



Muchelule & 18 others v National Land Commission & 3 others (Environment & Land Petition 20 of 2019) [2023] KEELC 22469 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 20 OF 2019**

JM ONYANGO, J

DECEMBER 18, 2023

**THE INFRINGEMENT ON THE FUNDAMENTAL RIGHTS AND FREEDOMS
OF THE PETITIONERS BY THE NATIONAL LAND COMMISSION VIDE
STANDARD NEWSPAPER ADVERTISEMENT OF 17TH JULY, 2018.**

**ALLEGED COMPULSORY ACQUISITION OF TITLE NO.S. BY OR
ON BEHALF OF THE COUNTY GOVERNMENT OF KAKAMEGA.**

**UNPROCEDURAL IMPOSITION OF RESTRICTIONS ON TITLE NO.S S/WANGA/
EKERO/4777, S/WANGA/EKERO/471, S/WANGA/EKERO/2378, S/WANGA/
EKERO/873, S/WANGA/EKERO/640, S/WANGA/EKERO/638, S/WANGA/EKERO/659,
S/WANGA/EKERO/652, S/WANGA/EKERO/1362, S/WANGA/EKERO/624, S/WANGA/
EKERO/476, S/WANGA/EKERO/470, S/WANGA/EKERO/620, S/WANGA/EKERO/756,
S/WANGA/EKERO/643, S/WANGA/EKERO/737, S/WANGA/EKERO/1557, S/WANGA/
EKERO/2204 AND S/WANGA/EKERO/714 BY THE CHIEF LAND REGISTRAR**

**ARTICLES 22, 23, 25, 27, 28, 35, 29, 40, 43, 47,50, 56
AND 57 OF THE CONSTITUTION OF KENYA, 2010**

SECTIONS 107 THROUGH TO 121 OF THE LAND ACT, NO. 6 OF 2012

SECTIONS 4, 5, 6 AND 12 OF THE FAIR ADMINISTRATIVE ACTONS ACT NO. 4 OF 2015

SECTION 4 OF THE ACCESS TO INFROMATION ACT, NO. 31 OF 2016

BETWEEN

MUSA NDALIRO MUCHELULE & 18 OTHERS PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT



RULING

1. By a Notice of Motion dated 20th February, 2023 and amended on 23rd February, 2023 the Petitioners/Applicants filed an application seeking the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this application this court be pleased to issue an injunctive order against the 2nd Respondent, her agents, servants and/or persons claiming through her and/or working on her behalf to stay the intended official opening of the modern Bus Park and Market located on land parcel number South/Wanga/Ekero/833 within the Mumias Triangle disputed area.
 - iii. That in the alternative to prayer 2 above, and pending the hearing and determination of this application, this court be pleased to issue a *status quo* order directing the 2nd Respondent, her agents and servants and/or persons claiming through her and/or working on her behalf in respect to the intended official opening of the modern Bus Park and Market located on land parcel number South/Wanga/Ekero/833 within the Mumias Triangle disputed area.
 - iii A That pending the hearing and determination of this application this court be pleased to issue an injunctive order restraining the 2nd Respondent her agents, servants and/or persons claiming under her and/or working on her behalf from giving further access to any member of the public to the modern Bus Park and Market located on land parcel number South/Wanga/Ekero/833 within the Mumias Triangle disputed area.
 - iii B That pending the hearing and determination of this application this court be pleased to issue an order to suspend the decision of the 2nd Respondent, her agents servants and/or persons claiming through her and/or working on her behalf to open the modern Bus Park and Market located on land parcel number South/Wanga/Ekero/833 within the Mumias Triangle disputed area.
 - iii C That pending the hearing and determination of this application this court be pleased to issue an order to suspend and /or revoke the decision of the 2nd Respondent, her agents servants and/or persons claiming through her and/or working on her behalf to open and give access to the members of the public, the modern Bus Park and Market located on land parcel number South/Wanga/Ekero/833 within the Mumias Triangle disputed area.
 - iv That pending the hearing and determination of this application this court be pleased to issue an injunctive order against the 2nd Respondent, her agents servants and/or persons claiming through her and/or working on her behalf to stay the intended official opening of the modern Bus Park and Market located on land parcel number South/Wanga/Ekero/833 within the Mumias Triangle disputed area.
 - v That pending the hearing and determination of this suit, the court be pleased to issue a restraining order against the 2nd respondent, restraining her agents, servants and/or persons claiming under her and/or working on her behalf from interfering with the petitioners' use of the suit land parcels known as S/Wanga/Ekero/4777; S/Wanga/Ekero/471; S/Wanga/Ekero/2378; S/Wanga/Ekero/873; S/Wanga/Ekero/640; S/Wanga/Ekero/638; S/Wanga/Ekero/659; S/Wanga/Ekero/652; S/Wanga/Ekero/1362; S/Wanga/Ekero/624; S/Wanga/Ekero/476; S/Wanga/Ekero/470; S/Wanga/Ekero/620; S/Wanga/Ekero/756; S/Wanga/



