Mae v Musango & 11 others (Environment & Land Petition 19 of 2021) [2024] KEELC 5502 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5502 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 19 OF 2021

LL NAIKUNI, J

JULY 24, 2024

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 40, 47, 47 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ADJUDICATION COMMITTEE AND ARBITRATION BOARD AND OBJECTION IN THE LAND COMMITTEE CASE NO. 2348, 234, ARBITRATION CASE NO. AND OBJECTION NO. 26 AND 27

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2013.

AND

IN THE MATTER OF: PLOT NOS. 2097 AND 2028 MWANDA/MBALAMBWENI ADJUDICATION SECTION

AND

IN THE MATTER OF: ARTICLES 20, 21, 22 & 23 OF THE CONSTITUTION OF KENYA, THE ENVIRONMENT & LAND COURT ACT NO. 19 OF 2011, SECTIONS 13, 19, 20, 21, 22, 26, 27, 28 AND 29 OF THE LAND ADJUDICATION ACT CAP. 284 LAWS OF KENYA, THE LAND ACT NO. 6 OF 2012 AND THE LAND REGISTRATION ACT, NO. 3 OF 2012

BETWEEN

PASCAL MWARINGA MAE ..... PETITIONER

AND

JACKSON K MUSANGO & 11 OTHERS ..... RESPONDENT

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated November 30, 2023. It is filed by Pascal Mwaringa Mae, the Petitioner/Applicant herein brought under a certificate of urgency under the provisions of Order 51 Rules 1 and Order 40 Rule 1 (a) (b),2 (1) of the Civil Procedure Rules, 2010, Sections 1A, 3, 3A & 63 (e) of the *Civil Procedure Act*, Cap. 21 and all enabling provisions of the law.

2. Upon service of the same, its only the 2nd Respondent who opposed the notice of Motion application dated 30th November, 2023 by filing a Replying Affidavit dated 13th February, 2024.

II. The Petitioner/Applicant's case

3. The Petitioner/Applicant sought for the following orders:-

    a. Spent.

    b. That the Honorable court be pleased to issue an order restraining the 2nd Respondent-Ali Bakari Mwamunda either by himself, its agents, servants, attorneys or workmen's or persons acting under their instructions or otherwise however from encroaching, alienating, disposing, wasting and or cultivating, damaging, constructing on or in any manner whatsoever interfering with Plot No. 2097Mwanda/ Mbalamweni Adjudication pending the hearing of the main Petition.

    c. That the officer commanding station O.C.S Ndonya Police Station does ensure compliance of the orders issued herein.

    d. That cost of this Application be granted to the Applicant.

4. The application by the Applicant is premised on the grounds, testimonial facts and the averments made out under the 10 paragraphed annexed Supporting Affidavit of Pascal Mwaringa Mae the Applicant herein together with four (4) annextures marked as "PMM - 1 to 4". The Applicant averred that:

    a. The Petitioner is the legal and absolute owner of parcel of land/ Plot No. 2097 hereto.

    b. He had a dispute pertaining to the subject Plot herein with the 1st respondent which dispute was heard by the land committee in Land Case No. 220 as evidenced by the consent, certified proceedings and a complaint to the Board marked as "PMM - 1, 2 and 3' annexed hereto.

    c. The 2nd Respondent was purporting to lay claim ownership of the same and had commenced invasion by erecting a fence and cultivation.

    d. The main Petition was slated for hearing on 21st February 2024 when parties would be required to tender oral evidence.

    e. He contested the entire proceedings and decision of the land committee and the objections lodged by the 1st Respondent which culminated to the Instant matter to which his then Advocate on record filed an Application dated 7th May 2021 and a ruling delivered on 4th April 2022 which directed that the matter be heard orally on 21st February 2024.

f. The 2nd Respondent was now a trespasser on the Plot No. 2097 as evidence bythe annexture marked as "PMM – 4" which were a set of photographs to demonstrate the same.

g. It was apparent that the 2nd Respondent had ulterior motives and was hell bent to proceed to encroaching and or cultivating the subject plot to his detriment and or in defiance to the Court directives as regards to the hearing and need to move this Honourable Court accordingly.

h. His efforts to further utilize the property had been put in jeopardy as a result of the 2nd Respondent illegally and unlawful acts which he now sought the Court's intervention.

i. The Petitioner is willing and prepared to abide by any condition precedent in granting the orders sought herein.

j. Unless the 2nd Respondent was restrained by an order from further engaging in his illegal acts as stated herein, he stood to suffer immense losses and damages

k. It was in the interest of justice and equity that the orders herein be granted.

