



REPUBLIC OF KENYA



KENYA LAW
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Korir & 89 others v Makala & 20 others (Environment & Land Case 115A of 2020) [2024] KEELC 6146 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 115A OF 2020**

**EO OBAGA, J
SEPTEMBER 26, 2024**

BETWEEN

**HON JOSEPH KIPRUTO KORIR & 89 OTHERS & 89 OTHERS & 89 OTHERS
& 89 OTHERS & 89 OTHERS PLAINTIFF**

AND

**KACHERO OLE MAKALA & 20 OTHERS & 20 OTHERS & 20 OTHERS & 20
OTHERS & 20 OTHERS DEFENDANT**

RULING

1. In the Notice of Motion application dated 19th January, 2024 brought under Certificate of Urgency, the Plaintiffs asked for orders that:
 - a. Spent
 - b. Spent
 - c. That pending hearing and final determination of this suit the court do issue; a permanent injunction restraining the 1st - 19th Defendants/Respondents by themselves, their agents or servants from encroaching, trespassing, evicting the Plaintiffs/Applicants and/or in any other manner from interfering with suit land being land parcel known as LR 8312 Nyalilbei Farm.
 - d. That pending the final determination of this suit, there be a stay of execution of the orders issued by Hon. H.A. Omondi on 23rd February, 2021 in respect of the suit land parcel herein being LR 8312 Nyalilbei Farm.
 - e. Costs of this application be provided for.
2. The grounds on which the Application is brought are set out on the face of it as well as in a Supporting Affidavit of even date sworn by Joseph Kipruto Korir, the first Plaintiff herein on behalf of the other Plaintiffs. In summary, the Plaintiff's case is that they are the registered owners of LR 8312 Nyalilbei



Farm (the suit property) and have been resident thereon for several years. That Hon. Justice H. Omondi issued orders in HCCC No. 210 of 1993 evicting them from the land. The order is said to have been obtained through a suspicious consent entered by parties who have never resided on the land. The order is further said to have been a violation of the Plaintiffs' right to property under Article 40 of the Constitution. The Plaintiffs aver the instant suit seeks to determine the ownership of the suit property.

3. It is the Plaintiff's case that the order was obtained in their absence yet the Defendants have vide a newspaper Notice of 9th January, 2024 expressed an intention to execute the orders of the High Court despite the existence of the suit herein. That on 24th November, 2021 this court issued orders of status quo in respect of the suit land, so the Defendants are barred from interfering with it pending the determination of this suit. The Plaintiffs termed the Defendants actions a violation of the status quo orders. That the injunctive orders are needed to conserve the suit land pending determination hereof. The Plaintiffs aver that they have a prima facie case with high chances of success and it is in the interest of justice that the application be allowed.
4. In response, Lemaiyan Ole Kachero who was substituted for the 1st Defendant swore a Replying Affidavit on 22nd February, 2024. He deponed that the application is intended to frustrate the execution in ELD HCCC No. 210 of 1993. He deponed that the Plaintiffs have withheld information and are misleading the court. He denied that the Plaintiffs are the registered owners of the suit property or that the Plaintiffs have encroached on the land without their consent. He explained that the process of subdivision of the land was done pursuant to a valid court order obtained in properly conducted proceedings, thus the allegations of fraud are misleading.
5. He accused the Plaintiffs of publishing a false narrative on print and social media to malign the Defendants' names. On the alleged fraud, he deponed that there was never any suspicion in the proceedings and that the Plaintiffs were accusing the Judicial officer therein of an illegality. That the Proceedings and determination of the High Court were never challenged, and he expressed doubt as to whether the proceedings in the High Court could be challenged in this court through a fresh suit. He also deponed that the instant application is a duplication of the Plaintiffs' application dated 4th December, 2020 which sought similar orders.
6. He admitted that they had published the notice to execute the judgement of the High Court which determined the issues pertaining to the suit land by directing that it be subdivided into two for the two. That the process is partially complete and the Plaintiffs are required to vacate from the Defendants' 606 Acre portion to their 303 Acres portion, and that some Plaintiffs have already complied and moved. He clarified that the Defendants have no claim or interest over the Plaintiffs' portion. He submitted that the Application is without merit and should be dismissed with costs.

Submissions:

7. The court directed that the application be canvassed by way of written submissions. The Plaintiff's complied and filed their submissions dated 15th July, 2024. On 24th July, 2024 the Defendants were given seven days to comply, but I have yet to see any submissions from them in the court file or on the online filing platform.

Plaintiffs' Submissions;

8. In the Plaintiffs' submission, it was submitted that to get a permanent injunction, the Plaintiffs are required to satisfy the requirements in *Giella v Cassman Brown Limited* (1973) E.A. 358 and reiterated *Nguruman Limited v Jan Bonde Nielsen* (2014) eKLR. Counsel submitted that the Plaintiffs have a prima facie case against the Defendants as was defined in *Mrao Limited v First American Bank of Kenya*



Limited & 2 Others, Civil Appeal No. 39 of 2002. It was also submitted that the Plaintiffs will suffer irreparable loss and damage if the orders are not granted as they are the lawful registered owners of the suit property since 1994, and have been in possession since 1973.

