Mbulia Community v Bilauri Limited (Environment & Land Case E003 of 2024) [2024] KEELC 4499 (KLR) (Environment and Land) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4499 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT & LAND CASE E003 OF 2024

EK WABWOTO, J

JUNE 6, 2024

BETWEEN

MBULIA COMMUNITY ..... PLAINTIFF

AND

BILAURI LIMITED ..... DEFENDANT

RULING

1. This ruling is in respect to two applications. The first application is the Plaintiff's application dated 5th February 2024 seeking the following reliefs: -

    a. Spent...

    b. Spent...

    c. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders of injunction restraining the Respondent by themselves, their servants, agents, proxies and/or persons exercising authority from them, operating a tourist lodge, a conservancy or any business dealings and/or inhibiting, alienating, dealing, disposing, trespassing and/or in any other manner interfering with the Plaintiff's quiet use occupation and possession of all those parcels of land known as Taita Taveta/Mbulia Group ranch/9.

    d. Costs of this application be in the cause.

2. The said application was premised on 8 grounds made in support of the said application together with a Supporting Affidavit sworn by Charles Mwaizinga on 5th February 2024.

3. The second application is the application dated 25th March 2024 filed by the Defendant seeking the following reliefs: -

    1. That this Honourable Court be pleased to stay the suit herein and any further proceedings by the Plaintiff herein including but not limited to the Notice of Motion dated 5th February 2024 pending reference, hearing and determination of the dispute herein to arbitrate agreement between parties.

    2. That the Honourable Court be pleased to refer this suit and dispute to Arbitration pursuant to arbitration agreement between parties herein.

4. The application is equally premised on the grounds contained on the face of the application and the Supporting Affidavit of Richard Corcoran sworn on 25th March 2024.

5. Both applications were contested and parties filed written submissions in support and or opposition to the said applications. Pursuant to the directions issued by this court it was directed that the two applications be heard simultaneously wherein the court will deliver its ruling.

6. The Plaintiff filed written submissions dated 6th May 2024. Counsel submitted on the following three issues: whether the court has jurisdiction to hear this suit and or refer the same to arbitration, whether the Plaintiff has satisfied the requirements for the grant of a conservatory order and who should bear costs of the applications.

7. It was argued that the Plaintiff has made numerous attempts in pursuing alternative dispute resolution which efforts have been impeded by the Defendant. The current application for arbitration stands in stark contradiction to the Defendant's earlier position.

8. It was argued that there is no valid agreement between the parties warranting arbitration. The lease agreement was drafted solely for the Defendant's benefit and was not lawfully accepted by the Plaintiff and further that the agreement blatantly contravenes the explicit provisions of the *Community Land Act* (2016). The said agreement was done without the consent of the community.

9. On whether the Plaintiff has satisfied the requirements for the grant of conservatory order, it was argued that Section 47(3) of the *Community Land* provides that land held by group representatives shall not be sold, leased/or converted to private land before it has been registered under the said Act. It was also argued that Amos Mghenyi, Edward Mrima Wanje and Manuel Mwambacha Kitololo were not authorized to execute the lease under Sections 7(1) and (5) and Section 15 of the *Community Land Act*. It was also argued that Section 36 of the *Community Land Act* cannot come to the aid of the Defendant since the Defendant with full knowledge decided to revoke all the rights as per the agreement dated 22nd November 2018.

10. The Defendant filed written submissions dated 6th May 2024. Counsel submitted on the similar issues raised by the Plaintiff. It was submitted that the Lease and License Agreements are not denied in the suit or Plaintiff's application. The dispute on the Lease or License on its validity or performance were agreed at Clause 21 thereof by parties to submit to arbitrate and non-exclusive jurisdiction of the courts of Kenya. The dispute in the application and the suit can only be determined by a sole Arbitrator. Under Section 17 of the *Arbitration Act* under the 'doctrine of competenz – competenz'. Section 41 of the *Community Land Act* provides that where there is a dispute relating to Community Land, the parties to the dispute may agree to refer the dispute to arbitration and appointment of the Arbitrator shall be in accordance with the *Arbitration Act*. It was further argued that the court does not have jurisdiction to hear and determine this suit due to existence of Clause 21 of the said license and Lease

dated 1st December 2011 and 22nd November 2018. The court was urged to stay the matter and refer the same to arbitration.

