



Mutune & 700 others v Westend Buthery Limited & another (Environment & Land Case E002 of 2024) [2025] KEELC 1402 (KLR) (19 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E002 OF 2024**

**A NYUKURI, J
MARCH 19, 2025**

BETWEEN

BONIFACE KIOO MUTUNE & 700 OTHERS PLAINTIFF

AND

WESTEND BUTHERY LIMITED 1ST DEFENDANT

MA KHAN ADVOCATES 2ND DEFENDANT

RULING

1. Before court are two applications, both filed by the plaintiffs, being applications dated 17th January, 2024 and 10th February, 2024.

Application dated 17th January, 2024

2. In the application dated 17th January, 2024, the plaintiff sought the following orders;
 - a. That this application be certified urgent.
 - b. That a temporary order of injunction be issued against the Defendants/Respondents, their assigns, successors, representatives and accomplices from selling transferring, or dealing with the suit property parcel L.R. NUMBER 7149/203 or any of its subdivisions if any, in any way until the application herein is heard and decided.
 - c. That an order of injunction be issued against the Defendants/Respondents, their assigns, successors, representatives and accomplices from selling, transferring, or dealing with the suit property parcel number L.R NUMBER 7149/203 or any of its subdivisions if any in any way until the main suit herein is heard and decided.
 - d. That the costs of this application be borne by the Respondents.



3. The application is predicated on the Supporting affidavit sworn by Boniface Kioo Mutune the 1st plaintiff. The applicants' case is that the plaintiffs have acquired adverse possession interest in respect of LR. Number 7149/203 and in 2016, they filed adverse possession cause No. 52 of 2016. That the Respondent filed another suit in 2017 despite being aware of the suit filed in 2016. That the two suits were compromised so that the respondent was to sell the suit property and pay the applicants Kshs. 700,000,000/= . That the sale did not materialize and that although the applicants' homes had been affected, they continued in the occupation thereof.
4. They complained that they had realized that the applicant was in the process of secretly selling the suit property without the applicants' knowledge with intention to relocate to the United Kingdom. That the respondent now claims that they are unaware of the applicants' claim and if they are to give them anything the same would be a token at their discretion from demolishing their structures. They lamented that it was clear that the respondent had reneged on a consent order filed in court. They stated that the process of sale was at an advanced stage as the respondent had already received 10% of the deposit. They attached consent in ELC 434 of 2017, offer letter from an alleged prospective purchaser and a letter from their advocate.
5. Although the 1st respondents counsel indicated in their submissions dated 28th October 2024 filed in court, that they filed grounds of opposition and preliminary objection dated 30th January, 2024, the record and the CTS show that the said documents were never filed. Maureen Alosa Oningo, counsel for the 1st respondent filed replying affidavit dated 24th April, 2024 and stated in paragraph 7 thereof that they intended to file the grounds of opposition and preliminary objection on 30th January, 2024 but were unable to do so because the file was in the judge's chambers and the matter had been scheduled for mention on 31st January, 2024. In the said affidavit, counsel also deponed that the plaintiff and their counsel failed to comply with this court's orders made on 31st January, 2024 that required them to file and serve the documents/exhibits referred to in their plaintiff's supporting affidavit to the application dated 17th January, 2024, despite being reminded by counsel for the 1st defendant.
6. In addition, one Mohammed Ali filed replying affidavit on behalf of the 1st defendant and stated that the 1st defendant was owner of the suit property and that plaintiffs had trespassed thereon leading to their filing of Machakos ELC Case No. 434 of 2017. That parties signed a consent dated 19th June, 2019 marking the matter as settled and that the plaintiffs agreed to demolish their structures in 14 days, which they did. That the 2nd defendant herein gave a professional undertaking in that suit for payment of Kshs. 700,000,000/= to the plaintiffs without instructions and authority of the 1st defendant but that the 1st defendant had promised to give a token of appreciation to the plaintiffs for agreeing to vacate the suit property. That the token was to be given after sale of the suit property which had not been done.

Notice of Motion dated 10th February, 2024

7. In the Motion dated 10th February, 2024, the applicant sought for a temporary injunction to restrain the respondents and their assigns and successors from settling on or dealing in LR Number 7149/203 or any of its subdivisions until the said application is heard and decided. They further sought costs. As the prayers sought in that application were to be granted pending hearing and determination of the application, it is my view that at this stage the application is spent and there is nothing pending for this court's consideration.
8. That then only leaves the application dated 17th January, 2024 for determination. Therefore, the only issue that arise for this court's determination is whether the applicants have met conditions for grant of temporary injunction.



Analysis and determination

9. The court having carefully considered the application herein, and the response thereto, the only issue that arise for determination is whether the plaintiff has met the threshold for grant of orders of temporary injunction.
10. Order 40 Rule 1 of the Civil Procedure Rules grants this court the jurisdiction to grant orders of temporary injunction where an applicant demonstrates that the disputed property is at risk of being wasted, damaged, alienated, wrongly sold in execution of a decree or the defendant threatens or intends to remove or dispose it in circumstances that would create the probability of the plaintiff being obstructed or delayed in execution of a decree that may ultimately be passed in his or her favour.
11. Conditions for grant of temporary injunction are well settled. An applicant for temporary injunction must demonstrate a prima facie case with chances of success; demonstrate that he or she stands to suffer irreparable injury that may not be compensated in damages and where the court is in doubt, it shall decide the application on a balance of convenience (See *Giella v. Cassman Brown* [1973] EA 358.)
12. In the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) (2014) eKLR the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
13. In the instant case, the applicant’s case is that they have a consent order issued in ELC case No. 434 of 2017 to the effect that the suit property was to be sold so that they are paid a sum of Kshs. 700, 000, 000/=. It is apparent that the applicants have decided to file this suit for purposes of executing an order made in Machakos ELC No. 434 of 2017.
14. Section 34 of the [Civil Procedure Act](#) bars this court from entertaining a claim meant to execute an order made in another suit and provides as follows;

Questions to be determined by court executing decree
 1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
15. Therefore, the applicants can move the court in the matter where the consent for their compensation of Kshs. 700 Million was recorded and execute the same, in the usual manner provided for by law, but they cannot lawfully enforce that consent through a fresh suit. Thus, this court has no jurisdiction to hear and determine this suit in so far as the same seeks to execute an order made in Machakos ELC No. 434 of 2017.



16. In the premises, I find and hold that this court lacks jurisdiction to hear and determine the application dated 17th January 2024 as well as this suit. Consequently, I hereby strike out the application dated 17th January 2024 with costs for want of jurisdiction.

17. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 19TH DAY OF MARCH, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Alosa holding brief for Mr. Makori for the Defendants/Respondents

Mr. Mwabosa holding brief for Mr. Mc'Owade for the plaintiffs/applicants

Court Assistant: M. Nguyai

