



Injera v Lukhongo; Lukhongo (Interested Party) (Environment & Land Case 27 of 2021) [2024] KEELC 4290 (KLR) (27 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 27 OF 2021**

MN MWANYALE, J

MAY 27, 2024

BETWEEN

ZEBEDEE MMATA INJERA PLAINTIFF

AND

BENSON ANUBI LUKHONGO DEFENDANT

AND

JOANNE CK LUKHONGO INTERESTED PARTY

JUDGMENT

1. Vide his plaint dated 19th July 2014 the plaintiff, Zebedee MMata Injera sued the Defendant Benson Anubi Lukhongo (now deceased) seeking a permanent injunction restraining him, his servants, agents and whomsoever was claiming from his from entering, occupying and trespassing and dealing whatsoever with the suit parcel of land known as Nandi /Kapkangani /380 as well as costs and any other relief the court may deem fit and just to grant.
2. The Defendant entered appearance in person and filed his Defence on 22/9/2014. On 5th October 2015 a Notice of appointment was filed by through the firm of Oonge and Company Advocates on behalf of the interested party and on 26th May 2015 the interested party had filed an injunction application. There is no record of a ruling having been delivered in respect of that application.
3. on 31/5/2018 this suit was dismissed for nonattendance on the part of the plaintiff and an application dated 31.7 2018 seeking reinstatement of the suit was filed, a ruling in respect of that application was rendered on 23/6/2021 when the suit was reinstated. Thereafter with the establishment of the Environment and Land court at Kapsabet, the suit was transferred to Kapsabet ELC for hearing and determination.



4. On 15/12 /2021 Mr. Osango Learned Counsel for the plaintiff in a routine mention of the matter indicted to Court that he would be withdrawing the suit against the defendant as the defendant was deceased and proceed against the Interested party as the suit against the defendant had abated. The matter was mentioned severally to take a hearing date and the Court directed the firm of M.N. Oonge Advocates to be served with the mention notices and a hearing date was given in the absence of the advocates for the Interested party for 25.5.2022 where the matter was to proceed at 2.30 pm on the said date upon filing of an affidavit of service to confirm service on the interested parties advocates.
5. At 2.42 pm on the said date the court noted that the plaintiff's counsel and the plaintiff were absent and the affidavit of service had not been filed as directed. The court also noted that the suit against the defendant had been withdrawn as it had abated and it raised an issue suo moto as to whether the Plaintiff could proceed directly against the interested party and invited submissions from the parties with directions that the firm of M. N. Oonge be served with that dates directions. And a mention date was set for 23/6/2022. On the said date as the plaintiff's advocates had not filed his submissions the court reserved the ruling for 12th July 2022 and the Ruling was duly delivered on the said date in absence of the parties.
6. There was inaction from the date of delivery of that ruling till 7/3/2023 when the matter was placed before court and a series of mentions followed thereafter without the parties and or their counsels being present till 17/10/2023 when another hearing date was fixed before Court when the matter did also not proceed and another hearing date was fixed.
7. Eventually the matter was heard on 30/4/2024 with the plaintiff testifying as the sole witness. Submissions filed were filed on 7/5/2024 and judgment reserved for delivery today 27/5 /2024.

Plaintiff's Case And Evidence

8. It is the Plaintiff's case that:
 - i. He had bought the said parcel of land from Chelel Rono initially one acre on 14th March 2006 and thereafter he bought an additional 0.5 acres thus making it total of 1.5 acres.
 - ii. The Defendant had without any colour of right visited the suit parcels between April and May 2014 in the company of strangers and threatened to forcefully subdivide his said parcel without his consent
9. On the strength on the above the Plaintiff sought for the sole relief of a permanent injunction 19/8/2014 that as set out at paragraph 1 of this judgment.
10. The Plaintiff testified as PWI. It was his case while adopting his witness statement dated 19/8/2014 that he had purchased a total of 1.5 acres from Chelel Rono initially purchasing I acre on 14.3.2006 thereafter purchased an additional 0.5 cares and took occupation in it and the defendant had threatened to subdivide his parcel. The witness produced the Agreement dated 14.3.2014 in evidence.
10. It was his further testimony that his witness who had sold the property to him could not be traced. The witness stated that he did not have the agreement for the additional 0.5 acres and the title in relation to the property had not yet been registered in his name, he stated further that the defendant and the interested party had encroached on 0.5 Acres and the defendant was since dead and was buried elsewhere while the interested a party had stayed put on his parcel and he prayed that she be evicted.

Defence Case

11. The Defence case shall not be considered as it was withdrawn the Defendant's suit having abated.



Interested Party's Case.

12. Other than filing an application for injunction dated 26/5/ 2015 alluded to at paragraph 2 of this Judgment. The interested party did not take part in the proceedings and her case shall also not be considered
13. After the close of the testimony of the PW1 the plaintiff case was closed and the ordered closure of the interested party's case and directed the plaintiff to put in written submission.

Plaintiff's Submission:

14. The plaintiff submits for the court to allow his case as the evidence was not contested and remained uncontroverted. The plaintiff in his submission mainly summed up the evidence adduced at trial and a summation of the pleadings.

Issues For Determination.

15. Before framing issues for determination, the court notes that this matter proceeded undefended and that withstanding the plaintiff was still under a duty to prove his case on the required standard of proof as was held in the decision of The Court of Appeal in the decision in the case of *Karugi and another v Kabiya and 3 others* 1983 (eKLR) where the court observed, interalia,

“The burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended, the burden of proof is not way lessened because this is heard by way of formal proof.”
16. Having analyzed the pleadings, the evidence adduced at trial as well the submissions by the Plaintiff and considered the law, the court frames the issues for determination as follows:
 - i. whether or not there is a competent suit before court?
 - ii. whether the plaintiff's suit is merited?
 - iii. What reliefs ought to issue?
 - iv. Who bears the costs of the suit?

Analysis And Determination:

17. On issue number the same is framed as a preliminary point of law which ought to be determined first as it has potential of disposing off the whole suit. The submissions of the plaintiff are silent on this issue. The plaintiff has sought for a permanent injunction against the defendant as the main and substantive relief in this matter with no other reliefs sought save a prayer for costs and the other prayer for any other relief that the court may deem just and expedient to issue.
18. Can the reliefs as sought issue? Upon withdrawal of the suit against the defendant and upon delivery of the ruling alluded to at paragraph 5 it was incumbent upon the plaintiff to amend the plaint so as plead a cause of action and to seek reliefs against the interested party as the defendant was no longer in the suit the suit against him having been withdrawn or to amend the plaint and convert the interested party as a substantive defendant. The plaintiff did not do so. As it is there are no prayers sought against the interested party and to that end the court finds there is no competent suit before it.



19. Thus in answer to issue number 1 the court finds that there is no competent suit for it determine s there are no reliefs sought and therefore shall not consider the other issues involving the case on their merits as that it has framed for determination as it strikes out the suit with no orders as to costs.

JUDGMENT DATED AND DELIVERED AT KAPSABET THIS 27TH DAY OF MAY, 2024.

HON. M. N. MWANYALE

JUDGE

IN THE ABSENCE OF MR. OSANGO DULY NOTIFIED

