



Kenya Sunny Industries Company Ltd v Ocharo & 2 others (Land Case E002 of 2023) [2023] KEELC 16610 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
LAND CASE E002 OF 2023
E ASATI, J
MARCH 28, 2023
IN THE MATTER OF: LAND PARCEL KAKAMEGA/
MBALE/328 & KAKAMEGA/MASANA/1182**

BETWEEN

KENYA SUNNY INDUSTRIES COMPANY LTD PLAINTIFF

AND

MICHAEL OMOLE OCHARO 1ST DEFENDANT

KITIGU RESOURCES LTD 2ND DEFENDANT

LAND REGISTRAR VIHIGA COUNTY 3RD DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated March 8, 2023 filed in court by the 2nd Respondent, Kitigu Resources Ltd, on March 10, 2023. The application is stated to be brought pursuant to the provisions of Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) and Order 10 Rule 11, Order 12 Rule 7, Order 22 Rule 6, Order 40, Order 51 of [Civil Procedure Rules 2010](#). The application seeks for orders that: -
 - a. The application be certified urgent
 - b. Pending hearing of the application inter partes, an order of injunction do issue staying, suspending the execution of the orders dated February 22, 2023
 - c. The 2nd Defendant/applicant be allowed to resume business and/or continue using parcels of land Kakamega/Mbale/328 and Kakamega/Masana/1128 pending the hearing and determination of the application
 - d. The court makes an order that it has no jurisdiction to preside over this matter



e. Costs be in the cause

The application is supported by the averments in the Supporting Affidavit sworn by Yao Youming on March 8, 2023.

2. The Plaintiff/Respondent opposed the application vide the grounds contained in the Replying Affidavit sworn by Ren Zhijian on March 18, 2023.
3. The application was argued orally on March 22, 2023.
4. A brief background of the application is that the Plaintiff filed the suit herein on February 14, 2023. Together with the Plaint, the Plaintiff filed Notice of Motion application dated February 14, 2023 under certificate of urgency seeking inter alia for orders of temporary injunction restraining the 2nd Defendant from dealing in, interfering with, using, transferring and or otherwise disposing of land parcels Kakamega/Mbale/328 and Kakamega/Masana/1128 except with the authority of the Plaintiff pending hearing and determination of the application and thereafter the suit.
5. When the application was placed before the court for certification as urgent and directions and/or orders, the court gave directions that the application be served upon the Respondents for inter partes hearing on February 22, 2023. On February 22, 2023 the 2nd Defendant was not ready to proceed and needed time to respond to the application. The court gave directions on disposal of the application and at the instance of the Plaintiff, issued interim order of injunction restraining the 2nd Defendant from dealing in, interfering with, using, transferring and or otherwise disposing of the suit lands pending hearing of the application inter partes. The matter was slated for mention on April 13, 2023 to confirm compliance and for a date for ruling on the application.
6. The 2nd Defendant/Applicant claims that the court does not have the jurisdiction to entertain the matter as it is a purely commercial matter. That the orders issued by the court on February 22, 2023 have subjected the 2nd Defendant/Applicant to financial loss, substantial damages in its legal business situate on the suit land and have rendered 400 people jobless. That the 2nd Defendant is an innocent purchaser for value of the suit lands and has invested huge sums of borrowed funds on the suit land and continue to suffer losses as it is not generating income to repay the bank loans and risk being auctioned. That the 2nd Defendant/Applicant has no intention of transferring the suit lands. That the 2nd Defendant is willing to abide by the directions of the court. That if the court does not grant the order the Plaintiff will unjustly be enriched and the 2nd Defendant suffer losses.
7. The Plaintiff's case is that under Article 162(2)(b) of the Constitution of Kenya 2010 and Section 13(2) and (7) of the Environment and Land Court Act the court has jurisdiction to entertain the suit. That the Plaintiff/Respondent is licensed to deal in mining specifically covering Kisumu, Vihiga and Kitui Counties and that it operated prospecting tunnels/shafts at the suit lands. That the applicant has not exhibited any mining license and has therefore not laid a basis for its mining rights. That the suit lands are within the Plaintiff's license area pursuant to section 4 of the Mining Act No 12 of 2016 hence the Applicant has no mining rights whatsoever within Vihiga County. That as the license holder, the Plaintiff has obligations under S 77 (b), (c) and (d) of the Mining Act. That the Plaintiff claims mineral rights over the suit land as well as proprietary interest in the land, given that the suit parcels were bought for and on its behalf and held in trust by the 1st Defendant who later transferred them to the 2nd Defendant/Applicant,
8. It was submitted on behalf of the Applicant that the Applicant is the owner of the suit lands. That the orders issued by the court deny the applicant a right to fair hearing under Article 50 of the Constitution of Kenya 2010. That the suit merely seeks to establish ownership of the suit lands. That the 2nd



