



**Kihara & another v Sharifow (Environment & Land Case
E041 of 2023) [2023] KEELC 17793 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E041 OF 2023**

**LN MBUGUA, J
MAY 25, 2023**

BETWEEN

BENSON NGURA KIHARA 1ST PLAINTIFF

FREDRICK KAMIRI KARUMBA 2ND PLAINTIFF

AND

ABDIRASHID ABDUL SHARIFOW DEFENDANT

RULING

1. The Plaintiffs' Notice of Motion application dated February 9, 2023 is for determination before this Court. They seek an injunction order restraining the Defendant by himself/Agents from interfering with the Plaintiffs' ownership and occupation of LR No 36/VII/503 pending the hearing and determination of this suit.
2. They also seek a mandatory injunction order compelling the Defendant to remove the waste water and foul air pipes and air conditioning equipment he has erected or mounted inside LR No 36/VII/503 and in default, the same be removed by the Plaintiffs with the supervision of the Officer Commanding Station, Pangani Police Station at Defendant's costs.
3. The application is based on grounds on its face and on the 2nd Plaintiff's supporting affidavit sworn on February 9, 2023. He avers that the Plaintiffs are beneficiaries of Plot No 503 pursuant to a Confirmed Grant. He avers that the plot is developed with residential apartments and at the time of developing it, the owners of Plot No 503 left an unbuilt strip measuring approximately 4 meters in width and which runs along the boundary between the adjacent plot.
4. He avers that the Defendant is the owner of the adjacent plot LR No 36/VII/285 which is developed with a commercial building which covers the entire plot beacon to beacon. That around March 2022, the Defendant forcefully removed a gate that the owners of Plot No 503 had mounted on their plot and also demolished structures which they had built along the boundary line but within their plot No



- 53 claiming erroneously that the gate and the structures had been put up along a public path or passage allegedly separating the 2 plots.
5. He also avers that the Defendant has also mounted air conditioning equipment, chimneys, sewer and waste pipes which spill often along the boundary wall between the 2 plots but inside Plot No 503 with the result that smoke and noise generated by the said air conditioning equipment and chimneys is an environmental hazard and nuisance to the tenants of plot No 503. He adds that the Defendant has also caused heavy voltage electric power cable to run on Plaintiff's plot No 503 thereby exposing the residents and their property to risk of fire.
 6. He annexed 2 reports by M/s Appollo Surveyors and Consultants dated August 14, 2018 and May 22, 2018 and a map from survey of Kenya and stated that there is no public space between plot 503 and 285 as claimed by the Defendant.
 7. The deponent also avers that there was a suit filed in the High Court being ELC Case No 127 of 2009 by the now deceased owners of plot No 503 who had sued the then owner of Plot No 285 against acts of trespass into Plot No 503 and by orders issued by the Court on April 1, 2009 and July 29, 2009, the Defendant herein was restrained from trespassing or in any way interfering with the Plaintiff's ownership of Plot No 503.
 8. The Defendant was served but he didn't file any response. The application is therefore unopposed, nevertheless, the court is duty bound to look into the merits of the said application - See of [Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others \[2018\] eKLR](#),
 9. The Principles for grant of an interlocutory injunction were set out in the case of *Giella v Cassman Brown [1973] EA 358* where the Court stated that an applicant must show a prima facie case with probability of success, that he stands to suffer irreparable injury which would not adequately be compensated by an award of damages. And if the court is in doubt it would decide such an application on the balance of convenience. As for the grant of a mandatory order of injunction, an applicant must establish that there are special circumstances to warrant the issuance of such orders.
 10. In [Kenya Breweries Ltd & Another v Washington O Okeya\[2002\] eKLR](#), the Court of Appeal stated that;

' A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.'
 11. Firstly, it is not clear as to whether the plaintiffs are litigating for and on behalf of the claimants in the suit 127 of 2009. In paragraph 13 of the current suit, it is pleaded that;

' The defendants offending acts are in disobedience of the restraining orders made on April 1, 2009 and on July 29, 2009 in the said ELC 127 OF 2009'.
 12. The plaintiffs in the former suit were claiming more or less similar prayers as the ones in the current suit, including an averment that there is no public access between the two plots. The current plaintiffs have



not indicated the fate of the former suit. In the circumstances, the issue of: subjudice or res-judicata does arise and must be dealt with before any other orders are dealt with.

13. I must also add that the prayers sought in the application are a reflection of the main prayers in the plaint, hence granting such orders would amount to granting a major relief without the benefit of a hearing, See- [Daniel Atibu Jasimba v Ainea Sandanyi Magana \[2013\] eKLR](#).
14. In the end, I find that the application dated February 9, 2023 is not merited, the same is hereby dismissed with no orders as to costs. The plaintiffs are directed to address this court on the issue of subjudice or res-judicata to the case 127 of 2009.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Muturi for Plaintiffs Applicants

Court assistant: Eddel

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