



**Ethics Anti-Corruption Commission v Mutua (as Administrator Ad Litem of Peter Kasyoka Mutua - Deceased) & 2 others (Environment & Land Case E086 of 2022) [2023] KEELC 21256 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21256 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E086 OF 2022  
MD MWANGI, J  
OCTOBER 31, 2023**

**BETWEEN**

**ETHICS ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**NICHOLAS MUTINDA MUTUA (AS ADMINISTRATOR AD LITEM OF PETER KASYOKA MUTUA - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**IKIBBI LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

*(In respect of the Plaintiff's application dated 1st March, 2022)*

**RULING**

**Background**

1. The plaintiff filed the application under consideration by way of a notice of motion dated 1st March 2022 expressed to be brought under order 40 rules 1, 4 and 10 and order 51 rule 1 of the [Civil Procedure Rules](#), as well as section 3A of the [Civil Procedure Act](#).
2. The Plaintiff is seeking an injunction order to restrain the 2nd Defendant whether by itself, its agents, servants and/or employees or any other person whomsoever from alienating, wasting, transferring, disposing or in any other way dealing with title Number L.R. No. 1/1085 (Original No. 1/210/1).
3. The application is premised on the grounds on the face of it and the Supporting Affidavit of Dorothy Mnjala deponed on the 1st March, 2022. The deponent deposes that she is an investigator working with the Plaintiff and was a member of a team which conducted investigations concerning the allegation that Title Number LR No. 1/1085 (Original No. 1/210/1), the suit property, belonging to Kenya Railways Corporation had been irregularly acquired by unknown persons.



4. She avers that investigations revealed that one Percival Vincent Chance purchased the parcel of land being LR No. 1/210 on 27th May, 1949 from A.H.N Holden Limited at a consideration of Kshs. 6,000/=. By an Indenture dated 29th March, 1954, the Commissioner for Transport then purchased the parcel of land being LR No. 1/210 from Percival Vincent Chance at Kshs. 120,000/= and vested it in the then East African Railways Corporation (the predecessor in title of Kenya Railways Corporation). It is alleged that Title LR No. 1/210 was consequently subdivided into two parcels being LR No. 1/1085 and 1/1086.
5. The deponent alleges that the deceased, Peter Kasyoka Mutua (now represented by the administrator of his estate and sued as the 1<sup>st</sup> Defendant), being the Estate Manager of Kenya Railways Corporation illegally and fraudulently purported to transfer to himself the suit property vide a lease dated 30th December, 1989 at a consideration of Kshs. 74,000/=. Subsequently, the Lease over the suit property was issued on the 18th July, 1995 for a term of 99 years backdated to 1st May, 1989. The 1st Defendant thereafter transferred the Lease to himself on 6th April, 1995.
6. The deponent avers that on 21st October, 1998, the 1st Defendant executed a Sale Agreement in favour of the 2nd Defendant at a consideration of Kshs. 5,000,000/=. Vide an indenture dated 8th March, 1999, the 1st Defendant transferred the leasehold interest in the suit property to the 2nd Defendant at a consideration of Kshs. 5,000,000/=.
7. The deponent accuses the 1st Defendant of illegally and fraudulently signing a consent to himself in respect of the Lease and the Indenture to the 2nd Defendant without the Corporation's approval. She states that the transfers were fraudulent as the land was public land for use by Kenya Railways Corporation hence it was not available for alienation/transfer to the 1st Defendant.
8. The Plaintiff contends that the 2nd Defendant is in the process of transferring the suit property to a third party. The deponent exhibits among other documents a copy of a 'Conveyance' from the 2nd Defendant to an entity known as 'La Safor Limited'.
9. It is on this basis that the Plaintiff submits that there is urgent need for an order of injunction to restrain the 2nd Defendant from dealing with the suit property so as to preserve it. According to the Plaintiff, the public on whose behalf it has brought this suit, will suffer irreparable loss and damage if the orders sought are not granted.

