



Ole Mosinko & another v Ole Nkuraiya (Environment and Land Appeal E001 of 2023) [2024] KEELC 107 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E001 OF 2023
CG MBOGO, J
JANUARY 24, 2024**

BETWEEN

STEPHEN LENKITIYA OLE MOSINKO 1ST APPELLANT

LANDER TANYASIS 2ND APPELLANT

AND

PETER OLOISHURUA OLE NKURAIYA RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's court at Narok (Hon. S.M. Mungai) in Narok CMCC ELC No. 71 of 2021 delivered on 24th January, 2023)

JUDGMENT

1. The appellants herein, being dissatisfied with the ruling of the Chief Magistrate's Court at Narok in CMCC ELC No 71 of 2021, delivered on 24th January, 2023 by Hon. S.M. Mungai, have appealed to this court vide a memorandum of appeal dated 9th February, 2023 against a part of the ruling on the following grounds: -
 1. The learned magistrate erred in only allowing a part of the appellant's notice of motion dated 21st September, 2021.
 2. The learned magistrate erred in not holding that the issues raised by the respondent in that suit were *subjudice* by virtue of Section 6 of the *Civil Procedure Act* and in view of the pendency of Narok ELC Misc Application No 13 of 2018; *Nepatao Ole Manangoi & others v The Attorney General & others*.
 3. The learned magistrate erred in overlooking the uncontested averments made by the 2nd appellant that he is the genuine and lawful owner of the suit property which is a part of the Ntulele Group Ranch, in which he is a member, which is 56,000 acres in area.



4. The learned magistrate erred in holding that since the respondent was not a party to the said Narok ELC Misc Application No 13 of 2018: Nepatao Ole Manangoi & others v The Attorney General & others, any orders allegedly made in that suit barring re-adjudication of the 56,000 acres did not affect the said respondent.
 5. The learned magistrate erred in holding that the pending contempt of court proceedings pending in the said Narok ELC Misc Application No 13 of 2018: Nepatao Ole Manangoi & others v The Attorney General & others, did not touch the respondent but the Narok Land Adjudication Officer.
 6. The learned magistrate erred in ignoring the fact that the orders issued in the said Narok ELC Misc. Application No 13 of 2018: Nepatao Ole Manangoi & others v The Attorney General & others, barred the said Narok Land Adjudication Officer from re-adjudication of the 56,000 acres which he purportedly did on 6th March, 2021 in favour of the respondent.
 7. The learned magistrate erred in not holding that the purported allocation of a part of the suit property to the respondent by the said Narok Land Adjudication Officer on 6th March, 2021 was in contravention of the said orders issued in the said Narok ELC Misc Application No 13 of 2018: Nepatao Ole Manangoi & others v The Attorney General & others and was, therefore, null and void.
 8. The learned magistrate erred in holding that the 2nd appellant had not put forth any evidence conferring him ownership of the suit property.
 9. The learned magistrate erred in holding that the respondent had established the necessary conditions for a grant of the injunctions sought.
 10. The learned magistrate erred in issuing a mandatory injunction as sought in the respondent's notice of motion dated 13th September, 2021, thereby evicting the 1st appellant from the suit property despite the overwhelming evidence on record that the 1st appellant was and has always been in possession of the same since 2016.
 11. The learned magistrate wholly ignored the appellants' pleadings and submissions.
2. The appellants therefore pray for the following orders: -
- a. That the appeal be allowed with costs.
 - b. That the ruling delivered by the lower court on 24th January, 2023 be set aside.
 - c. That there be substituted thereof an order allowing prayer 2 of the appellants' notice of motion dated 20th September, 2021 to wit that the respondent be restrained either by himself, his servants or agents from interfering with the 1st appellant's possession and enjoyment of plot No 406 in the Ildamat Adjudication Section pending the hearing and determination of the said Narok CMCC ELC No 71 of 2021.
 - d. Any other/further orders that this honourable court deems fit to make.
3. The grounds of appeal were canvassed by way of written submissions. On 13th October, 2023 the appellants filed their written submissions dated 11th October, 2023. The appellants submitted that under Order 40 Rule 1 of the *Civil Procedure Rules*, the court is empowered to grant a temporary injunction restraining any act or dealing with the suit property pending the hearing and determination