11. On whether the Plaintiff should be granted the injunctive orders sought, it was submitted that the Defendant is an assignee of the license and or lease that commenced on 1st January 2012 by reason of the License and neither the community nor the Group Ranch then at any time ever alleged trespass, evicted or brought a trespass suit. Equally, the Defendant who has common directorship and shareholding with the said assignor has been on the land since 2018 following the assignment yet neither the community nor Mbulia Group Ranch have alleged trespass. The Plaintiff was registered in June 2021 and its committee must have arisen from the community which co-existed with the Defendant yet no suit was brought or challenged from 2021. The Defendants possession, use and occupation of the Land is neither unlawful or trespass because it is based on a License dated 1st December 2011 and Lease dated 12th December 2018. The Defendant's occupation on the suit property has been in existence since 2012 yet neither the Community nor the Committee managing the suit property on behalf the Community objected or filed a trespass suit. Secondly, the Plaintiff has admitted receiving rent and lodge fees from the Defendant at all material times of the License and Lease.

12. It was further submitted that the Defendant has by its affidavit demonstrated that the possession, use and occupation of the suit property since 2012 was consented to by the community and the management thereof as per the License and Lease. The Defendant is an assignee of the license and Lease and that at paragraph 13 of the Replying Affidavit, the Defendant has demonstrated that the assignment of the license or lease was authorized by a Special General Meeting of the Community. The License and Lease was equally authorized by duly elected management of the Community.

13. It was argued that suit has been caught up by laches having been brought to court after 11 years. It was further argued that the Plaintiff has not come to court with clean hands and is guilty of misrepresentation and non-disclosure of material facts. It was submitted that the Plaintiff has admitted receiving rent and lodge fees without denial of other benefits such as the social corporate benefits received by the Plaintiff's community from the Defendant yet on the other hand alleges that the Defendant evicted the Plaintiff's community and occupied the suit property. No evidence of eviction has been demonstrated.

14. The Defendant concluded its submission by urging this court to dismiss the Plaintiff's application and refer the matter to Arbitration.

15. The court upon considering the applications, the rival affidavits filed and written submissions filed by the parties proceeds to adopt the issues outlined by the parties in determining the two applications:-

    i. Whether the proceedings herein should be referred to Arbitration.

    ii. Whether the Plaintiff has made a case for grant of the injunctive orders sought.

16. The tenor and import of Article 159(2) (c) of the *Constitution* as read together with Section 6(1) of the *Arbitration Act* Cap 49 is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance. The power of a court to stay proceedings and refer matters to arbitration is provided for under Section 6 of the *Arbitration Act* Cap 49. It provides that:

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters

appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

17. In this case Section 6(1) of the *Arbitration Act* has put a limitation to matters that will be referred to arbitration. The court will not refer the matter to arbitration as the agreement and by extension the arbitration clause are null and void as they violate various provisions of the law. This in itself is a ground upon which the court will decline to refer the matter to arbitration as an agreement which violates the law is null and void 'ab-intio.' This was stated in the case of *Njogu & Company Advocates –v- National Bank of Kenya Limited* (2016) eKLR.

18. It is not disputed that the Defendant's application herein was lodged properly. In determining whether to grant a stay of proceedings, the Court is called upon to consider validity of the arbitration agreement. This goes to say that a court cannot enforce unconscionable and invalid arbitration agreements which are marred with inequality of bargaining power and resulting in improvident bargain.

19. The Plaintiff is opposed to the dispute being referred to arbitration on several grounds including that the Lease agreement dated 22nd November 2018 is void having been executed contrary to several provisions of the *Community Land Act* (2016). It was also contended that the Plaintiff had undertaken efforts to initiate alternative dispute resolution with the Defendant in an attempt to comply with the provision of *Community Land Act* more specifically Section 39 – 42 of the said *Act* and as such the same cannot be referred to arbitration.

20. In the case *Niazsons (K) Ltd –v- China Road & Bridge Corporation Kenya* [2001]eKLR the court stated that whether or not an arbitration clause or agreement is valid is a matter seized of a court in the suit in which stay is sought and is duty bound to decide. The claim by the Plaintiff that the agreement is invalid should therefore be determined by this court. In *Esmaj –v- Mistry Shamji Lalji & Co* (1984) KLR, Court of Appeal. The principle governing the grant of stay of proceedings were laid down and are as follows: -

a) The court is not bound to grant stay but has discretion to grant or not to grant.

b) The discretion to grant should not be exercised when strong cause for doing so is shown.

c) The burden of proving such strong cause is on the applicant

d) In exercising discretion, the court should take into account the circumstances of the particular case.

e) A mere balance of convenience is not enough.

