



Washe & another v Kaduka & 13 others (Environment and Land Case Civil Suit 155 of 2015) [2024] KEELC 3854 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 155 OF 2015**

FM NJOROGE, J

APRIL 29, 2024

BETWEEN

JAPHETH KALAMA WASHE 1ST PLAINTIFF

PATRICK MONO MBURA 2ND PLAINTIFF

AND

CHRISPUS DECHE KADUKA & 13 OTHERS DEFENDANT

RULING

1. For determination is the Defendants' notice of motion application dated 26th March 2024 brought under Articles 19, 20, 21, 22, 23, 50 and 159 of *the Constitution* of Kenya, Sections 7 and 19 of the Sixth Schedule thereof, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 40 Rule 1 of the *Civil Procedure Rules* and Rules 20 and 21 of *the Constitution* of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of individuals) High Court Practice Rules. The Defendants seek the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That an order of temporary injunction be issued against the Respondents, their agents, servants, employees, assignees, or any other persons proxy to them from severally and jointly entering, farming, ploughing, interfering, leasing, or carrying out any activities on the suit land referred to as unsurveyed land situated at Mukwambani, Chonyi within Kilifi County pending hearing and determination of this suit.
 - d. That this court maintains the *status quo* over the subject land before interference by the Plaintiffs.
 - e. That the costs of this application be provided for.



2. The application is based on the grounds set out on the face of the motion and supported by the affidavit of Chrispus Deche Kaduka, also sworn on 26th March 2024. According to the deponent, the land in dispute was declared an adjudication area identified as “Chengoni Mtomkuu “B” Adjudication Section” and the same irregularly registered in the names of Japhet Kalama Washe and Patrick Mono Mbura, the Plaintiffs herein. The adjudication was said to be irregular because according to the deponent, there existed pronouncements from the land tribunal and the court to the effect that the disputed land belonged to the deponent’s father.
3. Chrispus asserted that the Defendants have at all material times been in occupation of the disputed land and that despite the conservatory orders issued in favour of the Plaintiffs on 2nd October 2015 being set aside on 1st July 2016, the Plaintiffs have continued to bar the Defendants from accessing the disputed land on grounds of the non-existent conservatory orders. He further deposed that on or about 16th February 2024, the Plaintiffs encroached the disputed land and began farming activities to the extent of 3 acres thereon.
4. In response, the Plaintiffs filed a Replying Affidavit they jointly swore on 9th April 2024. They stated that the disputed area was only 7 acres out of the entire land which measures approximately 30 acres. They affirmed that there was indeed a case filed before the land disputes tribunal and determined in favour of the Defendants’ father, but only in relation to the said 7 acres. The Plaintiffs asserted that the Defendants have continued to conduct farming activities on the land while encroaching on the section that belongs to the Plaintiffs. To the Plaintiffs, the application is unmerited and an attempt to delay the hearing of the suit.
5. Parties were directed to file written submissions, however, as at the time of writing this ruling, only the Plaintiffs had complied. I have carefully considered the application, affidavits and Plaintiffs’ submissions herein and find that the sole issue for determination is whether the application is merited.

Analysis and Determination

6. The law on temporary injunctions can be found under Order 40 rule 1 of the [Civil Procedure Rules](#) which provides:
Cases in which temporary injunction may be granted [Order 40, rule 1]
Where in any suit it is proved by affidavit or otherwise—
 - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
7. The conditions that one must meet in order for the court to grant a temporary injunction are first, an applicant must show that he has a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in



doubt, it will decide the application on a balance of convenience (See case of *Giella -v- Cassman Brown & Company Ltd* 1973 EA 358).

8. Further, in [Nguruman Limited -v- Jan Bonde Nielsen & 2 Others \[2014\]](#) eKLR the Court of Appeal restated the law 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) allay 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. ... If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.”

9. The question that follows therefore is whether the Defendants in this case have established a *prima facie* case with a probability of success? In the case of *Mrao -v- First American Bank of Kenya Limited* (2003) eKLR, Bosire JA (as he then was) described a *prima facie* case in the following terms:

“A *prima facie* case is one 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”

10. It appears to me that both parties herein are in one way or another in occupation of the land in dispute. Each side is accusing the other of trespass. On the one hand, the Defendants allege that the entire land belongs to them; on the other, the Plaintiffs’ claim is that the Defendants are only entitled to 7 acres of the disputed land which they allege measures approximately 30 acres in total. It would appear to me analyzing the evidence on which the application is based may prejudice the hearing and determination of the main suit. Besides, the parties will be at liberty to adduce such evidence in substance at the main hearing and it is therefore needless to go through it at this point in an interlocutory application. It is sufficient to state here that the court has noted the plea of the defendants that the plaintiffs obtained possession of some land during the pendency of the suit. In the given circumstances, I find it prudent that the prevailing *status quo* is maintained, seeing that the hearing of this matter is ongoing and that the next hearing date is 21/5/2024.

11. I therefore order that the status quo prevailing as of the date of this ruling be maintained pending the determination of this suit, and that each party shall bear its own costs. All the parties are also enjoined to prepare fully for an expeditious hearing so that the main dispute is resolved with finality.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29TH DAY OF APRIL 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

