Tuwei v Barsoy (Civil Appeal E042 of 2024)
[2024] KEELC 7552 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7552 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CIVIL APPEAL E042 OF 2024

JM ONYANGO, J

NOVEMBER 14, 2024

BETWEEN

JOHN TUWEI ..... APPLICANT

AND

SARAH JEROP BARSOY ..... RESPONDENT

RULING

1. The Appellant herein filed a Notice of Motion Application dated 7th October, 2024 seeking the following orders:-

    a. Spent

    b. That this Honourable Court be pleased to set aside orders delivered on the 3rd day of October, 2024 in Misc. MCCC No. E150 of 2024 by Hon. Peter Areri pending the hearing and determination of this application inter-partes.

    c. That the Honourable Court be pleased to stay and set aside the orders pending hearing and determination of this Appeal.

    d. That this Honourable Court be pleased to exercise its powers under section 42, 43, 3 and 18 (1)(b) of the Civil Procedure.

    e. That the cost of the Application be borne by the Respondent.

2. The grounds in support thereof are set out on the face of the motion and in the Appellant's Supporting Affidavit sworn on 7th October, 2024. The Appellant's case is that he was served with Misc. Cause No. E150 of 2024 and an injunction order dated 17th September, 2024. He filed a response, and when the matter came up for inter partes hearing on 19th September, 2024 his advocate informed the court that it had issued an injunction without substantive pleadings and asked the court to dismiss the suit as well as discharge the orders. He deponed that an injunction cannot be issued without prayers being

grounded in a Plaint. The Appellant explained that the matter relates to a road used by surrounding land owners whose access had been blocked by the Respondent.

3. He asserts that the land in question was a public utility thus the Attorney General should have been the Respondent in that case, further, that the Respondent herein needed to have complied with Section 21 of the *Government Proceedings Act*. The Appellant also averred that the Respondent herein, without leave of court and without knowledge of the Appellants, filed a further Affidavit after the inter-partes hearing, which the court adopted in its ruling. The Appellant deponed that all the proceedings of the case went against Article 50, 25 and 159 of *the Constitution* and all relevant laws in issuance of injunction. He deponed that the existence of the orders has enabled the Respondent to block the Road causing them untold suffering.

4. The Application was opposed vide the Respondent's Replying Affidavit sworn on 22nd October, 2024. She deponed that she is the legal, beneficial and registered owner of Mois Bridge/ziwa Block 16 (legebet)98 (the suit property herein) as evidenced by the title deed thereto. She labeled the Application incompetent, improper, made in bad faith, malicious and fatally defective. She averred that the prayers sought herein are inter-alia outrageous, illegal, unlawful and if granted will amount to a miscarriage of justice to her as the Applicant in MCCC Misc/E150/2024 and the Plaintiff in MCELC/E149/2024. She alleged that the Appellant has easy access to his land but elects not to use it, instead he has encroached and is trespassing on her land thus infringing on her rights as the land owner.

5. She deponed that there is a prima facie case pending at the Chief Magistrate's Court in Court 1 before Hon. Mikoyan, which the Appellant has been served with. She explained that due to financial difficulties, she filed the Application first then the Plaint. She sought to rely on Article 159(d) of *the Constitution* on administration of justice without undue regard to procedural technicalities. She deponed that there is no pending survey dispute between her and the Appellant and neither were there any records at the Survey and Lands Registry showing an access road through her property. She accused the Appellant of tampering with and fixing survey marks to encroach and create an access road. She explained that she tried to have the dispute resolved through ADR but that was impossible since, as the elders confirmed in their minutes, the Appellant was forcefully and illegally creating the road on private land without her consent.

6. The Respondent annexed a copy of the cadastral map showing the existence of an access road touching on the Appellant's property. She added that if at all there is no existing access road, she placed the blame on the Surveyors and that they should be the only ones to rectify the mistake. She also deponed that the Appellant failed to disclose what prejudice he would suffer if the orders sought are denied. She prayed that the application be dismissed with costs for lack of merit.

