



Aga Khan Foundation v County Government of Kisumu (Environment & Land Case E031 of 2022) [2023] KEELC 17647 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E031 OF 2022**

**E ASATI, J
MAY 25, 2023**

BETWEEN

AGA KHAN FOUNDATION PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated November 16, 2022 brought on behalf of the Plaintiff pursuant to the provisions of Section 1A, 1B, 3A and 3B of the [Civil Procedure Act](#), Order 40, Rule (1) and (2) and 51 Rule 1 of the [Civil Procedure Rules](#). The application seeks for orders that:-
 - a) a temporary injunction do issue restraining the Defendant whether by itself, its servants, employees and/or agents or any person acting under its direction, permission and/or authority from evicting the Plaintiff from, breaking into taking possession of and/or otherwise interfering with the Plaintiff's right to quiet enjoyment, use and possession of the property known as Kisumu Municipality/Block8/216 situated in Milimani, Kisumu pending the hearing and determination of the suit.
 - b) such further orders as the court may deem in the interest of justice be issued.
 - c) cost of the application be awarded to the Plaintiff.
2. The application was based on the grounds that in the year 1951 the Government of then Protectorate of Kenya issued a lease to HRH Sultan Sir Mohamed Shah Agah Khan, Aga Khan III over the property known as Kisumu Municipality/Block8/216, situated in Milimani, Kisumu for a term of 99 years commencing on May 1, 1951. That in 1979, the property known as Kisumu Municipality/Block 8/216 was transferred to the Plaintiff, a private, not-for-profit, non-denomination, international development agency established by HRH the Aga Khan IV which undertakes charitable and



humanitarian works globally and in the Republic of Kenya. That the Plaintiff is therefore the registered proprietor of the property known as Kisumu Municipality/Block 8/216 and has been in possession and occupation of the said property since 1979. That on or about November 9, 2022, the Plaintiff received a letter issued by or on behalf of the Acting City Manager of the Defendant in which letter the Defendant falsely alleged that Kisumu Municipality/Block 8/216 had been irregularly acquired by the Plaintiff and explicitly threatened break into and unlawfully take possession of the Plaintiff's property without exercise of any legal process whatsoever. That the Defendant has no legal mandate or authority to undertake the threatened actions aforesaid and any attempt to take possession of the Plaintiff's premises aforesaid would amount to an illegal and forceful dispossession of private property in contravention of the Plaintiff's right under Article 40 of the [Constitution of Kenya](#). That the Defendant has no disclosed property right or interest whatsoever in the property known as Kisumu Municipality/Block 8/216.

3. That notwithstanding delivery of the letter on November 9, 2022 as aforesaid, the said letter is dated October 21, 2022 and threatens the Plaintiff with adverse action within 7 days thereof. That as such the Plaintiff is duly apprehensive that it may be unlawfully and irregularly evicted from its premises at any moment and without further notice. That the Plaintiff is seeking this Honourable Court's protection by way of an injunction to prevent an unconstitutional and manifestly illegal abuse of power by the Defendant. That the Plaintiff is apprehensive that unless otherwise restrained by this Honourable Court, the Defendant is not likely to respect the rights, title and ownership interest that the Plaintiff enjoys and/or should enjoy pursuant to Article 40 of the [Constitution of Kenya](#). That the Defendant's blatant, unlawful and irregular actions as threatened in its letter dated October 21, 2022 ought to be halted before it causes further harm to the Plaintiff. That Plaintiff is the registered proprietor of the suit property and has a prima facie case against the Defendant with a probability of success.
4. That the Plaintiff stands to suffer irreparable harm, loss and damage in the event the Defendant is not rectified from interfering with the Plaintiff's right of ownership and occupation of the suit property aforesaid pending the hearing and determination of the suit. That the Defendant does not stand to suffer any damage which cannot be compensated by an award of costs and/or interest if the orders sought herein are granted and the balance of convenience evidently tilts in favour of issuance of the Orders sought herein. That it is in the manifest interest of justice and fair ness that the Orders sought herein do issue as prayed.
5. The application was supported by the averments in the Supporting Affidavit sworn by Evenas Ingala on November 16, 2022 and the annexures thereto and the Supplementary Affidavit sworn by the same deponent on March 1, 2023 and annexure thereto.
6. In opposition to the application, the Respondent filed a Notice of Preliminary Objection dated June 19, 2023 and a Replying Affidavit sworn on February 16, 2023 by Michael Abala Wang'a.
7. Directions were taken by consent of parties on January 24, 2023 that the preliminary objection and the application be canvassed together by way of written submissions. In compliance, the applicant filed written submissions dated March 1, 2023 through the firm of O & M LAW LLP Advocates while written submissions dated February 16, 2023 were filed on behalf of the Defendant through the Office of County Attorney, Kisumu County.
8. From the application and reply thereto and the submissions made two issues arise for determination namely;
 - a) Whether or not the Plaintiff/Applicant has capacity to institute the suit in its name and without compliance to Order 1 Rule 13(1) and (2) [Civil Procedure Rules](#).



- b) Whether or not the Plaintiff/applicant has made out a case for issuance of the orders sought.
9. On whether or not the Plaintiff has capacity to sue, the Plaintiff describes itself in paragraph 1 of the Plaintiff as Charitable Foundation incorporated in Switzerland and issued with a certificate of compliance in the Republic of Kenya.

