



REPUBLIC OF KENYA



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Eastern Produce Kenya Limited v Kimasas Farmers Co-operative Society & another (Environment & Land Case E006 of 2023) [2024] KEELC 13651 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13651 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E006 OF 2023
MN MWANYALE, J
DECEMBER 9, 2024

BETWEEN

EASTERN PRODUCE KENYA LIMITED PLAINTIFF

AND

KIMASAS FARMERS CO-OPERATIVE SOCIETY 1ST DEFENDANT

INSPECTOR GENERAL KENYA NATIONAL POLICE SERVICE 2ND DEFENDANT

RULING

1. Four substantive applications are pending determination in this matter, to wit;
 - a. The Notice of Motion dated 3rd August 2023 filed by the Plaintiff seeking injunctive prayers against the 1st Defendant (herein after referred to as the “1st application”).
 - b. The Notice of Motion dated 11th August, 2023 filed by the Plaintiff seeking to cite, Kimasas Farmers’ Co-operative Society, Inspector General of Police and Daniel Biwott for contempt of Court (herein after referred to as the “2nd application”).
 - c. The Notice of Motion dated 30/8/2024 seeking variation of the injunction order dated 4th August 2023, filed by the Plaintiff (hereinafter referred to as the “3rd Application”)
 - d. Notice of Motion dated 17/9/2024 filed by the 1st Defendant seeking the setting aside of the orders issued on 4th August 2023 (herein referred to as the “4th Application”)
2. This Ruling relates to an application 30/8/2024 which seeks review of the Court directions issued on 18/9/2023 with regard of hearing of the 1st and 2nd applications together.
3. When this matter came up on 18/9/2023 the Court directed as follows; -



- i. The Preliminary Objection dated 9/8/2023 shall be treated as a reply to the Application dated 3/8/2023.
 - ii. Leave is granted to the Applicant to file a further affidavit within 21 days from today, in respect of both applications.
 - iii. Applications to proceed by way of written submissions. Applicant to file submissions together with the further affidavit within 21 days from today.
 - iv. Both applications shall be heard simultaneously noting that the Preliminary Objection raises jurisdictional issues.”
4. It is in respect of the above directions that the application dated 30/8/2024 subject of this ruling was filed. The grounds in support of this application are interalia,
 - a. The Defendants contemnors continue are in outright and blatant violation of the injunction orders issued on 4/8/2023 and members of the 1st Defendant as well as the 3rd contemnors have on 18th and 19th August 2024 erected additional illegal structures on the Plaintiffs airstrip and adjoining areas, hence continues to trespass; that the destruction of the airstrip will bring untold suffering to the Plaintiff who invested in the airstrip whose use had been impeded.
 - b. That the Plaintiffs had lodged several complaints against the 2nd Contemnors but the OCPD and OCS Nandi Hills Police station have refused and/or failed to stop the 1st Defendants members and the 3rd Contemnors.
 - c. That in line with the decision of the Supreme Court in Petition No. 15 of 2020 Bia Tosha Distributors vs Kenya Breweries PLC that contempt applications must be determined as a Preliminary Objection issue in limine as soon as it is raised.
 5. The application is further supported by the affidavit of Dennis Gitaka the Legal Manager of the Plaintiff/Applicant who reiterated the grounds in support of the application , and additionally annexed a copy of the Court order dated 4th August 2023, photographs taken on 18th and 19th August 2024, and has deponed the impediment of the airstrip in terms that the Plaintiff is unable to apply fertilizers on the tea plantations, replenish the aircraft with fertilizers, conduct aerial application of the fertilizers.
 6. The 1st Defendant/Respondent in opposition to the application filed grounds of opposition while the 2nd Defendant did not file any response and chose not to participate in the instant application.
 7. Court issued directions on filing of submissions and highlighting of the same.
 8. Mr. C.F. Otieno Learned Counsel together with Mrs. Opiyo Learned Counsel for the Applicant highlighted their submissions, they submitted that at time the orders were issued on 4/8/2023 there was no invasion but after service the police took no action leading to members of the 1st Defendant to invade the Applicants premises as evidenced by the photographs in the affidavit of Deniss Gitaka.
 9. Placing reliance on the decision in the Supreme Court decision in the case of Bia Tosha vs Kenya Breweries Limited as well as Ngima Gichuna vs South Nyanza. The Applicants urged the Court to review the Directions issued on 18/9/2023.
 10. In response, Mrs. Nderitu Learned Counsel, placed reliance on the grounds of opposition filed and submissions on record. She submitted that the 1st Defendant took occupation of the suit property after delivery of judgment in Kapsabet ELC Appeal No. 2/2023, hence they were not invaders but owners



and that the Plaintiff deliberately did not disclose this when it made the application for injunction, the Respondent urged for the dismissal of this application.