Eker0/643; S/Wanga/Eker0/737; S/Wanga/Eker0/1557; S/Wanga/Eker0/2204; S/Wanga/Eker0/741 and S/Wanga/Eker0/833 within the disputed Mumias Triangle, pending the hearing and determination of the suit herein.

- vi That pending the hearing and determination of this suit, the court be pleased to issue an order directing the Respondents, her agents, servants and persons claiming through her and/or working on her behalf within 7 days to furnish the Petitioners and this court with the with the names of all the persons to whom they have leased the suit land portions of the same and relevant lease documents affecting the land parcels numbers S/Wanga/Eker0/4777; S/Wanga/Eker0/471; S/Wanga/Eker0/2378; S/Wanga/Eker0/873; S/Wanga/Eker0/640; S/Wanga/Eker0/638; S/Wanga/Eker0/659; S/Wanga/Eker0/652; S/Wanga/Eker0/1362; S/Wanga/Eker0/624; S/Wanga/Eker0/476; S/Wanga/Eker0/470; S/Wanga/Eker0/620; S/Wanga/Eker0/756; S/Wanga/Eker0/643; S/Wanga/Eker0/737; S/Wanga/Eker0/1557; S/Wanga/Eker0/2204; S/Wanga/Eker0/741 and S/Wanga/Eker0/833 and any other parcels within Mumias triangle disputed area and/or in the alternative, they prayed that they be considered to be representing the interests of all such persons who acquired interests through the Respondents.
 - vii The Officer Commanding Station Mumias to ensure observance of the orders issued by this court.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the Supporting affidavit of Kassim Wangalwa Atibu sworn on 20th February, 2023 and a Further affidavit sworn on 23rd February, 2023 on his own behalf and on behalf of all the Petitioners. In the affidavit sworn on 20th February, 2023 he deposes that he represents the family of Wangalwa Atibu which has proprietary interests in land parcel no S/Wanga/Eker0/833.
 3. He depones that sometime in 2009 the 2nd Respondent started evicting persons from parcels of land which they claimed had been compulsorily acquired by the government. The said evictions led to the filing of various suits in different courts by the affected persons. They later learnt that the Respondents had in one of the cases- Kakamega ELC Petition no 5 of 2018, filed a Replying Affidavit alleging that the 2nd Respondent between 1970 and 1987 the Government of Kenya in exercise of the powers conferred by the provisions of the Land Acquisition Act approached the Petitioners' by themselves, their servants, predecessors, or authorized agents for purposes of compulsorily acquiring the suit properties.
 4. He alleges that the proprietors of the suit properties had agreed and they were duly compensated. Restrictions were subsequently registered on the suit properties and thereafter the Commissioner of Lands allocated some of the parcels to ratable tenants for varying periods. The 2nd Respondent alleged that despite being compensated, the Petitioners were laying fresh claims over the disputed parcels of land.
 5. Mr Atibu denies that there has been compulsory acquisition of the suit properties and that the Respondents are engaged in a scheme of defrauding the Petitioners and other members of the public of their land through a sham and mysterious scheme camouflaged as compulsory acquisition. In particular, he denied that his family was compensated for land parcel number S/Wanga/Eker0/833 where the modern bus stage and market has been constructed and which was to be opened on 22nd February, 2023.
 6. He denies that some of the suit properties were leased to different individuals as the petitioners still hold valid titles to their parcels of land and urged the court to direct the 1st Respondent to avail the names of the of the persons who were allegedly allocated the suit properties.



