



Mwirichia & 2 others (Being the Chairman, Vice- Chairman and Secretary of Golden Gate Estate East Wing Court) v Masera Kenya Limited & 7 others (Environment & Land Case E520 of 2024) [2025] KEELC 2843 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E520 OF 2024
JG KEMEL, J
MARCH 25, 2025**

BETWEEN

**JOHN MWIRICHIA 1ST PLAINTIFF
BENSON MACHARIA 2ND PLAINTIFF
THEOBALD LUCHIDIO 3RD PLAINTIFF
BEING THE CHAIRMAN, VICE- CHAIRMAN AND SECRETARY OF GOLDEN
GATE ESTATE EAST WING COURT**

AND

**MASERA KENYA LIMITED 1ST DEFENDANT
SUPPLY TWO THOUSAND (K) LTD 2ND DEFENDANT
NATHANIEL CHEBELYON 3RD DEFENDANT
ISAIAH NYABUTO ONCHONGA 4TH DEFENDANT
THE DIRECTOR OF SURVEY 5TH DEFENDANT
THE CHIEF LAND REGISTRAR 6TH DEFENDANT
THE CITY COUNTY OF NAIROBI 7TH DEFENDANT
THE NATIONAL LANDS COMMISSION 8TH DEFENDANT**

RULING

(In respect of the Plaintiffs’ application dated 13/12/24)



1. This ruling is in respect of notice of motion filed by the Plaintiffs/Applicants dated 13/12/25 seeking orders that:
 - a. Spent;
 - b. Spent;
 - c. Pending the hearing and determination of the suit, an Order of Injunction do issue to restrain the 1st, 2nd, 3rd, and 4th Respondents or anybody claiming through them, their servants, workers and or employees from moving into, demarcating, fencing and from undertaking any form of building, construction, development or and any activity upon the open spaces the subject of this case situated in Golden Gate Estate South B, Nairobi and specifically the open spaces upon which the illegal Title No. Nairobi/ Block 93/1408; 1409; 1410 and 1411 have been created and from charging, selling or transferring the said illegal titles to any other person or entity.
 - d. Pending the hearing and determination of the main case herein an order of injunction do issue to restrain the City County of Nairobi from giving any approval for the development of or construction upon any of the open spaces in Golden Gate Estate South B, Nairobi as represented in illegal Title No. Nairobi/ Block 93/1408; 1409; 1410 and 1411.
 - e. Pending the hearing and determination of the main case herein an Injunction Order do issue against the Chief Land Registrar to stop the registration of any charge or transferring the illegal Title No. Nairobi/ Block 93/1408; 1409; 1410 and 1411.
 - f. The Costs of the application be borne by the 1st to 4th Respondents in any event.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of John Mwirichia, the 1st Applicant and the Chairman of the 4th Plaintiff, sworn on even date.
3. A summary of the grounds and the averments in the Affidavit by the 1st Applicant is that the 4th Plaintiff is a Residential Estate situated in South B, Nairobi County comprised of about 417 houses. The members of the 4th Plaintiff purchased the houses from M/S Nairobi Homes Limited, the then developer in the 1980s. That the developer designed, planned and developed the entire estate and left open spaces (also called common areas) for children's playground and other recreational needs of the owners. It is averred that the open space measuring about one acre is currently valued at about Kshs. 100 Million.
4. That on completion of the development, the Developer surrendered the Common areas to the residents and City County to hold in trust. That they believe that the common areas have no titles.
5. He contends that to their surprise, they have recently discovered that the open spaces have been titled and registered as Nairobi/ Block 93/1408, 1409,1410 and 1411 in favour of the 1st to 4th Respondents. That they filed complaints with investigative agencies being the EACC and the DCI interalia, but no action has been taken against the Respondents. That the 1st-4th Respondents are in the process of selling the suit lands to a developer who intends to develop the open spaces as can be seen in the beacons that they have fixed on the ground.
6. He further avers that it is the illegal grabbing of the land surrendered to residents for their common good that they intend to protect for themselves and their future generations. It is for that reason that they pray for restraining orders to stop any further alienation, encroachment and development of the said open spaces.



