



**Mangeli & 2 others v Muindi & 4 others (Environment & Land Case E003 of 2020) [2022] KEELC 13423 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13423 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E003 OF 2020  
A NYUKURI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**MARY MBAIKA MANGELI ..... 1<sup>ST</sup> APPLICANT  
EDWARD ORINA NYANUMBA ..... 2<sup>ND</sup> APPLICANT  
LENA KITEME (SUIING ON THEIR BEHALF AND AS THE OFFICIALS OF  
“KIMWAA HILL VIEW RESIDENTS ASSOCIATION) ..... 3<sup>RD</sup> APPLICANT**

**AND**

**RICHARD NZIOKI MUINDI ..... 1<sup>ST</sup> RESPONDENT  
KIMATU MUTUKU ..... 2<sup>ND</sup> RESPONDENT  
ABDI MAJID ..... 3<sup>RD</sup> RESPONDENT  
PAUL MULWA ..... 4<sup>TH</sup> RESPONDENT  
RACHAEL WANZA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. What is before court is the Notice of Motion dated 18<sup>th</sup> January, 2021 brought by the Respondents seeking for the following orders:
  - a. Spent
  - b. That this Honourable Court be pleased to set aside the orders made on 21<sup>st</sup> October, 2020 and the Respondents be granted leave to respond/defend the Application dated 7<sup>th</sup> October, 2020.
  - c. That a temporary injunction do issue restraining the Applicants either by themselves, their agents, servants and/or personal representatives or anybody acting on their behalf from



evicting, trespassing, selling, alienating, sub-dividing, transferring, disposing, wasting, leasing, destroying the Respondents' crops and houses and/or in any other way dealing/interfering with the suit property known as 12610/1-5 pending the hearing and determination of his Application.

- d. That orders do issue in terms of prayer 3 pending the hearing and determination of the suit herein.
  - e. That the Plaintiffs do bear the costs herein.
2. The Application is supported by the Affidavit of Richard Nzioki Muindi, the 1<sup>st</sup> Respondent herein, sworn on 18<sup>th</sup> January, 2021. The Respondents' case is that they were never served with the pleadings and application leading to the orders issued herein on 21<sup>st</sup> October, 2020. Further, that they got wind of the said orders when the Applicants and the authorities began intimidating them and that they have a good response to the application as the Applicants were members of Village D Self Help Group and only recently got registered as officials of Kimwaa Hill View Residents Association. They also state that the Applicants have been harassing the Respondents and that they failed to disclose the existence of ELC Misc. No. 35 of 2017.
  3. The Respondents also alleged that the Applicants were sub-dividing the suit property by force, disposing off parcels thereof, placing beacons thereon and selling the same to unsuspecting members of the public. Further, that it is the Applicants who have been demolishing the Respondents houses and threatening them with eviction. According to the Respondents, they have been the ones living in quiet and peaceful enjoyment of the suit property and title thereof should be issued to them.
  4. The Respondents pleaded that should the orders of 21<sup>st</sup> October, 2021 continue in force, they stand to suffer great prejudice as they have been in occupation of the suit property since early 90's as the suit land belonged to their forefathers.
  5. The Application is opposed. Mary Mbaika Mangeli, the Chairlady of Kimwaa Hill View Residents Association, the Applicants herein, swore a Replying Affidavit dated 8<sup>th</sup> February, 2021 in opposition to the Application. It was the Applicants' case that the Respondents were duly served and that is why they have not disclosed how they were made aware of the court order herein. The Applicants denied failure to disclose material facts and stated that they were not privy to the dealings of other groups. They also denied being members of Village D and G of the Respondents' Association.
  6. The Applicants denied selling land and stated that they have settled on their respective parcels for the last 25 years. They distanced themselves from the Respondents' annexure RNM3, which is a letter purportedly written by themselves as members of Ngelani D Village Phase 5 Settlement Scheme. They alleged that the said letter did not originate from them but that the same was a forgery.
  7. On 2<sup>nd</sup> December, 2021, the court directed parties to file and exchange submissions in respect of the Application within 14 days. However, none of the parties complied, hence no submission were filed by either party.

### **Analysis and determination**

8. Having carefully considered the Application, the Affidavit in support as well as the Replying Affidavit, the issues that emerge for determination are as follows:
  - a. Whether the Respondents have met the threshold for setting aside orders of 21<sup>st</sup> October, 2020.
  - b. Whether the Respondents have met the threshold for grant of temporary injunction.



