



REPUBLIC OF KENYA



**Philip & 22 others v National Housing Corporation & another (Environment & Land
Petition E006 of 2023) [2023] KEELC 22169 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E006 OF 2023
NA MATHEKA, J
DECEMBER 13, 2023**

BETWEEN

JOYCE WANZIA PHILIP 1ST PETITIONER
EVERLYNE WANGARI WAMBUGU 2ND PETITIONER
GABRIEL IHWAGI GIKONYO 3RD PETITIONER
FRANCIS THUKU WAWERU 4TH PETITIONER
ROBERT AMUKO OLIMBA 5TH PETITIONER
JUMAA KARISA KOI 6TH PETITIONER
LEAH WAMBOI MAINA 7TH PETITIONER
JUDY MUENI WAMBUA 8TH PETITIONER
ZADOCK KILAVUAL KIHIMA 9TH PETITIONER
ELIJAH OMWAGWA NYAMWEYA 10TH PETITIONER
LYDIA NDIA KIROGO 11TH PETITIONER
EZEKIEL KALO 12TH PETITIONER
DAVID OKOTH OCHOLA 13TH PETITIONER
EUNICE MWASAHA 14TH PETITIONER
FREDRICK MURIITHI KING'ANGI 15TH PETITIONER
PAUL MATHENDU 16TH PETITIONER
ZAKARY G. NGUGI 17TH PETITIONER
BRUCE ASHIKOYE 18TH PETITIONER
ERASMUS JOSHUA KANGIO 19TH PETITIONER



DAVID TELELA NGALA 20TH PETITIONER
TITUS MWENGA MUTAMBU 21ST PETITIONER
E. KAMAU M. GIKA 22ND PETITIONER
KEFA OTURI MARANGA 23RD PETITIONER

AND

NATIONAL HOUSING CORPORATION 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The first application is dated 31st August 2023 and is brought under Section 10 and Section 27 (1) and 3 of the *High Court (Organization and Administration and under the (High Court and Procedure Rules Part 1 Vacation Rule 3 and under rule 20 and 21 of the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of Individuals) High Court Practice Rule* and Articles 19, 20, 21, 22 and 23 of *the Constitution* of Kenya and Sections 7 and 19 of the Sixth Schedule thereof seeking orders;
 - a. That service of this application be dispensed with in the first instance and this application be heard ex parte and be certified urgent.
 - b. That due to the urgency of the matter and the risk factor the matter be heard during this court's vacation with this court's leave.
 - c. That this honorable court be pleased to issue a conservatory order in the form of an injunction to restrain the respondents either by themselves or through their agents, servants, proxies employees, acolytes and/or accomplices from in any way interfering with, forcefully evicting, demolishing, causing damage, obstructing and/or in any other way interfering with the petitioners continued occupation of the houses in National Housing Corporation Changamwe Rental Estate within Mombasa County and or its buildings or causing the amelioration or negative waste degradation and damage to their environment and structures in purported implementation of the forceful eviction of the petitioners pursuant to the letter/ notice dated 10th August 2023 or any other letter or notice serving the same purpose pending the hearing of the application inter parties.
 - d. That this honorable court be pleased to issue a conservatory order in the form of an injunction to restrain the respondents either by themselves or through their agents, servants, proxies employees, acolytes and/or accomplices from in any way interfering with, forcefully evicting, demolishing, causing damage, obstructing and/or in any other way interfering with the petitioners continued occupation of the National Housing Corporation Changamwe Rental Estate within Mombasa County and or its buildings or causing the amelioration or negative waste degradation and damage to their environment and structures in purported implementation of the forceful eviction of the petitioners pursuant to the letter/notice dated 10th August 2023 or any other letter or notice serving the same purpose and after the hearing of the application interparties pending the hearing and determination of the constitutional petition herein.



