



**Wangai & 3 others (suing as Officials of Njoro Kiwanja Ndege Welfare Associations) v Mukonyoro & 6 others (Environment & Land Case E83 of 2021) [2022] KEELC 13359 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13359 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E83 OF 2021  
JM MUTUNGI, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**JOSEPH CHEGE WANGAI & 3 OTHERS & 3 OTHERS ..... PLAINTIFF  
SUING AS OFFICIALS OF NJORO KIWANJA NDEGE WELFARE  
ASSOCIATIONS**

**AND**

**KAMANGA MUKONYORO & 3 OTHERS (SUED AS TRUSTEES OF UHURU  
WELFARE ASSOCIATION) ..... 1<sup>ST</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT  
DIRECTOR PHYSICAL PLANNING ..... 3<sup>RD</sup> DEFENDANT  
COUNTY GOVERNMENT OF NAKURU & 3 OTHERS ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff has instituted the present suit vide a plaint dated November 24, 2021 and seeks declarations that the plaintiffs are the lawful owners and/or allottees of various plots comprised in PDP No R23/98/7 issued by the director of physical planning on the December 5, 1997; that the PDP NoR23/2001/3 was illegally, irregularly and fraudulently procured and hence null and void; and an order of permanent injunction against the defendants.
2. Simultaneously with the plaint the plaintiffs filed under a certificate of urgency the notice of motion dated November 4, 2021 which is the subject of the instant ruling. The applicants sought various orders and the relevant ones to this ruling are prayers 3, 4 and 6 which are set out hereunder:-
3. That pending the hearing and determination of this suit, the 1<sup>st</sup> defendant/respondent by itself, its members, trustees, officials, agents, servants and/or anyone claiming under



them from claiming proprietary rights, evicting, interfering with plaintiffs' quiet and peaceful occupation and use of their respective plot numbers Njoro Golf Squatters phase 1 plot No 4,J4,J5,7,11,12,13,18,19,21,22,25,27,28,30,33,34,36,37,38,44,49,56,57,66,72,78 (Residential), Njoro Gold Squatters Phase II plot No J2,3,8,9,12,15,J16,17,19,20,21,25, J25, J28,31,32,33, J33, J34,35, J35,37,J38,42,48,59,60,61,65,74,75,77,80(Residential) and Njoro Gold Squatters Phase III 6,10,17,23,25,26,31,37,66,74,87,102(Residential) comprised in the PDP No R23.98/7 certified by the 3<sup>rd</sup> defendant/respondent on the December 5, 1997 and approved by 2<sup>nd</sup> defendant/respondent on the January 21, 1998.

4. That in the alternative this honorable court be pleased to order that pending the hearing and determination of this suit, the *status quo* obtaining on the plots numbers Njoro Golf Squatters Phase 1 Plot No 4, J4, J5,7,11,12,13, 18,19,21,22,25,27,28,30,33,34,36,37,38,44,49,56,57,66,72,78 (Residential), Njoro Gold Squatters Phase II Plot No J2,3,8,9,12,15,J16,17,19,20,21,25, J25, J28,31,32,33, J33, J34,35, J35,37,J38,42,48,59,60,61,65,74,75,77,80 (Residential) and Njoro Gold Squatters Phase III 6,10,17,23,25,26,31,37,66,74,87,102(residential) comprised in the PDP No R23.98/7 certified by the 3<sup>rd</sup> defendant/respondent on the December 5, 1997 and approved by 2<sup>nd</sup> defendant/respondent on the January 21, 1998 be maintained.
6. That pending the hearing and determination of this suit this application interpartes this honorable court be pleased to stay any further proceedings in Nakuru ELC No 437 of 2013; [Njoro Golf Club Squatters Self Help Group v Uburu Welfare Association](#).
3. The application was anchored on the grounds set out on the body of the application and the supporting affidavit sworn by Joseph Chege Wangai dated November 24, 2021. *Inter alia*, the applicants aver that the plots they claim ownership of were comprised on PDP No R23/98/7 which was used to allocate the plots to them. It is the applicants averment that prior to the issuance of PDP NoR23/98/7 on December 5, 1997 they had been in occupation of the land since 1935 and that they have continued to be in occupation even after the PDP was issued and the plots allocated to them.
4. The plaintiffs however aver that notwithstanding that a PDP No R23/98/7 for the land they were in occupation of had been issued, the 1<sup>st</sup> defendant in collusion with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants caused another PDP No R23/2001/3 over the same land to be fraudulently issued and gazetted vide Gazette Notice No 999 of November 28, 2001 without any notice or consultation with the plaintiffs. The plaintiffs further aver that the 1<sup>st</sup> defendant had vide an application in Nakuru ELC No 437 of 2013, sought an order of eviction against the plaintiff/applicants on the basis of an alleged decree issued in that case on a claim predicated on the impugned PDP No R23/2001/3. The plaintiff/applicant averred that unless this court intervene and grants an injunctive order the plaintiff/applicants stand to suffer great prejudice and irreparable damage.
5. The plaintiff/applicants have in the affidavit sworn in support of the application set out in detail the underlying perspective of the matter and it is clearly which of the two PDP's is applicable to the disputed parcel of land. Is it PDP No R23/98/7 which the plaintiffs predicate their claim on or is it PDP No R23/2001/3 which the 1<sup>st</sup> defendant anchors their claim to the disputed parcel of land upon?
6. The 1<sup>st</sup> defendant filed a replying affidavit through John Maina Gichuru in opposition of the plaintiffs application for injunction. The 1<sup>st</sup> defendant averred that the present suit was resjudicata ELC No 437 of 2013 and thus, stated the plaintiffs application was incompetent and an abuse of the court process and urged that the same be struck out with costs. The 1<sup>st</sup> defendant further averred that there was no evidence that the PDP No R23/98/7 alleged by the plaintiffs was ever approved and/or gazetted while in contrast, the 1<sup>st</sup> defendant has shown that PDP No R23/2001/3 was duly approved and gazetted.



The 1<sup>st</sup> defendant maintained that the PDP was not obtained fraudulently as alleged by the plaintiffs and asserted that the High Court in Judicial Review No 201 of 2008 upheld the PDP and quashed all the allotment letters that had been issued by County Council of Nakuru over the land that was comprised in PDP R23/2001/3 on the basis that the council had no power or authority to allocate land comprised in a PDP as such power was reposed in the Commissioner of Lands. The 1<sup>st</sup> defendant has in the replying affidavit at paragraph 20 referred to Nakuru HC J/R No 201 of 2008 and Civil suit No 773 of 2009 as if they were one and the same case presided over by Martha Koome (as she then was) which is misleading. The said paragraph 20 is reproduced hereunder:-

“That I say so in paragraph 19 supra, for the reason that in an interlocutory ruling in the Nakuru High Court Judicial Review No 201 of 2008, delivered by Hon. Lady Justice Martha Koome on the February 20, 2009, the Judge castigated the 2<sup>nd</sup> defendant ( country council of Nakuru) in Civil suit No 773 of 2009 for acting ultra vires in exceeding its jurisdiction and was prohibited from surveying and issuing allotment letters to the then respondents and currently the plaintiff/applicants”

