2022. It was filed by the plaintiff who seeks the following main orders, other prayers having been spent:

    1. That this honourable court be pleased to grant a temporary order of injunction restraining the defendants, their agents, servants, or whom whatsoever from continuing to enter, trespassing, fencing, interfering and preventing the plaintiff from accessing and/or undertaking further developments on his plot measuring 50 by 100 feet situated as Syengoni road, Manyatta sub-location in Makindu Sub-county within Makueni County, pending the hearing and determination of this suit;

    2. That the Officer Commanding Makindu Police station to enforce compliance of the order;

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

2. The application is supported by an affidavit sworn by the Plaintiff and is premised on the following grounds:

a. The plaintiff/applicant is the lawful and legal owner of the suit land which he bought from the 1st defendant;

b. The defendants have entered, trespassed, fenced off and prevented the plaintiff from accessing and/or undertaking his lawful activities on the suit land without any justifiable reason;

c. The said actions by the defendants have caused and will continue to cause great damage to the plaintiff;

d. It is just and in the interest of justice that the orders sought be granted.

3. In the affidavit in support of the application, the Plaintiff reiterated the grounds on the face of the application and annexed copies of documents in support of the application. The plaintiff deposed that he enjoyed quiet possession of the suit land until sometimes in August, 2021 when the 3rd defendant built a wall encroaching into his land and thereby denying the plaintiff access thereto. That through the village elder, the 1st and 2nd defendant were able to mark the boundary but thereafter, the 1st and 2nd defendant claimed that they had not sold any land to the plaintiff and continued to trespass thereon.

THE 1ST AND 2ND DEFENDANTS' RESPONSE

4. The 1st and 2nd Defendants opposed the application by filing a Replying affidavit sworn by the 2nd defendant. The 2nd defendant deposed that the application was fatally defective, frivolous and an abuse of the court process. That the suit land is located in an unsurveyed or adjudication area and as such, the suit offends the law. The 2nd defendant further deposed that the court lacked jurisdiction to hear the application and entire suit. That the agreement relied upon by the plaintiff is falsified. It was deposed that the 1st defendant did not own any land at the place where the plaintiff claimed. The 2nd defendant gave a long narration and explained that it was the plaintiff who encroached on her parcel of land and was even charged with the offence of malicious damage to property, having damaged the 2nd defendant's fence.

MAIN ISSUES FOR DETERMINATION

5. In my view, the main issues for determination are:

a. Whether the plaintiff is entitled to orders of injunction as against the defendants as prayed for in the application;

b. Who should bear costs of the application?

SUBMISSIONS BY THE PLAINTIFF/APPLICANT

6. The plaintiff submitted that he had demonstrated a prima facie case with a probability of success. He relied on an alleged agreement to prove ownership of the land and alleged that there was unlawful interference by the defendants. The plaintiff argued that he stands to suffer irreparable harm owing to the complete denial of access to his property. That the ongoing construction activities by the 3rd defendant threaten to permanently alter the character of the land. The applicant further argued that on a balance of convenience, his long standing possession of the suit land outweighed the defendants' recent encroachment. The plaintiff relied on the following authorities:

a. Kenya Breweries Limited & another v Washington O. Okeyo [2002] eKLR;

b. Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR.

SUBMISSIONS ON BEHALF OF THE 1ST AND 2ND DEFENDANTS

7. The 1st and 2nd defendants also filed written submissions. The said defendants relied entirely on their replying affidavit and maintained that the court did not have jurisdiction to entertain the application and the suit on the ground that the land was situated in an unsurveyed or adjudication area. The 1st and 2nd defendants argued that the plaintiff had not established a prima facie case. Further, that any alleged damage to the plaintiff is quantifiable. The 1st and 2nd defendants urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

8. Before delving into the merits of the application, I wish to point out that it was an error on the part of the plaintiff to amend the supporting affidavit. An affidavit cannot be amended. Where a party amends an application, all they have to do is file another affidavit and not amend the existing affidavit like a pleading. In the authority of Ethics and Anti-Corruption Commission v Haria & another [2025] KEELC 385 [KLR], the court observed thus:

> " I agree that in law you cannot amend an affidavit, for reason that an affidavit comprises of evidence. To amend an affidavit would mean that one swore a false affidavit in the first place. What one needs to do is only file a supplementary affidavit or an additional affidavit for purposes of clarification or elaboration of the first affidavit."