The Responses

7. The 2nd Respondent opposed the application vide a Replying Affidavit sworn by Cornelius Muthuri Mwega, its Director, dated 20/1/25. He avers that he is the registered proprietor of Parcel No Nairobi/ Block 93/1411 jointly with his wife namely Florence Gacheri Muthuri. That they purchased the said parcel from one John Gichuki Thogo and subsequently, a Certificate of Lease was duly issued on the 11/10/94 in their favour. That since then they have been in active possession of the suit land to date and dutifully paying land rates as demanded.
8. He termed the Plaintiffs' assertion that they are entitled to ownership and possession of the suit land as baseless and unfounded in the absence of any evidence that the Developer owned the land and or surrendered it to the 7th Respondent to hold in trust for the Plaintiffs. He contends that the claims/ actions of the Plaintiffs are tantamount to grabbing their registered land. That as the rightful registered proprietors, they stand to suffer irreparable harm if the orders sought are granted and urged the Court to dismiss the application with costs.
9. The 3rd Respondent opposed the application vide the Replying Affidavit sworn by Gideon Cheruiyot Kirui on 18/1/25 in line with the Power of Attorney dated 17/3/22. He avowed that the Plaintiffs' intentions are to deny the 3rd Respondent his Constitutional right to a fair administrative action, right to fair hearing and access to justice under Article 47 and 48 of *the Constitution*. He maintains that he is a bonafide purchaser for value for all that parcel No NAIROBI/BLOCK/1408 having acquired it legally.
10. That upon purchase he took possession and has been the rightful owner enjoying quiet uninterrupted and peaceful possession. That he has acquired ownership of the said parcel of land by way of adverse possession having been in open, exclusive, peaceful, and uninterrupted possession for periods exceeding twelve (12) years. He decried the actions of the 1st – 3rd Plaintiffs who accosted him when he visited the land on baseless claims of ownership.
11. He faults the Plaintiffs for accusing him of trespass, encroachment and grabbing the suit land yet he was only taking possession of what is rightly his, having been issued with a Title and ownership status confirmed by the Nairobi City County. That their efforts to fence off the property has been hindered by the Plaintiffs by pulling down the fence. He prays that the application be dismissed with costs.
12. The 4th Respondent, Isaiah Nyabuto Onchonga, in his Affidavit sworn on the 5/2/25 avers that he is the registered proprietor of the parcel of land known as Nairobi/ Block 93/ 1409 by virtue of Certificate of Lease issued to him on 21/10/94 for a term of 99 years. He avers that the land was initially allotted to John Wambua vide the Letter of Allotment dated 11/1/94 by the Commissioner of Lands and later transferred to him upon payment of the requisite consideration.
13. Absent any evidence having been adduced, he termed the Plaintiffs assertions that Nairobi/ Block 93/ 1409 is an open space for recreational activities, baseless. He contends that he legally acquired the said parcel of land after following due processes. The deponent states that he is in possession of a survey plan and cadastral map that confirms the existence of his land. Therefore, the claim that the same was surrendered is unsupported in evidence. He avers that he is yet to be summoned by any of the investigative agencies over any alleged malady in the acquisition of the said land.
14. In conclusion he stated that the Plaintiffs have not established a prima facie case with high chances of success and that granting the temporary injunction will be highly prejudicial to his proprietary rights. He therefore prays that the application be disallowed with costs.