9. Further that the eviction is a violation of the status quo order issued on 1st March, 2021 to preserve the suit property, which is still in force. He relied on *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR and *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3Others* (2008) eKLR. Counsel for the Plaintiffs also submitted that the balance of convenience tilts in the Plaintiffs' favour since the inconvenience to be caused to them if the orders are not issued is much greater. Counsel cited *Amir Suleiman v Amboseli Resort Limited* (2004) eKLR to bolster his contention.
10. On the stay of execution, Counsel reiterated that the order in HCCC No. 210 of 1993 was obtained by parties who are not lawful owners of the land. That it was obtained illegally as the Defendants misled the court. Further, that the Defendants intend to proceed with execution despite the fact that the land is subject of this pending suit, thus the stay of execution was meant to preserve the subject matter pending hearing and determination of the suit. Counsel relied on *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR and *Peter Nakupang Lowar v Nautu Lowar* (2022) eKLR. Counsel concluded that it is in the interest of justice that this court allow the application and issue the injunction and stay of execution as prayed, and grant the Plaintiffs costs.

Analysis and Determination:

11. This Court has considered the application and the affidavits filed in support of and opposition thereto, the submissions filed and the applicable law. In the opinion of this court, the following issues arise for determination:-
 - i. Whether the Plaintiffs have met the requirements for grant of a permanent injunction;
 - ii. Whether the ELC Court can stay the execution of a decree issued by the High Court.
 - a. Whether the Plaintiffs have met the requirements for grant of a permanent injunction
12. The Plaintiffs are seeking a permanent injunction against the Defendants, restraining them from interfering with the suit property herein. There are the three requirements that a party seeking any order of injunction, be it interlocutory or permanent must satisfy as separate, distinct and logical hurdles, which the applicant is expected to surmount sequentially. These triple requirements as set out in the case of *Giella v Cassman Brown Limited (Supra)* are;
 - a. establish his case only at a prima facie level
 - b. demonstrate irreparable injury if a temporary injunction is not granted; and
 - c. where there are any doubts, then the court must consider the balance of convenience.
13. Of note is that the Plaintiffs seek a permanent injunction against the Defendant despite the fact that the suit is yet to be heard and determined on merit. Ordinarily however, a permanent injunction, as opposed to an interlocutory one, is perpetual and issued after a suit has been heard and finally determined. It fully determines the right of the parties in the dispute and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.
14. There is no doubt that this Court has the powers to grant the permanent injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Act* if it feels the right of a Party has been fringed, violated and/or threatened. However, as has been held numerous times, a permanent injunction cannot be granted at



an interlocutory stage due to its perpetual nature. It can however be granted after hearing the case on merit. See the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, it was held inter alia as follows:

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

15. There are competing claims by both sides as regards the ownership of the suit property and these require further interrogation. The hearing of the suit herein is yet to take off, no witnesses have testified yet or evidence produced. One of the prayers sought in the Plaint herein is an order of Permanent Injunction to restrain the Defendants herein from inter alia interfering with the Plaintiffs’ use and occupation of the land. It is therefore clear that it would be premature for the court to grant a permanent injunction, which is in the nature of a final order, at this interlocutory stage without having taken the evidence of the parties. Granting the prayer at this stage is tantamount to condemning the Defendants unheard and for that reason, that prayer fails.

b. Whether the ELC Court can stay the execution of a decree issued by the High Court.

16. The Plaintiff also seeks an order of stay execution of the decree of the High Court in Eldoret HCCC No. 210 of 1993. It is not clear from the Motion what legal provision the prayer is made. However, Order 42 Rule 6 deals with Stay of Execution pending Appeal. I note that in his Replying Affidavit, the 1st Defendant deponed that the Plaintiffs have not challenged in any way the proceedings and determination of the High Court in Eldoret HCCC No. 210 of 1993. To this court’s knowledge therefore, there is therefore no pending Appeal. The Plaintiffs did not controvert this averment in any way, but instead moved this court through this fresh suit and now the Application herein seeking a stay of execution.
17. I am convinced that the Plaintiffs’ Application may have been premised on Order 22 Rule 25 of the *Civil procedure Rules, 2010* which is to the effect that:-
 25. Stay of execution pending suit between decree-holder and judgment-debtor [Order 22, rule 25]
Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.
18. However, this provision envisions a scenario where the decree was obtained in the same court in which the new case is pending, which is not the case here. Although Article 162(2) of the *Constitution* provides that the Environment and Land Court is of the same status as the High Court, the two courts could never be confused as being the same court. They have different jurisdictions over distinct areas of law. Having regard to the provisions of Article 162 of the *Constitution* as well as the *ELC Act*, this court cannot purport to have jurisdiction to interfere in matters determined by other courts of equal status.



19. On the issue of stay of execution of a decree issued by a court of equal status, I find guidance in *Isaac Kinyua & 3 others v Hellen Kaigongi* (2018) eKLR, where the court held that;

“Succession matters do not fall under the ambit of the jurisdiction of the ELC court. If this court was to grant stay orders in respect of the succession cause, it would in essence amount to straying in a field where the court has no jurisdiction”.

20. I am of the view that the order of stay of execution that the Plaintiff is seeking in respect of the decree and orders issued in Eldoret HCCC No. 210 of 1993 ought to be granted by the High Court before which the suit is was heard and determined. To question the validity of the consent order, which the Plaintiffs herein have called into question, or indeed any order issued by the high Court would be akin to sitting on appeal or review of the decision of the High Court, a matter for which this court has no jurisdiction. However, the Plaintiffs are at liberty to approach the learned Judges sitting at the High Court at Eldoret who are capable of hearing any applications filed in that suit and making appropriate orders. Alternatively, they are at liberty to pursue an appeal on the same.

21. Consequently, the court finds no merit in the Plaintiff's application dated 19th January, 2024 and the same is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 26TH DAY OF SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Nasongo for Mr. Yego for Plaintiffs/Applicants.

M/s Kipseii for 1st Defendant/Respondent.

Court Assistant -Laban

E. O. OBAGA

JUDGE

