



**Fleig & 6 others v County Government of Mombasa & 2 others (Environment and Land Constitutional Petition 12 of 2021) [2023] KEELC 18310 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18310 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 12 OF 2021**  
**SM KIBUNJA, J**  
**JUNE 26, 2023**  
**IN THE MATTER OF ARTICLE 19, 22(1) AND ARTICLE 23 OF THE**  
**CONSTITUTION OF KENYA AND ENFORCEMENT OF BILL OF RIGHTS**  
**AND**  
**IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA ON**  
**PROTECTION OF RIGHT TO PROPERTY**  
**AND**  
**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA ON**  
**FAIR ADMINISTRATIVE ACTION**

**BETWEEN**

**ROBERT FLEIG ..... 1<sup>ST</sup> PETITIONER**  
**FARIDA ABDULLA ..... 2<sup>ND</sup> PETITIONER**  
**ALVIN JONES ..... 3<sup>RD</sup> PETITIONER**  
**UWE MEIXNER ..... 4<sup>TH</sup> PETITIONER**  
**MANFRED DIESTLER ..... 5<sup>TH</sup> PETITIONER**  
**IRENE OMONDI ..... 6<sup>TH</sup> PETITIONER**  
**FLORIDA MANAGEMENT SERVICES LTD ..... 7<sup>TH</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**  
**CABINET SECRETARY, MINISTRY OF LANDS ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**



## RULING

### [NOTICE OF MOTION DATED 1<sup>ST</sup> MARCH 2021]

1. Through the notice of motion dated the 1<sup>st</sup> March 2021, the petitioners seek for inter alia pending the hearing and determination of this petition, a conservatory order of injunction to issue, restraining the respondents jointly and severally by themselves, their agents or persons acting under their authority, from demolishing the petitioners' properties and structures on property known as Pungu Villas, formerly known as Pungu Fuel/77, now subdivided into:
  - a. Kwale/Pungu Fuel/139 in the name of Abdalla Farida Haron;
  - b. Kwale/Pungu Fuel Area/134,135, 136, 140 and 142 in the names of Alvins Jones, Cynthia Wood, Lily Pen and Robert Fleig;
  - c. Kwale/Pungu Fuel Area/143 in the name of Manfred Adam Distler;
  - d. Kwale/Pungu Fuel Area/131 in the name of Uwe Meixner;
  - e. Kwale/Pungu Fuel Area/141 in the name of Florida Management Services Ltd, and
  - f. Kwale/Pungu Fuel Area/138 in the names of Tam Wing and Robert Fleig.

The application is premised on the eight (8) grounds on its face and supported by the affidavit of Robert Fleig, the 1<sup>st</sup> petitioner, sworn on the 1<sup>st</sup> March 2021 deposing among others that the petitioners are owners of the suit properties described herein above; that before the subdivision of the mother title, the Provincial Roads Engineer visited the land and vide his letter dated the 27<sup>th</sup> June 2008 confirmed it had not encroached onto any roads; that after the subdivisions and titling, the petitioners established buildings on the suit properties and were surprised to receive the letter dated the 10<sup>th</sup> December 2020 requiring them to remove their developments to pave way for a road, failure to which the structures would be demolished.

2. The application is opposed by 2<sup>nd</sup> and 3<sup>rd</sup> respondents through the grounds of opposition dated the 24<sup>th</sup> March 2021 and filed on the 7<sup>th</sup> May 2021, to the effect that the petitioners have not established a prima facie case as no approved physical planning development plan has been availed and their developments were illegally erected; that the 1<sup>st</sup> respondent is under section 30 (4) (a) & (b) of the Physical Planning Act (repealed) mandated to revert the land back to the state it was before the illegal development; that the rights of access by the adjacent neighbourhoods outweighs the petitioners interests.
3. The application is also opposed by the 1<sup>st</sup> respondent through the replying affidavit sworn by Calistus Luseno, the Building inspector in the 1<sup>st</sup> respondent's department of lands, planning and housing, sworn on the 7<sup>th</sup> May 2021. He inter alia deposed that the 1<sup>st</sup> respondent had received the letter dated the 27<sup>th</sup> October 2020 from one Paul Kariuki Njoroge, owner of Plot No. Pungu/147, complaining that the petitioners had blocked the access road to his plot and those of other neighbours; that he carried out investigations and confirmed that the petitioners had built a wall blocking the access road at the point marked A – B in his annexure. That he wrote the letter dated 30<sup>th</sup> December 2020 to the petitioners requiring them to open the road and the court should issue an order to demolish the erected wall and open the road.
4. The record shows that temporary conservatory order pending determination of the application was issued on the 4<sup>th</sup> March 2021. Then on the 11<sup>th</sup> May 2021 the timelines for filing and exchanging replies



and submissions were given by the court. The timelines were extended on the 10<sup>th</sup> November 2022 and again on the 6<sup>th</sup> February 2023. The learned counsel for the 1<sup>st</sup> respondent finally filed their submissions dated the 24<sup>th</sup> March 2023 while that for the petitioners filed theirs dated the 24<sup>th</sup> March 2023 on the 27<sup>th</sup> March 2023 which the court has considered.

5. The issues for the determinations by the court are as follows;
  - a. Whether the petitioners have met the threshold for the issue of conservatory order of injunction at this interlocutory stage.
  - b. Who pays the costs of the application.
6. The court has carefully considered the grounds on the application, grounds of opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings;
  - a. That from the affidavit evidence and specifically the copy of the survey plan annexure marked “CL2” in the 1<sup>st</sup> respondent’s replying affidavit, the bone of contention appears to be the wall reportedly built by the petitioners at the point marked “A – B” where the road leaves parcels 136 and 143. The said survey plan that was provided by the 1<sup>st</sup> respondent and has not been challenged by the petitioners, indicates that the road should proceed beyond parcels 136 and 143 to the lands beyond.
  - b. That for the petitioners to be entitled to the court’s discretionary powers exercised in their favour, they had a duty to meet the threshold set out in the case of *Giella versus Cassman Brown & Company Ltd* (1973) EA 358, by establishing a prima facie case with a probability of success, and show that they stand to suffer irreparable loss if the order sought is not granted and that the balance of convenience tilts in issuing the order in their favour.
  - c. That in view of the finding in (a) above, the court is of the considered view that the petitioners have failed in the first test of establishing a prima facie case. All they appear to rely on is the letter dated the 27<sup>th</sup> June 2008 from the Coast Provincial Roads Engineer to the Chief Engineer Roads, that the Pungu Villas Plot on the ground does not encroach onto the roads. The letter does not say that the road in issue terminates at the end of that plot.
  - d. That further to (c) above, the petitioners have not set out the particulars of the irreparable loss that they are likely to suffer if the order they seek is not granted. That while there is no doubt the court is with jurisdiction in appropriate cases to consider issuing a conservatory order of injunction even where damages would otherwise suffice, the applicant(s) must first show that the respondent(s) have been high handed or oppressive towards them. It is only when the applicant(s) discharges that duty that the dicta in the case of *Waitbaka versus Industrial & Commercial Development Corporation* (2001) KLR 374 may come to their aid. The petitioners herein have not shown any high handedness or aggression from the respondents towards them. The letter written to them dated the 30<sup>th</sup> December 2020 cannot be said to be evidence of aggression or high handedness especially in view of the explanation in the replying affidavit that it was done after investigations prompted by the letter dated 27<sup>th</sup> October 2020 by one Paul Kariuki Njoroge. The petitioners have therefore failed on the second test.
  - e. That on the third test of balance of convenience, the court agrees with the 1<sup>st</sup> respondent’s position that the petitioners have as of now not shown that the necessary approvals had been sought and obtained before erecting the developments especially the wall that blocked the road of access. Even though the court is not expected to make final findings at this interlocutory



stage due to the limited evidence before it, the balance of convenience tilts towards not issuing the conservatory order of injunction.

f. That though the petitioners have failed in their application, the court finds this to be an appropriate case whether the costs of the notice of motion should abide the outcome of the petition.

7. That flowing from above, the court finds and orders as follows;

a. The notice of motion dated the 1<sup>st</sup> March 2021 is without merit and is hereby dismissed.

b. The costs of the application to abide the outcome of the petition.

c. The interim order issued on the 4<sup>th</sup> March 2021 be and is hereby vacated.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Petitioners: Absent

Respondents : Absent

Counsel : M/S Okumu for Magolo for Petitioners