9. Similarly, in the case of James Peter Maina Muriuki Vs Moses Maina Ngugi & another [2008] eKLR, Aganyanya JA [as he then was] held that:

> " While the law does not allow an amendment of an affidavit to support an amended chamber summons, there should be an independent affidavit to support the amended chamber summons even if it is in similar terms as that which supports the original chamber application. And it is not advisable to only refer to original affidavit as supporting the amended chamber application".

10. In the case of In re Estate of NMM [Deceased] [2021] KEHC 8035 [KLR], Onyiego J had this to say:

> " An affidavit cannot be amended to support an amended pleading. The best the applicant should have done was to file a supplementary affidavit. Unfortunately, there is no fall back to the original supporting affidavit. In view of this lapse, the amended Notice of Motion is exposed and therefore a nullity on the face of it. It is by all means a defective application which cannot stand the test of a valid application. A pleading or submissions pegged on a fatally defective affidavit cannot stand. See Supreme court decision in the case of Gideon Sitelu Koncellah v Julius Lekakeny Ole Sukuli & 2 others [2018] eKLR where the court held that;
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> > ' A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submission and /or list of authorities that should be subsequently filed. Absence of this foundational pleading, the replying affidavit, and even the written submissions purportedly filed by the 1st respondents on 17th August 2018 are of no effect.'

Having held that the amended notice of motion is fatally defective, I am inclined to have the same struck out. Having struck out the engine of the application, I have nothing remaining to consider."

11. In the above case, the court struck out an application on the ground that it was supported by an amended affidavit, which made it fatally defective. However, in the authority of Chumbe [Suing as the administrator to the Estate of the Late Alex Chumbe Omio] v Miyawa [2024] KEHC 4609 [KLR], Aburili J held:

> " I observe that an affidavit cannot be amended. However, an application can be amended and was properly amended, as a pleading. Order 51 Rule 1 of the Civil Procedure Rules does not mandate that an affidavit be filed in support of the application hence the amended affidavit though defective, does not invalidate the application as amended."

12. Bottom line is that an affidavit cannot be amended and when it is so amended, it becomes defective. As to whether an application supported by an amended affidavit becomes fatally defective, is still a matter of debate in the superior courts.

13. I also note that the 3rd defendant is a church sued in its own name. Churches are ordinarily registered under the *Societies Act*. If so registered, they do not become body corporates and cannot sue or be sued in their own names. Such entities are to be sued in the name of their officials or in most cases, their registered trustees. Unless the 3rd defendant is registered under the Public Benefits Organizations Act [which I highly doubt], it would be unprocedural to sue it in the manner that the plaintiff has done.

The Legal provisions

14. Section 1A of the *Civil Procedure Act* provides as follows:

    [1] The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

    [2] The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection [1].

    [3] A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

15. Section 1B provides as thus:

    [1] For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

        [a] the just determination of the proceedings;

        [b] the efficient disposal of the business of the Court;

        [c] the efficient use of the available judicial and administrative resources;

        [d] the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

        [e] the use of suitable technology".

16. Section 3A provides:

> " Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

17. Order 40 rule 2 provides as follows:

> " [1] 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.
>
> [2] The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit".

18. I have carefully considered the application together with the documents in support thereof as well as the response by the 1st and 2nd defendants. I have further considered submissions by the parties and directed my mind to the applicable law. In the case of Assand v Pettitt [1989] KLR 241, it was held that the object of a temporary injunction is to keep things in status quo so that if at the hearing the plaintiff obtains a judgment in his favour, the defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.

19. The principles to be considered by the court when considering an application for a temporary injunction were laid down in the leading authority of Giella v Cassman Brown & Co. Ltd [1973] EA 358. The principles are that:

    i. The applicant must establish a prima facie case with a probability of success;

    ii. The applicant must show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages;

    iii. If the court is in doubt, it should decide the application on the balance of convenience.

20. However, in considering such an application, the court should be careful not to decide substantive issues at the interlocutory stage. My view is fortified by the Court of Appeal's finding in the case of Shitakha v Mwamodo & 4 Others [1986] KLR 445. A similar view was held by the same court in the case of Mbuthia v Jimba Credit Finance Corporation & Another [1988] KLR 1 where the court held that the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The court further held that where the disputed facts raised doubt in the court's mind as to which party would be proved right at the trial, the court would comfortably consider the balance of convenience.

