



REPUBLIC OF KENYA



KENYA LAW
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Ojwang v National Irrigation Authority & another (Environment & Land Case E010 of 2022) [2023] KEELC 16552 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E010 OF 2022**

**AY KOROSS, J
MARCH 23, 2023**

BETWEEN

JOHN SIRADUK OJWANG PLAINTIFF

AND

NATIONAL IRRIGATION AUTHORITY 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

RULING

1. For determination is a notice of motion dated October 5, 2022 brought by the plaintiff together with one Charles Otieno Malowa. The motion has been filed within the provisions of Section 3A of the [Civil Procedure Act](#) and orders 40 rule 3 and 51 rule 1 of the [Civil Procedure Rules](#). In it, the plaintiff and co-applicant sought the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the suit, the defendants, their agents, servants or assigns be restrained from implementing the recommendations made by the defendants on March 11, 2022, trespassing upon, rerouting, constructing, developing or in any way interfering with land parcel No Siaya/Nyadorera/1976 or any part thereof and from harassing, threatening, intimidating or in any manner causing disharmony to the plaintiff.
 - d. That costs of the motion be provided for.
2. The motion is premised on the grounds enumerated on the face of it and on the supporting affidavit deponed by the plaintiff John Siraduk Ojwang dated October 5, 2022.



3. The plaintiff made several depositions which this court has taken the liberty of summarizing. He was the registered proprietor of the land parcel No Siaya/Nyadorera/1976 (hereinafter ‘the suit property’). By several gazette notices, the defendants intended to compulsorily acquire the suit property. Several engagements between the parties culminated into an alleged fresh inspection and assessment of the suit property on March 11, 2022. The outcome led to the 2nd defendant’s project management unit issuing recommendations to the 2nd defendant. These recommendations had far reaching implications and his life was in limbo since the defendants were yet to get in touch with him.
4. By its counsel, J.O. Juma & Co. Advocates, the 1st defendant filed grounds of opposition dated January 26, 2023. In it, the 1st defendant contended the motion had not met the legal threshold, was fatally defective, an abuse of court process, an attempt to conduct a full hearing at an interlocutory stage and a waste of judicial time.
5. In reply to the motion, counsel for the 2nd defendant M/s Caroline Khasoa, filed a replying affidavit sworn on January 12, 2023 by its valuation and taxation officer, Mr. Peter Kaunda. Mr Kaunda made several depositions. That all due processes were conducted in acquiring the suit property. The 2nd defendant issued gazette notices on intention to acquire the suit property. The 1st defendant conducted a sensitization exercise. In accordance with a subsequent gazette notice done in accordance with Section 107 (5) of the Land Act, a site inspection of the suit property was done and an asset inventory conducted.
6. In accordance with Section 112 of the Land Act, a gazette of public inquiry was issued and an inquiry made on the suit property and land parcel No Siaya/Nyadorera/1975 which had been jointly developed with it. A meeting was held on March 11, 2022 to address various concerns over acquisition of the suit property. This visit resulted to recommendations being made by its project management unit.
7. According to the 2nd defendant, they were just mere recommendations and no action had been taken to bring them to fruition. The 2nd defendant opted for the 2nd recommendation on compensation and it issued an award to the persons affected including those residing on the suit property. However, the award had not been collected.

Plaintiff’s Submissions

8. By counsel on record P.C. Onduso & Co. Advocates, the plaintiff filed written Submissions dated December 20, 2022. Counsel identified 2 issues for this court’s determination; (a) whether the plaintiff was entitled to the orders sought and (b) whether the plaintiff would suffer irreparable harm.
9. On the 1st and 2nd issues, counsel submitted the plaintiff had met the prerequisites of the celebrated case of Giella v Cassman Brown & another [1973] EA 358 because he was the registered owner of the suit property and had established a prima facie case. The proposed project would create a secondary canal which would traverse the suit property thus causing harm. Further, the plaintiff had been denied the right to private property as envisaged by Article 40 of the Constitution.
10. Counsel contended the plaintiff held a sentimental value which could not be compensated by an award of damages since ancestral graveyards stood on the suit property. To buttress his position, counsel relied



on the persuasive decision of *Joseph Siro Mosiao v Housing Finance Company of Kenya & 3 others* (2008) eKLR where the court held thus: -

‘On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law.’

1st defendant’s submissions.