Defendant is only an innocent purchaser for value. That if the order continues to be in place, 200 employees will be rendered jobless and the Applicant will lose millions in cash and risk being sued by the employees. That there will be no prejudice if the orders sought are granted and the interim orders lifted as the Plaintiff can be compensated by way of damages. That Article 40 of the Constitution gives rights to the land owner.

9. It was submitted on behalf of the Plaintiff that the court has jurisdiction to determine the suit as one of the issues is ownership to land. That by virtue of the Plaintiff being in possession of the prospecting license pursuant to the Mining Act, no other party can be entertained to mine except by consent of the license holder. That it is the license holder who bears the consequences from the mining activities and has the obligation to keep the set conditions of the licence and maintain the standards of mining, hence it is prejudicial to the Plaintiff if the Applicant continues with the mining. That the Application lacks merit.
10. Prayer 1 and 2 of the application having been spent, what is outstanding for this court's determination is prayers 3, 4 and 5. I will determine prayer 4 first because it challenges the jurisdiction of the court. I have read the plaint and particularly the prayers therein. The substantive cause of action is ownership of the suit lands. Secondly the Plaintiff claims mining and mineral rights by virtue of being the prospecting license holder. The prayers in the plaint are for injunction, cancellation of title and register in respect of the suit land and transfer of the same to the Plaintiff. These are matters within the jurisdiction of this court under the provisions of section of 13 of the Environment and Land Court Act. I am satisfied that the claim is within the jurisdiction of this honourable court.
11. Prayer 3 of the application reads;

The 2nd Defendant/Applicant be allowed to resume business and/or continue using parcels of land Kakamega/Mbale/328 and Kakamega/Masana/1128 pending the hearing and determination of the application.”

I have considered the grounds in support of the application, the grounds in opposition and the rival submissions made. It is the Plaintiff's case that as the holder of prospecting license for Vihiga County it has exclusive mineral rights in the mining area and that it bears the responsibility for the obligations attendant to the licence under the Mining Act. This has not been disputed or challenged by the 2nd Defendant. And although the suit lands are registered in the name of the 2nd Defendant, there is no evidence that the 2nd Defendant's mining activities thereon are licensed, have received any approvals or have been regulated in any way under the Mining Act and the Regulations thereunder. The 2nd defendant now seeks to be allowed to resume business. The Plaintiff contends that this is prejudicial to their prospecting license. The matters raised in this application are matters that can be conclusively canvassed and decided in the application for injunction. In the circumstances, I find that the application is not merited and hereby dismiss it. I direct the parties to comply with the directions given on February 22, 2023 for expeditious disposal of the application for injunction. Each party to bear own costs of the application.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 28TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E ASATI,
JUDGE.**



In the presence of:

Maureen - Court Assistant.

Amondi Advocate for the Plaintiff/Respondent

Kori Advocate holding brief for Osoro for the 2nd Defendants/Applicant

Karanja holding brief for Mokuu for the 1st Defendant

