



REPUBLIC OF KENYA



Karisa & 49 others v Zani & another (Environmental and Land Originating Summons E004 of 2023) [2024] KEELC 5946 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023
LL NAIKUNI, J
SEPTEMBER 18, 2024**

BETWEEN

JACKSON KARISA 1ST PLAINTIFF

MERCY WANJIKU 2ND PLAINTIFF

RAMA MWAKOMBE & 47 OTHERS & 47 OTHERS 3RD PLAINTIFF

AND

ZACHARIAH MWADEBWE ZANI 1ST DEFENDANT

TEREZA KADZO ZANI 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated 31st July, 2023. The Court was moved under Certificate of urgency by Jackson Karisa, Mercy Wanjiru and Raa, the Petitioner/Applicant. The application was brought under the provisions of Order 40 Rule 1 of the Civil Procedure Rules 2010, Sections 3A and 63 of the *Civil Procedure Act* Cap 21 Laws of Kenya.
2. Upon service of the same, the Defendant/ Respondent filed their responses accordingly.

II. The Plaintiffs' case

3. The Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.



- c. That the Respondents by themselves, their servants and or their agents be restrained by a temporary injunction from evicting, demolishing, harassing and or interfering in any manner with the plaintiffs/applicants occupation of Title No.Kilifi/Mtwapa/192 Mtwapa, Kilifi County and the OCS Ndonya Police Station,OCPD,DCIO Mtwapa Police Division and OCS Mtwapa Police Station to enforce these orders pending the hearing of the main suit.
 - d. That an order be issued directing the Land Registrar to prohibit or restrict dealings to all that parcel of land known as Title No.Kilifi/Mtwapa/192 Mtwapa Kilifi County pending the hearing and determination of this application and the main suit thereafter.
 - e. That this Honourable Court be pleased to invoke its inherent powers and issue any further Orders that will be just and fair to safeguard the interests of the Plaintiffs herein.
 - f. That costs be in cause.
4. The application by the Applicant is premised on the grounds, facts and testimony on the face of the application and further supported by the 18 paragraphed annexed affidavit of Jackson Karisa the Applicant herein and a resident in Mtwapa together with others on Title No. Kilifi/MTW APA/192 Mtwapa Kilifi County situated in Mtwapa in the County of Kilifi with three (3) annextures marked as "A to C". The Applicant averred that:
- a. At no time did the Defendants ever ask any of the Plaintiffs herein including himself for ground rent or any payments for being in occupation and possession of the portions of land stated above.(Annexed in the affidavit and marked "C" are copies of search).
 - b. The balance of convenience tilts in favour of the plaintiffs who will be prejudiced if the defendants evicts and demolishes their houses before the suit herein was heard and determined on merit.
 - c. The Plaintiffs herein had each occupied a sizable piece of land in the suit parcel of land.
 - d. He had peacefully coexisted with the other plaintiffs on the subject parcel of Land without any interference for a continuous period of over 40 years.
 - e. They had continued to live and carry out their normal lives as families would do including farming, raising families, raring of livestock and running of small scale subsistence businesses. The suit property was their home and they did not know any other place they could call home.
 - f. He was fully convinced that they had acquired an interest by way of adverse possession over the suit property.
 - g. The Plaintiffs who had occupied all that parcel of land known as Title No.Kilifi/Mtwapa/192 Mtwapa Kilifi County had been threatened by eviction by people who were claiming that the land had been earmarked for private development. The said issue had caused alot of tension in the area and it was bound escalate to violence as witnessed in the past in adjacent areas.
 - h. The Plaintiffs were apprehensive that the Defendants, servants and or agents had now resorted to demolitions and evictions by ambush where they bring youths accompanied by police in the wee hours of the morning and commence massive demolitions using bulldozers.
 - i. Further, on several occasions the said person had been heard informed the Plaintiffs to vacate the suit premises yet the Plaintiffs known no other home.