#### **1st Defendant's Replying Affidavit**

10. In response to the Plaintiff's application, the 1st Defendant, Nicholas Mutinda Mutua (the administrator of the estate of Peter Kasyoka Mutua), filed a Replying Affidavit sworn on 8th May, 2023 in opposition. He denies the allegations that the deceased illegally and fraudulently acquired a lease over the suit property in his favour. He avers that the deceased made an application to the Corporation seeking allocation of the suit property in 1987. The approval for the said allocation was issued on 27th October, 1987 by the Managing Director of the Corporation. He asserts that the allocation was a Leasehold interest with a tenure of 99 years, a stand premium of Kshs. 74,000/= and an annual rent of Kshs. 14,800/=.
11. The 1st Defendant contends that a Lease Agreement was subsequently drawn on the 30th December, 1989. The Board of Directors of the Corporation then approved the allocation on 20th April, 1994. Later, the Minister accorded his covering approval to the allocation. The Lease was then duly sealed in the presence of the Executive Chairman and Secretary who countersigned the Lease. Thereafter, a consent for the transaction was signed on 6th April, 1995.



12. The 1<sup>st</sup> Defendant asserts that the deceased executed the consent in his official capacity as the Estate Manager of the Corporation with due authority. The Lease was then lodged for registration on the 18th July, 1995.
13. The transfer of the lease to the 2nd Defendant was therefore legal as the allocation to the 1<sup>st</sup> Defendant had followed due process.
14. The 1st Defendant argues that the Plaintiff has not established a prima facie case with a probability of success. The 1<sup>st</sup> defendant having lawfully acquired the suit property had every right to transfer the suit property to the 2nd defendant. The Application by the plaintiff is an unjustifiable infringement of the 2nd respondent's right to property enshrined under article 40 of *the Constitution*.
15. He further asserts that the alleged Conveyance by the 2<sup>nd</sup> Defendant to a third party is not dated. In any event it indicates that it was entered into in 2018; 5 years have since lapsed after the alleged conveyance was executed. There is no imminent risk of the suit property being transferred as claimed.
16. He argues that the court can order for a cancellation and revocation of any transaction should the court eventually determine this suit in favour of the Plaintiff. The balance of convenience lies in favour of the 2nd Respondent, being the lawful proprietor of the suit property. The Plaintiff's application should therefore be dismissed with costs to the Respondents.

### **2nd Defendant's Replying Affidavit**

17. The 2nd defendant on its part opposed the application vide the replying affidavit of Thumbi Kamau, one of its directors, deposed on the 10th May, 2022.
18. The deponent alleges that Kenya Railways Corporation had power under section 14 (4) to convey, transfer or surrender any surplus land by a conveyance or a deed of surrender with or without consideration. As such, the Lease to the deceased was legally processed as it was signed by Executive Chairman of the Board of the Corporation.
19. The deponent avers that the 2nd Defendant was even given a consent to construct a building worth Kshs. 12,000,000.00. The suit premises have however, been wrongfully locked by the Plaintiff together with all the furniture inside and other office equipment without any notice to the 2<sup>nd</sup> Defendant.
20. He contends that the Plaintiff already has in its custody the title documents of their company. Therefore, there is no danger of alienation of the property while this suit is ongoing. The 2nd Defendant suggests that they be allowed to access and remain in the suit premises. In any event, there can be no alienation of the Lease without the consent of the Corporation as the Head-lessor.
21. The deponent asserts that as a Lease holder who has no land rent arrears and for a property which the corporation has no immediate use of, there is no illegality committed by them or the 1st Defendant who sold the land to them. Granting the injunction at this point in time will only cause more sufferings to an innocent party yet there is no danger of alienation of the suit property.
22. Allowing the Defendants to remain in the suit premises while the case is ongoing will not cause any prejudice to the Plaintiff. The 2nd Defendant should therefore be allowed to re-occupy the suit premises pending the determination of the suit.

### **Court's Directions**

23. With the agreement of the parties, the court directed that the application be dispensed with by way of written submissions. The parties complied.