Appellant's Submissions

7. The Application was heard orally when it came up for interpartes hearing on 24th October, 2024. Counsel for the Appellant submitted that the Magistrate's court issued orders contrary to the law. That the law on injunctions is laid out at Order 40 Rule1 of the Civil Procedure Rules and the principles thereto are to be found in Giella vs Cassman Brown and he listed them. Counsel also cited a case of Eden (1878) ACHO 268 on the need to exercise caution before granting interlocutory orders. He submitted that in the instant case the Appellant filed a Miscellaneous Application without pleadings. The court thus erred in granting the injunction in the absence of pleadings because the court was unable to establish a prima facie case, he relied on Morris & Co. Advocates vs KCB & Another (2001) E.A. 420.

8. Counsel also faulted the Trial Magistrate for deciding contested issues in the absence of parties and for allowing the Applicant to file an Affidavit after fixing a ruling date without giving the Respondent

a right to be heard under Article 50 of *the Constitution*. Counsel argued that the issue in dispute is a public road used by many people and its closure has affected them as it is without proper basis. He submitted that the allegation of filing a subsequent suit after obtaining the injunctive orders amounts to sub-judice. He invoked Section 18 of the *Civil Procedure Act* that clothes the Court with supervisory jurisdiction over magistrate's courts and empowers it to set aside any orders made erroneously. He concluded by stating that in this case the application had no legs to stand on and it should not have been issued.

Respondent's Submissions

9. Counsel for the Respondent accused opposing Counsel of misleading the court. She contended that they filed the Plaint dated 3rd September, 2024 while the ruling was delivered on 3rd October, 2024. She submitted that although the ruling was delivered in the Miscellaneous application, the Respondent subsequently filed a Plaint. Counsel explained that she intended to file an application to consolidate the Miscellaneous Application in line with Article 159 of *the Constitution*. She told the court that they had actually filed an application for consolidation but the ruling in the Miscellaneous Application was delivered before the Application for consolidation could be heard. She reiterated that the Appellant had another access road that he had chosen not to use and was taking advantage of the Respondent's situation to frustrate her.

10. Counsel submitted that after the meeting with the elders, the Appellant destroyed the Respondent's barbed wire cowshed and expanded the road. She added that the Appellant has infringed on the Respondent's right to property. That under Article 40 the Respondent has a right to fence her property for security purposes. She also submitted that the Respondent established that she had a prima facie case as her home would have been destroyed if the orders were not granted. She added that the Appellant had not demonstrated that he had been denied the use of a public road. She prayed that this application be dismissed and the matter be sent back to the lower court for hearing and determination.

Appellant's Submissions in Reply

11. In his rejoinder, Counsel submitted that the Respondent's Advocate had confirmed the need to have pleadings so that orders can be made on the basis of a suit. Counsel informed the court that he had advised the Respondent's Advocate to withdraw the Miscellaneous Application but she opted not to do so. Counsel further relied on a letter from the county court dated 14th October, 2024 which give an accurate picture regarding the road in dispute following a visit by the County Surveyor. He expressed the view that the road was erroneously closed and the same should be opened.

Analysis and Determination

12. I have carefully considered the Application herein, the replying affidavit filed thereto as well as the submissions by Counsel in court. The issues that arise for determination by this court are:-

    i. Whether the orders delivered on the 3rd day of October, 2024 in Misc. MCCC No. E150 of 2024 by Hon. Peter Areri should stayed/set aside pending hearing and determination of this Appeal.

    ii. Whether the court should exercise its powers under section 42, 43, 3 and 18 (1)(b) of the *Civil Procedure Act*.

    Whether the orders delivered on the 3rd day of October, 2024 in Misc. MCCC No. E150 of 2024 by Hon. Peter Areri should stayed/set aside pending hearing and determination of this Appeal.

13. The Appellant herein challenged the orders made on the ground that the same were premised on a Miscellaneous Application without a pending substantive suit. According to the Respondent though, this is a non-issue because she later filed another suit in which she seeks the substantive prayers. I have not been fortunate enough to get a glimpse of the Notice of Motion filed in the Miscellaneous Application before the Trial Magistrate. However, ideally, injunctions are brought under Order 40 of the Civil Procedure Rules, 2010, where Rule 1 and 2 thereof provides that:-

    1. Cases in which temporary injunction may be granted [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.

    2. Injunction to restrain breach of contract or other injury [Order 40, rule 2](1)In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

    2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."