11. The 1st defendant’s written submissions dated January 26, 2022 dealt with the motion that is the subject of this ruling and another application dated December 6, 2022. I have failed to understand counsel’s logic because this court directed that this particular pending application will be addressed after this court renders this ruling. For these reasons, I am constrained from addressing that portion of the submissions because to do otherwise would prejudice the plaintiff and 2nd defendant.

12. Counsel, M/s Okoth, identified one issue for this court’s determination: whether the plaintiff was entitled to the orders sought. In a similar fashion, counsel placed reliance on *Giella v Cassman Brown* (supra). She also relied on the persuasive case of *Jan Bolden Nielsen v Herman Philipus Steyn & 2 others* [2012] eKLR where in paragraph 44 of the judgment, the court was of the view *Giella v Cassman Brown* (supra) was not cut in stone and cited with approval the case of *Suleiman –vs- Amboseli Resort Ltd* (2004) 2 KLR 589 where Ojwang Ag. J (as he then was) at page 607 expressed himself as follows: -

‘... for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before...Lastly, there would be a much larger risk of injustice if I found in favour of the defendant than if I determined this application in favour of the applicant.’

13. In applying the principles of this decision, counsel contended that from the unique circumstances of this case, public interests outweighed the plaintiff’s personal interests since Article 40 (3) of the *Constitution* allowed compulsory acquisition of private property subject to certain parameters being met. These prerequisites were laid out within the provisions of Section 107 to 133 of the *Land Act*. Counsel argued that as evidenced by the 2nd defendant’s awards, the plaintiff could be compensated by an award of damages. Counsel placed reliance on the authorities of *Edward Saya Malovi Juma v Kenya Electricity Transmission Co. Ltd* (2015) eKLR and *Kenya Power & Lighting Co. Ltd v Mosiara Trading Company Ltd* (2016) where in these decisions, the courts held that if there were competing interests between public and private interests, the balance of convenience tilted in favour of the public.

2nd Defendant’s Submissions.

14. The 2nd defendant’s counsel filed her written submissions dated January 30, 2023 in which she identified 2 issues for this court’s determination; (a) whether the defendants’ recommendations were contrary to those of the project management unit and, (b) whether the plaintiff’s application had met the legal threshold to warrant the grant of a temporary injunction.

15. On the 1st issue, counsel contended the plaintiff’s allegation was unfounded since the 2nd defendant had not contravened any recommendations.

16. On the 2nd issue, counsel submitted the plaintiff had not established a *prima facie* with probabilities of success since he had not disclosed which of the project management unit’s recommendations the 2nd defendant had contravened.



17. On irreparable harm, counsel submitted the 2nd defendant had conducted an official site valuation in accordance with Section 112 of the Land Act, suit property valued and an award for compensation made. Counsel argued that any loss to the plaintiff could be mitigated by damages. Counsel placed reliance on the case of Nguruman Limited v Jan Blonde Nielsen & 2 others [2014] eKLR where the Court of Appeal stated as follows when referencing the principles of Giella v Cassman Brown (supra): -

‘...It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86....if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.’

Analysis and Determination

18. Having carefully considered the plaintiff’s motion, affidavits, grounds of opposition and parties’ rival submissions together with provisions of law and judicial precedents that have been well cited by counsels, the single issue for determination is whether the plaintiff has met the threshold to warrant grant of an order for temporary injunction.
19. However, this court has observed that the motion has allegedly joined a stranger to it. The plaintiff has only one plaintiff and this court is uncertain if this was a typographical error or otherwise. This equally applies to the description of the suit property. From the documents tendered, it is Siaya/Nyadorera/B/1976 and not Siaya/Nyadorera/1976. Be that as it may, I will proceed to deal with the issue for determination.
20. My authority to award an order of temporary injunction emanates from Section 63 (c) and (e) of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules. This Order 40 Rule 1 provides as follows: -

‘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.’ Emphasis added.
21. The case of Mrao Limited v First American Bank of Kenya Limited & 2 others Civil Appeal Number 39 of 2002 reminds this court that its authority in an application for interlocutory injunction is discretionary and such discretion must be exercised judiciously. And as is the position, judicial discretion has to be exercised on the basis of the law and evidence.
22. The principles of interlocutory injunctions are well settled. For one to succeed, one has to meet not one but all the principles in a sequential manner. The principles are separate and distinct and inter alia



