Kilifi Plantations Limited & another v Kilifi Boatyard Limited; Kenya Forest Service & another (Interested Parties) (Environment & Land Case 41 of 2023) [2024] KEELC 4262 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4262 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 41 OF 2023

EK MAKORI, J

MAY 22, 2024

BETWEEN

KILIFI PLANTATIONS LIMITED ..... 1ST PLAINTIFF

DARTSTAR LIMITED ..... 2ND PLAINTIFF

AND

KILIFI BOATYARD LIMITED ..... DEFENDANT

AND

KENYA FOREST SERVICE ..... INTERESTED PARTY

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

RULING

1. On the 23rd day of October 2023, this Court delivered a ruling dismissing the Notice of Motion dated 31st May 2023 for an injunction brought by the plaintiff/respondent.

2. Thereafter, the Court directed parties to Comply with Order 11 of the *Civil Procedure Rules* and set the matter down for a hearing on merit.

3. Before that could happen. The Defendant/Applicant brought an application dated 27th of March 2024 seeking:

    i. That this application be certified as urgent and heard ex-parte at the first instance.

    ii. That an injunction restraining the Plaintiffs herein whether by themselves, their employees, officers, servants, contractors, agents or licensees (or any one of them) or any other person with purported interest howsoever, from prohibiting the Defendant's access to the public road passing through the properties known as Kilifi Group V 1628 and CR 79667, CR 61950, CR

61951 and any other adjacent property, leading to all that property known as Kilifi Group V 122 (the "suit property"); be and is hereby granted pending the inter partes hearing and determination of this application.

iii. That an injunction restraining the Plaintiffs herein whether by themselves, their employees, officers, servants, contractors, agents or licensees (or any one of them) or any other person with purported interest howsoever, from prohibiting the Defendant's access to the public road passing through the properties known as Kilifi Group V 1628, Kilifi Group V/1629 and CR 79667, CR 61950, CR 61951 and any other adjacent property, leading to all that property known as Kilifi Group V 122 (the "suit property"); be and is hereby granted pending the hearing and determination of this suit.

iv. That an injunction restraining the Plaintiffs herein whether by themselves, their employees, officers, servants, contractors, agents or licensees (or any one of them) or any other person with purported interest howsoever, from evicting or in any other manner interfering with the Defendant's occupation, use and enjoyment of accrued rights over the whole or any part of the suit property being parcel number Group V 122 situate in Kilifi; be and is hereby granted pending the inter partes hearing and determination of this Application.

v. That an injunction restraining the Plaintiffs herein whether by themselves, their employees, officers, servants, contractors, agents or licensees (or any one of them) or any other person with purported interest howsoever, from evicting or in any other manner interfering with the Defendant's occupation, use and enjoyment of accrued rights over the whole or any part of the suit property being parcel number Group V 122 situate in Kilifi; be and is hereby granted pending the hearing and determination of this suit.

vi. That the costs of this Application be provided for.

2. The Court certified the matter as urgent in view of the application's disclosure that an access road had been closed leading to the property where the Applicant was conducting his business. The Court considered it important to hear both sides before issuing any orders.

3. When the parties appeared before me, an issue was raised that the Court could not issue orders because the portions comprising the access road, involved several parcels belonging to parties who were not joined in this matter.

4. The Court directed that a County Surveyor appear to explain whether the road prohibited for access was public or private. On 5th April 2024, the County Surveyor had not filed a report. On 12th April 2024, the Applicant filed a report from an independent Surveyor instructed by it. The Surveyor was present virtually that day. The report was opposed. The Court provided another further date.

5. The County Surveyor appeared on 30th April 2024; when called to testify, the Applicants opposed, saying no report was supplied but only a letter. The Court then, given the parties' controversies, directed that they file all relevant documents, including any expert reports on the issues beforehand concerning the access road, and also file skeletal submissions. A ruling date was provided.

