



Birya v Kilifi Boatyard Limited; Darstar Limited (Interested Party) (Environment & Land Case E001 of 2024) [2024] KEELC 6137 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E001 OF 2024
EK MAKORI, J
SEPTEMBER 25, 2024**

BETWEEN

LUNFRANCUS WASI BIRYA APPLICANT

AND

KILIFI BOATYARD LIMITED RESPONDENT

AND

DARSTAR LIMITED INTERESTED PARTY

RULING

1. On the 24th of May 2024, this Court delivered a ruling in Malindi ELC No. E041 of 2023 - Kilifi Plantations Limited & another v Kilifi Boatyard Limited, Kenya Forest Service & National Land Commission - Interested Parties in this manner:

“The prohibition of the 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 Mwanja 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.”



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.

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.

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.”

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.”

2. The orders from this Court immediately sparked a flurry of activities, including filing the current suit and closing the “access road,” which this Court decreed to remain open until the pending suit was heard and determined. The Plaintiff/Applicant concurrently filed an application dated 29th May 2024 seeking, among other reliefs, injunctive orders against the Defendant/Respondent and for setting aside the Court's ruling delivered on 24th May 2024 in ELC No. E041 of 2023. In his supporting affidavit, the Applicant maintains that he is a beneficial owner and purchaser for value of the suit property being Title No. C.R. 61951 and Title No. C.R. 61950, and as such, the Court's ruling gives rise to a breach of his rights under Article 40 of *the Constitution*.
3. In a rejoinder, the Respondent, in addition to filing its Preliminary Objection, grounds of opposition, and further replying affidavit, applied to strike out the suit on the ground that the Applicant has no locus standi to file this the same against the Defendant.
4. The Court directed that the Preliminary Objection and the application for injunction be heard simultaneously and that parties file written submissions addressing the issues raised.
5. From the materials placed before me and the extensive submissions by the parties, who have cited several authorities on the issues at hand, I frame the issues for this Court's determination as whether the Preliminary Objection raised is sustainable, whether an injunction should be issued under the circumstances, and who should bear the costs of the objection and the application.
6. A preliminary objection consists of a point of law that has been pleaded or arises by clear implications out of pleadings, which may dispose of the suit if argued as a preliminary point. It cannot be raised if any fact(s) has/have to be ascertained or if what is sought is the exercise of judicial discretion – see Mukisa Biscuit Manufacturing Ltd v West End Distributors [1969] EA.



7. Here, the Respondent contends that Applicant has no locus standi to propagate this suit since, from his supporting affidavit, it is evident in paragraph 5 of the same that he is not the registered owner of the suit property and consequently no protectable interests in the suit property. And that, as admitted on the face of paragraph 9 of the plaint, there is no interest in the suit properties registered in favor of the Applicant.
8. The Respondent believes that the Applicant has not acquired a proprietary interest worthy of protection under section 43(2) of the Land Registration Act and Article 40 of the Constitution.
9. On the contrary, the Applicant submits that he has locus standi to sustain this cause because he has a beneficial interest in the suit property as a purchaser. The Interested Party, in his sworn affidavit on record, confirms the sale and that the transfer is yet to be affected. The Court was referred to the decision in *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] eKLR.
10. I agree with the Applicant that the Preliminary Objection raised cannot stand as correctly submitted, citing *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] eKLR, this Court (Gacheru J.), faced with a similar situation held as follows:

“Taking into account the above findings of the court, this Court finds that since the Applicant’s suit is based on beneficial interest over the suit property, making a determination as to whether or not they hold such interest over the suit property at this stage will be draconian as the Applicant suit would have been determined via a Preliminary Objection and it would mean that the Court would not have had an opportunity to ventilate on the issues that would have been raised by the Plaintiff. Further it is the Court’s holding that the instant issue while it goes to the jurisdiction of this Court, certain facts must be ascertained and therefore the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take evidence to determine the same. See the case of *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga ...Vs...Eliud Timothy Mwamunga & Sagalla Ranchers Limited* [2017] eKLR, where the Court held that: -

“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.

Consequently, the Court finds and holds that at this juncture, it would be imprudent to dismiss the Applicant’s Application as the suit ought to be heard and facts ascertained to arrive at a just determination.”

11. This brings me to the next question of whether to set aside the orders of this Court issued on 24th May 2024 in ELC No. E041 of 2023. The Applicant is of the view that since he was not a party to the proceedings in that matter, in so far as the Court decided on the issue without his participation, the same contrived his right to ownership of property as enshrined in Article 40 of the Constitution and the right to be heard.



12. On the other hand, the Respondent believes that the Court issued conservatory orders to preserve the substratum of the suit in ELC No. E041 of 2023. The orders were directed to the Respondent/Plaintiff, servants, agents, assignees, or those who claimed under them. Even if the Applicant was not a party, he has not established his proprietary rights over the suit property.
13. Because of the strong views held by the parties in the stated suit provoking the filing of this one, the Court decided to visit the suit property on the 10th of June 2024 to establish the existence of an “access road,” disputed by the Respondent/Plaintiff in ELC No. E41 of 2023 and ease the doubts harboured by the parties. The Court established that:

“The main access road that leads to the property occupied by the Respondent/Defendant seems to have been in use for a long time. The route is passable while using a motor vehicle. According to Mr. Fondo, the sub-county Forest Conservator, this road has been used to access Kilifi Creek. It is the same road KFS uses to collect levies.

While at the Boatyard, the Court visited the public access road depicted in the Survey Map. It is a narrow path between a forest and a steep slope. The road can only be accessed by one person at a time. If more than one person is heading in one direction, they can only do so by walking in a row. This path is not motorable.

The public access road from Mnarani Dispensary is also a narrow path leading to a downslope. It is in between trees, and no motor vehicle can use it.”

11. The conclusion from the site visit is that the only access road that has existed for the use of the Respondent and his predecessors is the one the Court decreed that it remains open until the determination of ELC No. E041 of 2023.
12. The issue of whether to review this Court’s orders on the access road is entwined with the current application for an injunction. A Court cannot review its orders via another matter. The applicant should have applied to be joined in ELC No. E041 of 2023, which is still active. This Court has no jurisdiction to revise and overturn its orders already in place.
13. Nonetheless, on the application’s merits, the Applicant states that his right to ownership of property will be in jeopardy if the access road remains open as it is not a “public access road.” Having visited the site, I believe that will be a trial issue here and in ELC No. E041 of 2024. The public access road alluded to by the Applicant only exists on paper. It has never been possible to access the Boatyard or the Kilifi Creek using the said “public access road.” Consequently, the status quo on the ground has to be maintained. The access road will remain open until this suit and ELC No. E041 of 2023 is heard and determined.
14. The upshot is that the Preliminary Objection dated 4th June 2024 and application dated 29th May 2024 are hereby dismissed, costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Okune, for the Plaintiff

Ms. Akwana, for the Defendant



Happy: Court Assistant

