Kimerinyang v Chekes (Suing as the legal representative of the Estate of the Late Lomerikat Pkurket Lomer) (Environment and Land Appeal E007 of 2024) [2024] KEELC 14039 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14039 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E007 OF 2024

FO NYAGAKA, J

DECEMBER 18, 2024

BETWEEN

PIKAT KIMERINYANG ..... APPELLANT

AND

C HEBET MARGARET CHEKES (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE LOMERIKAT PKURKET LOMER) ..... RESPONDENT

(Being an Afrom the Judgment of the Hon. Principal Magistrate S. N. Telewa delivered on 07/03/2024 in Kapenguria PM's Land Case No. E036 of 2023)

JUDGMENT

1. The Appellant was the Defendant in Kapenguria Principal Magistrates Court Case No. E036 of 2023. The suit was filed by the plaintiff on 27/11/2023 vide a Plaint dated 23/10/2023 and verified by an Affidavit sworn by Chebet Margaret Chekes on the same date. Accompanying the plaint was a List of Documents dated the same date and a Notice of Motion dated 27/11/2023. The Motion was supported by an affidavit sworn by the said Chebet Margaret Chekes the same date. She brought the application under certificate of urgency. Later, on 06/03/2024, the Plaintiff filed an Amended Notice of Motion dated the same date. It was supported by an Affidavit sworn by the plaintiff on the same date.

2. Meanwhile, the Defendant had filed a Memorandum of Appearance dated 06/11/2023.

3. When the Application dated 27/11/2023 was placed before the learned trial Magistrate on the same date, she granted interim orders in terms of prayer 1 and 2 thereof. Prayer 1 was that the application be certified urgent and interim orders be issued. Prayer 2 was that an order of temporary injunction is issued restraining the defendant by himself, his agents, servants from entering, extracting gold or in any

way interfering with the user of parcel number West Pokot/Kopro/Wakor/387 pending the hearing and determination of the main suit.

4. When the matter came up for hearing on 06/03/2024 arguments were made concerning whether prayer (c) of the application should be granted. The court was of the view that allowing the prayer would mean that there would be no need to hear the application but the main suit and further, that the other party would have no opportunity to be heard in the application. It was at that stage that the Respondent's learned counsel sought to amend the application by the following day. The Defendant did not object to it. He filed an Amended Notice of Motion dated 06/03/2024.

5. On 07/03/2024 the court directed that an order of temporary injunction be issued restricting the defendant by himself, his agents from entering, extracting gold, or in any other way interfering with land parcel number West Pokot/Kopro/Wakor/ 387 pending the hearing of the suit. It then ordered compliance with Order 11 of the Civil Procedure Rules within 3 days and the hearing of the main suit to take place within 14 days.

6. Aggrieved by the decision of the trial magistrate, the defendant appealed on two grounds, namely:

    1. The learned trial magistrate held in law by not according to the appellant an opportunity to ventilate his issues through a response that would weigh against an order of injunction being issued on land parcel West Pokot/Kopro/Wakor/387 thus amounting to undue prejudice.

    2. The learned trial magistrate held in law and facts by failing to issue an order of status quo pending. The hearing and determination of the application dated 27th November 2023.

7. The appeal was canvassed by way of written submissions. The Appellant filed hers dated 14/10/2024. He argued that Article 50(1) of *the Constitution* of Kenya granted every party's right to a fair hearing. He argued that he was not accorded an opportunity to respond to the application on record despite seeking an extension of seven days to put in a response to it. So the orders granted were against the rules of natural justice because the court did not accord each party an opportunity to be heard. He relied on the case of Pinnacle Projects Limited versus. Presbyterian Church of East Africa, Ngong Parish and another [2018] eKLR.

8. Regarding the second ground he argued that he had been living in and utilizing the property, hence it was unfair for the temporary injunction to be issued in that he stood to suffer irreparably if he was not allowed to ventilate his application. He relied on the case of Civil 101 of 2011 (sic) Wachira Karani versus Bildad Wachira [2016] eKLR.

9. On her part, the Respondent submitted through a written document dated 08/10/2024. She argued that the court considered the circumstances of the application and in its wisdom decided that even if it was to allow the respondent to put in a replying affidavit it would be tricky for it to arrive at a just decision on a mere application, since land matters were grievous. She argued that in the circumstances the land ought to have been preserved. Therefore, the order was merited. She submitted that their appeal was only a mere delay of the matter. Regarding the second ground she argued that there was unlawful extraction of gold on the suit land, which action amounted to interference and infringement of the right to private land. She argued that the appellant did not reside on it as to found the issuance of the order of status quo. She argued that the appeal was brought in bad faith and a waste of the court's precious time.

10. This court has considered both the rival submissions by the parties. It is worthy of note that this is an appeal arising from an interlocutory application in which the trial court exercised its discretion in arriving at the decision it did. The principles governing appeals against decisions where a court has exercised its discretion are well stated by the Supreme Court of Kenya in the case of Apungu Arthur

Kibira v Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR in which it was held that:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v. Bashir (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held: "In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.'"