6. The parties filed their respective averments and submissions.

7. Based on the materials and submissions placed before me, I will frame the issues for determination as - whether to issue an injunction directed at the respondent to cease prohibiting the access road alleged to have been blocked and who should bear the burden of the costs arising from the application.

8. The Applicant averred that the background of the Application is detailed in the Supporting Affidavit sworn on 27th March 2024, which can be summarized by a ruling delivered on 23rd October 2023; this Court dismissed the Respondent's Application dated 31st May 2023 seeking injunctive orders restraining the Applicant from occupying, operating, or dealing with the property known as Kilifi Group V/122.On 5th February 2024, the 3rd Respondent served upon the Applicant a Desist Letter directing that the Applicant immediately cease trespassing on the suit property allegedly owned by the 3rd Respondent. Subsequently, on 13th March 2024, the 2nd Respondent issued a "Notice of Permanent Road Closure" to the Applicant and other users of the subject Public Access Road leading to the suit property, citing the expiration of the lease agreement between the Applicant and the 2nd Respondent, which issue is pending determination before this Court. On 15th March 2024, the Respondents, directly through the 2nd Respondent and indirectly through one Wasi Birya, issued a "Notice of Permanent Road Closure" addressed to all road users and boat owners, indicating that they shall close the public access road to the suit property immediately. Under the said Notice, the Respondents closed the Public Access Road to the suit property, thereby permanently preventing the Applicant and other members of the public from accessing the suit property. This also caused the Applicant's boat yard business, which has been running for twenty years, to halt immediately. The Applicant lodged the instant Application seeking injunctive relief against the Respondents on the above basis.

9. The Applicant believes that this Court can issue the orders sought under Section 13(7) of the *Environment and Land Court Act* No. 19 of 2011. The guiding principles for granting orders of temporary injunctions are well settled and set out in the Judicial decision of *Giella v Cassman Brown* [973] EA on page 358. This position has been reiterated in numerous Kenyan court decisions, particularly in *Nguruman Limited v Jane Bonde Nilsen & 2 Others* [2014] eKLR. The principle of the grant of an injunction can also be drawn from the case of *Grace Chemutai Koech v Franny Chess Kiplangat Chebiror & 2 Others* [2018] eKLR.The Applicant states the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003], eKLR defined what a prima facie case entails.

10. The Applicant contends that, in this instant application, the Applicant has occupied the suit property since 2001, having bought the assets of a boatyard formerly known as Swynford Boatyard, which had occupied the suit property since 1982. The Applicant also holds a renewable Special Use License dated 31st May 2022 for an initial term of 25 years, issued by the 1st Interested Party in compliance with the *Constitution* of Kenya and the *Forest Management Conservation Act*, 2016. For the past 23 years, since its occupation of the suit property, the Applicant and other members of the public have enjoyed uninterrupted use of the Public Access Road, which leads to the suit property. Additionally, the Survey Report annexed to the Applicant's Supplementary Affidavit proves that the said Public Access Road had existed and been used for over forty years since 1982, when the Applicant was established.

11. The Applicant argues that closing the public access road and the cease-and-desist notices directly interfere with the Applicant's legal interests over the suit property.

12. The Applicant further asserts that In *Francisca Wanza Nthenge & Another v Mwania Cooperative Society* [2020] eKLR, the Court quoted the Court of Appeal case of *Kamau v Kamau* (1984) eKLR, enunciated that where any way or watercourse or the use of any water has been enjoyed as an easement peaceably and openly as of right, and without interruption, for twenty years, the According to the written law on the limitation of actions, the right to such a way or watercourse is absolute and indefeasible.

13. In the preceding, the Applicant submits that it has established a prima facie case with a high probability of success that can only be safeguarded by an Injunction.