14. After an order of injunction has been issued, the party subject to the injunction can apply to the Court to vary, discharge or set it aside. Courts have power to discharge, vary or set aside any interlocutory order granted under Order 40. In particular, Order 40 Rule 7 provides that:

    " 7. Order for injunction may be discharged, varied, or set aside [Order 40, rule 7]

    Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

15. The above provision does not stipulate the conditions under which an order of injunction may be discharged, varied, or set aside. Courts have through case law developed and prescribed the conditions to be considered before an injunction is discharged, varied or set aside. In Ochola Kamili Holding Limited vs Guardian Bank Limited (2018) eKLR for instance, the court stated that:-

    " The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly

intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party, or to deny justified repayment of outstanding loan. That once such a post-injunction behaviour is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice"

16. I am also guided by the decision of Munyao Sila J. in Filista Chemaiyo Sosten vs Samson Mutai (2012) eKLR, in which he stated thus:

> " In James Juma Muchemi & Partners Ltd vs Barclays Bank of Kenya & Another (Nairobi HCCC No.339 of 2011 (2012) eKLR, my brother Mabeya J, expressed the view that the jurisdiction under Order 40 Rule 7 was discretionary and like in all other discretions, the same must be exercised judiciously although there are no firm rules of law or practice that have been set down. In Ragui vs Barclays Bank of Kenya (2002) 1 KLR 647, Ringera J stated that:-
>
> "It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged".
>
> I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction."

17. What then should the court consider when faced with an application for setting aside an injunction? In the case of Atlas Copco Customer Finance AB vs Polarize Enterprises (2016) eKLR, the court distilled the factors that may be considered when faced with a question of discharge, varying or setting aside of an injunction. The court held as follows:

> " ... it is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to:
>
> a. proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;
>
> b. a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;
>
> c. proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;
>
> d. proof that the sustenance of the injunction would cause an injustice."

18. The first consideration is that the court must be satisfied that there was concealment of facts which if presented would have worked against granting the injunction. In granting the injunction, the trial magistrate expressed that it was guided by the principles set out in Giella vs Cassman Brown & Co. Ltd. [1973] E.A. 358 and Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) eKLR. These principles are that an Applicant must show a prima facie case with a probability of success, they must show that they will suffer irreparable injury which would not adequately be compensated by an award of damages and if the Court is in doubt, it will decide an Application on the balance of convenience.

19. The court made the finding that the Respondent had established a prima facie case. I note that in the orders granted by the trial court, the injunction was issued pending hearing and determination of the suit. The Appellant averred that he informed the court that there was no substantive suit pending on which the injunctive orders could stand, however, this information was not contained in his Affidavit filed in reply to the Miscellaneous Application. I have also not seen a copy of the proceedings to confirm whether the court was in fact informed.

20. Nevertheless, the Respondent herein admitted that she filed the Miscellaneous Application E150 of 2024 before filing a substantive suit which is Eldoret CM ELC E149 of 2024. Despite the uncertainty on whether the Appellant informed the trial magistrate of the lack of substantive pleadings/suit, I am convinced that the trial magistrate was aware that there was no suit pending within which to grant the injunctive orders since he had full access to the court file, so this cannot count as a concealment of facts.

21. I am at a loss therefore, as to what the trial magistrate meant when he made the finding that there was a prima facie case in his ruling in ELC Misc. Application No. E150 of 2024, since none existed at all to warrant being labelled prima facie or otherwise. I also do not understand the practical basis that the trial magistrate found the Respondent to have established when there was no basis upon which to grant the injunction in the first place. It must have been blatantly clear from the record that there was no pending suit that could have formed such a basis for the grant of the injunctive orders.

22. From Order 40 Rule 1&2, interlocutory injunctions are meant to preserve the substratum of a suit pending the hearing and determination thereof. It is thereof accepted that substantive orders cannot be issued in miscellaneous applications. This is the position that was adopted by Limo J. in Witmore Investment Limited vs County Government of Kirinyaga & 3 Others (2016) eKLR, where he held as follows:

> "So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law."