15. Geoffrey Lukundi Naituli swore an Affidavit dated 28/1/25. He avers that he jointly owns the parcel of land No. Nairobi/ Block 93/1410 with his wife Faith Lucy Kingwa Lukundi. He avers that the application is greatly misconceived and aimed at violating their constitutional rights to own property. He states that they purchased the said parcel of land from Masera Kenya Limited in the year 1995 and paid the full consideration. Subsequently, a Certificate of Lease was issued and have been paying the requisite land rent and rates to date.
16. He deposes that after purchasing the said parcel from the 1st Respondent, they took active and vacant possession of the said property. He too termed the Plaintiffs claim as baseless unfounded in law, frivolous and an attempt to grab their legally registered land. That although the Plaintiffs allege surrender by the Developer, Nairobi Homes Limited, the said Developer did not have any title to the land for it to have the legal capacity to transfer and or surrender. That in any event, the alleged developer has not sworn an affidavit or adduced any document confirming the availability of the open spaces as alleged.
17. The deponent avers that they are keen on developing their property and although the Plaintiffs have lodged complaints with various government authorities, they have not adduced any document to proof ownership of the subject property before the said authorities. He argues that the application is not merited and should therefore be dismissed with costs.
18. The 7th Respondent filed a Replying Affidavit sworn by Wilfred Masinde on 4/3/25. The deponent avers that the 7th Respondent is the institution mandated with the approval of all development applications and grants development permission in accordance with the *Physical and Land Use Planning Act* and the subsidiary legislations. That the development approvals are issued upon compliance with the provisions of Section 15 of the Physical and Land Use Planning (General Development Permission and Control) Regulation *Legal Notice 253 of 2021*.
19. The deponent lists the conditions the applicant has to meet for the approval to be granted inter alia to wit; that the application has to be accompanied by a certified copy of the Title Deed or a written consent of the registered owner where the applicant is not the registered owner, an official survey map among other requirements. He avers that once an Applicant presents a Certificate of Title issued by the Land Registrar, it is taken as prima facie evidence that the person named thereon is the absolute and indefeasible owner. That the 7th Respondent has no mandate to investigate the historical background of a Certificate of Title when presented to it for purposes of issuing ad development approval.
20. He asserts that the Applicant's claim that the suit lands were part of a Surrender to the 7th Respondents by the Developer Nairobi Homes Limited to the residents and that it was included in the purchase price is baseless as no evidence has been adduced to prove the allegation. Further, that the Developer has not availed any legal documents of ownership or the alleged surrender. That the application should therefore be dismissed with costs as the Applicants' suit is frivolous and an abuse of the Court process.

The written submissions

21. The Court has read and considered the written submissions placed before it on record by the parties.

Analysis and determination

22. Having considered the application, the responses thereof and the rival submissions, the sole issue that arises for determination is whether the Plaintiff/Applicant has met the threshold to warrant the grant of a temporary injunction.



23. The purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The Order provides that;

“ 1. 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 Respondent 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 Respondents 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 orders”.

24. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience. See the celebrated cases of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and *Nguruman Ltd. –vs- Jan Bonde Nielsen & 2 Others* [2014] eKLR.

25. The starting point is to establish whether the applicant has demonstrated a prima facie case to grant the orders sought. The Court of Appeal in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123, defined a prima facie case as:

“ A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. In *Nguruman* (supra) the Court of Appeal went further to state that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. The standard of proof is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.

27. In the instant suit, the Plaintiffs aver that they are members of the 4th Plaintiff, a Residential Estate with members owning units that were acquired for consideration from the then Developer namely M/S Nairobi Homes Limited who had developed the said Scheme totaling to about 417 houses. It is argued that the Developer reserved a portion of the land measuring about 1 (one) acre to be used as an open area. The open area was reserved for a playground for the Unit Owners’ children among other social amenities. The Applicants have adduced a Certificate of Registration of the Association, their individual Titles of the Units owned as well as a Sketch Plan of the Estate upon development.