14. The Applicant states that the Court of Appeal's decision in *Director of Public Prosecutions v Justus Mwendwa Kathenge and 2 Others* [2016] eKLR enunciated that an application for an injunction seeks an equitable remedy. Section 63 of the *Civil Procedure Act* and, Order 40 (previously Order 39) of the *Civil Procedure Rules*, and Article 23 of the *Constitution* explicitly identify an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person's right or fundamental freedom under the Bill of Rights has been denied, violated, infringed, or threatened. Needless to emphasize, the remedy of a temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established to prevent the ends of justice from being defeated.

15. On irreparable injury, the Applicant states the Court of Appeal defined the same in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. The Applicant stands to suffer irreparable injury owing to the nature of the boat business conducted on the suit property, which has solely depended on the access road for over two decades. There is no other way through which the suit property can be accessed other than through the subject access road; the closure/restriction will destroy the Applicant's business operations, which have contributed to Kilifi County's blue economy, job creation, and other complementary activities. The local community has and continues to benefit from the economic activities created by the Applicant's business operations, which now stand to be threatened/stagnated owing to the closure of the access road. Hence, prayers are sought in the subject application. *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, elucidating that - irreparable injury means that it must be one that cannot adequately be compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and no other remedy is open. By doing so, he will protect himself from the consequences of the apprehended injury.

16. The Applicant believes that the balance of convenience in this case tilts in its favour, as held in the cases of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR and *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 Others* [2016] eKLR. *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR and *Robert Mugo Wakaranja v Ecobank Kenya Limited & Another* [2019] eKLR.

17. The Applicant affirms its entitled to costs.

18. The Plaintiffs/Respondents submitted that the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] enunciated the principles on the issuance of injunction as set out in *Giella v Cassman Brown* (1973) EA 358. It was reiterated in the seminal Court of Appeal case of *Mrao v First American Bank of Kenya Limited* [2003]. The first requirement this Court should consider in granting the injunctive reliefs sought has been discussed. The Defendant/Applicant has not clearly outlined the legal right they claim to be infringed. They don't own the land. They claim a public road exists; third parties own that land not joined in this suit. They don't hold a registered easement concerning the property through which the claimed public road passes. No registered surrender or survey map shows that the Government of Kenya has identified this as a public road as defined in the *Public Roads and Roads of Access Act* (CAP 399). The Defendant/Applicant has not even attempted to establish where their rights start on this issue, which does not involve the suit property, to aid this Court in determining how those rights interface with other constitutional guaranteed rights to own private property accruing to third parties. Therefore, the Plaintiffs/Respondents submit that the orders sought cannot and should not be granted as prayed for failure to satisfy this first prerequisite.

19. The Respondents submit the second requirement for injunctive relief if a party ought to demonstrate irreparable injury if the injunction is not granted; to grant the prayers sought means trampling on the constitutional rights of third parties not party to this suit. This is one of the many follies of the present Application. The Defendant/Applicant is essentially asking this court to sanction trespass.

The escalation of injury and consequent litigation that the Granting of the prayers sought will cause has to serve as a bar to this court entertaining the Defendant/Applicant's invitation. What boggles the mind is that the Defendant/Applicant has available a path of least resistance: engage the owner(s) of the land and negotiate an easement. They have not taken this option. The Plaintiffs/Respondents ask, why should the court care to issue injunctive orders for a party who suffers from self-inflicted injuries?

20. The Respondents argue that the third requirement of the test for granting an injunction has not been met. They cite the case of *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* [2019] to support their position. The inconvenience and mischief that may be caused to third parties not joined in this suit, far outweighs the inconveniences that the Defendant/Applicant may suffer.

21. For all the preceding reasons, the Plaintiffs/Respondents seek that this court dismiss the Notice of Motion dated 27th March 2024, in toto, with costs awarded in favor of the Plaintiffs/Respondents.

22. I am well guided by the authorities cited by the parties in this matter. The Court has meticulously considered the arguments presented. For an injunction to be issued, the threshold to achieve before the grant of the same is as held in the Giella Case(supra):

> " The Applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages, and thirdly, if the Court is in doubt, it should decide on a balance of convenience."