21. From the evidence adduced herein, the previous efforts and attempts of referring the matter and or resolving the dispute amicably having failed and further considering that the validity of the Lease agreement is contested, the Defendant's request that the suit be stayed and referred to arbitration is not for granting.

22. On the second issue as to whether the Plaintiff has met the threshold for grant of the injunctive orders sought, the principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that

an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

23. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and went further to state as follows:

> "The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

24. From the evidence availed to the court herein, it is evident that the Plaintiff is the registered proprietor of all that parcel of land registered as Taita Taveta/Mbulia Group Ranch/9 and the land is managed by the Mbulia Community Land Management Committee which was also issued with land registered as Taita Taveta/Mbulia Group Ranch/9, Mbololo/Mbulia/7 and 6. It is also evident that the Plaintiff has disputed the validity of the lease agreement executed in the name of Mbulia Group Ranch with signatures affixed by Amos Mghenyi, Edward Mrima Wanje and Manuel Mwambacha Kitololo for lack of authority to bind the Plaintiff herein. In view of the foregoing the court is satisfied that the Plaintiff has established a prima facie case with a probability of success.

25. The next issue is whether the Plaintiff have proved that they stand to suffer irreparable injury, which would not adequately be compensated by an award of damages. The general position is that an injunction ought not to be granted if the applicants may be compensated by an award of damages.

26. In this case, the Plaintiff averred that the effect of the actions of the Defendant will lead to catastrophic consequences and loss of lives among the community members who exceeds 10,000 individuals. The Defendant on the other hand averred that the Plaintiff has not demonstrated any irreparable loss that it shall suffer if the injunction order is not granted. It was averred that the Defendant has been in occupation and use of the property since 2011. It has an established a work force of 100 employees managing its wildlife conservancy and tourist lodges and that it is the Defendant who will suffer irreparable loss and not the Plaintiff.

27. As regards irreparable injury or loss, the sentiments of the court in *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* (Supra) are instructive;

> "On the second factor, that the applicant must establish he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold required and the burden is on the applicant to demonstrate prima facie the nature of the injury."

28. According to *Halsbury's Law of England* 3rd Edition Vol. 21 paragraph 739 at page 352,

> " . . . By the term irreparable injury meant injury which is substantial and could never be adequately remedied or atoned for by damages, not which cannot possibly be repaired . . . In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured."

29. The Plaintiff save for only stating that they will suffer loss and damages which cannot be adequately be compensated by monetary compensation was not able to demonstrate to the satisfaction of this court the irreparable loss or injury that it may suffer.

30. For the foregoing reasons, it is the finding of the court that the Plaintiff has failed to demonstrate how the loss or harm it was likely to suffer in the absence of an injunction will be unquantifiable in monetary terms.

31. Finally, in respect to balance of convenience, in the case of *Byran Chebii Kipkoech V Barnabas Tuitoek Bargoria & another* (2019) eKLR, the court explained the concept of balance of convenience as follows;

> " The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants, if an injunction is granted but the suit ultimately dismissed. . .In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

32. Considering the fact that the Plaintiff's seeks injunctive orders, which in effect will lead to halting the operations of the Wildlife Conservancy and Tourist Lodges being operated by the Defendant and further considering that the Defendant has been on the land managing the Wildlife Conservancy and Tourist Lodges since 2012, It is not in the best interest of justice to grant the said orders at this stage. In this case, the Plaintiff has not demonstrated the comparative inconvenience to the parties if the injunction sought is granted or withheld. In view of the foregoing the injunctive relief sought is declined.

33. In conclusion, the Plaintiff's application dated 5th February 2024 and the Defendant's application dated 25th March 2024 are hereby dismissed for lack of merit. Each party to bear own costs of the applications.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 6TH DAY OF JUNE 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Simon Mburu for the Plaintiff.

Mr. Litoro for the Defendant.

Court Assistants: Mary Ngoira and Norah Chao.