Wabungo v Nyawa & another (Environment and Land Appeal E003 of 2024) [2024] KEELC 13390 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13390 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND APPEAL E003 OF 2024

AE DENA, J

NOVEMBER 15, 2024

BETWEEN

NDURYA KITSAO WABUNGO ..... APPELLANT

AND

MGANGA MWAMVULA NYAWA ..... 1ST RESPONDENT

CHENGO MGANGA MWAMVULA ..... 2ND RESPONDENT

RULING

The Applications

1. The chamber summons instituting this suit alongside the Memorandum of Appeal was filed before this court Under Certificate of Urgency by the firm of Muriithi & Masore Law for the Appellant. The following are the grounds set out for the urgency;

    a. The court delivered exparte judgement on 19/12/2023 where it found in favour of the 2nd Respondent.

    b. The Appellants quest to set aside the said exparte judgement was declined by the lower court on 24/4/2024 and hence this appeal.

    c. That while this appeal is pending the Respondents have amplified activities on the suit property and which activities will irreversibly alter the character of the suit property, the activities have further been extended to the Appellant's ancestral home and the same is a clear act of aggression.

    d. The activities have caused hostility between the parties and which if not checked will result to parties taking up arms and resorting to extra judicial methods of protecting their interests.

2. The first Chamber Summons was basically for leave for the application seeking temporary injunctive orders be heard during the Court vacation. The same is spent. Contemporaneous with the Chamber Summons was the Notice of Motion subject of this ruling and which sought the following orders; -

    1. Spent

    2. Spent

    3. That pending the hearing and determination of the appeal herein, a temporary injunction does issue restraining the 2nd respondent, his agents, servants, employees, assigns, proxies, nominees or anybody assuming title from him from cultivating, alienating, disposing, constructing, developing or interfering in any manner with all that land located at Ndugu Ni Shakwa Village, Vijunduni Sub Location, Makamani Location, Kinango Sub County within Kwale County

    4. That costs of this application abide the outcome of the appeal.

3 The grounds informing the application are listed on its face and the same is further supported by the affidavit sworn by Ndurya Kitsao Wabungo the Appellant herein. The appellant avers that he was the Defendant whereas the 2nd Respondent was the 2nd Plaintiff in Mariakani SPM ELC Suit no E006 of 2021 Mganga Mwamvula Nyawa & Chengo Mganga Mwamvula V Ndurya Kitsao Wabungo. The lower court case was heard exparte and judgement issued against the Appellant herein and in favour of the 2nd respondent. The Appellant states that he moved the court in an effort to set aside the exparte proceedings and have the matter heard de novo but was unsuccessful in the same.

4 The Appellant states that aggrieved with the lower court findings, he has filed the instant appeal but pending its determination he finds it necessary that the injunctive orders sought are granted as the 2nd Respondent has amplified activities on the suit property as evidenced in the attached photographs of the activities on the suit property. That the activities have gone further to the Appellant's ancestral home and the same is viewed as an act of aggression which if not contained may escalate to violence. The Appellant states that it is imperative that the temporary injunctive orders do issue even on an interim basis to safeguard the substratum of the appeal.

Exparte Orders

5 The court considered both the Chamber Summons and the Notice of Motion and granted the following orders;

    1. The orders sought in the chamber summons dated 14/8/2024 are hereby allowed and the application is certified urgent

    2. That the status quo obtaining as at 14th August 2024 shall be maintained, there shall be no construction, development, alienation, subdivision of any part of the land located at Ndugu Ni Shakwa Village, Vijunduni Sub Location, Makamani Location, Kinango Sub County within Kwale County

    3. The orders in 2 above shall subsist until 26/9/2024

    4. That the application shall be served forthwith but not later than close of business on 16/8/2024. The respondent shall respond thereto within 10 days and the applicant shall be at liberty to respond further within 5 days of service

    5. That the application shall be fixed for hearing interparties on 26/9/2024.

Response

6 In opposing the application, the 2nd Respondent Chengo Mganga Mwamvula swore and filed a replying affidavit dated 27/8/2024. It is averred that the supervisory and appellate jurisdiction of Mariakani Law Courts lies at Malindi Environment and Land Court. That this court therefore has no jurisdiction to hear and determine this matter. The Respondent further stated that the Appellant has not shown any proof that the alleged furrowing was conducted in the suit and by the Respondent. The photos do not indicate when they were taken and that the Appellant does not have an ancestral home on the land as alleged. The Respondent avers that the Appellant's ancestral home is at Vigurungani.

