



**Ndunda & 5 others (Suing on behalf of Fedack Community Based Organization (CBO))  
v National Land Commission & 4 others; Kenya Poultry Development (Interested Party)  
(Petition E19 of 2021) [2022] KEELC 13537 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13537 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
PETITION E19 OF 2021  
A NYUKURI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**BENJAMIN KIOKO NDUNDA ..... 1<sup>ST</sup> PETITIONER  
JOSEPH MUINDI MUTUA ..... 2<sup>ND</sup> PETITIONER  
NICHOLAS MUTUKU ONDIEKI ..... 3<sup>RD</sup> PETITIONER  
FAITH NDUKU MUTUKU ..... 4<sup>TH</sup> PETITIONER  
FRANCIS NZIOKA WAMBUA ..... 5<sup>TH</sup> PETITIONER  
MUTHENGI WAMBUA ..... 6<sup>TH</sup> PETITIONER  
SUING ON BEHALF OF FEDACK COMMUNITY BASED ORGANIZATION  
(CBO)**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
MACHAKOS COUNTY ..... 2<sup>ND</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT  
DIRECTOR SURVEY OF KENYA ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**KENYA POULTRY DEVELOPMENT ..... INTERESTED PARTY**



## RULING

### Introduction

1. This ruling is in respect of the application dated September 28, 2021 brought by the petitioner/applicant seeking for the following orders;
  - (a) Spent
  - (b) Spent
  - (c) That upon hearing of this application interpartes, the respondents and the interested parties be stopped from alienating, disposing and or dealing with the aforesaid parcels of land till full hearing and determination of the petition herein.
  - (d) Costs of this application be in the cause.
2. The application is premised on the grounds on its face as well as the affidavit of Benjamin Kioko Ndunda, the petitioner's chairperson. The petitioner's case is that the petitioner is a community based organization duly registered and with the mandate of inter alia undertaking matters of public interest on behalf of Machakos county residents. According to the petitioner/applicant, land parcel nos 337/4798 and 28989/4 (suit property) are public lands which were unlawfully leased out. The petitioner asserted that the first allottee/lessee of the land was Kenchic Ltd, which was given a conditional lease to use the land for purposes of rearing chicken.
3. The petitioner stated that Kenchic Ltd was not allowed to transfer the lease to any other person or change the use of the land without prior permission of the commissioner of lands and that the allottee was not allowed to subdivide the land. Further, that the land had been lying idle for close to ten years. They also stated that having noticed that the suit property was being subdivided by unknown people, they obtained a search certificate that showed that the land had been transferred to the interested party.
4. The petitioners also assert that the interested party is now subdividing the land contrary to the terms of the original lease. They also state that the respondents have assisted the interested party to change user of the land from agriculture to residential, a process that was unlawful. Further that the land is being subdivided into smaller portions of 10 acres for sale, without making sufficient provision for public utilities. The petitioners claim that the public was never informed of the change of user or subdivision.
5. No response was filed in respect to the application despite service.
6. The application was canvassed by written submissions. On record are the applicant's submissions filed on November 23, 2021.

### Submissions

7. The applicant's counsel submitted that the suit property is public land and the same may only be leased by the respondents in compliance with the law. Counsel submitted that the petitioner's grievance is that the lease issued to the interested party did not meet the legal procedures laid down. Counsel maintained that the lease granted to Kenchic Ltd was for purposes of rearing chicken (farming) and that there was change of user from farming to residential, without giving the public notice in a widely read newspaper.



8. It way further submitted for the applicant that the county government should have been consulted before change of user. According to counsel, the local committee formed for that purpose ought also to have been consulted before transfer of the suit property to the interested party. Counsel contended that subdivision of the suit property ought to have been subject to reservation of some land for public utility. It was counsel's view that residential houses cannot be built on a hilly side without affecting residents downstream and it is the duty of the county government to protect the interests of local residents. Counsel opined that the interests of the local residents were never taken into account when there was change of user of the suit property from agriculture to residential and hence the respondents failed in their duty to guarantee the petitioner's safe environment and their right to proper use of public land.

### **Analysis and Determination**

9. Having considered the application, the affidavit in support, as well as the applicant's submissions, the sole issue that arise for determination is whether the petitioner/applicant has met the threshold for grant of the orders sought.
10. The orders sought were anchored in the provisions of article 42, 79(1) and (2) of the Constitution, the Physical Planning and Land Use Planning Act 2019, Machakos county policy on reservation of land for public utilities on large parcels of land leased to individuals, the Land Act 2012 and order 40 and 51 of the Civil Procedure Rules. I deduce that the orders sought are in the nature of a temporary injunction.
11. Order 40 Rule 1 provides for the power of the court to grant temporary injunction 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, 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 of 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.
12. Essentially therefore, where there is a risk of any property in dispute of being damaged, wasted, alienated or sold, or being removed from the jurisdiction of the court with the result that any ultimate decree passed in favour of the applicant may be obstructed from execution, the court has the discretion to grant temporary injunction so as to preserve the property pending determination of the suit.
13. Principles for grant of temporary injunction are well settled. In the case of Giella v Cassman Brown & Company Limited [1973] EA 358, the court stated the conditions for grant of temporary injunction 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 the balance of convenience.”

14. This position was restated in the case of *American Cyanamide Co v Ethicom Limited* [1975] A AER 504, where the court stated the three elements for grant of injunction as follows;
  - i. There must be a serious/fair issue to be tried,
  - ii. Damages are not an adequate remedy,
  - iii. The balance of convenience lies in favour of granting or refusing the application.
15. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 [2014] eKLR, it was held that the three conditions for grant of injunction are to be applied as separate distinct and logical hurdles which the applicant must surmount sequentially.
16. It is clear from case law, that to obtain an interlocutory injunction an applicant must demonstrate that he/she has a prima facie case with chances to succeed, that if the injunction is denied he/she stands to suffer irreparable injury that may not be restituted by an award of damages and that if the court has doubt as to whether the injury is irreparable, it ought to consider in whose favour the balance of convenience tilts.
17. A prima facie case was described in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR as follows;

“ 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 or an explanation or rebuttal from the latter.”
18. In this case, the petitioner’s grievance is that the suit property is public land and that the same was transferred to the interested party by the first allottee Kenchic Ltd, against the terms and conditions of the lease and that there was a change of user from agriculture to residential thereby infringing on the applicant’s rights. Further that subdivision did not provide for public utilities.
19. While the applicant alleges that the suit property is public land, it also states that the land was allocated to Kenchic Ltd who subsequently transferred the lease to the interested party.
20. Public land is defined in article 62 of the *Constitution* as follows;
  - a. land which at the effective date was unalienated government land as defined by an act of parliament in force at the effective date;
  - b. land lawfully held, used or occupied by any state organ, except any such land that is occupied by the state organ as lessee under a private lease;
  - c. land transferred to the state by way of sale, revision or surrender;
  - d. land in respect of which no individual or community ownership can be established by any legal process;
  - e. land in respect of which no heir can be identified by any legal process;
  - f. all minerals and mineral oils as defined by law;



- g. government forests other than forests to which article 63(2) (d) (1) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries and specifically protected areas;
  - h. all roads and thoroughfares provided for by an act of parliament;
  - i. all rivers, lakes and other water bodies as defined by an act of parliament;
  - j. the territorial sea, the exclusive economic zone and the sea bed;
  - k. the continental shelf;
  - l. all land between the high and low water marks;
  - m. any land not classified as private or community land under this Constitution; and
  - n. any other land declared to be public land by an act of parliament;
    - i. in force at the effective date; or
    - ii. enacted after the effective date.
21. Private land is defined in article 64 of the *Constitution* as follows;
- “private land consists of;
- a. registered land held by any person under any freehold tenure;
  - b. land held by any person under leasehold tenure; and
  - c. any other land declared private land under an act of parliament.
22. In the instant matter, the applicant contends that the suit property was first allocated to Kenchic Ltd and later transferred to the interested party herein. I have perused annexure BK1 which is a copy of lease in respect of the suit property as well as the search marked as annexure BK2. From the two documents, it is clear that the suit property was allocated to Kenchic Ltd for a 99 year leasehold period with effect from March 1, 1992, and on December 22, 2017 the leasehold interest in the said property was transferred to Kenya Poultry Development Limited.
23. It is therefore not correct that the suit property is public land, as the same does not fall within the definition of public land as provided for in article 62 of the *Constitution*. As the suit property is registered property, having been initially registered under the repealed *Registration of Titles Act* Cap 281, Laws of Kenya, it is my finding that the same is private land as defined under article 64(b) of the Constitution.
24. The petitioner’s grievance is that the said property was duly allocated to Kenchic Ltd for purposes of “rearing chicken (agriculture)” and that there was change of user from agriculture to residential without taking into account the law and the petitioner’s interests. The petitioners also argue that subdivision was done without reservation of land for public utilities.
25. I have looked at the lease issued in favour of Kenchic Ltd. Condition number 3 shows that the land and buildings shall only be used for residential purposes. I do not see any condition stating that the land was for agricultural purposes and therefore the applicant’s argument that there was change of user from agriculture to residential is baseless. In any event, no evidence of change of user has been exhibited in any manner by the petitioner.



26. On the issue as to whether there was subdivision of the suit property, which subdivision failed to provide for public utility, it was upon the applicant to avail before this court, evidence of such subdivision or deed plans done by the interested party. No such deed plans were produced by the applicants to show that the subdivision done by the interested party were unprocedural and or unlawful for failure to make provision for public utilities. In addition an owner of private land does not need to consult the public before transferring their property to third parties.
27. In the premises, I am not satisfied that the applicant has made out a prima facie case with a probability of success. Having found so, it is not necessary to interrogate whether the applicant shall suffer irreparable injury which may not be compensated in damages or where the scale of convenience tilts.
28. In the premises, I find no merit in the petitioner's application dated September 28, 2021 and the same is hereby dismissed. Costs shall abide the determination of the suit.
29. 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;**

Mr. Nyakundi for applicant.

No appearance for the Respondent.

C/A - Josephine

