Ambala & 2 others v Butt & another (Environment & Land Case 67 of 2020) [2023] KEELC 16738 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16738 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 67 OF 2020

MD MWANGI, J

MARCH 29, 2023

BETWEEN

ODUOR HAWI AMBALA ..... 1ST PLAINTIFF

ODHIAMBO AMBALA ..... 2ND PLAINTIFF

OGOLA AMBALA ..... 3RD PLAINTIFF

AND

HADIJA ASIF BUTT ..... 1ST DEFENDANT

FAROOK ASIF BUTT ..... 2ND DEFENDANT

RULING

(In respect of the Notice of Motion application dated 1st December 2020 brought under the provisions of article 159 of *the Constitution*, sections 1 A, 1B, 3A, 3B, 63 e and 80 of the *Civil Procedure Act*, cap 21 Laws of Kenya, orders 45 &51, rule 1 of the *Civil Procedure Rules,* 2010 and all enabling provisions of the law.)

Background

1. The application by the Defendants dated 1st December 2020 in essence seeks a review, variation and or setting aside of the ex parte mandatory injunctive orders issued on 24th November 2020. The 2nd substantive prayer is of stay of all proceedings in this suit pending hearing and determination of ELCC 51 of 2019, between Hadija Asif Butt (the 1st Defendant herein) and the Plaintiffs in this matter (Oduor Hawi Amballa, Odhiambo Tabu Ambala & Ogola Kodhek Ambala)

2. The application is premised on the grounds on the face of it and on the supporting affidavit of Hadija Asif Butt.

3. The Defendants/Applicants aver that the Plaintiffs on 11th June 2020, filed an amended Notice of motion application amending the application dated 11th May 2020 by introducing an additional prayer for a mandatory order of injunction. The mandatory injunction order sought to compel the Defendants/Respondents, their servants, agents, relatives, employees or anyone acting on their behalf to remove the structures and fence erected on parcels of land known as L.R. 1160/911, 1160/912, 1160/947, 1160/948 and 1160/949 (hereinafter referred to as 'the suit properties') or alienating the said parcels of land.

4. The amended application came up for mention before the court on 27th October 2020 and the court directed a mention on 23rd March 2021 to confirm compliance with respect to the orders that parties file their respective responses and submissions. However, the Defendants aver that the Plaintiffs purportedly appeared before the court on 24th November 2020 without notice to them and obtained the impugned orders of mandatory injunction ex parte.

5. The Defendants term the said orders unconstitutional, alleging that they violate Articles 40 & 50 of *the Constitution*; the Defendants' rights to property and to a fair hearing respectively. The Defendants aver that they are being deprived of property without due process of law and have been condemned unheard. The Defendants assert that the Plaintiffs obtained the said orders through misrepresentation and concealment of material facts.

6. The Defendants further aver that they discovered that the Plaintiffs filed a fresh application dated 2nd November 2020 which they ordered them to serve by Justice Okong'o, on 10th November 2020. The Defendants however, insist that they were never served with the said application nor with the orders of Justice Okong'o made on 10th November 2020. This failure to serve them prejudiced their interests and led to the violation of their Constitutional right to be heard.

7. The Defendants contend that the Plaintiffs 'stole a march' and circumvented justice by obtaining ex parte orders knowing very well that there were other pending suits, involving the suit properties and where interim orders had already been issued. The Defendants therefore pray that the said orders be reviewed, varied and or set aside.

8. The application was strenuously opposed by the Plaintiffs through the replying affidavit of the 1st Plaintiff sworn on the 15th December 2020. It was the Plaintiffs' contention that the Defendants' application was not only incompetent but also bad in law, malicious, frivolous and an abuse of the process of court brought by the Defendants with 'tainted hands'.

9. It was the Plaintiffs' assertion that the application was too late in the day and was just but a delaying tactic. Further that the application was filed by an Advocate who was not properly on record.

10. Parties had already filed submissions which the court has had an opportunity to read through. After the application was confirmed for hearing, the Plaintiffs requested leave to file further submissions which they did. The Defendants too filed further submissions in response to the further submissions of the Plaintiffs.

Issues for Determination

11. Having read the Defendants' application, the response by the Plaintiffs and the respective submissions by the parties, the court is of the view that the issues for determination in this matter are: -

    a) Whether the Defendants have established a case for review of the ex parte mandatory injunction orders issued on 24th November 2020.

b) Whether the Defendants have made a case for stay of proceedings in this matter pending the hearing and determination of ELCC 51 of 2019.

A. Whether the Defendants have established a case for review of the ex parte mandatory injunction orders issued on 24th November 2020.

12. Section 80 of the *Civil Procedure Act* allows any person aggrieved by a decree or an order from which no appeal has been preferred or from which no appeal is allowed under the Act to apply for a review of the judgment or the order to the court which passed the decree or made the order.

13. Ideally, and in accordance with the said section 80 of the *Civil Procedure Act*, an application for review should be made before and considered by the Judge or court that made the order or issued the decree sought to be reviewed.

14. The order in issue and that is sought to be reviewed in this case was made by my sister Judge Lady Justice Komingoi who constructively recused herself from handling this matter. This matter was referred to me by the Presiding Judge of the Court thereafter. In any event, Lady Justice Komingoi, is no longer in the station. It is therefore my unenviable responsibility to consider the decision by my sister Judge in view of the application by the Defendants.

15. Order 45, rule 1 of the *Civil Procedure Rules* enumerates the grounds upon which an application for review under Section 80 of the *Civil Procedure Act* should be grounded on. As the court in the case of *Republic v Public Procurement Administration Review Board & 2 others* (2018) eKLR observed, Section 80 (of the *Civil Procedure Act*) gives the power of review while Order 45 sets out the rules. The rule provides that: -

> " 1(i) Any person considering himself aggrieved:-
>
> a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred, or
>
> b) By a decree or order from which no appeal is hereby allowed, and from whom the discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the Judgment to the court which passed the decree or made the order without unreasonable delay."

16. The court in the case of *Slyvester Nthenge v Johnstone Kiamba Kiswili* (2021) eKLR rightly observed that there are three limbs discernible from part (b) of rule 1 (above), namely: -

(i) Discovery of new and important matter or evidence,

(ii) Mistake or error apparent on the face of the record, and

(iii) Any other sufficient reasons.

17. The orders that the Defendants/Applicants seek to review in this case are ex parte mandatory injunction orders. These are not an 'every day kind of orders'. They are granted only in 'special circumstances' at the interlocutory stage.

18. In the case of *Stephen Kipkebut t/a Riverside Lodge & Rooms v Naftali Ogola* (2009) eKLR, the Court of Appeal cited its earlier decision in E.A. Fine Spinners Ltd (in receivership) & 3 others v Bedi Investments Ltd, where Gicheru J.A. (as he then was) cited Megarry J (as he then was) in *Shephered Homes Ltd –Vs- Sandahm* (1971) 1 Ch.34 where he had stated that: -

> " .....it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic than a prohibitory injunction. At the trial of the action, the court will, off course grant such injunctions as the justice of the case requires; but at the interlocutory stage when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."

19. In an earlier case, the Court of Appeal had pronounced the test for a mandatory injunction. This was in the case of *Kenya Breweries Ltd and 2 others v Washington Okeyo* [2002] EKLR. The court expressed it in the following terms: -

> " The test whether to grant a mandatory injunction or not is correctly stated in volume 24 Halsbury's Laws of England 4th Edition paragraph 98 which reads: -
>
> 'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, if the act done is simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the Plaintiff.....a mandatory injunction will be granted on an interlocutory application."

20. The Defendants/Applicants have invited this court to look into the circumstances under which such drastic orders were granted ex parte and at the interlocutory stage.

21. The Plaintiff's/Respondents, as pointed earlier filed further submissions dated 20th February 2023. In the said submissions, the Plaintiffs made reference to this court's ruling of 16th February 2022 where the court noted that, "the law firm of Ogado & Co. Advocates is not properly on record for the Defendants". The Plaintiffs submit that the import of that finding is that the application under consideration having been filed by an advocate who was not properly on record for the Defendants is defective and a nullity.

22. The Defendants in their further submissions vehemently opposed the further submissions by the Plaintiffs urging this court to uphold substantive justice over procedural technicalities as enjoined by article 159 (2) (d) of *the Constitution* of Kenya, 2010.

23. The circumstances leading to the issuance of the impugned orders are to say the least intriguing. The chronology of events is as here below:-

Chronology of events.
12th May 2020 - suit filed by way of plaint dated 11th May 2020 together with Notice of Motion dated 11th May 2020 under certificate of urgency.12th May 2020 - Lady Justice Komingoi made an order that application dated 11th May 2020 "is not certified urgent". The same be served upon the Respondents for directions on 27th May 2020.26th May 2020 - Affidavit of service filed confirms service of application upon Defendants.27.5.2020 - Notice of Motion dated 11th May 2020 fixed for mention 28th May 202028th May 2020 – Leave is granted to the Defendants/Respondents to file their responses within seven days.12th June 2020 -Justice Okong'o directs that the Plaintiffs Notice of Motion dated

on 11th June 2020 be served upon the Defendants for hearing before Lady Justice Komingoi on 22nd July 202022nd July 2020 – The Plaintiffs do regularize the filing online with the new directions that all documents be filed through e-filing platform. The Defendants do file their documents within seven days thereafter.27th October 2020 – Matter mentioned before the Deputy Registrar who directs that the matter will be mentioned on 23/3/2021 before Justice Komingoi for directions.10.11.2020 - Justice Okong'o directs service of application dated 2nd November 2020 upon the Respondents for inter partes directions on 19.11.2020 before Lady Judge Komingoi.24.11.2020 - Notice of motion dated 2.11.2020 allowed in terms of prayer 4 and 5.2.12.2020 - Defendants file current application.2.12.2020 - Justice Komingoi certifies the application dated 2.12.2020 urgent and grants interim orders in terms of prayer 2 of the application. Respondents to be served.

24. My observation is that on the date that the orders of mandatory injunction were granted, the matter was listed for mention. Further the application upon which the orders were granted had been amended by the Plaintiffs/Applicants without leave of the court. Additionally, the affidavit of service deponed on 23rd November 2020 confirms that the Notice of Motion application was served on the Defendants' Advocates, Ogado & Co. Advocates, whom the Plaintiffs insisted were not properly appointed as Advocates for the Defendants. Finally, the Honourable Judge did not give any reasons explaining the 'special circumstances' behind her decision to grant the orders of mandatory injunction at the interlocutory stage.

25. While the Plaintiffs insisted that the Defendants' Advocate was not properly appointed as an Advocate for the Defendants it is surprising that they went ahead to serve him with a mention notice on behalf of the defendants. Going by their argument then, the mention notice was therefore served on an unauthorized 'agent' of the Defendants.

26. Further, I must point out that while this court's ruling of 16th February 2022 pointed out that the 'law firm of Ogado & Company Advocates is not properly on record for the Defendants', the court went further and stated that, 'they should regularize that forthwith'. The court was deliberate in its use of the word, 'regularize'. The clear and obvious meaning of the word in the context in which it was used was that the situation would be remedied by the Advocate filing a notice of appointment of Advocates, which they did as directed by the court.

27. In the court proceedings of 24th November, 2020, the court noted that the Defendants/Respondents had been served and went ahead to allow the application 'in terms of prayer 4 & 5' despite the fact that the mention notice had been served upon the Defendants' Advocate's law firm.

28. To, add 'salt to an injury', the mandatory injunction orders were granted on a mention date. Issuing substantive orders on a mention date is an issue that the Court of Appeal has addressed severally. In the case of *Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 others* [2016] EKLR, the court made reference to the case of *Republic v Anti-Counterfeit Agency and 2 others ex-parte Surgippharm Ltd* [2014] eKLR where Odunga J (as he then was) had examined several decisions of the Court of Appeal on the issuance of orders on mention dates as follows: -

> " In Central Bank of Kenya v Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In Mrs. Rahab Wanjiru Evans v Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. Dealing

> with the same issue the Court of Appeal in AG vs Simon Ogila Civil Appeal No. 242 of 2000 (supra) held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly in Peter Nzioki & Another v Aron Kuvuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in Kenya Commercial Bank v N J B Hawala Civil Application No. 240 of 1997..... As was held in Onyango Oloo vs Attorney General [1986-1989] EA 456 a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

29. From the foregoing, it is my finding that the impugned orders were made in error(s) which are glaring and apparent on the face of record. The errors are self-evident and do not require an elaborate argument to be established.

30. I therefore find that the Defendants have established a case for review of orders issued on 24th November 2020.

> B. Whether the Defendants have made a case for stay of proceedings in this matter pending the hearing and determination of ELCC 51 of 2019

31. In regard to this issue, the Defendants have not provided this court with sufficient material or facts to enable the court make a decision. The prayer is disallowed.

32. I hereby set aside the ex parte mandatory injunction orders issued on 24th November 2020 in their entirety and direct that the Plaintiffs' applications dated 11th May 2020 and 2nd November 2020 be set down for hearing inter partes forthwith. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH MARCH 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ng'ang'a for the Plaintiffs.

Mr. Ogado for the Defendants.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE