



REPUBLIC OF KENYA



KENYA LAW
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Makau & another v Muoti; Kivut & another (Intended Interested Party) (Environment & Land Case E017 of 2023) [2025] KEELC 3481 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E017 OF 2023**

NA MATHEKA, J

APRIL 29, 2025

BETWEEN

CHRISTINE MBAIKA MAKAU 1ST PLAINTIFF

FRANCISCAH MUMBUA PETER 2ND PLAINTIFF

AND

LYDIA MUOTI DEFENDANT

AND

DUNCUN MUISYO DAVID KIVUT' INTENDED INTERESTED PARTY

JUDITH NDUKU KIMEU INTENDED INTERESTED PARTY

RULING

1. The application is dated 18th December 2024 and is brought under Section 1A, 1B, 3A of the [Civil Procedure Act](#), Order 1 Rule 10(2), Order 51 of the Civil Procedure Rules and all other enabling provisions of law seeking the following orders;
 1. That the Intended Interested Parties be enjoined in this suit.
 2. That leave be granted to the Interested Parties to file Defence and comply with pre-trial directions out of time.
 3. That parties herein be at liberty to amend their pleadings in so far as it is necessary.
 4. That costs of this Application be provided for.
2. It is based on the grounds deponed to in the annexed Affidavit of Duncun Muisyo David Kivutu and on other further grounds as may be adduced at the hearing hereof and on inter alia the following grounds that the Plaintiffs filed this suit against the Defendant vide a Plaint dated 4th September, 2023 seeking



among other orders that - A declaration that the properties known as Katheka-Kai Block /203, 204, 208 and 209 - 20 acres, Katheka-Kai Block “B” Block 4/144 - 10 acres, Katheka-Kai Block “B” Block 4/145 - 10 acres, Katheka-Kai “B” Block 5 Plot No 158 - 25 feet by 100 feet, Katheka-Kai “A” Plot No. 45 - 9 acres and Coffee Plot No. D14 – 1 acre. That the records at Katheka-Kai Farmers and Co-operative Society Limited show that the Defendant together with Luise Peter transferred Machakos Block 4/144 and Machakos Block 4/145 to the Interested Parties herein (Attached and marked DMKD 4 is the transfer form). That Katheka-Kai Farmers Co-operative Society Limited confirmed that the Defendant jointly with others owned Machakos Block 4/144 and Machakos Block 4/145 and revoked ownership documents previously issued to others (Attached and marked DMKD 5a and 5b are copies of letters from Katheka-Kai Farmers Co-operative Society). That the Interested Parties took up possession and occupation in 2014 and have extensively developed the land and use it for commercial farming and livestock rearing. That the Interested Parties have been on the land known as Machakos Block 4/144 and Machakos Block 4/145 from 2014 to date. That he knows for a fact that the two properties do not form part of the Estate of Nzisa Kamala as they were awarded to the Defendant and the Judgment has never been appealed against and/or set aside. That it is necessary them to be enjoined in these proceedings so that they can defend their interest in the above-mentioned properties. That their joinder in this suit is necessary in order to enable us protect our proprietary interests and further enable the court effectually and completely adjudicate upon and settle all questions in dispute. That it is also in the interest of justice that upon joinder, the court do grant us leave to file their responses and documents that they will rely on during the hearing of this suit. That no prejudice shall be occasioned to the Plaintiffs and Defendant if the orders sought are granted.

3. The second application is dated 22nd January 2025 and is brought under Order 40 Rules 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules and under Section 3A of the [Civil Procedure Act](#) Cap 21 seeking the following orders;
 1. That this Application be certified urgent, its service dispensed with and heard ex parte in the first instance.
 2. That the 1st Interested Party, Duncun Muisyo David Kivutu and/or his agents and/or servants and/or anyone acting under him be restrained by way of temporary injunction from alienating, disposing, fencing, developing, building, utilizing and/or in any other manner from interfering with the properties known as Katheka-Kai “B” Block 4/144 and 145 pending the hearing and determination of this Application.
 3. That the 1st Interested Party, Duncun Muisyo David Kivutu and/or his agents and/or servants and/or anyone acting under him be restrained by way of temporary injunction from alienating, disposing, fencing, developing, building, utilizing and/or in any other manner from interfering with the properties known as Katheka-Kai “B” Block 4/144 and 145 pending the hearing and determination of this suit.
 4. That the costs of this Application be provided for.
4. It is based on the following grounds that the Plaintiffs are the Administrators of the Estate of the late, Priscilla Nzisa Kamala alias Nzisa Kamala who was/is the owner of the subject properties, Katheka-Kai “B” Block 4/144 and 145 among others. They were appointed as Administrators pursuant to Machakos HCC. Succ No. E043 of 2022 which is still pending before the court. That the deceased did not sell and/or part with possession of the properties during her life time. That as the Administrators of her Estate they have not sold or alienated the properties or in any way authorized the 1st Interested Party, Duncun Muisyo David Kivutu to utilize it in any way. That the 1st Interested Party is yet to file his substantive pleadings and documents in this suit to disclose what interest he has in the said properties



and it is in the interest of justice and all fairness that the orders sought herein be granted pending the hearing and determination of this matter. That the Estate of the deceased stands to lose the properties to an intermeddler, the 1st Interested Party, of her Estate and therefore suffer great prejudice. That the 1st Interested Party does not stand to suffer any prejudice if the orders sought herein are granted as the properties will be preserved pending the hearing and determination of the parties' respective rights in this matter.

5. This court has considered the application and submissions therein. The applicant desires to be joined as interested parties to these proceedings as the subject matter of this suit. That the records at Katheka-Kai Farmers and Co-operative Society Limited show that the Defendant together with Luise Peter transferred Machakos Block 4/144 and Machakos Block 4/145 to the Interested Parties herein (Attached and marked DMKD 4 is the transfer form). That Katheka-Kai Farmers Co-operative Society Limited confirmed that the Defendant jointly with others owned Machakos Block 4/144 and Machakos Block 4/145 and revoked ownership documents previously issued to others (Attached and marked DMKD 5a and 5b are copies of letters from Katheka-Kai Farmers Co-operative Society). That the Interested Parties took up possession and occupation in 2014 and have extensively developed the land and use it for commercial farming and livestock rearing. That the Interested Parties have been on the land known as Machakos Block 4/144 and Machakos Block 4/145 from 2014 to date.
6. As to whether they ought to be enjoined in the suit as a defendant or an interested party, the Court is guided by Order 1 Rule 10(2) of the Civil Procedure Rules which states;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

5. The Supreme Court decision in *Communications Commission of Kenya and 4 Others v Royal Media Services Limited & 7 Others* Petition No. 15 of [2014] eKLR where the Court pronounced itself on who an Interested Party is and held as follows:

“In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court's decision in the *Mumo Matemo* case where the court (at paragraphs 14 and 18) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.



We ask ourselves the following questions:

- a) what is the intended party's state and relevance in the proceedings and
- b) will the intended interested party suffer any prejudice if denied joinder.?"

6. It is therefore clear that the parties who should be made parties to a suit are persons who are necessary for a complete and effectual adjudication of disputes before the court. The Applicant claims that he bought the suit land. I find that the Applicant has interest over the suit property and ought to be enjoined. I find that no prejudice shall be suffered by the parties herein as the addition of the Applicant as a defendant to this suit is necessary and shall enable the Court to completely and effectually determine all questions involved in the suit herein in finality. The applicant also prayed that the Chief Land Registrar be enjoined in this matter as it involved the determination of the authenticity of the titles and therefore ownership. I find that the Land Registrar could always be called to produce the parcel file and/or give evidence as to the authenticity of the said titles if need be and there is no need for them to be enjoined.
7. The plaintiffs opposed the application and stated that they were appointed as Administrators of the estate of the late Priscilla Nzisa Kamal alias Nzisa Kamala who passed away on 18th August 2002, pursuant to Machakos HCC. Succ No. E043 of 2022 which is still pending before the court. That the deceased did not sell and/or part with possession of the properties during her life time. We as the Administrators of her Estate have too not sold or alienated the properties or in any way authorized the 1st Interested Party, Duncun Muisyo David Kivutu to utilize it in any way.
8. I find that joinder of the interested parties will result in the complete settlement of all the question involved in the proceedings as they a currently in possession of the suit property. I find the first application for joinder dated 18th December 2024 is merited and I grant it as prayed. Costs to be in the cause.
9. On the second application the court has considered the application and the submissions therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* [1973] EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) [2014] eKLR where 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.
10. 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”.
11. Consequently, the Plaintiff ought to, first, establish a prima facie case. The Plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] EKLK in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. In support of their application, the Plaintiffs have attached copies of documents of issued by the Society of the suit properties.

13. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR provides an explanation for what is meant by irreparable injury and it states;

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.

14. The Plaintiffs submitted that they are the Administrators of the Estate of the late, Priscilla Nzisa Kamalaalias Nzisa Kamala who was/is the owner of the subject properties, Katheka-Kai “B” Block 4/144 and 145 among others. They were appointed as Administrators pursuant to Machakos HCC. Succ No. E043 of 2022 which is still pending before the court. That the deceased did not sell and/or part with possession of the properties during her life time. They as the Administrators of her Estate have not sold or alienated the properties or in any way authorized the 1st Interested Party to utilize it in any way.

15. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

16. In the case of Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the



greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

17. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because they stand to lose the suit property to an interested party who is the 1st interested party.

“The decision of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated; The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

18. Bearing this in mind, I am convinced that there is a lower risk in not granting orders of temporary injunction than granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the Plaintiffs/Applicants claim. I have also not had the opportunity to interrogate the Respondent’s documents.

19. In *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

20. The interested parties argue that the records at Katheka-Kai Farmers and Co-operative Society Limited show that the Defendant together with Luise Peter transferred Machakos Block 4/144 and Machakos Block 4/145 to the Interested Parties herein (Attached and marked DMKD 4 is the transfer form). That Katheka-Kai Farmers Co-operative Society Limited confirmed that the Defendant jointly with others owned Machakos Block 4/144 and Machakos Block 4/145 and revoked ownership documents previously issued to others (Attached and marked DMKD 5a and 5b are copies of letters from Katheka-Kai Farmers Co-operative Society). That the Interested Parties took up possession and occupation in 2014 and have extensively developed the land and use it for commercial farming and livestock rearing. I find that the balance of convenience tilts in their favour. I find that this application is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

