Warui & 5548 others v Mbeere Elders Advisory Welfare Group (Ngome) & 14 others (Civil Application 141 of 2020) [2024] KECA 1051 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 1051 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION 141 OF 2020

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

APRIL 12, 2024

BETWEEN

BENSON MUTHIKE WARUI AND 5548 OTHERS ..... APPLICANT

AND

MBEERE ELDERS ADVISORY WELFARE GROUP (NGOME) .... 1ST RESPONDENT

DAVID NJUKI ..... 2ND RESPONDENT

NJERU MBANDA ..... 3RD RESPONDENT

ESTON NYAGA NTHIGA ..... 4TH RESPONDENT

SERAPHINO NGARI ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

COMMISSIONER OF LANDS ..... 7TH RESPONDENT

DIRECTOR OF LANDS ADJUDICATION ..... 8TH RESPONDENT

CHIEF LAND REGISTRAR ..... 9TH RESPONDENT

DISTRICT LAND REGISTRAR MBEERE ..... 10TH RESPONDENT

THE COUNTY COUNCIL OF MBEERE ..... 11TH RESPONDENT

THE NATIONAL LAND COMMISSION ..... 12TH RESPONDENT

THE COUNTY SECRETARY LAND AND PHYSICAL PLANNING, EMBU COUNTY ..... 13TH RESPONDENT

AMBROSE KITHAKA KARIUKI AND 233 OTHERS ..... 14TH RESPONDENT

JUSTIN NYAKI NGURE & 249 INTERESTED PARTIES ..... 15TH RESPONDENT

(Being an application for an order of injunction from the ruling and order of the Environment and Land Court at Embu (Y.M. Angima. J.) dated 28th May 2020 in ELC Case No. 14 of 2014)

RULING

1. On 12th January 2016 before the Environment and Land Court at Embu, a partial consent was entered into between the rd October 2020 the applicants sought to have the consent reviewed, varied and/or set aside, and to have the titles that had been issued following the consent cancelled to have the process to start all over again. The application was opposed by the respondents. The learned Judge found that the applicants had not made out a case for review and/or setting aside. The application was dismissed and each side asked to bear their own costs.

2 The applicants were aggrieved and filed an appeal to this Court. They then filed an application dated 28th May 2020 under Rule 5(2)(b) of the *Court of Appeal Rules, 2010* and Order 42 Rule 6(1) of the *Court of Appeal Rules* seeking the stay of the orders of the learned Judge. The application was opposed by the respondents through a replying affidavit sworn on 25th March 2021. In a ruling delivered by this Court on 8th October 2021, it was found that the applicants had not demonstrated that they had an arguable appeal. The application was dismissed with no orders as to costs.

3. Before us is an application dated 25th February 2024 made under -

> " Rule 3B of the *Court of Appeal Act*, Rules, Rule 47 of the *Court of Appeal Rules* and Order 40 of the *Civil Procedure Rules, 2010*."

They sought that this Court does issue restraining orders to the 8th, 10th, 11th and 12th respondents from issuing titles in Mwea Settlement Scheme pending the hearing of the appeal.

4. The applicants' case is that the consent had been entered into without their participation, and yet it was in respect of their ancestral land and that their interests had not been taken into consideration. They want an injunction issued to preserve the land as they wait for the hearing and determination of the appeal. The injunction is sought to stop the titling of the land.

5 The response by the 1st, 2nd, 3rd and 5th respondents was that, first, titles had already been issued and therefore there was nothing to restrain as the individual titles now constitute private property, and, secondly, that the application was being brought too late in the day.

6. Written submissions were filed in this application, and we have considered them.

7. We have no hesitation in dismissing this application. This is because, as early as when the applicants applied before the Environment and Land Court to have the consent entered into to be reviewed and/or set aside, there was the acknowledgment that the process of titling had proceeded and individual titles had been issued. The applicants acknowledged the same in the application for stay before this Court in Civil Application No. 120 of 2018 and in the instant application. In the instant application, this is what Benson Muthike swore on behalf of the applicants: -

> 8. That I am aware that based on the directive the 10threspondent proceeded with issuance of titles for land below five acres... "

8. In response, the respondents deponed as follows:-

> " 13. The applicants are now seeking to stall a process that is already complete "

There was no further affidavit by the applicants.

9. We hold that, the titling of the land in question having been undertaken to completion, there is nothing to stay, or to injunct. The application has been overtaken by events.

10. More important, whether the Court is dealing with stay of execution or injunction, both under Rule 5(2)(b) of the *Court of Appeal Rules*, the applicant has to demonstrate that he has an arguable appeal, and that, if stay is not granted, the intended appeal would be rendered nugatory in the event that the appeal ultimately succeeds. (See *Stanley Kang'ethe Kinyanjui -vs- Tony Ketter & 5 Others* [2013]eKLR). When the applicants appealed against the decision of the Environment and Land Court and applied for stay, this Court considered the application and found that, on the available evidence, no arguable appeal had been demonstrated. We are bound by that finding, because the circumstances have not changed. Infact, it was expected that the applicants, if they were diligent, they should move this Court for stay and injunction in the application dated 28th January 2020. This Court expected the applicants to litigate at once, and not in instalments, if they wanted the Court to arrest the execution of the decree of the trial court pending the hearing and determination of the appeal. In *John Florence Maritime Services Limited & Another -vs- Cabinet Secretary Transport and Infrastructure & 3 Others*, Supreme Court of Kenya Petition No. 17 of 2015) it was observed that:-

> " 54. The doctrine of res-judicata, in effect, allows a litigant only one bite of the cherry. It prevents a litigant, or person claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficiency in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to the end, and the verdict duly translated into fruit for one party and liability for another, conclusively."

11. In conclusion, we find that this application not only lacks merits but is also an abuse of the process of the Court. It is dismissed.

12. Given the nature of the dispute, we make no order as to costs.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR