



**Beroya Gospel Fellowship Manna Mission Centre of Kenya & another v Board of Management, Garsen Primary School & another (Environment & Land Case E096 of 2024) [2025] KEELC 3490 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3490 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E096 OF 2024**

**FM NJOROGE, J**

**APRIL 28, 2025**

**BETWEEN**

**BEROYA GOSPEL FELLOWSHIP MANNA MISSION CENTRE OF KENYA ..... 1<sup>ST</sup> PLAINTIFF**

**KILLIAN GONA LUKIU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BOARD OF MANAGEMENT, GARSEN PRIMARY SCHOOL .. 1<sup>ST</sup> DEFENDANT**

**GARSEN PRIMARY SCHOOL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. For determination is the Plaintiffs’ Notice of Motion application dated 17/9/2024 and brought under sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 40 Rules 1,2 and 4 of the Civil Procedure Rules. The orders sought therein are as follows: -
  1. ....Spent;
  2. ....Spent;
  3. That pending the inter parties hearing of the main suit, this honourable court be pleased to issue a permanent order of injunction restraining the Respondents, by themselves, their agents, employees, servants and or otherwise howsoever from developing, occupying, constructing or any other manner dealing in the parcel of plot known as TRCC/GRS/R/232 situated at Garsen;
  4. That pending the inter partes hearing of the main suit, this honourable court be pleased to issue a permanent order of eviction against the Respondents, by themselves, their agents, employees,



servants and or otherwise howsoever from developing, occupying, constructing or any other manner dealing in the parcel of plot known as TRCC/GRS/R/232 situated at Garsen;

5. That there be an order of mandamus directing the Chief Land Officer and physical planning confirming ownership and issue an allotment letter as applied;
  6. That the OCS Garsen Police Station to assist in executing the orders.
  7. That costs of this application be provided for.
2. The application is based on the affidavit of Killian Gona Luku, the 2<sup>nd</sup> Plaintiff herein, who is said to be the chairman of the executive officials of the 1<sup>st</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff deposed that the 1<sup>st</sup> Plaintiff was awarded the parcel of land known as TRCC/GRS/232 (the suit property), through its co-founder Rev. Simon Wachu Mitsozi, on 13/6/1986 and officially awarded the same on 19/11/1990 by the then Town Clerk; that the 1<sup>st</sup> Plaintiff has since been in occupation thereof and even put up a temporary structure known as B.G.F Church, until when the Defendants entered the suit property claiming ownership thereof. To the Plaintiffs, the Defendants have unlawfully and wrongfully trespassed into the suit property and commenced construction which must be stopped to ensure that the Plaintiffs do not suffer irreparable loss.
3. The Attorney General entered appearance on behalf of the Defendants. He filed grounds of opposition dated 13/12/2024 and a Replying Affidavit sworn by Maulid Dado Hidi on 16/12/2024. The grounds were framed as follows: -
1. That the application and the suit herein are bad in law, misconceived, mischievous and an abuse of the court process;
  2. That the interlocutory orders being sought pending the hearing of this application are res judicata the same having been sought in Garsen MCELC E007 of 2024: Beroya Gospel Fellowship & Kilian Gona Luku vs. Board of Management Garsen Primary School and Garsen Primary School and not being issued;
  3. That this application and suit herein are thus sub judice Garsen MCELC E007 of 2024 which was filed on 4<sup>th</sup> September 2024 and is still pending before the trial court since the subject matter of both suits is the same and the orders sought are similar;
  4. That the Plaintiffs are guilty of forum shopping;
  5. That the affidavit in support of the application is fatally defective for having attachments not sealed by the seal of the commissioner per Rule 9 of the Oaths and Statutory Declarations;
  6. That this application is thus defective for lacking evidence in support of the averments therein;
  7. That the 1<sup>st</sup> Plaintiff does not have locus standi to sue for not being a juristic person;
  8. That the 2<sup>nd</sup> Defendant does not have locus standi to be sued as it is not a juristic person and should thus be removed from these proceedings and costs be awarded to it for having been dragged to court.
4. The deponent of the replying affidavit was said to the 2<sup>nd</sup> Defendant's head teacher. He deposed that the 2<sup>nd</sup> Defendant school was allocated land by the community and the then County Council of Tana River, through a letter dated 14/7/2009; that upon demarcation by the District Surveyor, the school was settled on the suit property and has since began construction of ECDE classes. He asserted that the process of mapping and registration of land within the area is ongoing therefore no individual has a title over the suit property. The deponent also exhibited copies of the pleadings and order in Garsen



MCELC E007 of 2024, Beroya Gospel Fellowship & Killian Gona Luku v Board of Management Garsen Primary School and Garsen Primary School.

5. Court directed parties to canvass the application by way of written submissions. As at the time of writing this ruling, only the Defendants had complied with the court's directions.

### **Defendants' Submissions**

6. Mr. Ojwang, State Counsel, identified four issues for determination- firstly, whether the suit and application are sub judice Garsen MCELC E007 of 2024; secondly, whether the application is fatally defective; thirdly, whether the orders sought can be granted in an interlocutory application; and lastly, who shall bear the costs of the application and the suit.
7. It was counsel's submission that the rule on sub-judice is embodied in Section 6 of the *Civil Procedure Act*. To counsel, the Defendants only became aware of the suit filed in Garsen when the Plaintiffs mistakenly filed a notice of withdrawal of the Garsen suit in this matter. According to him, the parties in both suit, issues and orders sought are similar in both suits hence the present suit is sub judice and an abuse of the court process and should be dismissed. Counsel relied on the case of Catherine Nyakoboke Nyang'au v Evangeline Njoka & 3 Others [2021] eKLR.
8. Relying on Rule 9 of the Oaths and Statutory Declarations Rules, counsel submitted that it is required that annexures should be sealed and marked. He argued that in the Plaintiffs' supporting affidavit, the Plaintiffs have indeed demonstrated that they are aware of the above rule. This he believed because at the end of paragraphs 3, 6 and 7 they have indicated that there are some attachments marked as KGL 1, KGL 2 and KGL 3 respectively. However, this reference to attachments ended in the affidavits and the attachments do not bear the commissioning stamp as required which make the documents inadmissible in evidence. For the above, counsel urged the court to expunge from the record the attachments that are neither marked nor commissioned by a Commissioner for Oaths, and in turn dismiss the application for want of evidence. To support this proposition, counsel relied on the cases of Jeremiah Nyangwara Matoke v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR; Francis A. Mbalanya vs. Cecilia N. Waema [2017] eKLR; and the case of Solomon Omwega Omache & Another v Zachary O Ayieko & 2 others [2016] eKLR which was cited with approval in Komora & 8 others (On their own behalf and on behalf of 9 Waata Families) v Cabinet Secretary Lands and Physical Planning & 13 others [2023] KEELC 15723 (KLR).
9. Counsel further submitted that Court cannot issue a permanent injunction (prayer no 3) and eviction orders (prayer no 4) at an interlocutory stage for reason that a permanent injunction means that the rights of the parties have finally been determined such that one is denied right to enjoy the subject matter of a suit forever. He was guided by the decision delivered by Maraga J (as he then was) in case of Headmaster Kiembeni Baptist Primary School & Another V Pastor of Kiembeni Baptist Church [2005] KEHC 2273 (KLR).
10. Counsel urged the court to dismiss the application and suit and award costs to the Defendants as costs follow the event.

### **Analysis And Determination**

11. The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with a previously instituted suit between the same



parties pending before same or another court with jurisdiction to determine it. Section 6 of the [Civil Procedure Act](#) which embodies the above doctrine provides as follows:

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

12. The Defendants contend that the present suit is sub-judice Garsen MCELC E007 of 2024 between the same parties herein. It must however be noted that for this doctrine to successfully apply, the former suit must be pending or live before the same or another court. Counsel for the Plaintiff, told this court that the Garsen suit had been withdrawn. I see no reason to hold otherwise. In the circumstances, the present suit cannot be said to be sub-judice Garsen MCELC E007 of 2024.

13. On the issue of annexures, Rule 9 of the Oaths and Statutory Declarations Rules provides as follows:

“All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters identification.”

14. I have perused the documents filed by the Plaintiffs on CTS. First, the supporting affidavit as filed has no annexures. There is however another batch of documents filed alongside the other pleadings and which are dubbed as “annexures”. For purposes of determining this application, I will presume those to be the annexures referred to in the supporting affidavit. I have keenly perused the said annexures, it is clear that they are neither marked with serial letters identification nor sealed with a seal of a Commissioner of Oaths. I am of the humble view that the documents annexed to the affidavit of Kilian Gona Luku as exhibits have not been properly sealed or marked as required by the rules, hence they are improperly on record and should be and are hereby ordered struck out and expunged from record.

15. In the absence of such evidence, the statements in the supporting affidavit remain unsubstantiated, and the Plaintiffs’ application remains a shell with nothing to stand on. As the orders sought have not been substantiated, they must automatically fail. In any event, the Plaintiffs seek a permanent injunction which cannot be granted at this interlocutory stage as the same can only be granted after the hearing of the case on merit, considering that the same reliefs are sought in the Plaint. The Plaintiffs have neither demonstrated that there are any special circumstances to warrant the granting of a permanent injunction and eviction order at this stage. In the case of *Kenya Power & Lighting Co. Limited –v- Sheriff Molana Habib* [2018] eKLR, the court held thus:

“A permanent injunction 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.”

16. It is therefore clear that it would be premature for the court to grant a permanent injunction at this interlocutory stage without having taken the evidence of the parties. The court also notes that an order of mandamus is to be sought in Judicial review proceedings and not in private litigation such as the present. It ought not have been sought herein in the first place.

17. The upshot of the foregoing is that the Notice of Motion Application dated 17/9/2024 is not merited. It is hereby dismissed with costs. The matter shall be listed for a pretrial conference on 29/5/2025.



**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 28<sup>TH</sup>  
DAY OF APRIL 2025**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