- j. The Plaintiffs being desperate and in a helpless position, and not interested in unlawful means to counter the threats meted on them, were seeking the intervention of this Honourable Court through the prayers sought.
- k. What seemed to be a move orchestrated by the Defendants through their agents, had been accompanied by threats to harm the Plaintiffs in the event they would have wanted to access the suit property.
- l. He wanted the Court to intervene and issue temporary orders of injunction pending hearing of the application and/ or suit.
- m. He herein applied to this Honourable Court for an order that the entries in the land registry, Kilifi showing the Defendants or any other person for that matter as the proprietor of the suit property be deleted and or expunged forthwith and Plaintiffs be registered as the joint proprietors of part of the suit property which they occupy.
- n. He had never known any other home hence it was in the interest of justice that this suit was heard and determined by way of viva voce evidence.
- o. He had proved his case on a balance of probability.

III. Submissions

- 5. On 27th February, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 31st July, 2023 be disposed of by way of written submissions and all the parties complied. Unfortunately, by the time of penning down this ruling none of the parties had complied. The Honourable Court on 16th May, 2024 proceeded to reserve a ruling date on 1st July, 2024 on its own merit accordingly.

IV. Analysis and Determination

- 6. 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 31st July, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - b. Who will bear the Costs of Notice of Motion application 31st July, 2023.

Issue No. a). Whether the Notice of Motion dated 31st July, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

- 7. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. 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.

8. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (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.”

9. 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”.

10. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case of:- MRAO Limited – Versus - First American Bank of Kenya Limited & 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”

11. As the Court previously observed in this ruling, the Applicant in the affidavit supporting the Application avers that at no time had the Defendants asked the Plaintiffs for ground rent or any



payments for being in occupation and possession of the portions of land stated above. The Plaintiffs herein had each occupied a sizable piece of land in the suit parcel of land. The Plaintiffs had peacefully coexisted with the other plaintiffs on the subject parcel of Land without any interference for a continuous period of over 40 years. They had continued to live and carry out their normal lives as families would do including farming, raising families, rearing of livestock and running of small scale subsistence businesses. The suit property was their home and they did not know any other place they could call home. They were fully convinced that they had acquired an interest in the land by way of adverse possession.

12. In 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.”

13. 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.”

14. In the present case, the Defendants/ Respondents by their action, have threatened to continue with the continued threats to evict the Plaintiffs out of the suit property. Regarding this first condition though, the Plaintiffs/ Applicants have demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.

15. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Plaintiffs/ Applicants 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 “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 facie, 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.”

16. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants’ property is at risk and being that they live in the suit property they will suffer risk if they are evicted by the Defendants/ Respondents if the Court does not intervene. The Plaintiffs/ Applicants 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.”

17. Quite clearly, the Applicants 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 Applicants have therefore satisfied the second condition as laid down in “Giella’s case”.
18. Thirdly, the Applicants have 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”.

19. 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.”



20. The balance of convenience tilts in the favour of the Applicants. 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.”

21. 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 Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

22. 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...”

23. 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 strongly find that the Petitioner/Applicant has met the criteria for grant of orders of temporary injunction.

24. As for prayer 4 of the Application, the Court does not believe the same is necessary being that the Civil Procedure Rules has measures for anyone who flaunts the court orders herein issued. Therefore, in the given circumstances, the Court proceeds to decline the same.

Issue No. b). Who will bear the Costs of Notice of motion application dated 31st July, 2023

25. 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 Rules 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.



V. Conclusion & Disposition

26. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Plaintiffs/ Applicants have a case against the Defendants/ Respondents.
27. 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. That the Notice of Motion application dated 31st July, 2023 be and is hereby found to have merit and is hereby allowed as per the Court's discretion and the preservation of the suit property.
 - b. That the Honorable court be and is hereby pleased to issue an order restraining the Defendants/ Respondents by themselves, their servants and or their agents by a temporary injunction from evicting, demolishing, harassing and or interfering in any manner with the plaintiffs/ Applicants occupation of Title No. Kilifi/Mtwapa/192 Mtwapa, Kilifi County and the OCS Ndongya Police Station, ocpd, dcio Mtwapa Police Division and OCS Mtwapa Police Station to enforce these orders pending the hearing of the main suit.
 - c. That for expediency sake, the matter to be heard on 16th December, 2024. There shall be a mention on 14th November 2024 for purposes of conducting a Pre – Trial Conference trial pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
 - d. That the cost of these application will be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF SEPTEMBER, 2024.

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HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, Court Assistant.
- b. No appearance for the Plaintiffs/ Applicants.
- c. Mr. Matende Advocate for the Defendants/ Respondents