23. The first issue to determine then is whether the Applicant has proved a prima facie case with the probability of success as held in *Mrao v First American Bank Of Kenya & 2 others* [2003] KLR 125 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 in rebuttal from the latter."

24. On the 23rd day of October 2023, this Court delivered a ruling dismissing the Notice of Motion dated 31st May 2023 for an injunction brought by the plaintiffs/respondents in this manner:

> " From the preceding, it is evident that the plaintiffs/Applicants have no right over the subject area being a public forest falling within the jurisdiction of the 1st interested party and which right has been infringed by other parties. This is because the subject area was declared a public forest even before the title was issued to them and before the alleged Temporary Occupation License (TOL) was issued over forest land.
>
> The Applicants have not established the legal rights that stand to be infringed since the land is forest land. From the abovementioned, the plaintiffs/Applicants have failed to demonstrate that they have a prima facie case with a probability of success.
>
> Under the second guiding principle in the Giella case, the Applicant must demonstrate that he might otherwise suffer irreparable injury, which would not be ordinarily and adequately compensated by an award of damages. The purported sub-lease of the suit property by the Applicant is devoid of any proof even at this stage, and further, it is only the 1st interested party that can grant authorization for occupation and use of the subject area. However, if the injunction is granted then the obligations of the licensee in ensuring the sanctity of the mangrove forest will remain suspended for the duration of the injunction thereby

occasioning loss that cannot be adequately compensated by an award of damages. The harm to the environment far outweighs the harm to the plaintiffs/Applicants as held in the case of *Nawaz Abdul Manji & 4 others v Vandeep Sagoo & 8 others* [2017] eKLR, where the Court held:

> "I have balanced the two concerns and do find that though the falling trees are a threat to the golf cause users, it will lead to irreparable harm in clearing portions of the forests without consulting the trustees who are vested with both movable and immovable property of the Club. The harm on the trees far outweighs the harm on humans as the trees are beneficial to a large population and that if the plaintiffs succeed ultimately there will be no trees and that damages will not be adequate compensation."

The second principle, thus, is not met by the plaintiffs/Applicants to satisfy this court to grant an injunction.

The principles stated in Giella's case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd V Afraha Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

> "so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed."

The plaintiffs/Applicants' have failed to shoulder the burden of satisfying the first two principles.

The balance of convenience is in favour of the respondent, who is a licensee of the 1st interested party and is in occupation of a gazetted forest. The conditions for issuance are as depicted in the SUL issued pursuant to the determination by the 1st interested party primarily for the purposes of those activities listed in the First Schedule to the license. No person can claim proprietary rights over a gazetted forest that was never available for allocation in the first place. The plaintiffs'/Applicants' application dated 31st May 2023 is hereby dismissed with costs."

25. The decision was reached after careful consideration that the suit property is a mangrove forest emanating from Proclamation No 44 of 1932, a legal status affirmed in numerous cases. This proclamation declared mangrove swamp forest reserves as follows:

> " All land between high water and low water marks (ordinary spring tides) in the localities as described below, viz on the mainland and islands adjacent to the coast from the mouth of the northern Kilifi River in the north, to Ras Ngomeni in the south. In the following creeks and all branches thereof;- Mida (Uyombo), Kilifi (southern), Takaungu, and Mtwapa. Provided that any areas that lie within the foregoing boundaries which may have been, or maybe, declared private property under Crown, are excluded from the forest reserves.'