21. The Court of Appeal in the case of *Mureithi v City Council of Nairobi, Nairobi Civil Appeal No. 5 of 1979* [UR] held that the power to grant or deny an application for a temporary injunction is within the discretion of the court but such discretion must be exercised judiciously. It is a fundamental rule that the court will grant an injunction only to support a legal right. This position was buttressed in the English case of Montgomery v Montgomery [1964] 2 ALL ER 22. It has been held that the injunction

sought must relate to the claim in the suit or rather the relief sought in the suit. The case of Winstone v Winstone [1953] 3 ALL ER 580 is germane on this point. In the said case, Winn J held as follows:

> “ In my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made ”.

22. A similar view was made in the case of McGibbon v McGibbon [1973] 2 ALL ER 836, where it was held that an injunction must bear some relationship to the cause of action.

23. From the above authorities, it is my considered view that while considering an application for a temporary injunction, the court must consider the plaint and the statement of defence alongside the affidavits in support of or in opposition to the application. The injunction must be based on the relief claimed by the plaintiff in the plaint. Numerous court decisions have held the position that an interlocutory injunction ought not to be granted if the prayers in the application are at variance with the suit. The leading case on this point appears to be the case of Dismas Oduor Owuor v Housing Finance Co. [K] Ltd & Another, HCCC No. 630 of 2001 where Ringera J [as he then was] held as follows:

> “ The plaintiff's interlocutory application of 7th June, 2001 is inconsistent with the prayers sought in the suit. Whereas in the suit he is seeking an injunction to restrain the sale of the charged property, in the application he is seeking to restrain the transfer of the said property to the auction purchaser and other consequential or subsequent dealings with the property. The plaintiff, in my opinion, cannot be granted interlocutory orders, which are at variance with the permanent orders sought. I think he goofed in not amending his plaint before amending the chamber summons. He could not be allowed to injunct a transfer by the chargee to the auction purchaser without amending his plaint to challenge the auction sale complained of…”

24. I have perused the plaint and find that the prayers sought have a bearing on the application. The Supreme Court of India in the case of State of Orissa v Madan Gopal Rungta [1952] AIR 12, 1952 SCR 28 held that it was a well stated principle of law that an interim relief can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a suit or any other proceeding. The foundation of an interlocutory application such as the instant one is the plaint. I have considered the averments made by both parties.

25. The 2nd and 3rd defendants raised a pertinent issue in their replying affidavit as well as in their submissions. They alleged that the land in issue was unsurveyed and in an adjudication area and as such, the court had no jurisdiction to entertain the application and the suit. This issue was never responded to by the plaintiff by either filing a further affidavit to dispute the claim or addressing the same in his submissions. The other issue that the plaintiff failed to respond to in any way is the alleged fact that the suit land belongs to the 2nd defendant. In my view, by failing to address these two key issues, it cannot be said that the plaintiff has established a prima facie case. The response by the 1st and 2nd defendants raises reasonable doubt as to whether this court has jurisdiction to entertain the suit, let alone the application.

26. Furthermore, the issue of ownership of the land is not straightforward. There is nothing to show that the plaintiff has an edge over the defendants in respect of the suit land. What the plaintiff relies on is an alleged agreement which is highly disputed. The plaintiff did not even attach evidence of whatever nature to show that he has settled on the suit land. There is no evidence whatsoever to show the alleged encroachment by the defendants. Not even photographs of the scene were exhibited to court. There is

nothing to show an act of trespass by the defendants or denial of access to the detriment of the plaintiff. This is not the kind of application in which stories would suffice. Without evidence, there is no prima facie case.

DISPOSITION

27. In view of the foregoing, I find that the application dated 26/10/2022 is devoid of merit. For the reasons given hereinabove, it is my opinion that the plaintiff has failed to meet the threshold of granting a temporary injunction. Consequently, I proceed to dismiss the application. The plaintiff shall bear the costs of the application. I would advise the plaintiff to seriously consider whether this court has jurisdiction to hear and determine the suit. I could not determine the issue based on averments made in the replying affidavit as poof of such an allegation would require more than just an averment in an affidavit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 29TH DAY OF JULY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.