11. Again, the Court of Appeal in Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment) stated as follows:-

> " It was therefore held by this Court in Price & Another v Hilder [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. The Supreme Court of Uganda, in Kiriisa v Attorney-General and Another [1990-1994] EA 258 held that it is settled law that the discretion must be exercised judiciously and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously. As to what the term "discretion" connote the Court stated that: "Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances."

12. Guided by the above decisions, I now turn to the facts of the instant appeal. It is clear to me that this Court is not to interfere with the decision of the trial Court unless it is shown by the appellant or borne out by the record that the trial Court decided the matter on a whim, was prejudicial or was capricious, or erred in law or principle or took into account of irrelevant considerations; failed to take account of a relevant consideration or made a decision plainly wrong.

13. The record of the trial Court shows that from the time the application dated 27/11/2023 was filed and presented, the court issued interim orders considering the circumstances of the case. Then it fixed the application for inter partes hearing of on 13/12/023. By that time, the defendant had appointed learned counsel to represent him. Counsel entered Appearance on 09/11/2023. Come 13/12/2023 the application had not been responded to. The Respondent (now Appellant) sought two weeks to respond. Again, by 10/01/2024 the application was not responded to. It was fixed yet again for 24/01/2024. Similarly, by then the Respondent had not filed any Replying Affidavit to it yet he continued to carry out gold-mining activities on the suit land. That was the case up to when the decision appealed from was made on 07/03/2024. That was a period of four months down the line, without a response to the application.

14. In my humble view, even if the Amended Notice of motion was filed on 06/03/2024, a day before the grant of the orders appealed from, it had taken the Appellant such a long time that the court was entitled to consider whether granting any longer period for filing a response would serve any better purpose than proceeding with the hearing of the main suit hence it properly exercised its discretion to fix the suit for hearing rather than taking time to consider the application. Spending time dealing with the application while the real issues in controversy were not yet addressed, was in my view not in the interest of justice. The Court was right in exercising discretion as it did, for two reasons. One, based on the overriding objective of this Court as provided for under Section 3 of the *Environment and Land*

Court Act and Section 1B of the *Civil Procedure Act*, which is that matters ought to be disposed of expeditiously and unjustly, and given the constitutional unction under Article 15(2) (b) that justice should be delivered expeditiously the learned trial Magistrate was right in directing that a temporary injunction does issue pending the hearing and determination of the suit.

15. Further, it appears to me that the learned trial Magistrate was conscious of the need to realize the objective of the Court hence rightly directed that compliance with Order 11 of the Civil Procedure Rules be done within 3 days and a hearing date fixed within 14 days from the date of the decision. To bring it out clearly, the Appeal herein has taken almost nine months from the time the date of the decision of the magistrate to this determination. If the parties had heeded the learned trial Magistrate's directions and avoided the appeal, they could have made a judgment in the suit. Thus, which one was better for the Appellant, to urge the appeal for an interlocutory order or to firm his claim over the land by having the trial court determine who the owner of the suit land is? It is inconceivable that justice is being served by taking such a long time contend to set aside an order of injunction while leaving aside the real issue, unless one of the parties has a different goal than getting to settle on who the real owner of the suit land is. In any event the Plaintiff had demonstrated prima facie that he was the registered owner of the land while the defendant/ Appellant now had not, and to date.

16. The second reason the learned trial Magistrate was right, besides the factual situation was, the Defendant had been given an opportunity to file papers in opposition to the application and had for four months squandered it. Thus, contrary to appellant's contention that he was denied the right to hearing as provided for under Article 50(1) of *the Constitution* which he relied on and the rules of natural justice, he was given an opportunity to mount a hearing by filing responses as required by law but failed to exercise his right to firm it up. In any event, factually he had not dislodged the Plaintiff's claim that she was in occupation of the land hence it was proper for an injunction to issue to preserve the suit land pending the hearing and determination of the suit. This position is legally backed by the provisions of Order 51 Rules 1, 2 and 4 which stipulate that:-

> "(1) Any respondent who wishes to oppose any application may file t any one or a combination of the following documents -
>
> (a) a notice preliminary objection: and/or;
>
> (b) replying affidavit; and/or
>
> (c) a statement of grounds of opposition;
>
> (2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.
>
> (4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte".

17. Therefore, in my view the learned trial magistrate exercised her discretion properly considering that the Application had not been responded to for all that period it was served and came up in court for hearing. The upshot is that application is not merited. It is hereby dismissed. Each party bears their own costs.

18. It is hereby directed at the parties in the subordinate court to comply with Order 11 Rule 3 of the Civil Procedure Rules within the next seven (7) days of this judgment. The suit be fixed for hearing as soon as possible and be heard on a priority basis, in any event a hearing date be fixed within 14 days of the end of the 7 days this Court has granted the parties for compliance. In default of the observance of the

above timelines, the matter may proceed ex parte if the defendant, duly served, does not comply. If it is the plaintiff who will not comply, the defendant will be at liberty to fix the suit for dismissal for want of prosecution immediately after the end of the 21 days.

19. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 18TH DAY OF DECEMBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE. ELC KITALE.

In the presence of:

Mr. Lowasikou Advocate for the Respondent

Ms . Sugut for the Appellant