26. In the case of *Pati Limited v Funzi Island Development Limited & 4 others* (Petition 37 of 2019) [2021] KESC 29 (KLR) (16 July 2021), the Supreme Court in affirming the legal status of Proclamation No. 44 of 1932 held as follows:

> " The appellant relies on the provisions of the Forest Act, cap 385 as read with its Subsidiary Legislation and section 5 of the Revision of Laws Act, set out above, to urge that Proclamation No 44 of 1932 ceased to have effect after the enactment of the Forest Act

cap 385, as the latter omitted the content of the Proclamation. However, it should be noted that Proclamation No. 44 of 1932 was not made under the Forest Act cap 385. The Proclamation was made under the provisions of the Forests Ordinance Cap 176, which is not one of the laws repealed by the Forest Act Cap 385, the Forest Act No 7 of 2005, or the *Forest Conservation and Management Act* No 34 of 2016. Of significance is the fact that the Minister never degazetted the suit land as a mangrove forest. A clear reading of section 5 of the Revision of Laws Act leaves no doubt that Proclamation No 44 of 1932 could not have formed part of the contents of that which was omitted by section 4 of the Forests Act, cap 385 of the Laws of Kenya. 55. Besides, the Forests Act No. 7 of 2005 at section 65 and the *Forest Conservation and Management Act* No. 34 of 2016 at section 77 provide (d) that, notwithstanding the repeal of the preceding Act, 'any land which, immediately before the commencement of the subsequent Act was a forest or nature reserve under that Act, shall be deemed to be a state or local authority forest or nature reserve, as the case may be, under the succeeding Act.' Section 77 of the *Forest Conservation and Management Act* specifically sets out that all gazetted or land registered as a forest reserve in its Third Schedule or under any other relevant law shall be deemed to be a public forest under the Act. The Third Schedule identifies mangrove swamp forests as land declared under Notice No 44 of 1932. Although the word 'Proclamation' is not used, we have no doubt that the 'Notice' referred to, can only be "Proclamation No 44 of 1932". The conclusion, to which we must therefore arrive, is that the legal status of mangrove forests as declared in Proclamation No. 44 was saved by the Third Schedule of the *Forest Conservation and Management Act*."

27. The prohibition of use of the access road to the suit property then, without considering the Survey Reports, acts contra the ruling of this Court dated 23rd October 2023 and the doctrine of lis pendens because it attempts to alter the substratum of the suit before the anticipated hearing since the said access road has been operating and serving as an easement for over 40 years. As correctly submitted by the Applicant, the decision in *Francisca Wanza Nthenge & Another v Mwania Cooperative Society* [2020] eKLR is germane. The Court, in that case, quoted the Court of Appeal holding in *Kamau v Kamau* [1984]eKLR, where it was stated as follows:

> "Where any way or watercourse or the use of any water has been enjoyed as an easement peaceably and openly as of right, and without interruption, for twenty years, the right of such way or watercourse is absolute and indefeasible according to the written law on the limitation of actions."

28. The Respondents say there are parties whose constitutional property rights ownership will be inconvenienced. They have not been mentioned. In any event, the access road has existed in perpetuity.

29. The Applicant has demonstrated prima facie the loss that has already been incurred by the prohibition of using this access road. Its impact on its boat yard business, its users, and the surrounding community using it cannot be gainsaid. The respondents have not expressed why the access road has been closed at this point after its existence for over 40 years.

30. The principles stated in Giella's case are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraha Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

> "so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed."

31. I need not consider the other tests in the *Giella Case*. I allow the application dated 27th March 2024 with costs in this manner:

> An injunction be and is hereby issued restraining the Plaintiffs/Respondents herein, whether by themselves, their employees, officers, servants, contractors, agents or licensees (or any one of them) or any other person with purported interest, howsoever, from prohibiting the Defendant's/Applicant's access to the public road passing through the properties known as Kilifi Group V 1628, Kilifi Group V/1629 and CR 79667, CR 61950, CR 61951 and any other adjacent property, leading to all that property known as Kilifi Group V 122; be and is hereby granted pending the hearing and determination of this suit.

DATED, SIGNED, AND DELIVERED ON THIS 22ND DAY OF MAY 2024. AS DIRECTED BY THE COURT, ALL PARTIES WILL BE SUPPLIED WITH A SOFT COPY OF THE RULING VIA THEIR RESPECTIVE EMAILS.

E.K. MAKORI

JUDGE