



**Omuya & 4 others v Nawel Business Agencies & 6 others; Nairobi City
County & 2 others (Interested Parties) (Environment & Land Case
E141 of 2023) [2023] KEELC 2022 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 2022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E141 OF 2023**

**JO MBOYA, J
SEPTEMBER 28, 2023**

BETWEEN

**JACOB ANUNDA OMUYA 1ST PLAINTIFF
MARGARET MOKEIRA ORUKO 2ND PLAINTIFF
JANE KHASHINDU IMBWAGA 3RD PLAINTIFF
CALEB GICHANA 4TH PLAINTIFF
LIVUTWA (LIBERTY VILLA UTAWALA WELFARE ASSOCIATION)
COMPANY LIMITED 5TH PLAINTIFF**

AND

**NAWEL BUSINESS AGENCIES 1ST DEFENDANT
LIBERATTA N KAMARU CHAIRPERSON NAWEL BUSINESS
AGENCIES 2ND DEFENDANT
ALICE WAMBUI MWANGI SECRETARY, NAWEL BUSINESS
AGENCIES 3RD DEFENDANT
CATHERINE N MBUGUA TREASURER, NAWEL BUSINESS
AGENCIES 4TH DEFENDANT
LUCY WANJIRU NJONJO MEMBER, NAWEL BUSINESS
AGENCIES 5TH DEFENDANT
MITH MBAE T/A MBAE SURVEYORS 6TH DEFENDANT
JN NYAKUNDI LAND REGISTRAR NUMBER 221 7TH DEFENDANT**

AND

NAIROBI CITY COUNTY INTERESTED PARTY



RULING

Introduction And Background

1. The Instant Application has been filed by the various Plaintiffs/Applicants herein, who contend to have entered into and executed lawful sale/purchase agreements with the 1st to the 5th Defendants, respectively, relating to and touching on LRNo. 6845/182, situate within Utawala Area, within the City of Nairobi.
2. Furthermore, the Applicants have contended that upon entering into and executing the sale/purchase agreements, the 1st to 5th Defendants/Respondents proceeded to and sub-divided the suit property into various plots, which were thereafter (sic) transferred to and registered in the names of the various Plaintiffs/Applicants.
3. Nevertheless and despite having acquired lawful interests over and in respect of various plots, arising from the suit property, the Applicants herein now contend that the purported registration in their favor and which were undertaken at the instance of the 1st to 5th Defendants/Respondents, appear to be fictitious and phony. In this regard, the Applicants are therefore apprehensive that the 1st to 5th Respondents, may alienate and/or dispose of Plots which (sic) lawfully belong to same.
4. Arising from the foregoing, the Plaintiffs/Applicants herein have filed and/or lodged before the Honourable court the Application dated the 19th May 2023; and in respect of which same have sought for the following reliefs; (verbatim)
 - i. Spent.
 - ii. Pending the hearing and determination of this Application, an order of Temporary Injunction be and is hereby issued restraining the Respondents by themselves, servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienating, dealing, disposing, trespassing and/or in any other manner interfering with the Plaintiffs and their members quiet use, occupation and possession of all those parcel of land known as LRNo. Nairobi/Nairobi/6845/182.
 - iii. Pending the hearing and determination of this Application, an order of Temporary Injunction be and is hereby issued restraining the Respondents by themselves, servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienating, dealing, disposing, trespassing and/or in any other manner interfering with the Plaintiffs and their members quiet use, occupation and possession of all those parcel of land known as LRNo. Nairobi/Nairobi/6845/182.
 - iv. That this Honorable court be pleased to order the Defendants to file in this court the mutations for subdivisions of LRNo. Nairobi/Nairobi/6845/182; and the subsequent area list and acreage for each and the official searches for all the 57 title issued to some of the Applicants together with map/sketch plan of the area.
 - v. [Blank]