III. The Response by the Respondents

5. Whilst opposing the application by the Appellant, the 2nd Respondent, Ali Bakari Mwamunda responded to the application through a 9 paragraphed Replying Affidavit dated 13th February, 2024 where he averred that:-

a. The application was taken out, drawn and filed was misconceived, frivolous and otherwise an abuse of the court process.

b. The issue of Plot No. Mwanda/Mbalamweni/2097 was well in the Ruling of the Court dated 4th April, 2022 and hence the same never existed anymore.

c. The 1st Respondent Jackson Karisa Mwango set the history of parcel of land No. Mwanda/mbalamweni/2097 in his affidavit filed on 17th August, 2021. He stated that plot Number 2097 originally 18 acres or thereabout was subdivided and registered as follows:-

i. 2097 & 3603 to Nzaro Karisa Nzaro.

ii. 3600 to Ambale Gaya chulele.

iii. 3601 Nathan Ohilele Mulekya

iv. 3526 Emilya Edith Mbeyu.

a. He referred to the Court to full content of the affidavit of Jackson Karisa Musango which was on record filed on 17th August, 2021.

b. The application filed herein was not only misconceived but its "Res – Judicata".

c. His plot was Number 3602 for which he was waiting for the title.

IV. Submissions

6. On 7th March, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30th November, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 21st February, 2024 a ruling date was reserved on 10th April, 2024 by Court accordingly.

V. Analysis and Determination

7. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has two (2) framed the following issues for determination.

    a. Whether the Notice of Motion dated 30th November, 2023 meets threshold required of a temporary injunction under the provision of Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Who will bear the Costs of Notice of Motion application 30th November, 2023.

Issue No. a). Whether the Notice of Motion dated 30th November, 2023 meets threshold required of a temporary injunction under the provision of Order 40 Rules 1 of the Civil Procedures Rules, 2010.

8. The main substratum of this motion is for the preservation of the suit property. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

    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.

9. The principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Ltd (1973) EA 358", where it was stated:-

    > " First an applicant must show 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

10. The three conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR",

    > " 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. See Kenya Commercial Finance Co. Limited - Versus - Afraha

Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

11. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125,

> " So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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"

12. As the Court previously observed in this ruling, the Petitioner has averred that he is the registered owner parcel of land/ Plot No. 2097 hereto. He had a dispute pertaining to the subject Plot herein with the 1st Respondent which dispute was heard by the land committee in Land Case No. 220 as evidenced by the consent, certified proceedings and a complaint to the Board marked as "PMM 1, 2 and 3. The 2nd Respondent is purporting to lay claim ownership of the same and has commenced invasion by erecting a fence and cultivation. The main Petition is slated for hearing on 21st February 2024 when parties will be required to tender oral evidence. He contested the entire proceedings and decision of the land committee and the objections lodged by the 1st respondent which culminated to the Instant matter to which his then Advocate on record filed an Application dated 7th May 2021 and a ruling delivered on 4th April 2022 which directed that the matter be heard orally on 21st February 2024. The 2nd Respondent is now a trespasser on the Plot No. 2097 as evidence by marked as "PMM – 4" which are a set of photographs to demonstrate the same. It is apparent that the 2nd Respondent has ulterior motives and is hell bent to proceed to encroaching and or cultivating the subject plot to his detriment and or in defiance to the Court directives as regards to the hearing and need to move this Honourable Court accordingly. His efforts to further utilize the property have been put in jeopardy as a result of the 2nd Respondent illegally and unlawful acts which he now sought the Court's intervention. The Petitioner is willing and prepared to abide by any condition precedent in granting the orders sought herein.