7 According to the Respondent, the Appellant is a stranger on the suit property and suffers no prejudice with regards to the on goings on the suit property. That the appellant has never sought to stay execution of the judgement at the lower court and nothing bars the respondent from cultivating the land. That the land is used for agricultural activities which sustain the respondents and their families and in the event the orders sought are granted he might starve. Further that the Appellant has been in contempt of several orders of the court and has even threatened to sale the land to third parties leading to the letter dated 12/3/2021 which was never Respondent to. That the alleged response was prepared for purposes of this suit.

8 The Respondents at paragraphs 28 to 33 has stated many issues with regards to the Appellant's personal conduct and which the court notes. That the Appellant should be ordered to deposit Kshs 243,625/- being costs awarded at the lower court before the application and appeal are heard and determined. The application is thus vehemently opposed in its entirety.

Supplementary Affidavit

9 The Appellant in a rejoinder to the issues raised in the replying affidavit by the 2nd Respondent filed a 3 paged supplementary affidavit. It is averred that the appeal is properly before this court and there is no law barring the court from exercising its supervisory jurisdiction over the subordinate court in Mariakani. That this court has original and appellate jurisdiction and the property herein is situated in Kwale County within this court's jurisdiction. The Appellant states that despite service of the orders of this court upon the respondents, they have not ceased activities on the land and have clearly disregarded the courts directions hence the need for further intervention by the court. It is stated at paragraph 12 that the orders referred to by the respondents as having been disregarded by the appellant were issued on the both parties to not trespass upon each other's land. The court is urged to preserve the substratum of the suit pending the hearing and determination of the appeal.

Submissions

10 The application was canvassed by way of written submissions which parties filed and exchanged. The Appellant's submissions are dated 17/9/2024 and the Respondent's dated 30/9/2024. The court has considered the submissions. The status quo orders issued on 15/8/2024 were extended to the date of this ruling.

Preliminaries

11 The territorial jurisdiction of this court has been questioned by the respondents herein. It is trite that jurisdiction of the court is a core basis in carrying out its functions and lack of it may render its proceedings baseless. The concept and factors to consider on territorial jurisdiction and which include public interest factors to litigation were persuasively enumerated by Nyakundi J in Korea Nyamai v Neema Parcels Limited [2021] eKLR

a. The administrative factors namely crowded dockets in our legal system.

b. The law governing the cause of action.

c. Local interests in deciding localized controversies at home.

d. Right to access justice under article 48 of *the Constitution*.

e. The tenets of forum non-convenience and the duty of fairness of the trial.

12 I will not belabour much into this issue as the same is clearly not on the merit of the pleadings or the cause of action but rather a geographical issue. The suit property as per its description is within Kwale County. The proximity of the suit property to this court as compared to the Malindi ELC leans towards having this court determine the dispute in terms of access to the court premises which goes hand in hand with access to justice a major principle in the rule of law. Given the vicissitudes of the current economic times, it will be in the interest of justice to have a matter heard in a court whose geographical location is closer to them. I need say no more on this issue, as such I find that the court is clothed with the requisite territorial jurisdiction to determine the appeal and application before it.

Dictum

13 The main issue for determination is whether the Appellant has met the threshold for grant of temporary injunction, pending appeal, this court has discretion to grant the said orders under the provisions of Order 42 Rule 6 (6) of the *Civil Procedure Rules*. The relevant part of Order Rule 6 of the Civil Procedure Rules provides that:

(1) No appeal or second appeal.....

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

14 The principles for grant of temporary injunction pending appeal are now well settled. In the case of *Patricia Njeri & 3 Others vs. National Museum of Kenya* [2004] eKLR, the court stated as follows;

(a) "an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.

(b) the discretion should be refused where it would inflict greater hardship that it would avoid.

(c) the applicant must show that to refuse the injunction would render the appeal nugatory.

(d) the court should also be guided by the principles in Giella vs. Cassman Brown [1973] EA 358."

