



**Huma v Plateau Residents Association & another; Nairobi Metropolitan Services (Interested Party) (Environment and Land Case Civil Suit E318 of 2021) [2022] KEELC 15126 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15126 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E318 OF 2021  
OA ANGOTE, J  
NOVEMBER 24, 2022**

**BETWEEN**

**JOHN IRUNGU HUMA ..... PLAINTIFF**

**AND**

**PLATEAU RESIDENTS ASSOCIATION ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL WAINAINA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**NAIROBI METROPOLITAN SERVICES ..... INTERESTED PARTY**

**RULING**

1. Three Applications are before this court for determination. The first application is dated 27<sup>th</sup> August 2021 in which the Plaintiff has sought for the following orders:-
  - a. That this Honourable Court be pleased to issue a permanent injunction to restrain the Respondents whether acting by themselves or through their agents, servants, workmen, and/or accomplices from trespassing upon, damaging, alienating or otherwise interfering with the suit property and businesses on Nairobi/Block/110/223 and Nairobi/Block/110/224 pending the hearing and final determination of this suit.
  - b. That costs of this application be borne by the Respondents.
2. The grounds supporting the application are listed on the face of the application and the Supporting Affidavit sworn by the Plaintiff. According to the Plaintiff, he is the bona fide owner of all those parcels of land known as Nairobi/Block/110/223 and Nairobi/Block/110/224 (the suit properties) which he bought in 1994 and that he has been carrying out business on the suit premises for more than 30 years.



3. It was deponed by the Plaintiff that on 18<sup>th</sup> August 2021, without any good reason or justifiable case, the 2<sup>nd</sup> Respondent sent out a letter to him and one of his tenants informing him that his tenant's business contravenes the by-laws of Plateau Residents Association cluster and that they should shift the business elsewhere with immediate effect.
4. It was the Plaintiff's deposition that it would be unreasonable for him to relocate his business where he has over the years accumulated vast assets, machineries and equipment, and that it would take at least 5 years to effect such relocation.
5. The Plaintiff deponed that the businesses on the suit property are his sole means of livelihood and that when he purchased the suit land in 1984, Thome was agricultural and not residential area; that no clusters existed then; that as subdivision was incomplete, land owners were not issued title deeds and that the Respondents were being selective as other residents operate businesses from their homes,
6. The Defendants opposed the application vide Replying Affidavit dated 24<sup>th</sup> August 2021. It was their case that the 1<sup>st</sup> Defendant is a Residents Association duly registered as a society, that the area is a controlled development area with rules that govern the interactions and usage of the parcels of land as set out in *the constitution* of the society passed by the residents and that the Plaintiff has however refused/failed or ignored to abide by the rules and regulations of the Estate as defined in its constitution. According to the Defendants, the Plaintiff has recently commercialized his property, which has interfered with the peaceful enjoyment of the neighborhood by members of the association and the residents of Thome One.
7. The Defendants urged that the suit properties now hold various businesses including garages, factories, go downs, shops and offices, among others and that this has interfered with the neighborhood through increased insecurity due to high movements of unknown personnel, goods and motor vehicles, noise, air and environment pollution.
8. It was deponed that further, the numerous businesses on the suit properties has led to destruction of the newly repaired private road by the heavy commercial trucks, which neighbors fundraised to repair using cabro bricks and devaluation of residential properties, health hazards from parasites and rodents in the warehouse, dangerous environmental condition for children playing in the neighbourhood, high risk of smuggling and selling drugs to minors and frequent power outages due to high voltage consumption by the Plaintiff.
9. The Defendants urged that the residents of the association stand to lose their investments and the recently constructed cabro road which they fully funded; that despite requests to the Applicant to abide by the Estate rules and regulations, the Applicant failed to respond or to abide by the Association's requests and that the Plaintiff continues to violate and is in breach of the residents' right to privacy under Article 31 and 38 of *the Constitution* and their right to peaceful enjoyment of their land as enshrined under Article 40.
10. The Plaintiff's second application is dated 25<sup>th</sup> October 2021 and seeks the following reliefs:
  - a. That the Nairobi Metropolitan Services (NMS) be enjoined in the suit as an interested party
  - b. That this Honourable Court be pleased to issue a temporary order of injunction restraining the intended interested party either by itself, their agents, servants and/ or representatives from interfering with the suit properties and businesses on Nairobi/ Block/ 110/223 and Nairobi/ Block/110/224 pending the hearing and determination of this suit.
  - c. That the costs of this application be provided for.



