



**Kipaliash & 8 others v Maitha (Environment & Land Case  
E008 of 2023) [2023] KEELC 17610 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17610 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E008 OF 2023**

**CA OCHIENG, J**

**MAY 23, 2023**

**BETWEEN**

**DANIEL NCHOONKA KIPALIASH ..... 1<sup>ST</sup> PLAINTIFF**  
**CHARITY SILAU RISANCHO ..... 2<sup>ND</sup> PLAINTIFF**  
**PATRICK LIKAM PARKIRE ..... 3<sup>RD</sup> PLAINTIFF**  
**PARSANKA OLE PARDIRET ..... 4<sup>TH</sup> PLAINTIFF**  
**SILANTOI TOISON MUKARE ..... 5<sup>TH</sup> PLAINTIFF**  
**MIRRIAM SINTA LETILA ..... 6<sup>TH</sup> PLAINTIFF**  
**RAKWA OLE GUSIL ..... 7<sup>TH</sup> PLAINTIFF**  
**MOSES TENKES LETAYIAN ..... 8<sup>TH</sup> PLAINTIFF**  
**AGNES SAOYI TUMPIENE ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**JOSEPH KAMUYA MAITHA ..... DEFENDANT**

**RULING**

1. What is before Court for determination is the Defendant's Notice of Motion Application dated the May 2, 2023 where he seeks the following orders:
  1. Spent.
  2. That pending the hearing of this Application the Honourable Court be pleased to stay and or suspend the orders granted on the April 26, 2023.



3. That the Honourable Court be pleased to set aside the *ex parte* orders granted on the April 26, 2023.
  4. That the Honourable Court do reinstate the status quo ante pending hearing and determination of the suit.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the Respondent Joseph Kamuya Maitha. He contends that the Notice of Motion Application dated the April 19, 2023 was never served upon him. He insists that the Affidavit of Service is meant to mislead the court on issue of service. He claims there is no evidence that the mobile number 0721xxxxxx belongs to him. He avers that he has been in possession of the suit land since he purchased the same in 1989 contrary to the Plaintiff's averments. He reiterates that the Court Order has not been served upon him within three (3) days as required by the law which is in contravention of Order 40 Rule 4(3) of the Civil Procedure Rules. Further, that the current orders are prejudicial to him and ought to be set aside.
  3. The Applicants' opposed the instant Application by filing a Replying Affidavit sworn by 1<sup>st</sup> Applicant Daniel Nchoonka Kipaliash where he confirms swearing the said Affidavit on behalf of the Applicants. He insists that they have been on the suit land for over 30 years and have never been evicted therefrom. He claims Erdeman Property Limited are agents of the Respondent. Further, that the Respondent mandated them to evict persons who are in occupation of LR No 12581/7 and 12581/8 respectively. He claims they are in possession of the whole suit land. He contends that the Respondent was duly served and explains the mode of service by one Osoro Ogora as evident in his Affidavit of Service dated the May 8, 2023. Further, that he was present when service was effected upon Mr. Alphonse Mutinda, the Respondent's advocate. He denies that they have Title Deeds to the suit land. He made reference to two related suits being ELC No 24 of 2021 and 43 of 2020. He further denies that the Respondent did not allow them to graze on the suit land as claimed. Further, that he is not related to Kipaliash mentioned in ELC No 24 of 2021 and insists that the Respondents in the said suit are not parties herein. He admits ELC No 24 of 2021 and 43 of 2020 were dismissed for want of prosecution. He further denies being parties to ELC No 408 of 2017 which was determined and insists Noah Leinah and Emmanuel Taison are strangers to them. He reiterates that they are in occupation of the whole suit land which they have fenced.
  4. The Application was canvassed by way of written submissions which was highlighted by Counsels for Respondent and Applicants on 15<sup>th</sup> May, 2023.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivalling submissions, the only issue for determination is whether this Court should set aside the *ex parte* Orders granted on the April 26, 2023.
6. The Respondent seeks to set aside the *ex parte* orders issued by this Court on April 26, 2023 in respect to the Applicants' Notice of Motion Application dated the April 19, 2023 which stated that:
  - (1). That an interim injunction be and is hereby issued restraining the Defendant/Respondent, his servants, agents, assignees and employees or otherwise from trespassing, interfering with, demolishing structures, conducting evictions, coming into, resurveying, selling, fencing, alienating in any the suit property being LR No 12581/7 and 12581/8 (hereinafter referred to as the suit property).
  - (2). That application dated April 19, 2023 fixed for hearing on May 10, 2023. (3). That Hearing Notice to issue."



7. The Respondent contends that these orders will prejudice him as owner of the suit lands. Further, that he was not served as alleged by the Process Server Osoro Ogora. I note in the annexed affidavit of Osoro Ogora the Process Server, actually admits that he first served the Court Order to one Samuel Ohullo an agent of Erdeman and later Mr. Mutinda, the Respondent's advocate. I note from the said Affidavit, the Respondent was indeed not served personally. Further, the process server only served the Court Order upon the Respondent's Advocate and there is no indication as to whether he served summons to enter appearance including the impugned Application. From the averments in the Applicants (Respondents') Affidavit, the deponent admits in paragraphs 22 and 23 of the Replying Affidavit, that he saw the Process Server talking to Mutinda and handing documents to him but did not know the contents of their conversation. Further, I note Mr. Mutinda who is the Respondent's advocate in his submissions denied being served with the Court Order.
8. I note the dispute in respect to the suit lands (LR No 12581 IR 40811) has been litigated in various aforementioned cases to wit: ELC 24 of 2021, ELC 43 of 2020 and ELC 408 of 2017 which have all been determined. The Applicants deny being parties to any of the said suits and not knowing parties therein. The Applicants' Advocate in his submissions claimed there are many families residing on the suit land but I note they are not parties to this suit. Be that as it may, it is my considered view that since the Respondent was not personally served and his advocate who was allegedly served with a Court Order has also denied service, it cannot be deemed as proper service. Further, from the Process Server's Affidavit of service, he indicates that the Respondent's Advocate Mr. Mutinda declined to sign. I note by the time of the alleged service, Mr. Mutinda was not representing the Respondent herein. Order 51 Rule 15 of the Civil Procedure Rules allows the Court to set aside orders and since I find that there was no proper service effected upon the Respondent, I am of the view that it is pertinent if the *ex parte* orders were set aside and the Applicant's application for injunction determined on merit. However, on the prayer for granting of status quo ante, since this Court has not been informed of the status quo ante, but had already made orders on May 15, 2023 to maintain it, I will decline to make an order on the same.
9. Since the Respondent has filed his responses to the Application for injunction and Originating Summons, I will proceed to set aside the orders issued on April 26, 2023 and direct that parties herein do exchange written submissions within the next fourteen (14) days from the date hereof to canvass the said Application for injunction. In the meantime, I direct parties to maintain orders on status quo as indicated in the order dated the May 15, 2023.
10. It is against the foregoing that I find the Notice of motion application dated the May 2, 2023 partially successful.
11. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23<sup>RD</sup> DAY OF MAY, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