- e. Costs
2. It is based on the grounds that the petition raises fundamental issues of the constitutionality and legality of the respondent's actions in attempting to forcefully evict the petitioners. That there is imminent danger of the petitioners being forcefully evicted and or being dealt with in a manner that threatens the rights of the citizens. The decisions of the respondents to forcefully evict the petitioners being houses they have occupied from as early as 1985 is arbitrary, oppressive and unfair. This application and petition will be rendered nugatory unless this application is heard urgently and conservatory orders issued. The petitioners and citizens of National Housing Corporation rental estate face the risk of substantial loss of its assets and property and an infringement on their rights and that of their children.
3. The second application is dated 18th October 2023 and is brought under Article 19,20, 21, 22, 23, 50 and 159 of *the Constitution* of Kenya 2010 and Section and 19 of the sixth Schedule thereof, under Section 1A, ID, 3A and 63 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, under Rule 20 and 21 of *the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of Individuals) High Court Practice Rule* and under Order 40 Rule 1 of the Civil Procedure Rules seeking the following orders;
- a. That service of this application be dispensed with in the first instance the same be heard ex-parte and certified urgent.
- b. That the court herein do forthwith review its orders dated 17th October 2023 and in their place allow prayer 2 of the Notice of Motion dated 31st August 2023 pending the hearing and determination of the Notice of Motion dated 31st August 2023. In the alternative, the court do order that the status quo be maintained pending hearing and determination of the application.
- c. That upon hearing of this and the petitioners' application dated 31st August 2023 inter parties the Honourable Court be pleased to issue a conservatory order in terms of prayer 2 of that application in the form of an injunction to restrain the respondents either by themselves or through their agents, servants, proxies employees, acolytes and/or accomplices from in any way interfering with, forcefully evicting, demolishing, causing damage, obstructing and/or in any other way interfering with the petitioners continued occupation of the National Housing Corporation Changamwe Rental Estate within Mombasa County and or its buildings or causing the amelioration or negative waste degradation and damage to their environment and structures in purported implementation of the forceful eviction of the petitioners pursuant to the letter [notice dated 10th August 2023 or any other letter or notice serving the same purpose and after the hearing of the application interparties pending the hearing and determination of the constitutional petition herein.
- d. Costs of this application.
4. It is based on the following grounds that the Petitioners are residents of National Housing Corporation Changamwe rental houses located within the Mombasa County in the Republic of Kenya. They each have a family of at least 6 people putting the number of people to be affected by the eviction at over 200 people. The estate has mix of old people middle age young people, youth, children and even babies. It also has people living with disabilities. Additionally, they are the most vulnerable economically disadvantaged and impoverished living below the poverty level with no consistent income without basic social amenities and will be grossly affected by any forceful eviction. That on 31st August 2023 the Petitioners herein filed an application dated 31st August 2023 under Certificate of urgency praying for conservatory orders in the form an injunction to restrain the respondents either by



themselves or through their agents, servants, proxies employees, acolytes and/or accomplices from in any way interfering with, forcefully evicting, demolishing, causing damage, obstructing and/or in any other way interfering with the petitioners continued occupation of the houses in National Housing Corporation Changamwe Rental Estate within Mombasa County and or its buildings or causing the amelioration or negative waste degradation and damage to their environment and structures in purported implementation of forceful eviction of the petitioners pursuant to the letter/notice dated 10th August 2023 or any other letter or notice serving the same purpose pending the hearing of the application interpartes. That the said application was not certified urgent and slated for application hearing on 17th October 2023 before Honourable Lady Justice Nelly Matheka. That on 17th October 2023 the Court declined to preserve the status quo pending the hearing and determination of the petitioners' application dated 31st August 2023 and directed parties to file their respective Responses and submissions to the petitioners' application dated 31st August 2023.

5. That immediately after the court directions the 1st Respondent either by themselves or through their agents, servants, proxies' employees, acolytes and/or accomplices proceeded and started interfering with, forcefully evicting, demolishing, causing damage to the Petitioners houses in National Housing Corporation Changamwe Rental Estate within Mombasa County in alleged implementation of forceful eviction of the petitioners pursuant to the letter/notice dated 10th August 2023 or any other letter or notice serving the same purpose pending the hearing of the petitioners application dated 31st August 2023 interparties. That the respondent's forceful eviction is in breach of the Government of Kenya eviction and resettlement guidelines and is without a court order hence its arbitrary oppressive and illegal.
6. This court has considered both applications and submissions therein. The power of the court in an application for interlocutory injunction is discretionary, the discretion is judicial and is exercised on the basis of law and evidence. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, set out the three requirements that has to be satisfied in an interlocutory injunction application. The applicant has to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and where the court has any doubts, it will be decided on a balance of convenience.
7. The court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 defined a prima facie case is. It held that;

" So what is a prima facie case? I would say that in civil cases it is a case in 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." The court went further to hold that "A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant case upon trial. That is clearly a standard which is higher than an arguable case."

8. The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR held that;
" On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that



is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

9. The court in *Nguruman Limited* (supra), found that the three conditions and stages have to be applied as separate, distinct and logically. It was held that;

“ If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

10. In the instant case, the 1st Respondent has submitted that the area was marked for redevelopment and had 184 houses. The tenants were given notices on the 24th January 2018 to vacate and were given alternative new houses to relocate to within the same area and developed by the 1st Respondent. A total of 61 tenants relocated leaving the 23 Petitioners. That subsequently other Petitioners moved out leaving 018 and the 2nd to 11th Petitioners are strangers to the 1st Respondent. This has not been disputed. I find that the Plaintiffs/Applicants have not established a prima facie case and that they will suffer irreparable loss that cannot be compensated by way of damages. I find that both applications are not merited and are dismissed. Costs of the applications to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2023.

N.A. MATHEKA

JUDGE

