



Abdille & another v Bungale/Wale Muungano Group & another (Environment and Land Appeal E026 of 2024) [2024] KEELC 5762 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5762 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E026 OF 2024**

**EK MAKORI, J
JULY 29, 2024**

BETWEEN

SULEIMAN ABDILLE 1ST APPELLANT

ABDILLE HASSAN DUWALE 2ND APPELLANT

AND

MATANYANGO MUUGANO GROUP 1ST RESPONDENT

BUNGALE/WALE MUUNGANO GROUP 2ND RESPONDENT

RULING

1. The Applicants, recognizing the urgency of the matter, promptly filed a motion on July 1, 2024. This motion sought, among other reliefs, a stay of execution of the ruling delivered on June 25, 2024, an order restraining the Respondents from evicting the Applicants from the suit property, and a stay of proceedings pending appeal, with the attendant costs.
2. The Applicants relied on the supporting affidavit deposed on July 1, 2024. In opposition to the application, the Respondents filed a replying affidavit to the motion dated July 4, 2024, while the Applicants filed a further affidavit dated July 8, 2024.
3. Parties were directed to file written submissions, and they diligently and comprehensively complied, ensuring all relevant information was presented.
4. From the materials and submissions placed before me, it is clear that the issues that need to be determined in this appeal are of utmost importance. These include whether to grant a stay of proceedings and stay orders pending appeal and who should bear the costs of the current application.
5. The Applicants argue that they entered into separate five-year lease agreements for grazing stock with the Respondents on 25 July 2023. However, in her ruling (Hon. Ivy Wasike PM), dated June 25, 2024,



- the magistrate issued a mandatory injunction that effectively terminated the lease agreements before they could run their full term and before the main suit was heard.
6. The Respondents, on the other hand, claim that the Applicant failed to adhere to the terms of the leases. They allege that the initial deposit and monthly rent were not paid as stipulated in the respective leases. As a result, the termination clause was invoked, leading to the filing of the suit before the Magistrates Court and the subsequent ruling.
 7. In their submissions, the Applicants have cited several authorities to support their position. They argue that the Self-Help Groups had no locus standi to sue without incorporating its officials, citing significant decisions such as *Alfred Njau v City Council of Nairobi* [1983] eKLR, *Kipsiwo Community Self-Help Group v Attorney General and six others* [2013] eKLR, and *Senti Kumi Community Self Help v Kenya Maritime Authority & another* [2019] eKLR. These cases establish that Self Help Groups sue through their officials. In this case, the trial Court had no jurisdiction to issue orders to amorphous entities since its officials were not incorporated in the suit.
 8. The Applicants argued that Section 6 of the *Civil Procedure Act* provides that where an issue is directly and substantially in issue in proceedings between the same parties, another Court should stay its proceedings in respect of such suit. In this case, since an appeal has been filed arising from the interlocutory proceedings, the Lower Court matter ought to be stayed, see Ringera J (as he then was) in *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000.
 9. The Applicants further proceeded to state that the principles for allowing a stay of proceedings have been codified and include whether the Applicant has established that he/she has a prima facie arguable case, whether the application was filed expeditiously, and whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.
 10. The Applicant avers that the attached Memorandum of Appeal filed before this Court raises triable issues, including the court's jurisdiction to handle the case, which goes to the substratum of the case.
 11. The Applicants believe that the application was filed expeditiously. The Lower Court's ruling was delivered on June 25, 2024, and the application was filed on July 1, 2024.
 12. According to the Applicant, vide the ruling dated July 25, 2024, the Applicant stands to lose interests in the suit property and, therefore, the determination of the case without parties having gone for the entire trial. The temporary mandatory injunction rewrote the contracts between the parties and declared the Applicants herein the trespassers. This was against the canons of natural justice.
 13. The Applicant further avers that a stay of execution preserves the case's substratum, as held in *Consolidated Marine v Nampijja & another*, Civil App.No. 93 of 1989 (Nairobi). The Applicants aver that the injunction granted by the learned magistrate was a mandatory injunction, which necessitates a party to do a particular activity. The Court of Appeal in *Kenya Breweries Limited & Another v. Washington O. Okeyo* Civil Appeal No. 332 of 2000 [2002] 1 EA 109 found that to issue an interlocutory mandatory injunction would require exceptional circumstances—none of which obtains in the matter before the Lower Court.
 14. The Respondents, however, submit that the Applicants failed to pay the requisite deposits and rents as the lease requires. Furthermore, the Applicants could not follow the terms of the lease agreement on good farming, leading to the issuance of termination. The continued stay of the Applicants' stock in the suit property has led to an outbreak of water-borne diseases and hospitalization of locals. The orders issued by the magistrate were germane in the circumstances.