13. According to the Respondents theissue of Plot No. Mwanda/Mbalamweni/2097 was well in the Ruling of the Court dated 4th April, 2022 and the same does not exist. The 1st Respondent Jackson Karisa Mwango sets the History of parcel of land No. Mwanda/Mbalamweni/2097 in his affidavit filed on 17th August, 2021. He stated that plot Number 2097 originally 18 acres or thereabout was subdivided and registered as follows:-

    a. 2097 & 3603 to Nzaro Karisa Nzaro.

    b. 3600 to Ambale Gaya chulele.

    c. 3601 Nathan Ohilele Mulekya

    d. 3526 Emilya Edith Mbeyu.

14. The Respondents referred the Court to full content of the affidavit of Jackson Karisa Musango which was on record filed on 17th August, 2021. With reference to the 9th Respondent's 8th paragraphed replying affidavit filed on 17th August, 2021, the deponent started by saying that being the owner of all that parcel of land known as No. 3526 at Mwanda/Mbalamweni which was a consolidation from No. 3009 and 2097. She bought the suit land, which had been adjudicated upon but had no title deed, from the 1st Respondent and his brothers on 9th February 2020. She claimed that the Petitioner lost the suit land to the 1st Respondent before the adjudication committee and before the High Court Malindi. That the Petitioner later appealed to the arbitration board but never pursed the appeal and snubbed the entire adjudication process.

15. On this aspect, I further seek refuge form the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;

> "In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

16. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd" the court held that:-

> "In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

17. In the present case, the Respondents by their action, have threatened to continue with the said construction on their parcel of land herein, and to hand over the same as such for public use without considering the Petitioner's interest, and without compensation.

18. Regarding this first condition though, the Petitioner has demonstrated a prima facie case with a probability of successat the trial as enunciated in the case of "Giella -Versus - Cassman Brown & Co. Ltd (Supra)".

19. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Petitioner might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in the case of:- "Nguruman Limited (supra)", held that:-

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

20. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot

be quantified in monetary terms or cannot be cured. It is not hidden that the Applicant's property is at risk.The Petitioner has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately 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 there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

21. Quite clearly, the Applicant would not be able to be compensated through damages as it has shown the court that its rights to the suit property as a legal proprietor and that the Respondents ought to be stopped until such a time the acquire the affected portion(s) in a procedural manner. The Applicant has therefore satisfied the second condition as laid down in "Giella's case".

22. Thirdly, the Petitioner has to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, 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 is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

23. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

24. The balance of convenience tilts in the favour of the Petitioner. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated;-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

25. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Petitioner.

26. In the case of:- "Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR" where the court in deciding on an injunction application stated;

> " circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

27. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Petitioner/Applicant. In view of the foregoing, I find that the Petitioner/Applicant has met the criteria for grant of orders of temporary injunction.

28. As for prayer 3 of the Application, the Court does not believe the same is necessary and hereby declines to grant the same.

ISSUE No. b). Who will bear the Costs of Notice of motion application dated 30th November, 2023

29. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the *Civil Procedure Act* Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs in the cause.

VI. Conclusion & Disposition

30. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant has a case against the Respondents.

31. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

a. Thatthe Notice of Motion application dated 30th November, 2023 be and is found to have merit and hence allowed as per the Court's discretion and the preservation of the suit property.

b. Thatthe Honorable court be and is hereby pleased to issue an order restraining the 2nd Respondent-Ali Bakari Mwamunda either by himself, its agents, servants, attorneys or workmen's or persons acting under their instructions or otherwise however from encroaching, alienating, disposing, wasting and or cultivating, damaging, constructing on or in any manner whatsoever interfering with Plot No. 2097 Mwanda/ Mbalamweni Adjudication pending the hearing of the main Petition.

c. Thatfor expediency sake, the matter to be heard on 11th December, 2024. There be a mention on 15th October, 2024 for conducting a Pre – Trial Conference with pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.

d. Thatthe cost of the application to be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF JULY 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. Mr. Titus Mbario holding brief for Mr. B.W Kenzi for the 2nd Respondent.

c. No appearance for the Petitioner/Applicant and the other Respondents.