11. The 2nd Defendant/Respondent did not file a response and left the matter to the Court.
12. In a brief rejoinder Mr. Otieno and Mrs. Opiyo for the Applicant urged the Court to be guided by the decision in *Bia Tosha vs Kenya Breweries Limited* and further submitted that none of the previous cases declared the 1st Defendants as owners hence they are invaders and trespassers.
13. Having considered the application, the supporting affidavits, and the annexures thereto as well as both the written submissions and the highlighted submissions thereof, the Court frames the following as issues for determination.
 - i. What is the nature of the application before Court?
 - ii. Whether or not the application is merited
 - iii. What directions ought to issue?
 - iv. Who bears the costs of the application?

ANALYSIS AND DETERMINATION:

14. The application dated 30/8/2024 subject of this Ruling is expressed to have been brought under Article 10 (2) of *the Constitution* of Republic of Kenya, Section A, 1B and 3A of the *Civil Procedure Act* and al other enabling provision of the law.
15. Prayers 3 and 4 of the application being the substantive prayers are as follows; -

“

 - “3. THAT this Court does vary its previous directions dated 16/9/2023 and other subsequent directions to the effect that the contempt application and the injunction application be argued together,
 - “4. THAT the Court does issues directions that the contempt application dated 11/8/2023 should be heard in priority and in limine.”
16. At paragraph 3, of this ruling, the directions that are sought to be varied by this application have been set out. The directions were issued on 18/9/2023 and not on 16/9/2023 as stated in the application.
17. In Essence from the substance of the application and submissions, the Applicant seeks a Review of the directions, issued on 18/9/2023, but has couched the application as one seeking variation of the directions.
18. There are specific provisions of the Law that provide for review under the *Civil Procedure Act*, to wit, Section 80 and under Order 45 of the Civil Procedure Rules.
19. The Court shall thus consider the Application as an application for review and examine the same under the applicable law.
20. Thus, in answer to issue number 1, the Court finds that the application herein is a Review application and shall subject the same to the applicable law, in line with the principle “of *lex Specialis derogat legi generalis*” as applied by the Supreme Court in its decision in the case *Petition No. E015 of 2024, Judith Nyagol vs. Judicial Service Commission and the Chief Registrar of Judiciary* delivered on 22/11/2024.



21. Paragraph 51, thereof, where the Court stated interalia, “it is the rule of thumb in statute interpretation, that a specific law governing a matter should be applied instead of a General Law toughing on the matter, *lex specialis derogate legi generalis*”
22. On issue 2 as whether the application is merited, the Court has held in the proceeding paragraphs an application seeking review ought to be brought under Order 45 and be grounded on the grounds stipulated under Order 45 Rule 1, the said order provides; -
- 45 (1). Any person consideration himself aggrieved; -
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- a. by a decree or order from which no appeal is hereby allowed,
- and who from the discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time of the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made without unreasonable delay.”
23. The application as filed is not grounded on any of the grounds for review under Order 45 Rule 1 and set out above and it would definitely not pass the test for a review application and it ought to fail.
24. However, should the Court be wrong that the application is an application for review but that it is an application for variation of orders under the inherent powers of the Court as presented by the Applicant, the Court shall now proceed to examine the application on its merits.
25. The gravamen of the Applicants arguments is that under the decision of *Bia Tosha vs Kenya Breweries Limited*, the contempt application, ought to be heard in priority and in limine. In the said decision the Supreme Court held interalia, “just like a preliminary objection, when an issue of contempt of Court rises, it is one which should be prioritized and determined in limine as soon as it arises.”
26. The above is the position of the law as stated by the Supreme Court and based on it the Applicant’s seek variation of the directions issued on 18/9/2023 so that the 2nd application being the contempt of Court application is heard in priority.
27. Whereas that is the general position of the law, in the current suit, there is still pending a Notice of Preliminary Objection challenging the whole suit as *Resjudicata* interalia.
28. In the said *Bia Tosha* decision, the Supreme Court also referred to their decision in the case of *Stephen Maina Githiga & 5 others vs Kiru Tea Factory S. C.* Application No. 12/2019 (2020 eKLR) whereat paragraph 35 of the said decision the Court observed;
- “ 35. Lastly, we have no doubt that contempt proceedings are a matter of public interest, so where allegations are made that one party is misusing the same to get at another without due process. Contempt proceedings may lead to imprisonment and therefor where allegation of breach of the right to fair hearing are raised this Court ought to lend an ear to the complaining party.”
29. In the suit before Court the complaint raised by the Respondent is by way of the pending Notice of Preliminary Objection is that the suit is *Resjudicata* likewise, the Court ought to lend an ear to the party complaining that the suit been *Resjudicata* could not give rise to the contempt proceedings. This