15. The Respondents are of the view that the Principles in *Giella v Cassman Brown & Co Ltd* [1973] E A 358, as reiterated in *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] E.A, [Nguruman Ltd v Jan Bonde Nielsen & 2 others](#) [2014] eKLR and [Paul Gitonga Wanjau v Gatbuti Tea Factory Co. Ltd & 2 others](#) [2016] eKLR, that for an injunction to be issued there must be established a prima facie case with a probability of success and that damages will not adequately compensate the Applicant. That the Applicant stands to suffer irreparable loss. When in doubt, the Court decides on the balance of convenience.

16. In the Lower Court, the Magistrate, while addressing the conditions of grant of interlocutory mandatory injunction made findings that:

“It is not in dispute that the leased land is community land, and there are members of the community living near or on part of the leased land. Issues of depletion of water pans and contamination of water pans and dams meant for human use by livestock are issues that can cause irreparable damage to the health and life of the community. Issues of overgrazing and destruction of the environment, as a result, have devastating results, and these and the consequences may be dire and cannot be wished away through monetary compensation as it cannot be an adequate remedy to the health of the community and environmental conservation.....”

17. She found that from the foregoing, the Applicants, acts, and failures:

“to pay rent in full, subletting the land to other third parties thereby overgrazing the land, letting their animals destroy farms and farm produce thereby causing rifts between communities and refusing to vacate despite notice of termination of the tenancy as stipulated under the agreement....

Were sufficient and special circumstances warranting interlocutory mandatory injunction.

18. The failure by the Applicants to adhere to the lease agreement led to the magistrate issuing a mandatory injunction to mitigate any further damages occasioned by the Applicants’ cattle to the detriment of the respondent, notably outbreak of diseases and wrangles between communities. In [Kenya Breweries Limited & Another v Washington O. Okeyo](#) Civil Appeal No. 332 of 2000 [2002] 1 EA 109, the Court held that for a mandatory injunction to be issued at an interlocutory stage, the following conditions have to be met:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 [Halsbury’s Laws of England](#) 4th Edn. Para 948, which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

Also in *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901 at pg. 901, it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where



the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high degree of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

19. The trial magistrate, in the exercise of her discretion, was of the view that the Applicants, having failed to pay rent and follow the necessary dictates of the lease documents, had led to overstocking, pollution of water, and bringing in and subletting the land to other third parties, the recession of the leases by the Respondents was therefore tenable, and the only remedy available was to issue an interlocutory mandatory injunction in the manner she did. I will not, under the circumstances, based on the materials placed before her, fault the decision of the Court. The Applicants needed to adhere to the terms and conditions of the lease documents. They came to Court with unclean hands. The main suit still pends before the Lower Court. Any stoppage orders will not be in the interest of both parties. The degradation of the land will continue due to overgrazing. Waterborne diseases will continue to spread as cattle continue to water on the available human water source. Besides, there will be escalated community feuds and tensions arising from the acts of the Applicants.
20. The issue of locus standi was raised in this appeal. The Magistrate handled it this way:

“On the issue of locus standi to institute the suit in regard to the authority of Self-Help Groups, these are issues that are not to be raised on grounds of opposition or submissions as these are substantive issues of law which the Plaintiffs must be given an opportunity to respond to and therefore be raised appropriately and not entwined in the reply nor raised in submissions.”
21. I appreciate the authorities the Applicant cited before me on how Self-Help Groups need to approach the Court as entities – through their officials. This issue can be raised in the Lower Court as proposed by the Magistrate through perhaps a preliminary point of law or striking out suit.
22. I also firmly believe that, as the trial magistrate suggested, the parties can pursue an out-of-court settlement through our Court-Annexed Mediation or Alternative Justice System Mechanism. It will work magic in resolving the issues raised in the pending suit in the Lower Court and reconciling communities. I recommend that the parties try the same.
23. For now, the application dated 1 July 2024 is dismissed with costs to abide by the outcome of the main suit in the Lower Court.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 29TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mitei for the Applicants

Mr. Mangaro, for the Respondents

Happy: Court Assistant