7. In the Judicial Review No 201 of 2001 the 1<sup>st</sup> defendant as the applicant had sought letters of allotment issued by the county council of Nakuru to the plaintiffs to be quashed and the county council to be restrained from subdividing or allotting the suit land. The court granted the application that the applicants had predicated on their being in possession of PDP No R23/2001/3 and hence in essence the court upheld the PDP. The plaintiff/applicants herein as plaintiffs had sued the 1<sup>st</sup> defendant herein and the county council of Nakuru in Nakuru CMCC No 773 of 2009 seeking an injunctive order and the 1<sup>st</sup> defendant by way of counter claim sought to have the plaintiffs evicted from the suit land by virtue of being the legal owners on account of PDP No R23/2007/3. The plaintiffs said suit was struck out on account of lack of locus standi and jurisdiction of the court. The counterclaim proceeded to hearing and the court granted an eviction order against the plaintiffs. There were however new entrants in the suit before the judgment was executed and the judgment was set aside on application of the new parties. Thereafter the suit was transferred from the subordinate court to the Environment and Land Court and was renumbered as ELC No 437 of 2013. The case is still pending before the court as ascertained by the court on perusal of the file record in the course of the preparation of this ruling. The respondents, vide the replying affidavit sworn by John Maina Gichuru appear to confuse the purport of the case notably HCJ/R No 201/2008 and CMCC No 773 of 2009 and ELC No 437 of 2013. The Judicial Review 2001 of 2008 was earlier in time and the court merely held the county council acted ultravires in issuing allotment letters to the applicants (respondents in the J/R). The allotment letters were quashed. The applicants in response filed Nakuru CMCC No 773 of 2009 seeking to be declared as the legal owners of the suit property ostensibly by virtue of adverse possession. The Respondents defended the suit and filed a counterclaim seeking the eviction of the applicants. The suit by the applicants was struck out on the twin grounds of lack of locus standi and lack of jurisdiction of the Magistrate’s court. The counterclaim against the applicants was however allowed and an eviction order issued against the applicants. The judgment as indicated above was set aside and the chief magistrate’s suit was ordered transferred by consent of the parties to ELC where it was renumbered as Nakuru ELC No 437 of 2013. The suit as per the record was dismissed for want of prosecution by Munyao, J on January 30, 2018. The dismissal order has not been set aside and an application by the respondent to set the dismissal order of the suit has not been prosecuted.
8. Having outlined, albeit in brief the background of this matter, it is apparent issues pertaining to the disputed parcel of land which both the plaintiffs and the 1<sup>st</sup> defendant claim, are far from being settled. The plaintiffs lay claim to the parcel of land by virtue of PDP No R23/98/7 that they claim vested



the land to them while the 1<sup>st</sup> defendant lays claim to the same parcel of land by virtue of PDP No R23/2001/3.

9. The parties canvassed the application by way of written submissions. The 2<sup>nd</sup> and 4<sup>th</sup> defendants did not participate in the proceedings and did not file any pleadings. The attorney general filed a defence on behalf of the 3<sup>rd</sup> defendant but equally did not participate in the prosecution of the application. The plaintiffs and the 1<sup>st</sup> defendant purport to hold PDP's to the disputed land. The issue as to which of the alleged two PDP's is the valid one cannot in my view be determined at this interlocutory stage but is an issue that ought to be determined at the trial. The Director of Physical Planning is mandated under the law to prepare and issue PDP's under the *Physical and Land Use Planning Act*, 2019 and his evidence would be crucial in making the determination. It is not lost to the court that although the alleged PDP's were issued way back in 2001, to date no titles have been issued in regard to the disputed land. This could have been as a result of the dispute between the plaintiffs and the 1<sup>st</sup> defendant.
10. The 1<sup>st</sup> defendants have argued that the instant application is resjudicata as the issues canvassed in the application have been dealt with and settled in ELC No.437 of 2013. I do not think this is the case because as I have pointed out above, ELC No 437 of 2013 was dismissed for want of prosecution on January 30, 2018 and hence the issues raised in the suit cannot be said to have been determined finally. The doctrine of *resjudicata* would therefore not be applicable in the instant suit.
11. The plaintiffs in the suit claim to have occupied and developed the suit premises from the year 1935 and that the PDP No R23/98/7 was intended to legalize their ownership of the land. They claim the PDP No R23/2001/3 issued to the 1<sup>st</sup> defendant was fraudulently procured and was superimposed on the land that had already been planned vide PDP No R23/98/7 in their favour. The issue of who between the plaintiffs and 1<sup>st</sup> defendant is the rightful owner of the disputed property is a live issue which can only be resolved by hearing evidence at the trial.
12. In the circumstances the order that would commend itself to the court is to have the suit property preserved by ordering, which I hereby do, that the parties do observe and maintain the prevailing *status quo* as appertains to the disputed property pending the hearing and determination of the suit.
13. The parties shall bear their own costs of the application.

**RULING DATES SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**J M MUTUNGI**

**JUDGE**