- vi. Any other order or relief that this court may appear just and expedient to grant in the circumstances of this case.
5. The instant Application is premised and anchored on various grounds, some of which are omnibus. Furthermore, the Application is supported by the affidavit of one, Caleb Gichana sworn on the 19th May 2023; and to which the Deponent has annexed a total of 6 documents; in support of the Application.
6. Upon being served with the Application, the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants, duly entered appearance and thereafter filed Grounds of opposition dated the 16th June 2023. Additionally, the 1st necessary Party also filed Grounds of opposition dated the 20th June 2023; and in respect of which, same has contended inter-alia that the suit against the 1st necessary Party does not disclose any reasonable cause of action or at all.
7. Instructively, the subject Application first came up for hearing on the 6th June 2023; on which date, it turned out that Learned counsel for the Applicant had not served all the Defendants/Parties, in the matter and thus it became necessary to order and/or direct that the Plaintiffs/Applicants do reserve the pleadings upon all the Parties.
8. Subsequently, the matter came up before the court on the 26th June 2023, on which date it transpired that there were two sets of Application(s) dated the 19th May 2023; one set, filed by M/s Fredrick Odigo & Co Advocates, whilst the other one was filed by the firm of M/s Omariba & Company Advocates, for the same set of Plaintiffs.
9. First forward, arising from the confusion caused and created by the two named advocates for the same set of Plaintiffs, it became necessary to issue appropriate directions and in this regard, Learned counsel for the Plaintiffs' sought for and obtained Leave of the court to have the Application dated the 19th May 2023, filed by M/s Omariba & Company Advocates to be struck out from the record of the court.
10. Thereafter, the court proceeded to and issued directions for the filing and exchange of written submissions by the Parties. In this regard, the court circumscribed the timelines for the filing and exchange of written submissions.
11. Unfortunately and despite indulgence being granted to learned counsel for the Plaintiffs/Applicants to file and serve written submissions, none were served between the 21st June 2023 up to and including the 21st September 2023. Consequently, the court ordered that the matter shall now be reserved for the delivery of the Ruling; and the Plaintiffs/Applicants were prohibited from filing written submissions.

Depositions By The Parties:

A. Applicants' Case:

12. The Applicants' case is premised and/or anchored on the supporting affidavit sworn on the 19th May 2023; and wherein the deponent has averred inter-alia that the various Plaintiffs/Applicants entered into and executed sale/purchase agreements with the 1st to 5th Defendants, pertaining to and/or concerning the property otherwise known as LRNo. Nairobi/Nairobi/6845/182, (hereinafter referred to as the suit property).
13. Furthermore, the deponent herein has averred that arising from the sale/purchase agreement, details in terms of the preceding paragraph, the 1st to 5th Defendants proceeded to and sub-divided the suit property into various plots, which were thereafter transferred to and registered in the names of the various Plaintiffs/Applicants.



14. Additionally, the deponent has contended that upon the transfer and registration of the various plots to and in favor of the Plaintiffs/Applicants, same were issued with certificate of titles, apparently denoting that the Applicants herein now owned their respective plots.
15. Be that as it may, the deponent has averred that despite having been issued with the certificate of titles, same later on discovered that the certificate of titles that had been issued to and in their favor, at the instance of the 1st to the 5th Defendants, were apparently fictitious and phony.
16. Arising from the foregoing, the deponent contends that there is now a likelihood of the 1st to the 5th Defendants, re-surveying, alienating, selling and/or disposing the various plots, which however had hitherto been sold to and in favor of the various Plaintiffs/Applicants.
17. In view of the foregoing, the deponent now contends that in the event that the 1st to the 5th Defendants/ Respondents are allowed to alienate, sale and/or dispose of the various plots, which had previously been sold to the Applicants herein, then the Applicants shall be disposed to suffer irreparable loss.
18. Based on the foregoing averments, the deponent has implored the Honourable court to find and hold that the current Application is meritorious and thus ought to be granted, with a view to preserving and/or conserving the status of the suit property; and by extension the various Plots.

B. 1st To The 6th Defendants/respondents' Case:

19. The named Respondents filed Grounds of opposition dated the 16th June 2023; and in respect of which, same have contended inter-alia that the current suit has been filed before a court without the requisite Jurisdiction. In this regard, the named Respondents have cited and invoked the provisions of Section 9 of the *Magistrate's Court Act*, 2015.
20. Secondly, the named Respondents have also contended that the instant suit together with the Application attendant thereto, are vexatious and amount to an abuse of the Due process of the court. Consequently and in this regard, the named Respondents have therefore implored the court to dismiss the Application.

C. Response By The 1st Necessary Party:

21. The 1st Necessary Party has filed Grounds of opposition dated the 20th June 2023; and in respect of which same has contended inter-alia that the Plaintiffs herein, have neither demonstrated nor shown the interests and/or involvement of the 1st Necessary Party in the transactions affection the suit property.
22. Additionally, Learned counsel for the 1st Necessary Party has also contended that the entire suit, as well as the Application beforehand do not and/or otherwise demonstrate a reasonable cause of action as against the 1st Necessary Party, to warrant the joinder and/or inclusion of the 1st Necessary Party in the matter.
23. Arising from the foregoing, the 1st Necessary Party has therefore implored the court to find and hold that her joinder in respect of the subject matter, is not only made in bad faith, but same reeks of mala fides. Consequently and in this regard, the 1st Necessary Party has pleaded with the court to strike out and expunge her name from the pleadings herein.



Issues For Determination

24. Having reviewed and analyzed the instant application, as well as the various Responses thereto; and upon consideration of the averments made on behalf of the Plaintiffs/Applicants, the following issues do emerge and are therefore necessary for determination;
- i. Whether the Plaintiffs/Applicants herein have any reasonable cause of action and/or claim, whatsoever against the 1st Necessary Party.
 - ii. Whether the Application for Temporary Injunction as sought in the body of the Application are Legally tenable or otherwise.
 - iii. What reliefs, if any, ought to be granted in the circumstances of this case.

Analysis And Determination

1. Whether the Plaintiffs/Applicants herein have any reasonable cause of action and/or claim, whatsoever against the 1st Necessary Party.

25. From the pleadings filed by and on behalf of the Plaintiffs/Applicants (and I must confess that there are two sets of Plaints both dated the 13th April 2023, albeit by different law firms) and upon reviewing the contents of the supporting affidavit, what emanates from the said pleadings and the averments alluded to, is to the effect that the Plaintiffs entered into and executed sale/purchase agreements with the 1st to 5th Defendants/Respondents and not otherwise.
26. Additionally, it is also important to underscore that the Applicants have contended that upon entry into and execution of the sale/purchase agreements, the 1st to 5th Defendants/Respondents, proceeded to and (sic) undertook sub-division of the suit property, culminating into the creation of various and/or numerous Plots.
27. Furthermore, the Applicants have contended that thereafter the plots in question, which arose from the suit property were lawfully transferred to and registered in the names of the various Plaintiffs albeit at the instance of the 1st to the 5th Defendants/Respondents herein.
28. Nevertheless, even though the Applicants herein appear to have been issued with (sic) certificates of titles over and in respect of the various plots, created out of the suit property; the Applicants averred that it later on turned out that the certificates of titles issued to and in their favor, appeared to be fictitious and in any event non-existent .
29. Having made the foregoing observations, the question that needs to be addressed and resolved, with a view to determining the issue herein is whether the 1st Necessary Party was involved in the sale, survey, subdivision and subsequent transfer and registration of the various plots in favor of the Applicants herein, which are the subject of the instant proceedings.
30. Clearly, the 1st Necessary Party herein is a creature of the *constitution*, 2010; and by extension the *County Government Act*, 2012, and her mandate is well delineated. For good measure, the 1st Necessary Party is not involved in the survey, transfer and registration of the properties, which process is the preserve of the office of the Director of Survey and Chief Land Registrar, respectively.
31. Further and in any event, it is not lost on the court that even the Applicants herein have not adverted to and/or laid any accusation against the 1st Necessary Party, as pertains to any action and/or omission, over and in respect of the impugned transactions giving rise to the subject suit.