23. Eldoret CM ELC No. E149 of 2024 is what the Respondent seeks to anchor the existing injunctive orders on. Just to be clear, these are two separate matters thus it cannot be claimed that the injunctive orders are based on CM ELC E149 of 2024. As proof of their separateness, the Miscellaneous Application was handled by Hon. P. Areri whereas CM ELC No. 149 of 2024 on which the Respondent claims the injunctive orders are grounded is before Hon. Mikoyan. Since the Miscellaneous Application was determined and the orders already granted, I take it that the Miscellaneous file has since been closed. I do not see any scenario where an active file could be consolidated with a matter that has been determined, orders issued and the file closed. As matters stand currently, the orders still have no substantive suit upon which they are based/stand on.

24. I am fully aware and have also considered the fact that the orders of injunction sought to be discharged are the very subject of the main Appeal herein. However, it is not far from the truth to say that the orders as they stand are null and void, and it would be unjust for this court to allow such orders to stand. In Macfoy vs United Africa Co. Ltd (1961) 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said:-

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

25. Allowing the injunction to stand is the very epitome of what Lord Denning termed as "putting something on nothing" and expecting it to stand. For that reason, I see no justification for allowing the orders to stand. Consequently, the injunction order issued in CM ELC Misc. Application No. E150 of 2024 on 3rd October, 2024 is set aside.

Whether the court should exercise its powers under section 42, 43, 3 and 18 (1)(b) of the *Civil Procedure Act*.

26. The Appellant sought either stay or setting aside of the orders. Since this court has already set aside the injunction, I do not see the need to grant an order of stay. The Applicant also asked that the court be pleased to exercise its powers under section 42, 43, 3 and 18 (1)(b) of the Civil Procedure. Section 18 gives the High Court power to withdraw and transfer case instituted in subordinate court. It is not clear what case this court is being asked to withdraw or transfer; is it the CM ELC Misc. Application No. E150 of 2024 or the pending suit, ELC No. E149 of 2024? In any event, CM ELC Misc. Application No. E150 of 2024 is concluded and is no candidate for withdrawal or transfer to any other court. On the other hand, no reason has been given for the possible transfer or withdrawal of CM ELC E149 of 2024.

27. Section 42 is titled detention and release whereas Section 43 is on release on ground of illness, the two provisions have no bearing on the circumstances of this suit. What is left standing is Section 3 which provides as follows:-

> " 3. Saving of special jurisdiction and powers
>
> In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force."

28. I will add to this Section 3A of the *Civil Procedure Act*, which provides for the inherent jurisdiction of the court in the following words:

> " 3A. Saving of inherent powers of court.
>
> Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

29. Seeing as the Respondents primary intention was to protect the alleged interference on the suit property, it goes without saying that the setting aside of the orders will open up the suit property to the prior alleged interference before the determination of this Appeal. Therefore, this court sees the need

to preserve the suit property pending the determination of the Appeal herein. From the Appellant's Supporting Affidavit, this court has determined that the Respondent has currently sealed off the access road by fencing it so that the Appellant and the other road users therefore cannot access the said road.

30. The Respondent averred that the Appellant and other members of the community have another access road which they can use to access their properties. I note that the Appellant did not controvert the Respondent's allegation on the existence of an alternative access road to his land. As a consequence, this court will issue an order of status quo over the suit property. For the avoidance of doubt, the status quo order in this case will mean that the alleged access road shall for the time being remain inaccessible to the Appellant or anyone claiming under him pending the hearing and determination of this Appeal.

31. The upshot is that the Appellant's Application dated 7th October, 2024 partially succeeds and make the following orders:-

    a. The orders made by Hon. Areri (SPM) on the 3rd day of October, 2024 in Misc. MCCC No. E150 of 2024 are hereby set aside pending the hearing and determination of this Appeal.

    b. That an order of status quo do issue pending hearing and determination of this Appeal preserving the suit property in the status it is in at the date of delivery of this ruling.

    c. The costs of this Application shall abide the Appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF NOVEMBER 2024

.....

J.M ONYANGO

JUDGE

In the presence of;

Miss Otuma for the Respondent

No appearance for the Applicant

Court Assistant: Kuto