- of the suit. Further, that the trial court had jurisdiction under Section 3 (1) of the [Judicature Act](#) as it was held in the case of [Njoroge Kironyo & others v Kironyo Njoroge](#) (1976) KLR 109.
4. The appellants further submitted that they had met the conditions in [Giella v Cassman Brown & Co. Limited](#) [1973] as the record shows that the suit property forms part of the larger 56,000 acres owned by Ntulele Group Ranch which the 2nd appellant is a member. Further, that the 2nd appellant has been in possession of the same since the year 1987, and thereafter sold a portion of the same to the 1st appellant, who has been in possession of the same since the year 2016.
 5. The appellants further submitted that they shall suffer irreparable harm in view of the fact that the 1st appellant has been in possession since the year 2016 and has made improvements on the same and if the suit is sold by the respondent during the pendency of the suit, no amount of damages can compensate for the loss. They further submitted that the trial court had no jurisdiction to entertain the respondent's notice of motion by virtue of Section 6 of the [Civil Procedure Act](#) as the suit property forms part of the Ntulele Land Adjudication Section which is a subject matter in Narok ELC Misc Application No 13 of 2018. The appellants relied on the cases of [Hassan Zubeidi v Patrick Mwangangi Kibaiya & another](#) [2014] eKLR, [Epbraim Thamaini v Nancy Wanjiru Wangai & 2 others](#) [2022] eKLR, [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR and [David Ndi & others v Attorney General & others](#) [2021] eKLR.
 6. The appellants submitted that a court lacks jurisdiction to grant a party relief based on illegalities taking the forms of the Land Adjudication Officer disobeying the court orders issued in the year 2009. Further, that the respondent is guilty of non-disclosure of material facts as he was aware of the existence of the orders prohibiting re-adjudication after the year 1981. Reliance was placed in the cases of [Macfoy v United Africa Company Limited](#) (1961) 3 All ER 1179 and [Nabro Properties v Sky Structures](#) (2002) 2 KLR, 299.
 7. On 4th December, 2023 the respondent filed his written submissions dated 30th November, 2023. On ground one, the respondent submitted that the trial court, was lenient enough to consider the 2nd Appellant's application and averments dated 20th September, 2023, even though he was not yet admitted into the suit as the 2nd defendant thus allowing him to be enjoined in the suit. Further, that the trial court even having considered the 2nd appellant's application and "Replying/ Supporting Affidavit" found that the 1st appellant had not put forth any evidence conferring him ownership of the suit property, yet he still claimed ownership.
 8. On grounds two, four, five, six and seven, the respondent submitted that the trial court, in its ruling, reckoned that for a suit to meet the threshold of *subjudice*, the suit must be between the same parties or those claiming under them. He submitted that Section 6 of the [Civil Procedure Act](#) admits no ambiguity and that Narok ELC Misc. Application No 13 of 2018: Nepatao Ole Manangoi & others v The Attorney General & others is a live matter before the superior court. However, that neither the appellants nor the respondent are parties to the suit. Further, that the substrata of the matter in the lower court are trespass, illegal occupation and construction of temporary structures on the suit property and that the three phenomena have absolutely no bearing on the suit before the Superior Court.
 9. On grounds three and eight, the respondent submitted that the trial court further reckoned that the ownership of the suit property is at the heart of the suit. Further, that this court in its ruling dated 13th June, 2023, stated that both parties seem to lay claim to ownership of the suit land and further ordered that *status quo ante* be maintained. He submitted that whether the suit property belongs to the 2nd appellant will be determined at the logical conclusion of the suit and this court would misdirect



itself by declaring the rightful owner of the property when indeed the main suit is yet to be heard and determined. The respondent further submitted that the orders issued on 10th February, 2009, were interim orders that have a shelf life of 12 months, and it would be preposterous to cling to a stale court order after 14 years. The respondent relied on the cases of Regina Pads University Through the Board of Trustees & another v William Charles Fryda [2012] eKLR and submitted that there is nothing on record showing that indeed the said orders were extended.

10. On grounds nine and ten, the respondent submitted that the 1st appellant has not provided any evidence that the suit land does belong to him. Further, that the 2nd appellant has made a claim of the same even though the trial court in its ruling reckoned that it flouted the rules of procedure. The respondent submitted that he passed the test set out in *Giella v Cassman Brown* (1973) EA 358 as held correctly by the trial court.
11. I have considered the grounds of appeal, the rival submissions as well as the authorities cited by both parties and, in my view, the issue for determination is whether the appeal is merited.
12. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in Mwanasokoni v Kenya Bus Service Ltd (1982 – 88) I KAR 278.
13. The 2nd appellant herein filed a notice of motion dated 20th September, 2021 seeking to be joined as a defendant in the suit before the lower court, the subject of this appeal as well as orders of injunction against the respondent. This application was consolidated with the notice of motion dated 13th September, 2021 filed by the respondent seeking that a temporary injunction does issue restraining the 1st appellant either by himself, his agents and or servants and or anybody claiming any right through them from trespassing into and disturbing quiet occupation by the respondent on parcel No 406 Ntulele Trading Centre pending the hearing and determination of the suit.
14. The trial court delivered its ruling on 24th January, 2023 that is the subject of appeal. At the centre of the dispute is parcel of land known as parcel No 406 at Ntulele Trading Centre which the respondent claims to have been allocated to him by the Ildamat Adjudication Committee of Ildamat Adjudication Section. In the notice of motion dated 13th September, 2021, the respondent contended that in August 2021, he was notified by his neighbours that the appellants had laid a claim on his parcel of land and that the 1st appellant would take possession. From the pleadings, there was a meeting convened by the area chief and the committee of the Ildamat Adjudication Section which from the committee's records, it became apparent that he was the owner of the suit land.
15. The appellants in their notice of motion dated 20th September, 2021, contended that they are the genuine and lawful owners of the suit land, a fact which the respondent is well aware of. The 2nd appellant further contended that he sold the suit property to the 1st appellant in the year 2016. The respondent herein filed a further affidavit which was sworn on 5th October, 2021 in response to the notice of motion dated 20th September, 2021. In his response, the respondent averred that the matter before the court is not *subjudice* as the parties herein are not parties in ELC Misc Application No 13 of 2018 and that the orders issued therein in the year 2009 cannot have life or effect after 12 months. Further, that the appellants did not provide proof of ownership of the suit land.
16. On the other hand, the appellants filed grounds of opposition to the notice of motion dated 13th September, 2021. The appellants contended that the trial court lacked jurisdiction to issue the orders of