## **Plaintiff/Applicant's submissions**

24. The Plaintiff in its submissions dated 20th July, 2023, identifies 4 issues for determination. The first issue being whether the Applicant has demonstrated a prima facie case with a probability of success. Citing the case of *Mrao -vs- First American Bank of Kenya Limited* (2003) eKLR, the Plaintiff avers that it has demonstrated a prima facie case with a probability of success as the suit property is public land which ought to revert to the Corporation.
25. The Plaintiff submits that the 1st and 2nd Defendants infringed on a public right that calls for an explanation or rebuttal from them. The suit property is public land belonging to Kenya Railways Corporation which was illegally and fraudulently acquired by the deceased, Peter Kasyoka, the then Estate Manager of the Corporation. The deceased could therefore not pass a good title to the 2nd Defendant.
26. The second issue is whether the Applicant shall suffer irreparable injury which cannot be compensated by damages if the orders sought are not granted. The Plaintiff asserts that if the orders sought are not granted, the 2nd Defendant will proceed with the intended transfer. The Applicant will have to move court to sue the subsequent purchaser(s). Granting of the orders sought will be in line with the doctrine of lis pendens and the principle that litigation must come to an end.
27. As for the third issue, 'balance of convenience'; the Applicant submits that the balance of convenience tilts in favour of granting the injunctive orders sought. The inconvenience to be suffered by the Applicant if the orders sought are not granted outweighs any hardships that the 2nd Defendant will suffer if the orders sought are granted. Public interest in the land outweighs the 2nd Defendant's private interest in the suit property. Issuance of the orders will also protect third parties from the risk being duped into acquiring the public land.
28. Finally, on whether it is in the public interest to grant the interlocutory orders, the Applicant submits that it is in the public interest that the orders sought be granted to safeguard the public interest in the suit land. The 2nd Defendant should therefore be restrained from transferring or charging or in any way dealing or disposing the suit land.

## **1st Defendant's submission**

29. According to the 1st Defendant's submissions dated 6th September, 2023, the only issue for determination is whether the Plaintiff has satisfied the requirements for the grant of an interlocutory injunction. The 1st defendant cites the provisions of order 40 rule 1 of the *Civil Procedure Rules*, 2010. On prima facie case, the 1st Defendant submits that it is not in dispute that the Applicant is not the registered owner of the land. The Applicant has no legal title nor beneficial interest in the land. The Applicant is not in possession of the suit land either. It will therefore be unfair for the Plaintiff to prevent the lawfully registered owner of the land from dealing with their land as they please.
30. On the second limb of irreparable injury, the 1<sup>st</sup> Defendant submits that the Applicant has not shown which of its rights; whether legal or equitable that require protection by way of an injunction.
31. On the issue of balance of convenience, the 1<sup>st</sup> Defendant submits that in the event that the court eventually finds that the procedure to acquire and transfer the suit property was marred with irregularities, the court has the power to reverse such a transaction regardless of the bona fide purchaser doctrine. It is the 1<sup>st</sup> Defendant's position that the Plaintiff has failed to set-out a prima facie case that warrants this court's exercise of its discretion in the Plaintiff's favour. The application should therefore be dismissed with costs.



## 2nd Defendant's submissions

32. The 2nd Defendant in its submissions dated 9th October, 2023 aligns itself with the 1st Defendant's submissions on the issue of a prima facie case. The 2nd Defendant further submits that the original land; Land Reference Number 1/1085 was leased to the late Peter Kasyoka Mutua for a term of 99 years with effect from May 1989. The lease therefore has a residue of 65 years. The assignment of the suit property to the 2nd Defendant by the 1<sup>st</sup> Defendant was strictly in accordance with the provisions of the [Kenya Railways Act](#), cap. 397. The 2nd Defendant asserts that it remains the lawful lessee of the suit premises in spite of the illegal actions of the Kenya Railways Corporation of purporting to evicting them from the suit premises.
33. The second issue is whether the fears expressed by the Applicants are valid. The fear that the 2nd Defendant will sell the suit property is misinformed given that the 2<sup>nd</sup> Defendant cannot transfer, sublet or charge or part with possession without the Corporation's consent. No such consent to transfer has been sought as they have no intentions to transfer the suit property. The allegations by the Plaintiff are therefore baseless.
34. The 2nd Defendant further submits that the Applicant has not come to court with clean hands. The Kenya Railways Corporation ought to be made a party to the suit in order to state its role in the initial leasing of the property to the 1<sup>st</sup> Defendant.

