



Wachira & 3 others (Suing in their own Individual Capacities and on Behalf of Residents of Thunguma Village) v Land Registrar Nyeri & 5 others (Environment & Land Case E006 of 2021) [2022] KEELC 3371 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E006 OF 2021**

**JO OLOLA, J
JULY 28, 2022**

BETWEEN

**PAUL GICHOHI WACHIRA 1ST PLAINTIFF
ANTHONY THUO KARIMI 2ND PLAINTIFF
ROBERT MUBEA MWANGI 3RD PLAINTIFF
CHARLES MWANGI MAHIHU 4TH PLAINTIFF
SUING IN THEIR OWN INDIVIDUAL CAPACITIES AND ON BEHALF OF
RESIDENTS OF THUNGUMA VILLAGE**

AND

**THE LAND REGISTRAR NYERI 1ST DEFENDANT
THE LAND SURVEYOR NYERI COUNTY 2ND DEFENDANT
THE COUNTY GOVERNMENT OF NYERI 3RD DEFENDANT
THE NATIONAL LAND COMMISSION 4TH DEFENDANT
GOEDEV (K) LIMITED 5TH DEFENDANT
MUTHEKA FARMERS CO-OPERATIVE SOCIETY 6TH DEFENDANT**

RULING

1. By the notice of motion dated April 21, 2021, the four (4) plaintiffs suing in their own individual capacities and on behalf of the residents of Thunguma Village pray for orders:
 3. That the honourable court does restrain the 1st, 2nd, 3rd and 5th defendants, their agents, servants and anyone claiming under them from implementing



- the sub-division (of) Thunguma Village Public Land and proposed physical plan done by the 3rd and 5th defendants/respondents pending the hearing and determination of this suit;
4. That the 6th defendant be restrained from selling, alienating, disposing, charging and/or (in) any other way adversely dealing with the parcel of land (known as) Aguthi/Gatitu/3336 pending the hearing and determination of this suit; and
 5. That costs be provided for.
2. The application which is supported by an affidavit sworn by the 1st plaintiff - Paul Gichohi Wachira is based on the grounds:
- (i) That the 3rd defendant has issued a proposed physical plan for the sub-division/demarcation of Thunguma Village Public Land which proposed physical plan is contrary to the findings/determination of a public participation meeting of June 11, 2015 on how the land would be sub-divided/demarcated;
 - (ii) That the public participation meeting had determined that Thunguma Village would be demarcated into 13 households and 13 public utilities but the 5th defendant under instructions of the 3rd defendant has sub-divided the said public land and created extra units to the detriment of the plaintiffs by reducing the entitled acreage to the 13 households and 13 public utilities;
 - (iii) That the plaintiffs further contend that the 6th defendant who is the registered owner of land parcel number Aguthi/Gatitu/336 obtained the registration of the said title falsely and fraudulently on the basis that the parcel of land comprises or is within the public land comprising Thunguma Village; and
 - (iv) That it is only mete and just that the orders sought be granted.
3. The Land Registrar Nyeri and the Land Surveyor Nyeri County (the 1st and 2nd defendants respectively) are opposed to the application. In a joint replying affidavit sworn on their behalf by one Nathan Githaiga and Kimathi KM, the two defendants aver that they have been improperly joined in the suit as they were never involved in the survey and sub-division of the suit land. The 1st and 2nd defendants assert that the survey in question was done by the 5th defendant who is a private surveyor and no documents had been brought to their offices in regard to the survey.
4. The 1st and 2nd defendants further aver that the 1st defendant has not issued any title deeds to the residents of Thunguma Village following the said sub-division and urge that the suit as against themselves be struck out.
5. The County Government of Nyeri (the 3rd defendant) is similarly opposed to the application. In a replying affidavit sworn on its behalf by its Director Physical Planning and Urban Development Beatrice Chelangat, the 3rd respondent avers that the suit property described as Thunguma Village is public land belonging to itself.
6. The 3rd defendant avers further that it was intent on allocating the property to squatters of the said Thunguma Village and hence in the year 2015, it commenced the process that would culminate in the preparation of a physical development plan and issuance of title deeds to the said squatters. The 3rd defendant avers that for purposes of identifying the squatters to enable it carry out the task, it liaised with a committee formed by the squatters and known as the Village Settlement Executive Committee.



7. The 3rd defendant further avers that from the year 2015 it did together with the National Land Commission engage in a verification exercise with the assistance of the liaison committee that was transparent and open.
8. The 3rd defendant avers that at all times material it consulted with the plaintiffs and engaged in public participation foras where everyone were given an opportunity to air their views.
9. Geodev (K) Limited (the 5th defendant) is equally opposed to the application. In a lengthy replying affidavit sworn on its behalf by its Managing Director David Gichuki, the 5th defendant asserts that in the year 2016, it was contracted by the County Government of Nyeri (the 3rd defendant) to carry out planning and survey of Thunguma and Rititi Settlements but the works for Thunguma did not proceed to the survey phase.
10. The 5th defendant avers that again in the year 2020, the 3rd defendant did contract it to carry out surveying of various settlements including Thunguma Village. In that respect, the 3rd defendant supplied the 5th defendant with sub-division plans which the 5th defendant implemented through cadastral surveys.
11. The 5th defendant further avers that the plaintiffs have misconceived the role of public participation in the development and planning of Thunguma Village. They aver that they were contracted by the 3rd defendant to analyse the existing land use of Thunguma and carry out a plan on the proposed land use for residential, industrial, educational, recreational, public purpose, commercial, public utility and transportation purposes.
12. The 5th defendant avers further that all the facilities contemplated by the plaintiffs for allocation of land in Thunguma Village as listed under paragraph 11 of the supporting affidavit were fully provided for within the classification of planned facilities. They assert that the plaintiffs indeed affirmed the proposed development planning presented by themselves vide their letters dated July 22, 2017 and August 28, 2017.
13. The 5th defendant avers that it is aware that the plaintiffs petitioned the County Assembly of Nyeri over the same issues raised herein and the Committee on Physical Planning, Housing and Urbanisation considered the issues and presented a unanimous report to the County Assembly that the subject matter of this suit had been resolved through consultative meetings between the plaintiff and the 3rd defendant.
14. The 5th defendant states that it did on its own conduct public participation meetings on 16 different occasions between September 19, 2016 and May 3, 2021 in which it engaged the residents of Thunguma Village on the whole survey and planning process. The residents had several opportunities during these meetings in which they received the draft plans.
15. Equally opposed to the application is Mutheka Farmers' Co-operative Society Limited (the 6th defendant). In a replying affidavit sworn by its Chairman Harrison Githae Hunyu and filed herein on July 26, 2021, the 6th defendant denies that it has any intention of selling alienating and/or disposing of the parcel of land known as Aguthi/Gatitu/3336 and that any decision to do so would require to be ratified by its shareholders in an annual general meeting.
16. The 6th defendant avers that it is the bonafide registered proprietor of the said parcel of land measuring approximately 2.5 acres and denies that it acquired the same fraudulently. It asserts that its parcel of land does not comprise the utilities deliberated on as per the resolution of the Thunguma Village meeting held on 11th June, 2018 and avers that it is a total stranger to the same and has been improperly enjoined in this suit.



17. The 6th defendant further avers that it was a member of Tetu Growers Co-operative Society Limited which was initially registered as the proprietor of the said parcel of land on October 19, 1998 before it acquired the same through due process and was issued with a title deed in its name on November 12, 2020.
18. I have carefully perused and considered the plaintiffs' application as well as the response thereto by the 1st, 2nd, 5th and 6th defendants. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates representing the parties herein. While the 3rd defendant did not file any affidavit in reply to the application, it did file submissions in support of the 5th defendant's position.
19. The four (4) plaintiffs herein have instituted this suit in their own individual capacities and on behalf of the residents of Thunguma Village situated within Nyeri County. By the application before me, they urge the court to issue an order of a temporary injunction restraining the 1st, 2nd, 3rd and 5th defendants from effecting the proposed sub-divisions of the public land on which the said Thunguma Village is situated.
20. Additionally, the plaintiff also urge the court to issue another order of injunction restraining the 6th defendant co-operative society from selling, alienating, disposing of, charging or in any manner whatsoever dealing with a parcel of land known as Aguthi/Gatitu/3336 pending the hearing and determination of this suit.
21. It is the plaintiffs' case that the 3rd defendant County Government has issued a proposed physical plan for the Thunguma Village Public Land and that the same is contrary to the findings and or resolutions of a public participation meeting held in the village on June 11, 2015 on how the land was to be sub-divided. It is further the plaintiffs' case that the proposed sub-division as prepared by the 3rd and 5th defendant shall yield an extra five (5) units over and above the twenty-six (26) units that had been agreed upon during their meeting and that as a result, the proposed beneficiaries shall get smaller parcels of land contrary to what was earlier envisaged.
22. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358 where the court expressed itself as follows:

“First, an applicant must show 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 an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”
23. That being the case, the question that arises is whether the plaintiff's application meets the threshold. Considering what would constitute a *prima facie* case in a matter such as this, the Court of Appeal in *Mrao Limited v First American Bank of Kenya & 2 others* [2003] KLR 125 expressed itself thus:

“A *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
24. In the matter before me, it is not in dispute that the subject matter of the dispute is public land vested by law upon the 3rd defendant. The plaintiffs are said to be squatters residing on the said parcel of land.



- It is also not in dispute that sometimes in the year 2015, the 3rd defendant as the owner of the land decided to plan and survey the land and to allocate some of it to the squatters residing thereon.
25. Having carried out a verification exercise to identify the squatters with the help of the 4th defendant Commission, the 3rd defendant engaged the 5th defendant surveyors to analyse the existing land use of the said Thunguma Village and to carry out a plan on a number of proposed areas including residential, educational and public utility purposes.
 26. According to the plaintiffs, the final report prepared by the surveyors and on which the 3rd defendant now intends to act fails to take into account the resolutions of a public meeting held in the area on June 11, 2015 on how the land ought to have been sub-divided between some 13 families and 13 public utilities.
 27. I have looked at a copy of the resolutions annexed to the plaintiffs supporting affidavit (annexture “PGW3”). I was however unable to see anywhere where it specifies how the land was to be sub-divided and where it bound the 3rd defendant to do so. From the heading of the Minutes, this was a meeting of the Thunguma Village Planning Committee chaired by the Area Assistant Chief. The meeting was neither attended by the 3rd nor the 5th defendant and I was unable to find the basis upon which the Plaintiffs, insist that it bound the 3rd and 5th defendants.
 28. At minute 3 of the said minutes, those present have listed 13 public utilities said to have been identified within the village including churches and schools. At minute No 4, they have listed 13 names said to be those of family heads of the residents of the area. The document neither mentions the acreage of the land said to be occupied either by the said families or the identified public utilities.
 29. While the plaintiffs contend that their parcels of land would now be reduced, there was nothing to back that allegation. Nor did the plaintiffs provide any evidence of the five (5) additional units which they claim have been added and will now take portions of the land to which they claim entitlement.
 30. Having failed to establish their own entitlement to the public land and having provided no evidence of any new beneficiaries who are intended to benefit from the allocation, I was not persuaded to grant prayer No 3 of the application. On the contrary, it was clear to me that if the orders sought are granted, they will be more prejudicial to the entire community residing in the area as the County Government’s proposed development plan for the area shall not come into effect. Given that it was not denied that the issues in dispute had been subjected to some public participation, I decline to stop the proposed developments.
 31. In respect of prayer No 4 of the application it was clear to me that the 6th defendant’s title which the plaintiffs term to be fraudulent had been issued to their predecessor in title – Tetu Coffee Growers Co-operative Society Limited way back in the year 1998. The plaintiffs have not provided at this stage evidence of fraud in the registration of the title to the previous owner and/or in its transfer to the 6th defendant.
 32. I was also unable to find any evidence that the 6th defendant’s title was excised from the Thunguma Village public land as purported by the plaintiffs.
 33. It follows that I did not find any merit in the plaintiffs’ application. The same is dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF JULY, 2022.

In the presence of:



Mr Kariuki holding brief for GK Kibira for the 6th defendant/respondent.

Ms Wamaitha holding brief for Muhoho Gichimu for the plaintiffs.

Mr Siro for the 1st and 2nd defendants.

Court assistant - Kendi.

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JO OLOLA

JUDGE

