



Munga & another v Bulkon Builders Limited & 3 others (Environment & Land Case 188 of 2018) [2023] KEELC 20997 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 188 OF 2018
NA MATHEKA, J
OCTOBER 26, 2023**

BETWEEN

OMAR MUGALA MUNGA 1ST PLAINTIFF

IDD NGALA 2ND PLAINTIFF

AND

BULKON BUILDERS LIMITED 1ST DEFENDANT

OCS BAMBURI POLICE 2ND DEFENDANT

DEPUTY COUNTY COMMISSIONER KISAUNI 3RD DEFENDANT

OCPD KISAUNI 4TH DEFENDANT

RULING

1. The application is dated 22nd May 2023 and is brought under 1A, 1B, 3A & 63 of The [Civil Procedure Act](#) and Order 40 Rule 3 of the Procedure Rules 2010 seeking the following orders;
 1. That this Application be certified urgent and service hereof be dispensed with in the first instance;
 2. That pending the hearing and determination of this application inter parties the Plaintiffs be ordered to immediately and in any event, within 7 days demolish all the temporary or permanent structures put up on the First Defendants property known as Plot No.322/I/MN, Utange in breach of this Honourable Court's Orders of the 28th October 2019 issued on 8th November 2019 and in default, the First Defendant be at liberty so to do under the supervision of the Deputy County Commissioner, Kisauni Sub-County and the OCPD Kisauni;
 3. That pending the hearing and determination of this application inter-partes the Plaintiffs and any other person claiming through or under them be arrested and committed to civil jail



forthwith in discharge and execution of this Honourable Court's Orders of the 28th October 2019 issued on 8th November 2019;

4. That the Plaintiffs' suit herein be dismissed and an Order be made that all structures built upon the 1st Defendant's property be demolished under the supervision of the Deputy County Commissioner, Kisauni Sub-County and the OCPD Kisauni;{
 5. That an Order be made in favour of the 1st Defendant on its Counter-Claim that regardless of the dismissal of the Plaintiffs' suit the Orders of this Honourable Court made on 28th October 2019 and issued on the 8th November 2019 continue to remain in force and be enforceable as against the Plaintiffs and/or anyone else claiming through or under them and it be granted the relief sought in the said Counter-claim;
 6. That the costs of this application and the suit be awarded to the 1st Defendants
2. It is based on the grounds that the 1st Respondent is the registered proprietor of the property known as Plot No.322/1/MN, Utange. That the 1st Defendant is and continues to remain in occupation of its aforesaid property and has had possession since it was purchased in September 2009. That the Plaintiffs herein are trespassers on the 1st Defendant's aforesaid property. That by its Order made on October 2019 and issued on the 8th November 2019 this Honourable Court restrained the Plaintiffs and/or anyone else claiming through them or under them from committing acts of waste and/or constructing or putting up or developing any structures whether permanent or temporary on the 1st Defendant's aforesaid property or trespassing thereon. That the Plaintiffs are abusing and have abused the process of the Court by deceitfully alleging that they have resided on the 1st Defendant's property over the last fifteen (15) years and that the 1st Defendant is not a proprietor thereof and thereby interfering with the 1st Defendant's quiet enjoyment of its property. That in fact and to the contrary the Plaintiffs continue to deliberately and deceitfully disregard the Orders of this Honourable Court and have breached and/or infringed on these by continuing their acts of trespass and building developments structures on the Plaintiffs aforesaid property. That the Plaintiffs have previously in this Honourable Court's ruling of the 26th July 2022, found to be in contempt of the Court's Orders. That the Plaintiffs have neither paid the fine nor been committed to civil jail in compliance of this Honourable Courts Orders in its aforesaid decision. Given the Plaintiffs' deliberate and wanton disregard for this Honourable Court's Orders and the rule of law it is only fair and just that they be found to be in contempt again and stringent penalties be imposed upon them including an Order that all the structures built, whether temporary or permanent be demolished forthwith immediately and in default the 1st Defendant be at liberty to do so under Police supervision. That no prejudice will be occasioned if status quo pertaining is maintained such that the 1st Defendant's use, occupation and/or development of its property is not interfered with in light of the clear evidence of the fact that the Plaintiffs are not in occupation of the 1st Defendant's property but rather are abusing the process of this Honourable Court under the guise of the exparte injunction to try and entrench on the property without any regard for the authority or dignity of this Honourable Court and its Orders or for the rule.
3. This court has considered the application and submissions therein. The application was not opposed. The 1st Defendant's application dated 22nd May 2023 is inter alia for an order that the Plaintiffs' suit herein be dismissed and an Order be made that all structures built upon the 1st Defendant's property be demolished under the supervision of the Deputy County Commissioner, Kisauni Sub-County and the OCPD Kisauni. that the 1st Defendant's counter claim be granted. On the 26th July 2022 this Court restrained the Plaintiffs and/or anyone else claiming through them or under them from committing acts of waste and/or constructing or putting up or developing any structures on the suit land. The



parties have never set this suit for hearing and until this application dated 22nd May 2023 almost one year later! It is not possible to determine what the status quo was on 26th July 2023. A mandatory/permanent injunction is ordinarily granted after a full hearing and when all the evidence has been adduced and all facts have been established.

4. In the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* (2018) eKLR it was held inter alia as follows;

...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

5. When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR when it rendered itself thus:

...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

6. For the foregoing reasons, I find that it would be premature for me to grant final orders at this interim stage in favour of the 1st Defendant. The Plaintiffs have raised the issue of being in occupation of the suit land for over 15 years. I find that the court had ruled on this matter before and the order still stands, consequently, I order that the status quo be maintained pending the hearing and determination of this suit. Parties are advised to comply with Order 11 and set the suit down for hearing on a priority basis and in any event within the next 30 (thirty) days. Costs of the application to be in the cause.
7. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF OCTOBER 2023.



N.A. MATHEKA
JUDGE