32. In the absence of any allegations and/or averments against the 1st Necessary Party, the question that it is worthy of determination is thus; why has the 1st Necessary Party been impleaded and/or joined in respect of the instant matter.
33. In my humble view, a Party can be impleaded and/or joined either as a Principal Party or otherwise, provided that the Applicant can show that same has a cause of action against the impleaded Party; or, if an Interested/Necessary Party, then the Applicant must show that the presence of such a Necessary Party is paramount to the effectual and effective determination of the dispute beforehand.
34. However, where a Party is impleaded and/or joined, whether as Interested Party or Necessary Party, but her presence is not necessary and/or paramount to the determination of the issues in dispute, then such a Party must be excluded from the proceedings and be saved from incurring unnecessary legal costs in defending the suit.
35. To my mind, the 1st Necessary Party herein has no role and/or interests in the actions and/or omissions, giving rise to the subject suit and thus her continued involvement and participation in the subject proceedings, shall only engulf the same with unnecessary legal costs/expenses.
36. Additionally, it is not lost on this court that the funds/resources to be expended by the 1st Necessary Party in paying the Legal counsel and meeting the incidental expenses, shall be borne out of public resources allocated to same. Surely, such resources ought to be utilized and/or appropriated in such endeavors, that shall better the lives of the people of the City County of Nairobi and not otherwise.
37. Consequently and in this regard, it is my humble view that the inclusion of the 1st Necessary Party in a matter where same played no role in respect of the impugned transactions, serves no useful purpose; save for vexing same, which ought not to be countenanced.
38. In this regard, I therefore come to the conclusion that the joinder of the 1st Necessary Party in the subject matter, was informed by a misconception and misapprehension of the impugned actions and thus the name of the 1st Necessary Party be and is hereby struck out and expunged from the proceedings.

2. Whether the Application for Temporary Injunction as sought in the body of the Application are Legally tenable or otherwise.

39. The Plaintiffs/Applicants herein have filed the instant Application and thereby alluded to and enumerated the various reliefs that are sought thereunder.
40. As concerns the prayer for Temporary Anjunction, which have been enumerated in terms of prayers 2 and 3 of the application; it is important to point out that both aspects of the prayers of temporary injunction relates to the intervening period pending the hearing and determination of the application and not otherwise.
41. Instructively, the Plaintiffs/Applicants herein have neither sought for nor impleaded any substantive prayer for temporary injunction to issue pending hearing and determination of the suit. In this regard, it must be stated that the court must therefore confine itself to the reliefs sought by the Applicants and not otherwise.
42. Furthermore, there is no gainsaying that Parties are bound by their pleadings and that no relief and/or prayer can be granted unless same has been captured and/or reflected in the body of the pleadings filed. See Order 2 Rule 6 of the *Civil Procedure Rules, 2010*.



43. Additionally, I beg to underscore that the kind and nature of temporary injunction sought and/or contained in the body of the Application, are those which will automatically abort and/or abate immediately the court renders a ruling and determines the subject Application.
44. Consequently and in the premises, I ask myself as to what then shall happen ex-post the delivery of the Ruling. Clearly and with due respect, the manner in which the current Application has been crafted and worded is wanting and thus negates the issuance and/or grant of any substantive reliefs by the Honourable court.
45. In my humble view, Learned counsel for the Applicant ought to have seized the requisite moment and/or opportunity to remedy the defects on the face of the Application by seeking for and obtaining leave to amend; but no such endeavor was assumed and/or undertaken, prior to the Application being canvassed.
46. Having not pursued the question of amendment of the impugned Application, this court is left with the application in its current state and/or status and thus no order of Temporary Injunction can issue, say, pending the determination of the Application, because same will serve no purpose.
47. For coherence, courts of law do not issue orders in vanity and/or in futility; and in this regard, the issuance of a temporary injunction pending the determination of the application, shall certainly be an exercise in futility.
48. In a nutshell, my answer to issue Number two (2) is that no appropriate reliefs have been impleaded and/or sought; and given that Parties are bound by their pleadings, this court cannot issue a relief that has neither been impleaded, nor sought for by the Applicants.
49. To buttress the foregoing position, it is appropriate to adopt and reiterate the elaborate holding by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another versus Stephen Mutinda Mule & 3 others* [2014] eKLR, where the court stated and observed as hereunder;

“The Present Importance of Pleadings.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.

Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”