7. He expressed fear that upon opening the bus stage and market, more persons would be granted leases and/or occupation licenses that would further complicate and prejudice the Petitioners' rights to the suit properties as their removal would involve further litigation.
8. He avers that the Respondents had no right to the suit properties and they could therefore not create any legal rights in favour of other persons.
9. The application was strenuously resisted by the 2nd Respondent through the Replying affidavit of Vivianne Mmbaka Komwonyo, the County Attorney of the 2nd Respondent sworn on 3rd March, 2023. The long and short of it is that the suit property is part of the assets of the 2nd Respondent which is the custodian and trustee of all the assets and properties of the County Government of Kakamega (previously the County Council of Kakamega), whether purchased directly, acquired through the process of compulsory acquisition or by any other legal means.
10. It is her deposition that sometime between 1970 and 1987, the Government of Kenya in exercise of its powers under the Land Acquisition Act Cap 295, compulsorily acquired land parcels number South/Wanga/Ekero /4777, 471, 2378, 873, 640,638, 658,652, 1362, 624, 476, 470. 620, 643, 737, 1557, 2204, 741 and South/Wanga/Ekero/756 with the intention of developing and expanding Mumias Township by constructing, government offices, commercial sites, schools roads, industrial sites, residential areas and recreational sites and the original registered owners of the above suit properties or their representatives were fully compensated for their land as per the annexed list marked VMK 1 and report from the Lands Department. Following the said acquisitions, the owners of the land took their livestock and properties and moved from the suit properties. The government then placed restrictions on the said parcels of land. The Commissioner of Lands thereafter allocated or leased some of the land parcels to rateable tenants for periods ranging from 15 years to 99 years.
11. She deposes that notwithstanding the fact that the original owners were compensated, the Applicants are laying fresh claim over the suit property and have constructed temporary structures and fence off some portions while some of them are excavating murrum therefrom. They have also unlawfully prevented the 2nd Respondent's agents and workers from developing the suit properties thus causing multi-million projects to be suspended.
12. Further, the Applicants have fraudulently caused the restrictions on some of the suit properties to be removed and they have had the Certificates of Lease issued to some of the new lessors cancelled and the matter is being investigated by the Ethics and Anti- Corruption Authority.
13. It is further deposed that the Applicants have previously filed multiple suits over the same subject matter to wit:
14. Bungoma Constitutional Petition no 5 of 2019 *Musa Ndaliro Muchelule & 18 others v National Land Commission & 2 Others* which was dismissed by Justice N.A Matheka on 4th July 2019; Kakamega; HCCC no 220 of 1995 *Juma Mombo Opetu v Attorney General and another* which was heard and dismissed; Kakamega HCCC No:45 of 2005 *Omari Ifirie & others v Mumias Municipal Council* which was dismissed on 12th July 2017; Kakamega Constitutional Petition no 2 of 2011 *Juma Mombo Opetu & 17 Others v The Town Clerk Mumias Municipal Council & Others* which was transferred to the ELC as ELC Case no 20 of 2018 and dismissed on 13th July 2015; Kakamega CMCC no 18 of 2005 *Mohammed Bin Juma v The Town Clerk Mumias; Kakamega HC P&A Succession Cause no 225 of 2002 Ramadhan Alukwe Juma v Mumias Municipal Council; Mumias SRMCC no 1222 of 2006 Bakari Wesamba Sumba v Mumias Municipal Council; Bungoma HCCC no 79 of 2009 Mohammed Mukhwana v Municipal Council of Mumias & others* which was dismissed for want of prosecution on 12th October 2009. It is deposed that in the circumstances this matter is sub-judice and res judicata.