is in light of the fact that Notice of Preliminary Objection has not yet been determined as the Court directed that the same be treated as a response to the 1st application for the injunction in its directions.

30. Faced with the Preliminary Objection which ought to be prioritized as well as it has the potential of disposing of the entire suit, and the issue of contempt which equally needs to be prioritized the Court issued the directions that both the injunction application and contempt application be heard together as the determination of the injunction application shall dispose off the Preliminary Objection which had been converted as a response and the validity or otherwise of the suit shall be determined, and the issue of contempt equally determined.
31. The Court notes that the injunction orders issued on 4/8/2023 still subsists and are enforceable and the Applicant is protected by the said orders and that should the suit ultimately succeed, any breach of the said orders would not go unpunished, if the Court however was to determine the contempt application first, then the suit, by virtue of the Notice of Preliminary Objection deemed as a Response to the injunction application is found to be Resjudicata, then it will be putting the cart before the horse.
32. Good order would require determination of the existence of the suit first as raised in the Preliminary Objection (which was converted to a response to the injunction application), before the issue of contempt is dealt with. Consequently, the Court views the directions issued in respect of arguing the injunction application, in view of the Preliminary Objection raised, which is a Response to the said application, and the contempt application together as the most time effective and viable directions in the circumstances of this suit.
33. In light of the above, the Court finds no merits, in the application before Court in view of the existence of a Notice of Preliminary Objection to the entire suit which is yet to be determine thus the application fails.
34. Having noted the existence of four substantive applications and reply and submissions have been filed in respect of the 1st, 2nd and 4th applications, and that the said application are interrelated the Court directs as following; -
 1. Respondents file their Response to the Notice of Motion dated 30/8/2024 seeking variation of the injunction orders dated 4/8/2023. The (3rd application) within 7 days from date hereof.
 2. Parties to file and exchange submissions in respect of the 3rd application within 20 days, 10 days for the Applicant and 10 days for the Respondents, after they re-open offices after the Christmas holidays.
 3. In view of the fact that the 4 pending substantive applications set out at paragraph 1 of this Ruling are related, the 1st and 3rd application seeking injunction orders shall be argued one the application, the Preliminary Objection dated 9/8/2023 which was deemed as a Response to the application, seeking to set aside the temporary injunction orders issued on 4/8/2023 together with the substantive replies to the application dated 3/8/2023 shall be deemed as Response to the 1st and 3rd applications.
 4. The Contempt Application dated 19/8/2023 shall thus be heard alongside the other pending application.
 5. Mention to confirm filing of replies and submissions on 30/1/2025, whereat directions as to highlighting of the submissions and/or ruling date shall be issued.
 6. Costs of this application shall be in the cause.

RULING, DELIVERED AND DATED AT KAPSABET THIS 9TH DAY OF DECEMBER, 2024.



HON. M. N. MWANYALE,

JUDGE

In the presence of; -

Mr. C. F. Otieno and Mrs. Opiyo for Plaintiff/Applicant

Mrs. Nderitu for the Defendant/Respondent