28. Under the Physical Planning Act, Cap. 286 (now repealed) by The *Physical and Land Use Planning Act*, 2019 a developer is required to reserve land for roads and public purpose or for other purposes referred to in the Act for which land may be reserved. The Plaintiffs complaint revolves around open spaces in the estate which they aver were left to their enjoyment as a community by the developer. It is their case that the open spaces were surrendered to them and the 7th Respondents to hold as their trustee.
29. The Respondents refute any surrender of the open spaces to the Plaintiffs and or the 7th Respondents or any such other entity to hold in trust for the Plaintiffs. They have faulted the Plaintiffs for failing to adduce evidence before the Court in form of a surrender, transfer, registration and or such other documentary evidence in support of their claim. They contend that they hold valid titles for the land otherwise christened open spaces by the Plaintiffs and term the Plaintiffs claim as baseless and only fit for dismissal.
30. To that extent, it is the observation of the Court that the ownership of the suit land has been sharply contested by the parties. Guided by the decision in the Nguruman case cited above this Court will restrain itself from holding a mini trial so as not to embarrass the Court that will finally hear and determine the matter. To that end I say no more on the raging controversy.
31. Having said that the Court notes that the issues raised by the Plaintiffs touch on the alleged community open spaces for recreational, environmental and social well-being of the residents of the 4th Plaintiff's estate. Other than being property rights, these genre of rights have embody environmental rights which are protected by *the Constitution* and which entitles parties to seek redress from the Court on the ground that those rights have been, or are likely to be denied, violated, infringed and or threatened. In the event that the injunction is not granted and the open spaces are developed the case of the Plaintiffs will be rendered an academic exercise in my view. To that end, the Court is satisfied that the Plaintiffs have established a prima facie case.
32. Secondly, on the issue of damages being a sufficient remedy, it is admitted by the Respondents that they hold titles for the open areas and have plans to develop the suit properties. Despite the admission, the Respondents have not adduced any evidence of development say in form of approved building plans, third party contracts, funding arrangements and it is for that reason that the Court is of the view that if the orders are allowed, they stand to suffer no prejudice. None was adduced at the very least.
33. On the other hand, if the orders are not granted and the Respondents proceed with the desired development of the suit properties before the determination of the suit, the residents of the 4th Plaintiff would be deprived of the use of the open space in the event the suit is determined in their favour. Any development of whatever nature will change the character of the suit land hence defeating the Plaintiffs' claim and convoluting the matter further.
34. I am fortified by the finding of the Court in the case of FILMS ROVER INTERNATIONAL LTD V CANNON FILM SALES LTD 1986 3 ALL ER 772, where it was held that a Court considering such an application should take the course that appears to be the lower risk of injustice should it turn out to have been wrong.
35. Guided by the provisions of Order 40 Rule 1 of the CPR read together with Section 3A of the CPA, I therefore find that justice will be served if the suit lands are preserved pending the hearing and determination of the suit so that each party will adduce evidence and proof their claims in Court. Evidently, the balance of convenience tilts in granting the injunction. It is therefore my finding that the Applicants have met the threshold for grant of temporary injunction pending hearing and determination of the main suit.



Final orders for disposal

36. To that end, the Plaintiffs' application dated 13/12/254 be and is hereby allowed as follows;
- a. Pending the hearing and determination of the suit, an Order of temporary injunction do issue to restrain the Respondents or anybody claiming through them, their servants, workers and or employees from moving into, demarcating, fencing and from undertaking any form of building, construction, development or and any activity upon the open spaces the subject of this case situated in Golden Gate Estate South B, Nairobi and specifically the open spaces upon which Title No. Nairobi/ Block 93/1408; 1409; 1410 and 1411 have been created and from charging, selling or transferring the said illegal titles to any other person or entity.
 - b. Further orders are that pending the hearing and determination of the suit there shall be No Dealings on the title Nos. Nairobi/ Block 93/1408, 1409, 1410 and 1411 to wit; The City County of Nairobi be and is hereby restrained from giving any approval for the development of or construction upon any of the open spaces in Golden Gate Estate South B, Nairobi as represented by Title Nos. Nairobi/ Block 93/1408; 1409; 1410 and 1411 ; The Director of Survey be and is hereby restrained from affixing any beacons and or such other survey work/ registration and The Chief Land Registrar be and is hereby ordered to stop the registration of any charge, transfer and or transaction of whatever nature of the Nairobi/ Block 93/1408, 1409, 1410 and 1411.
 - c. For avoidance of doubt and effectiveness of these orders, that restrictions be lodged forthwith on the titles for the suit lands namely Nairobi/ Block 93/1408, 1409, 1410 and 1411 forbidding any dealings whatsoever on the lands pending the hearing and determination of the suit herein.
 - d. The Costs of the application will be borne by the 1st – 4th Respondents in any event.
35. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF MARCH, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr Omar HB for Mr Namada for the Plaintiffs
2. Ms Kajuju for the 1st & 2nd Respondents
3. Ms Kajuju HB for Mr Sigei for the 4th Respondent
4. N/A for the 5th and 6th Respondents
5. Ms Akello HB for Ms Otieno for the 7th Respondent
6. N/A for the 8th Respondent
7. CA- Ms Yvette Njoroge