15 he first point will be to establish whether the instant appeal can be termed as frivolous. The court in *Trust Bank Limited v Amin Company Ltd & Another* (2000) KLR 164 rendered itself on the same as follows;

> A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which

states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action"

16 I will steer off the merits of the appeal but from the pleadings it is noted that the suit in the lower court proceeded exparte. This court further notes that on 28/3/2023 counsels for both parties took a hearing date in open court. The plaintiffs counsel in the lower court Mr Anaya further served the hearing notice upon the Defendants advocate as per an affidavit of service alluded to in the proceedings of 25/10/2023. The appellant herein argues that the suit was not heard on merit and efforts to set aside the exparte judgement were thwarted by the lower court hence necessitating the instant appeal. On this ground only, it is my view that the right to be heard cannot be wished away. Every litigant has the right to be heard in a fair judicial process that is expeditious, for that I cannot term the appeal as frivolous. An arguable Appeal is not one which must necessarily succeed, but it is one that ought to be argued fully before the Court. See the case of *Kenya Commercial Bank vs Nicholas Ombija* (2000) eKLR. Also the Court of Appeal stated in *Stanley Kang'ethe Kinyanjui V Tony Keter & 5 Others* [2013] eKLR that:

> The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable".

17 See also *Denis Mogambi Mong'are V. Attorney General & 3 Others* Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the same Court stated that:

> An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."

18 The rest of the issues on the merits of the appeal will be on the facts and which cannot be determined at this particular time.

19 Will the refusal of the injunction inflict greater hardship and render the appeal nugatory? I doubt so. The appellant has stated that he had been denied use of the land and further that the respondents' activities on the land have encroached on his ancestral land. I have noted from the proceedings in the lower court that the court established neither of the parties have the land registered in their names. Infact, it was stated that the land is community land held on behalf of the community by a group ranch.

20 The Respondent has stated that they use the land for agricultural activities that sustain their livelihoods. The Appellant has in seeking the injunctive orders not proved his stake on the land in terms of what loss the alleged use by the Respondents is causing him. I will again restrict myself into diving so much into this issue so as not to pre-empt findings that will have to be made at the end of the appeal. For now, with regards to grant of the temporary injunction I'm persuaded that no hardship has been demonstrated on the part of the Appellant. The appeal will not be rendered nugatory if the orders sought are not granted for the reason that the gist of the appeal is ownership of the suit property and not use of the same per se.

21 The last hurdle to be surmounted by the appellant will be that of the threshold set in the classicus *Giella Versus Cassman Brown* case[supra] on temporary injunctions. The court therein stated the conditions for grant of interlocutory injunctions as follows;

> The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by

> an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience."

22 prima facie case was defined in the case of *Mrao Limited vs. First American Bank of Kenya & 2 Others* [2003] e KLR as follows;

> A prima facie case in a civil case include but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."

23 I have considered the evidence tendered before court by the Appellant. From the same I note that he has attached photographs of the ongoing activities on the land which are on one part disputed by the respondents and admitted on the other part. In all the foregoing, it is noted that the Appellant has not shown the part of the suit property that he has been in use. He alleges encroachment of his ancestral land by the Respondents but does not lead the court into clearly demonstrating the land is one, his ancestral land and two the nature and extent of the encroachment.

24 From the lower court record, which I perused to put several issues into the right perspective and context, the suit property herein is vast. It was imperative of the Appellant to confirm that it is indeed his alleged portion that has been invaded and which he has failed to do. I am guided by the dictum in *Charter House Investments Ltd. V Simon K. Sang & 3 Others* (2010) eKLR, the Court of Appeal stated: -

> Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties."

25 The question of irreparable injury is a matter of evidence. As noted above, the issue as to who the suit property belongs to has not been conclusively dealt with by way of evidence. The court cannot tell as of now who between the parties herein is bound to suffer irreparable loss and damage. In my considered view, no material has been placed before this court to demonstrate that the balance of convenience tilts in favour of grant of the temporary injunction sought. I would apply the findings of the Court of Appeal in *Madhupaper International Limited v Kerr* [1985] KLR 840 where the court pointed:

> The Court of Appeal's jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid."

26 Before I pen off it has been stated that the injunction should be granted since parties are insinuating resort to extra judicial methods of resolving disputes. For me this cannot be a basis for grant of orders of injunction. I think any lawlessness should be met with the commensurate criminal justice interventions.

27 The upshot of my analysis and discussions is that the court finds the appeal is properly before it. The Notice of Motion application dated 14/8/24 is hereby dismissed. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 15TH DAY OF NOVEMBER 2024

.....

A E DENA

JUDGE

Mr. Masore H/B for Mr. Mureithi for the Appellant/ applicant

Mr. Anaya for the Respondent

Asmaa Muftah - Court Assistant.