## Issues and Determination

35. I have read and carefully considered the application, the rival affidavits and submissions made by the parties herein. The issues for determination in my opinion are;
  - a. Whether the Plaintiff's application has met the threshold for the grant of temporary orders of injunction sought.
  - b. Which orders should the court issue?

## Analysis and Determination

36. The guiding principles for the grant of orders of temporary injunction are well settled since the decision of *Giella Versus Cassman Brown* (1973) EA 358. The position has been affirmed in numerous decisions from Kenyan courts. 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) ally 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”.



37. The first question then must be whether the Plaintiff has established a prima facie case. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows:
- “a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
38. In the instant case, the Plaintiff, as I have stated elsewhere is a statutory body whose mandate empowers it, not only to commence investigations into allegations of unlawful and irregular acquisition of public property but also to institute court proceedings to recover such property. The court should therefore not treat the Plaintiff like any other entity or an individual in considering its application for an interlocutory injunction. It does not file suit on its own behalf, rather on behalf of the people of Kenya or in other words in public interest.
39. The Plaintiff has raised questions regarding the manner in which the 1st Defendant acquired the suit property before transferring it to the 2nd Defendant. The Plaintiff case is that the 1<sup>st</sup> Defendant acquired the suit property which, according to the Plaintiff, is public land owned by Kenya Railways Corporation, illegally. On the other hand, the 1st and 2nd Defendants have vehemently denied the accusations leveled against them.
40. There is no doubt that the Plaintiff will be required to prove its claim against the Defendants in accordance with the law during the main hearing of the suit. It is not the role of the court to determine whether or not the 1st and 2nd Defendants’ title was lawfully issued at this stage. However, the documents annexed to the Plaintiff’s application prima facie establish that there are serious questions that call for an explanation or rebuttal from the Defendants.
41. It is therefore my finding that the Plaintiff has demonstrated that it has a prima facie case with a probability of success against the Defendants.
42. Secondly, The Plaintiff is required to demonstrate that irreparable injury will be occasioned if the order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo –vs- Frank Kimeli Tenai* (2018) eKLR provides an explanation of the meaning of irreparable injury as follows;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
43. I agree in this regard with Plaintiff’s submissions and the decision in the case of *Kenya Anti-Corruption Commission vs. James Raymond Njenga & Another* Eldoret HCCC No. 61 of 2008 that the loss to the Kenyan public where land set aside for public use is taken away cannot be adequately remedied by an award of damages.
44. It has also been held that where there is a conflict between public interest and the private interest, the public interest must prevail. See *Susan Waithera Kariuki & 4 others vs. Town Clerk, City Council of Nairobi & 2 Others* (2011) eKLR. The balance of convenience therefore tilts in favour of granting the orders sought to ensure preservation of the suit property pending the final determination of this suit.



45. Accordingly, the plaintiff's notice of motion dated 1st March 2022 is allowed in the terms of the following terms:

- a. The 2nd Defendant be and is hereby restrained whether by itself, its agents, servants and/or employees or any other person whomsoever be from alienating, wasting, transferring, charging, disposing or in any other way dealing with title Number L.R. No. 1/1085 (Original No. 1/210/1) pending the hearing and determination of this suit.
- b. The costs of the application shall be in the cause.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Kisaka holding brief for Ms Maina for the Plaintiff/Applicant

No appearance for the Respondents (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>)

Yvette: Court Assistant

**M.D. MWANGI**

**JUDGE**