- they are; establishing a prima facie case with a probability of success, proof one will suffer irreparable injury which cannot be adequately compensated by an award of damages and if in doubt, the court will decide the matter on a balance of convenience. See *Giella v Cassman Brown* (supra) and *Nguruman Limited v Jan Blonde Nielsen* (supra).
23. On the 1st and 2nd principles, the plaintiff had to demonstrate that he had established a prima facie case with probability of success. Put it in another way, the plaintiff was to demonstrate that an unmistakable infringement of his right was eminent which if subjected to trial would be successful. He needed to show the invasion of the right was material, substantive, deserving of protection and of urgent necessity so as to prevent irreparable damage. See *Giella v Cassman Brown* (supra) and *Nguruman Limited v Jan Blonde Nielsen* (supra) and *Mrao Ltd v First American Bank of Kenya Ltd* (supra).
 24. It is common ground the plaintiff is the registered proprietor of the suit property. It is common ground the 2nd defendant is a public body and has put in motion the process of compulsory acquiring the suit property on behalf of the procuring entity. The nature of the public project has been styled as lower nzoia irrigation and flood mitigation development project phase 1 Siaya and Busia Counties. The 1st defendant has contended it has nothing to do with the project.
 25. Although Article 40 (1)(a) of *the Constitution* provides private property shall not be arbitrarily deprived, Article 40 (3) and (4) thereof and Part VIII of the *Land Act* allows the 2nd defendant the right to acquire private land subject to just and adequate payment.
 26. At this point, this court is uncertain on the exact nature of the plaintiff's grievance against the defendants. In his grounds in support of the motion, he contends the defendants have refused to comply with the project management unit's recommendations while in his affidavit, his contestation is that the project management unit's recommendations will affect him. However, what he has made clear is that implementation of the project will have far reaching implications upon the suit property including affecting graveyards which are situated on it.
 27. From the evidence, this court has not come across any recommendations made on March 11, 2022 but rather March 12, 2022. Suffice to say, in it, the project management unit communicated as follows: -

'PMU will consider below summarised options...option (1): instruct NLC to inspect and compensate eligible assets in the entire home, this will include assets omitted during initial inspection ...will enable them to re-establish their livelihood after resettlement...Option 2: The proposed secondary canal (11) that is proposed to traverse through the homestead is made of earth and not lined with concrete...this option is advantageous...as resettlement impacts will be completely eliminated...an appropriate resolution that is agreeable to the parties will be finalised by PMU not later than April 30, 2022.'
 28. There is no evidence these recommendations have been put in motion. My understanding of this communication is that it was part of an internal dispute resolution mechanism which is in line with Article 159 (2) (c) of the *Constitution*. I say so because, Part VIII of the *Land Act* has an elaborate criterion for assessing value of a parcel of land that is subject of compulsorily acquisition including damages (Section 107 A and B).
 29. It is not in doubt as postulated by the plaintiff any compulsory acquisition has far reaching implications on inhabitants or proprietors of parcels of land and that may explain why the framers of Part VIII of the *Land Act* painstakingly provided a comprehensive legal framework for compensation. It is not clear if an award has been made over the suit property since all the awards that have been tendered by the 2nd defendant are in respect of Siaya Nyadorera B/1975 and not the suit property and from these awards,



it is evident that graveyards subsistent in a particular parcel of land are usually taken into consideration by the 2nd respondent when assessing compensation.

30. Being alive that it would be untimely and prejudicial to parties if I made any conclusive pronouncements on matters either of fact or law while the suit is yet to be determined on merits, it is my finding the plaintiff has not established a prima facie case with probabilities of success. Additionally, bearing in mind the statutory provisions of the Land Act, I am satisfied the plaintiff will not suffer irreparable harm which cannot be adequately compensated by an award of damages.
31. On the 3rd principle of balance of convenience, I agree with the 1st defendant's submissions that public interests outweigh private interests. In my considered view it favours the defendants. From the gazette notices, it is evident the project will facilitate irrigation for residents of Siaya and Busia Counties and will assist them in mitigating against adverse effects of flooding. See Edward Saya Malovi Juma v Kenya Electricity Transmission Co. Ltd (supra) and Kenya Power & Lighting Co. Ltd v Mosiara Trading Company Ltd (supra).
32. For the reasons stated above and circumstances of this case, I find the plaintiff has not met the legal threshold to warrant the orders sought. Consequently, the motion is declined and dismissed. Costs shall be in cause.

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF MARCH, 2023.

HON. A. Y. KOROSS

JUDGE

MARCH 23, 2023

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Onduso for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

Court assistant: Ishmael Orwa