The Defendant's case is that the Plaintiff ought to have obtained written authority of the members of the Foundation so as to be able to appear, plead or act on their behalf. The Defendant submitted that the Plaintiff being a foundation it lacked the capacity to institute a suit in its own name and as such the instant suit and the application are fatally defective. Secondly that the applicant has purported to institute the proceedings on behalf of the welfare of the Foundation without written authority. That there is no evidence tendered to prove the existence of Aga Khan Foundation. That Order 1 rule 3(1) and (2) of the Civil Procedure Rules requires that officials of such a Foundation do demonstrate that they have permission to bring the action on behalf of the members. That there is no evidence tendered to show that the foundation even has representatives officially elected as officials of the organization. The Defendant relied on the case of Kipsiwo Community Self Help Group –vs- Attorney General and 6 Others [2013]eKLR, Kituo Cha Sheria –vs- John Ndirangu Kariuki & another [2013]eKLR and William Kiprono Towett & 159 Others –vs- Farmland Aviation Ltd & 2 Others [2016]eKLR and prayed that the preliminary objection be allowed.

10. The Plaintiff's response as contained in the Supplementary Affidavit is that the Plaintiff has capacity to sue and be sued in its name. To the Supplementary Affidavit was annexed a certificate of compliance No E40/74. That the provisions of Order 1 Rule 13(1) & (2) relate to instances where a party is suing on behalf of other parties and is not applicable in the instant suit. It was submitted that the Plaintiff who is a registered company has capacity to sue. Counsel relied on a number of authorities including Section 367 of the Companies' Act and the case of Amin Akberali Manji & 2 Other –vs- Altaf Abdulrasul Dadani & 9 Others [2015]eKLR, Salomon –vs- Salomon Company Ltd [1895 – 99] All ER 33 to support the submissions.
11. I find that the Plaintiff company though incorporated in the Switzerland by virtue of its compliance with Companies' Act and issuance of a compliance certificate pursuant to the provisions of Section 366 of the Companies' Act had capacity to file suit and the application in its name. I further find that the provisions of Order 13(1) and (2) do not apply to the instant suit. Hence the preliminary objection is declined.
12. As to whether or not the Plaintiff has made out a case for issuance of the orders sought, the substantive prayer in the application is for an order of temporary injunction. The grounds for grant of temporary injunctions were set out in the case of Giella vs Cassman Brown Co Ltd (1973) 358 that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience.
13. The Applicant's case is that it is the registered owner of the suit land. That on or about November 9, 2022 it received a letter dated October 21, 2022 issued on behalf of the acting City Manager of the Defendant alleging that the suit land had been irregularly acquired by the Plaintiff and that the Defendant in the letter explicitly threatened to break into and unlawfully take possession of the Plaintiff's property without exercise of any legal process whatsoever. The letter dated October 21, 2022 was attached to the application and marked "E13". The letter read;

"Re: Illegal And Irregular Acquisition Of Public Property– KSM/MUN/Block 8/206



Reference is made to the above matter.

Please confirm to us in writing with supporting documents how the building and parcel of land on KSM/Mun/Block/216 was transferred to the Aga Khan Foundation. Secondly explain how you were exempted from paying land rates to the County Government of Kisumu. We wish to inform you that the County Government of Kisumu is taking possession of the building which is currently locked is a security threat.

By a copy of this letter, we do inform the OCS – Kisumu Police Station of our intention to break the locks and occupy the premises.

Respond within a week before the matter is taken to court”.

The letter was authored by Abala M Wanga (Mr) Ag City Manager, and addressed to the Plaintiff.

14. It was submitted on behalf of the applicant that the applicant had demonstrated the requisite grounds for grant of the order sought.
15. The Respondent’s response as contained in the Replying Affidavit of Michael Abala Wanga was that the Respondent is not laying claim of ownership of the suit property. That the Respondent’s intention is to confirm if the applicant has been exempted from land rates payable to the County Government of Kisumu. That the Respondent does not intend to demolish the property and that no notice of demolition was given. That the Respondent does not intend to take possession of the property. That the house on the suit property being vacant and locked and given that there is non-payment of rates is not beneficial to the public and the county government.
16. I have carefully considered the application and the reply thereto. I have considered the contents of the letter, the basis of the Plaintiff’s complaint. The Respondent has not denied authoring the letter. It is not disputed that the Plaintiff is the current registered owner of the suit land hence its proprietary rights are protected by among other laws, the provisions of article 40 of the [Constitution of Kenya 2010](#) and the [Land Registration Act](#). The contents of the letter are not in agreement with the averments in the Replying Affidavit. As much as the Replying Affidavit states that the Respondent is not interested in ownership of the property, the letter threatened repossession of the property and forceful take over of occupation thereof. Under Order 40 Rules I and 2 [Civil Procedure Rules](#), pursuant to which the application is brought, where in any suit it is proved by Affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit the court may by order grant a temporary injunction to restrain such act.
17. I find that the Plaintiff has made out a case for grant of the orders sought. I allow the application and make the following orders:-
 - i. An order of temporary injunction is hereby issued restraining the Defendant whether by itself, its servants, employees and/or agents or any person acting under its direction, permission and/or authority from evicting the Plaintiff from, breaking into, taking possession of and/or otherwise interfering with the Plaintiff’s right to quiet enjoyment, use and possession of the property known as Kisumu Municipality/Block 8/216 situated in Milimani, Kisumu pending the hearing and determination of the suit.
 - ii. Costs to the Applicant.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 25TH DAY OF MAY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.



E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

Wachira Advocate for the Plaintiff/Applicant.

Awuor Advocate for the Defendant/Respondent.