15. She deposes that the Applicants are not in actual occupation of the suit properties as they have their homes elsewhere. She avers that in view of the fact that there are other lessees and tenants on suit property who have not been joined in this suit, if the orders sought by the applicants are granted, it would be prejudicial to them.
16. It is her deposition that the construction of the new Mumias Town Bus Park has been going on for several years after their application seeking to stop it was dismissed by the court and the Applicants cannot seek to stop it at the last minute. Further that the application was served upon the Respondents after the opening and commissioning of the new modern Bus Park and the application has thus been overtaken by events and is merely aimed at embarrassing the 2nd Respondent
17. In response to the Replying affidavit, the Petitioners filed a Further Affidavit sworn on by one Osundwa Munyendo, the only surviving original owners of the parcels forming part of the Mumias Triangle filed on 30th March, 2023. In the said affidavit he denies that, the 2nd Respondent followed the process of compulsory acquisition laid down in the Land Acquisition Act and that the 2nd Respondent forcefully evicted the Respondents from their land and they remain the rightful owners thereof and they are still in control of portions thereof. It is his contention that he and the Petitioners would be prejudiced if the orders sought are not granted.
18. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully read and considered.

Analysis and Determination

19. The following issues fall for determination;-
 - i. Whether the suit is sub judice or res judicata
 - ii. Whether an order of injunction ought to be granted to stop the 2nd Respondent from officially opening and allowing members of the public to access the modern Bus Park and market situated on land parcel number South/Wanga/Ekero/833 and the neighbouring suit parcels within the Mumias Triangle.
 - iii. Whether the court should issue a status quo order directing the 2nd Respondent, her agents, servants and persons claiming through her and/or working on her behalf in respect to the intended official opening of the modern bus park and market located on land parcel no South/Wanga/Ekero/833 and the neighboring suit parcels within Mumias Triangle disputed area.
 - iv. Whether the court should issue an injunction restraining the 2nd Respondent, her agents, servants and/or any persons claiming through her from interfering with the suit properties.
 - v. Whether the Respondents should be directed to furnish the Petitioners and this court with the names of all the persons to whom they have leased the suit properties or portions of the same and the relevant lease documents affecting the suit properties and any other parcels within the disputed Mumias Triangle.
20. Before delving into the merits of the application, it is necessary to determine whether this suit is *sub judice* or res judicata.
21. In her Replying affidavit, Ms. Vivianne Mmbaka Komwonyo pointed out that the Petitioners have filed various suits against the 2nd Respondent or its predecessor some of which have been dismissed while others have been abandoned. In particular she mentioned the following cases:



- i. Bungoma Constitutional Petition no 5 of 2019 *Musa Ndaliro Muchelule & 18 others v National Land Commission & 2 Others*
 - ii. HCCC no 220 of 1995 *Juma Mombo Opetu v Attorney General and another*
 - iii. Kakamega HCCC No:45 of 2005 *Omari Ifirie & 5 others v Mumias Municipal Council*
 - iv. Kakamega Constitutional Petition no 2 of 2011 *Juma Mombo Opetu & 17 Others v The Town Clerk Mumias Municipal Council & Others*
 - v. Kakamega CMCC no 18 of 2005 *Mohammed Bin Juma v The Town Clerk Mumias;*
 - vi. Kakamega HC P& A Succession Cause no 225 of 2002 *Ramadhan Alukwe Juma v Mumias Municipal Council*
 - vii. Mumias SRMCC no 1222 of 2006 *Bakari Wesamba Sumba v Mumias Municipal Council*
 - viii. Bungoma HCCC no 79 of 2009 *Mohammed Mukhwana v Municipal Council of Mumias & others*
22. In his Replying Affidavit filed on 30th March, 2023 Osundwa Munyendo admitted that he was aware that different people had filed different suits in various courts touching on the subject matter in this suit but some had abated while others were dismissed on technicalities and none of them had been heard on merit. The Respondents have indicated that most of the suits were dismissed for want of prosecution and no judgment has been annexed to show that any of the suits were heard on merit and dismissed.
23. Regarding whether some of the suits are sub judice, the Petitioners have at paragraph 151 of the Petition stated that the said suits have abated or been terminated on technicalities. This means that there are no other active suits between the parties herein. However, since the suits are filed in various courts, it is difficult to establish the correct position.
24. Regarding the questions as to whether this application is res judicata, the doctrine of res judicata is set out in the [Civil Procedure Act](#) at Section 7 as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
25. The Court of Appeal in the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR set out the elements that that court needs to consider when determining the issue of re judicata. The court stated that;
- “Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
- (a) The subject matter or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.



- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

26. In the instant suit, Plaintiffs filed an application dated 15.10 .2018 seeking to restrain the defendants from evicting the Petitioners or interfering with their quiet possession of the suit properties.

27. I note that this matter was initially filed as Kakamega ELC Petition no 5 of 2018 before it was transferred to Bungoma where it was given the number Bungoma ELC Petition no 5 of 2019 before it was finally transferred to this court as Eldoret ELC. Petition no 20 of 2019. Having perused the proceedings from its inception I note that indeed the Petitioners filed an application for injunction dated 15th October 2018 seeking injunctive orders against the Respondents to restrain the 2nd Respondent from evicting the Petitioners from the suit properties which application was dismissed.

28. In her ruling delivered on 4th July 2018 Justice N. A Matheka J observed as follows;

a.

“The allegations that the Petitioners still have proprietary interest in the suit land and therefore this court ought to restrain the 2nd Respondent from carrying on their day-to day duty as a government are misplaced given that the mere fact that some of the titles are still having the names of the Petitioners registered as owners does not mean that their registration as proprietors and their interest in the said titles is absolute as they were paid and compensated when the land was fully acquired by the Government to expand Mumias town. I find that this matter cannot be determined at an interlocutory stage and needs to go to full hearing. This court has taken judicial notice that there have been numerous suits touching on this matter in the past. Indeed, there is a Task Force set up by the County Government of Kakamega trying to resolve the issue. I find that the Petitioners/Applicants have not shown a prima facie case with a probability of success. It has not shown that the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages if the orders are not granted. The 2nd Respondent maintains that they are in possession. I find this application is not merited and I dismiss it with costs.”

29. Although counsel for the Applicants has submitted that facts alleged in the application are based on the development of new circumstances between the same parties, it is not in dispute that they relate to the alienation of the same parcels of land which were the subject of the previous application. It is not in dispute that the construction of the modern Bus Park and Market commenced sometime in 2018 or thereabouts. In view of the above –mentioned ruling on a similar application for injunction, this application is res judicata and on this ground alone, I would dismiss this application.

30. Be that as it may, even if I had to consider the application on its merits the Applicants would have to satisfy the conditions in in the celebrated case of *Giella v Cassman Brown Company Limited* (1973) E.A 358 which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant



might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

31. In the case of *Mrao v First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

32. It is not in dispute that the modern Mumias Bus Park and market have since been officially opened and the two facilities are operational. The application has therefore been overtaken by events. The fact that the Bus Park and market have been opened confirms that contrary to the Applicants’ assertion that they are in possession of the suit properties, it is the 2nd Respondent which is in possession thereof. The Applicants’ prayer that the 2nd Respondent be restrained from giving access to any member of the public to the Bus Park located on land parcel no South Wanga/Ekero/833 and the neighbouring suits within Mumias Triangle is not tenable at this stage as this would have to await the determination of main suit when the issue of the ownership of the suit properties shall be settled. The Applicants have therefore failed to demonstrate that they have a prima facie case with a probability of success.

33. Additionally, the Applicants have not demonstrated that if an injunction is not granted, they shall suffer irreparable loss. In the circumstances, I am disinclined to grant an order of injunction.

34. The Petitioners have also prayed for an order that the Respondents be ordered to furnish the Petitioners and this court with the names of all persons to whom they have leased the suit land and portions of the same and relevant lease documents affecting the suit properties and any other properties within Mumias Triangle disputed area. They have further prayed that the Respondents be considered to be appearing for and representing the interests of all such persons who leased/ acquired interests through the Respondents.

35. With regard to the prayer that the Petitioners be furnished with the names of the lessees and lease documents in respect of the suit properties and any other parcels within Mumias Triangle disputed area, the same is speculative, amorphous and incapable of enforcement. I agree with my sister Justice Matheka that this suit ought to be fixed for hearing so as to resolve all the issues in dispute once and for all.

36. In the final analysis the application lacks merit and it is dismissed.

37. The costs of the application shall be in the cause.

DATED SIGNED AND DELIVERED THIS 18TH DAY OF DECEMBER 2023

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J. ONYANGO

JUDGE

In the presence of;

1. Mr. Okiri for Mr. Udoto Kongani for the Applicants

2. Mrs. Chungu for the Respondents

Court Assistant: A. Oniala