9. The 1<sup>st</sup> Respondent stated that he got wind of the orders of 21<sup>st</sup> October, 2020 and denies having been served the Application leading to those orders and/or the pleadings herein. According to them, they got wind of the impugned orders when the Applicants and the authorities began to intimidate them. They also state that they perused the court file after seeing the order.
10. The Respondents do not disclose the source of the information about the existence of the impugned order or by what means they were able to see the order. They deny having been served with the Application and pleadings but state that they saw the order without disclosing who showed them the order, or when they knew of the existence of the order.
11. In my view, the Respondents' explanation on how they were made aware of the impugned order is not satisfactory and I find that they were duly served with the order and they have been economical with the truth on this matter.
12. As to whether the pleadings and the Notice of Motion leading to the impugned orders, were duly served, I have considered the Affidavit of Service of Daniel Kanyiri Watu sworn on 19<sup>th</sup> October, 2020. He disclosed when and where the Respondents were served. He also described them and stated that on the date he served them being 14<sup>th</sup> October, 2020, they were having a meeting on the suit property. Having considered the Affidavit in support of the Respondents' Application, I note that there is no denial that the Respondents were having a meeting on the suit property on the date they were served, neither is there description denied or challenged in any way. I therefore find that the Respondents were duly served with the pleadings and the Application dated 7<sup>th</sup> October, 2020, hence the orders of 21<sup>st</sup> October, 2020 were regularly issued.
13. Order 51 Rule 15 grants the court discretion to set aside an order made ex parte. This discretion should however be exercised judiciously and meet the ends of justice.
14. Having already found that the Respondents were served with pleadings and the Application dated 7<sup>th</sup> October, 2020, I proceed to interrogate whether the intended response to the Application has merit. The Respondents stated that they have a good response to the Application. That response is that the Applicants were aware of the pendency of ELC Misc. No. 35 of 2017 where the Respondents sought to stop eviction by a party named Aldus Limited, as the Chairlady of the Applicant was then a member of Village D Self Help Group which was suing the said Aldus Limited. Further, that the Applicant misled authorities and usurped the powers of the committee members of Village D Self Help Group, before leaving that group and forming a new group, namely Kimwaa Hill View Residents Association, started harassing the Respondents and threatening them with evictions, having sold the land.
15. The Respondents' allegations against the Applicants were met with a vehement denial from the Applicants. They deny being aware of ELC Misc. No. 35 of 2017, which they allege not to be parties to, they also deny being members of the Respondents' Association and having sold the suit property and maintain that they have been on the suit property for 25 years where they live to date.
16. As the Respondents assertions remain unsupported allegations, it is my finding that the intended response to the Application dated 7<sup>th</sup> October, 2020, has not met and would not persuade this court to make a different decision, other than the one made on 21<sup>st</sup> October, 2021. I therefore find and hold that I am not persuaded that the orders of this court made on 21<sup>st</sup> October, 2020 ought to be set aside.



17. On the issue as to whether the Respondent has met the threshold for grant of interlocutory injunction, this court has power to grant injunction as provided for in Order 40 Rule 1 of the Civil Procedure Rules. The same provides as follows:

“Where in any suit it is proved by Affidavit or otherwise-

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. That the Defendant threatens or intends to remove or dispose off his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

18. It is therefore clear that where the suit property is in danger of being wasted, damaged, alienated or sold, which actions may make it difficult to execute the decree which may eventually be passed in favour of the Applicant, then the court may grant interlocutory injunction to preserve such property.

19. The conditions for grant of interlocutory injunctions are settled and were set out in the case of *Giella v. Cassman Brown Company Ltd* (1973) EA 358, where it was held that for the court to grant interlocutory injunction, the Applicant must demonstrate a prima facie case with a probability of success, that if the injunction is not granted the Applicant stands to suffer irreparable injury that may not be compensated by way of damages and that where the court is in doubt, an Application ought to be decided on the balance of convenience.

20. I note that this suit was initiated by the Applicants who filed an Originating Summons. The Respondents have not filed any pleadings in response to the Originating Summons. It is therefore clear that there is no case filed by the Respondent upon which the prayer for interlocutory injunction may be predicated upon. Hence, the Respondents have no prima facie case against the Applicants. As there is no proof of a prima facie case, it is needless to inquire into whether the Respondents stand to suffer irreparable injury that may not be compensated in damages or whether the balance of convenience tilts in favour of granting the temporary injunction.

21. In the premises, I am not satisfied that the Respondent has met the threshold for grant of interlocutory injunction.

22. In the end, I find no merit in the Application dated 18<sup>th</sup> January, 2021, and I therefore dismiss it with costs to the Applicants.

23. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**



No appearance for the Applicants.

No appearance for the Respondents.

C/A - Josephine