3. What Reliefs, if any, ought to be granted in the circumstances of this case.

50. The Applicants herein have sought for a plethora of reliefs at the foot of the Application. However, whilst discussing issue number two herein, I have pointed out that the nature of temporary injunction sought are such that same would automatically cease and/or become redundant automatically upon rendition/ delivery of this ruling.
51. Furthermore, I have found and held that courts of law do not issue and/or grants orders whose import and tenor, lapse and/or extinguish immediately upon proclamation. Certainly such a situation would render the impugned order to be in vain and/ or futility.
52. In the premises, I have held and I do hereby reiterate that the Plaintiffs/Applicants have not properly impleaded the requisite orders for temporary injunction and in this regard none can be issued and/or granted, albeit without breaching/ violating the Doctrine of Departure.
53. Secondly, the other reliefs that have been sought by the Applicants herein relates to and concern an order directing the 1st to the 5th Defendants/Respondents to file in court mutation for sub-division of the suit property; subsequent area list and also official searches, (sic) of all the 57 titles arising from the suit property.
54. In respect to the said prayer, my answer is two-fold. Firstly, the said prayer is a substantive relief and to the extent that same is a substantive relief, it can only be issued at the tail- end, if any, after the plenary hearing; and in any event, upon proof that indeed the Applicants herein have a legitimate stake and/ or interests in the named plots.
55. To my mind, the relief for filing and/or depositing the impugned Mutation, together with the incidental Documents, (some of which should be obtained from the Land Registry), with the court has therefore been made pre-maturely and in any event, in vacuum.
56. Secondly, it is worthy to note that the impugned prayer though curiously worded, strikes me as a prayer for provision of Documents and Information under the custody and/or possession of a Third Party and which, the Applicants herein intend to rely on to propagate their claim before the Honourable court.
57. Insofar as the prayer relates to the right to Information, which is underpinned by Article 35 of the [Constitution](#) 2010; it was therefore incumbent upon the Applicants herein to satisfy the court that same have since complied with the explicit and mandatory provisions of [Access to Information Act](#), 2016 Laws of Kenya.
58. Fundamentally, any Applicant seeking to procure and obtain information and/or document under the custody of Third Party, the Applicant herein not excepted, are obligated to write to the custodian of the documents in question first and foremost; pay the charges, if any, required and in the event of failure, approach the Honourable court for remedy.
59. Nevertheless and despite the very elaborate process, contained and stipulated under the provisions of the [Access to Information Act](#) 2016, there is no intimation in the entire body of the application and the supporting affidavit, that the Applicants herein have made any efforts towards complying with the provisions of the named Act.
60. Consequently and in the circumstances, it is my humble view that the prayer for compelling the 1st to 5th Defendants to file the alleged documents, is certainly pre-mature and in any event, contravenes the provisions of the [Access to Information Act](#), 2016.



61. Finally, despite the fundamental defects and the poor draft-manship evident in the crafting of the Application, there is the averment by the Applicants that the suit plots were subsequently transferred to and registered in their names. However, the Applicants have contended that despite having been issued with the impugned certificate of title, same now appear to be fictitious and in any event, non-existent.
62. Furthermore, the Applicants have adverted to a position that the Defendants herein and more particularly, the First to the Fifth Defendants, are keen to re-alienate and re-sell the plots afresh. In this regard, the Applicants are apprehensive that same shall suffer loss of their plots.
63. Arising from the foregoing, conventional wisdom demands that this court be pleased to intervene, even though the pleadings placed before the court are wanting. In any event, the provisions of Section 13(7) of the *Environment and Land Court Act*, 2011; bestow upon the court wide mandate and discretion, to grant inter-alia orders of status quo, for purposes of preserving the Disputed, where appropriate.
64. Borrowing from cited provisions of the Section 13(7) of the *Environment and Land Court Act*, 2011; and taking into account the inherent Jurisdiction of the court, whose scope and tenor was elaborated upon by the Supreme Court in the case of *Narok County Government versus Livingstone Kunini Ntutu* (2018) eKLR; I am minded to decree an order of status quo, to conserve and preserve the suit property in its current state, pending the determination of the suit.

Final Disposition:

65. Having addressed and considered the thematic issues that were itemized in the body of this Ruling, it is now appropriate and mete to proclaim the Final and Dispositive orders.
66. Consequently and in view of the foregoing, I make the following orders;
 - i. The Application dated the 19th May 2023; be and is hereby dismissed.
 - ii. The name of the 1st Necessary Party be and is hereby expunged and struck out from the proceedings.
 - iii. The costs incurred by the 1st Necessary Party so far shall be borne by the Plaintiffs/Applicants herein.
 - iv. Nevertheless and in the interests of justice, an order of status quo be and is hereby issued to preserve and conserve the suit property, namely, Nairobi/Nairobi/6845/182 and the resultant Plots, in their current status pending hearing and determination of the suit.
67. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023.

**OGUTTU MBOYA,
JUDGE.**