injunction based on the existence of orders that were issued in the year 2009 and which the respondent is aware of.

17. I have perused the impugned ruling delivered on 24th January, 2023 and I note that the trial court made several observations as to both applications and the issues arising therein. In the notice of motion dated 13th September, 2021, the 2nd appellant purported to oppose the application before he was allowed to be joined as a party. As a result, the court made a finding that owing to his unprocedural acts, the only issue that was left to be determined before the court was whether he should be joined as the 2nd defendant in the suit. The court sought to overlook his depositions as contained in his replying/supporting affidavit sworn on 20th September, 2021 which sought to respond to the application dated 13th September, 2021 as contained in paragraph 2 therein. On this, I agree with the trial court that the 2nd appellant's attempt to respond to the application dated 13th September, 2021 was unprocedural and his averments contained in the so called "replying/supporting affidavit" could not be considered at that stage since he was yet to be made a party to the suit. It was only after being joined as a 2nd defendant to the suit that the 2nd appellant had a right to respond to the application.
18. On whether the suit is *subjudice*, the trial court observed that the suit is based on trespass, illegal occupation and construction. Further, that the illegalities are directed towards the Land Adjudication Officer who has been enjoined in the counter claim and they are not parties in ELC Misc Application No 13 of 2018.
19. Section 6 of the [Civil Procedure Act](#) provides as follows: -
 - “6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”
20. The above provision of the law expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
21. With regard to the instant case, the matter before the trial court does not qualify to be termed as *subjudice*. The reason being that parties in the instant suit are not parties in ELC Misc Application No 13 of 2018. Further, the instant suit is based on claims of trespass, illegal occupation and construction by the 1st appellant. The trial court was therefore right to arrive at this finding.
22. On whether the trial court was right in granting the orders of injunction, in the case of *Giella v Cassman Brown* [1973] EA 358 and as was reiterated in the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) CA No 77 of 2012 (2014) eKLR, the Court of Appeal held that;
 - “in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates 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 states



are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

23. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 where the court held that in order to qualify for an injunction;
- i. First, the applicant must show a *prima facie* case with a probability of success.
 - ii. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
 - iii. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
24. The applicant in an application for injunction must first establish that he has a *prima facie* case with a probability of success. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR as follows;
- “a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case”. It is a case 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.”
25. On the issue as to whether the respondent has established a *prima facie* case with a probability of success, the respondent’s claim over the suit land is anchored on a document dated 6th March, 2021 which appears to have emanated from the Sub County Land Adjudication and Settlement Officer indicating that he is the owner of the suit land.
26. On the other hand, the 1st appellant contended that he is the lawful owner of the suit land, a fact which the respondent is well aware of. The appellants did not produce any document to evidence ownership of the suit land. The trial, was persuaded that the respondent was entitled to the orders of injunction by virtue of the document dated 6th March, 2021. Was the trial court right in doing so? Absolutely, yes. I say so because the trial court noted that whether the respondent is the lawful owner or not is an issue to be determined during the hearing as it was contained in paragraph 23 as reproduced hereunder: -
- “The plaintiff has tendered annexure marked PON-1 which on the face of it declares him as the owner of the suit land. Whether the same was issued illegally or not as pleaded by the 1st defendant is one of the issues for determination in this suit. The 1st defendant has not put forth any evidence conferring him ownership of the suit land but he has admitted that he is laying a claim to it.”
27. As regards the issue whether the respondent will suffer irreparable harm which cannot be adequately compensated by award of damages, the court observed that the fact that the 1st appellant can compensate him was no excuse for granting the relief sought. The trial court relied on a number of authorities in arriving at its finding, and which, I see no reason to interfere with the same. The applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.
28. In arriving at its conclusion, the trial court made a reasonable finding which on the face of it, warranted the grant of the orders of injunction. As such, I see no reason why this court should interfere with the finding of the trial and the orders issued thereon.



29. Arising from the above, the memorandum of appeal dated 9th February, 2023 lacks merit and it is hereby dismissed with costs to the respondent. The Deputy Registrar is hereby directed to return the file to the lower court for hearing and determination of the main suit. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JANUARY, 2024.

HON. MBOGO C.G.

JUDGE

24/1/2024.