11. The grounds of this Application, as indicated on its face and the affidavit in support sworn by the Plaintiff, are that vide a letter dated 9<sup>th</sup> September 2021, the Defendants herein sought the intervention of the intended Interested Party despite the ongoing case between the parties.
12. The Defendant urged that this letter was an afterthought as the Defendants were served with pleadings on 2<sup>nd</sup> September 2021, and that any such intervention ought to have been sought before the Plaintiff filed this suit.
13. It was the Plaintiff's deposition that the Interested Party, through its representative, visited the suit land on 21<sup>st</sup> October 2021 to intervene on the Defendant's behalf; that the intervention the Defendants are seeking from the Intended Interested Party is to establish whether the suit properties ought to be used for commercial or residential purposes and that there is an imminent risk of interference of the suit parcels by the intended Interested Party while the suit is still ongoing.
14. In their Replying Affidavit, the Defendants deponed that the Plaintiff had applied for a change of user from agricultural to multiple dwelling units in March 2021, and not commercial use, manufacturing and storage; that the Plaintiff had recently commercialized his property and wants to use this court to stop a statutory body from conducting its legal mandate and that this court should desist from usurping the mandate of a statutory body.
15. It was deponed that the Defendants have followed due process and raised complaints with various government bodies, including the NMS which has began the process of enforcement and ensuring compliance and that the claim by the Plaintiff amounts to abuse of the court process which has been undertaken with a scheme of hindering enforcement of laws and to stop a statutory body from exercising its mandate and ensuring compliance.
16. They averred that they have no objection to the joinder of the NMS as a substantive party, but object to the injunctive orders sought being issued against them.
17. The Defendants have also filed a Notice of Motion 22<sup>nd</sup> November 2021 in which they which have sought for the following orders:
  - a. A conservatory order be and is hereby issued prohibiting the Plaintiff, is agents, staff or any other resident of his house or of the Plateau Residents Cluster from illegally commercializing the properties within the cluster.
  - b. That the OCS Kasarani Police Station in collaboration with the Compliance and Services Delivery Coordinator Roysambu Sub County and the Administration Police under the Chief Roysambu Sub County to jointly implement and enforce the above orders.
  - c. That the Honourable Court be pleased to make any such further orders and issue any other relief it deems just and equitable to grant in the interest of justice.
  - d. Costs of the application be provided for.
18. The grounds of this application, as set out on the face of it and by the affidavit of Samuel Wainaina are that since the Plaintiff filed this suit, he has been conducting his affairs with a high level of impunity and that members of the 1<sup>st</sup> Defendant have raised numerous complaints concerning the sudden increase in dangerous gasses and chemical emissions coming out of the plaintiff's compound leading to respiratory difficulties.
19. The Plaintiff opposed the Defendant's Application vide Replying Affidavit dated 8<sup>th</sup> December 2021 in which he deponed that that he is not a member of the Plaintiff's Association and ought not to be



subjected to its rules and regulations and that he has the right to freedom of association, including the right not to be compelled to join or participate in the activities of the 1<sup>st</sup> Defendant Association.

20. The Plaintiff deponed that the road in question is a public road; that the Defendants have failed to give particulars of the alleged damage on the road and where the damage took place and its correlation to him and that the Defendants are running a smear campaign against him.

### **The Plaintiff's submissions**

21. The Plaintiff's advocate submitted that the Plaintiff is deserving of the injunctive orders sought based on the criteria set out in *Giella vs Cassman Brown*; that the purpose of the injunctive orders sought by the Plaintiff is to preserve the status quo and to stop further interference by the Defendant pending determination of this suit. Counsel relied on the cases of *Edwin Kamau Muniu vs Barclays Bank of Kenya Ltd*, *Agnes Adhiambo Ojwang vs Wycliffe Odhiambo Ojjo*, *Kisumu Stephen Abu Mukhobi vs Daniel Oria Odhiambo & Another ELC No.108 of 2012* and *Alternative Media Ltd vs Safaricom Ltd [2004] eKLR*.
22. With respect to the Defendant's application for conservatory orders, the Plaintiff's advocate relied on the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others [2014] eKLR* where it was held that conservatory orders bear a more decided public law connotation as they facilitate ordered functioning within public agencies and to uphold adjudicatory authority of the court in the public interest.
23. It was submitted that this dispute involves private interests and does not bear any public law connotation and that issues of public interest and constitutional values do not arise.
24. The Plaintiff's advocate submitted that they will be highly prejudiced if conservatory orders are granted at this stage as the issue of emission of gases ought to be canvassed at the hearing stage where the Defendants will have the opportunity to call expert witnesses to prove their case.
25. The Defendants' advocates submitted that that the Defendants have met the threshold for granting conservatory orders as set out in *Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others [2015] eKLR* and that they have an arguable prima facie case with a likelihood of success as defined by the court in *Mrao vs First American Bank of Kenya Limited & 2 others (2003) KLR 125*.
26. It was submitted on behalf of the Defendants that the actions of the Plaintiff have denied the Defendant peace and the quiet enjoyment of their rights and that the report by the Nairobi Metropolitan Services attached to the Respondent's affidavit has clearly shown the violations by the Plaintiff.
27. The Defendants' counsel submitted that they have presented uncontroverted facts which shows that the Plaintiff has been running an enterprise that poses health hazards to the residents of the 1<sup>st</sup> Defendant, which cannot be adequately remedied by way of damage and that the public and environment stand to be irreparably injured. They relied on the definition of irreparable injury as set out in *Halsbury's Laws of England, 3<sup>rd</sup> Edition Volume 21, paragraph 739, pg 352*.
28. It was submitted by the Defendants that the Plaintiff has obtained licenses that do not match the businesses he owns; that he conducted a change of user from agricultural to residential multi-dwelling units, and yet the premises are being used for commercial purposes and that the Plaintiff has acknowledged receipt of Environmental Initial/ Self Audit Reports, not the reports themselves nor evidence that NEMA approved the Applicant's businesses.



29. The Defendants' counsel submitted that the Defendants will suffer irreparable health conditions if the Plaintiff is allowed to continue with his factory business; that if the Defendant's application is not granted, this matter will be rendered an academic exercise and that their suit is in the Public's interest as the Plaintiff's actions infringe on the right to life of the Defendants as protected under Article 26.
30. The Plaintiff's advocate relied on the case of Mohammed Ali Baadi & Another vs the Hon. Attorney General & 11 others (2018) eKLR, where the court held that environmental pollution should be regarded as amounting to a violation of Article 21 of *the Constitution*. They also relied on the case of Friends of Lake Turkana Trust vs the Attorney General & 2 Others.

### **Analysis and Determination**

31. This Ruling is in respect to three applications, with the first two having been filed by the Plaintiff and the third by the Defendant. The first application by the Plaintiff has sought for orders of permanent injunction against the Defendants from trespassing or interfering with the suit land pending determination of this suit.
32. The application is premised on the grounds that the Plaintiff is the owner of the suit properties and has been conducting businesses thereon for more than thirty years; that the Defendants issued notices to himself and to his tenants on 18<sup>th</sup> August 2021, stating that his tenants' businesses contravene the by-laws of Plateau Residents Association cluster and that they should shift the business elsewhere with immediate effect and that this request by the Defendants is unreasonable.
33. The Defendants have argued that the Plaintiff recently commercialized his property, which has interfered with the peaceful enjoyment of the neighborhood by members of the association and residents of Thome One. They urge that this has interfered with the neighborhood through increased insecurity due to high movements of unknown personnel, goods and motor vehicles, noise, air and environment pollution, and the destruction of the newly repaired private road by the heavy commercial trucks, which neighbors fundraised to repair using cabro bricks.
34. The second application by the Plaintiff has sought for joinder of the Nairobi Metropolitan Services as well as injunctive orders preventing the NMS from interfering with the suit property pending hearing and determination of this suit.
35. Lastly, the third application by the Defendant has sought for conservatory orders restraining the Plaintiff from illegally commercializing the properties within the cluster. According to the Defendants, since the Plaintiff filed this suit, he has been conducting his affairs with a high level of impunity and that members of the 1<sup>st</sup> Defendant have raised numerous complaints concerning the sudden increase in dangerous gasses and chemical emissions coming out of the Plaintiff's compound leading to respiratory difficulties.
36. Neither the *Civil Procedure Act* nor the Rules defines an "interested party." The term is however defined under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as:

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation."
37. An Interested Party is also defined by the Black's Law Dictionary, 9<sup>th</sup> Edition as:

"A party who has a recognizable stake (and therefore standing) in the matter."



38. The Supreme Court of Kenya in the case of Francis K. Muruatetu and another vs Republic & 5 others (2016) eKLR articulated that enjoinder of an Interested Party in a suit is at the discretion of the court. The court held as follows:

“Enjoinder is not as a right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its participation, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”

39. The Plaintiff has sought the joinder of the NMS on grounds that the Defendants herein sought the intervention of the intended Interested Party despite the ongoing case between the parties. It is the Plaintiff's case that the agents of the Intended Interested Party visited the suit land on 21<sup>st</sup> October 2021 to intervene on the Defendant's behalf.

40. This court however takes judicial notice that the Nairobi Metropolitan Services handed back operations of the county to the Nairobi County Government on 30<sup>th</sup> September 2022.<sup>1</sup>

#### FOOTNOTE 1

41. The NMS having transferred back to the Nairobi City County the dockets of transport, housing, public works, utilities and ancillary services and country physical planning and development, which it had supervised for the last two years, its mandate lapsed, and is no longer in existence. This court thus declines to grant the prayer for joinder of the intended interested party.

42. Having declined to grant the order for the joinder of the intended Interested Party, it cannot issue any orders against them with respect to the subject matter herein. This is because the Intended Interested Party is no longer the institution responsible for county physical planning and development.

43. The Plaintiff has sought for an order of permanent injunction against the Defendant at this interlocutory stage. Considering that this suit has not been heard on merits, it would be premature for the court to issue a permanent injunction. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit.

44. 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.

45. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders by the court.

<sup>1</sup> (content missing)



Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties. That is what the Plaintiff must have meant.

46. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a prima facie case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (see *Giella vs Cassman Brown & Co Ltd* (1973) EA 358 and *Fellowes and Son vs Fisher* [1976] I QB 122).

47. What amounts to a prima facie case, was explained in *Mrao vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 case 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

48. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

49. It is the Plaintiff’s case that he is the registered owner of the two suit properties, on which he has operated business for the last thirty years. He asserts that he has suffered harassment from the



- Defendant and that on 18<sup>th</sup> August 2021, without any good reason or justifiable cause, the 2<sup>nd</sup> Respondent sent out a letter to the Plaintiff and another one to his tenants.
50. It is the Plaintiff's case that in the said letter, the Defendants informing them that his tenants' businesses contravenes the by-laws of Plateau Residents Association cluster and that they should shift the businesses elsewhere with immediate effect.
  51. In considering whether a prima facie case has been made out, it is the role of this court to gauge the strength of the suit and not to adjudge the suit at an interlocutory stage. This was held by the court in *Habib Bank AG Zurich vs Eugene Marion Yakub*, CA No. 43 of 1982.
  52. The Plaintiff has asserted that when he purchased his property, the user of the land was agricultural and not residential. The Defendants on their part, have averred that in March 2021, the Plaintiff applied to change the user of the land from agricultural to multiple residential units. The Plaintiff did not deny that he indeed applied for change of user to multiple residential units. He however clarified that he applied for the said change of user in 2013 and not 2021 as alleged by the Defendants.
  53. It is not disputed that the Plaintiff has indeed commercialized his property and has several businesses running on the property. It is also apparent that the Plaintiff's use of the land has always been contrary to its user, which has been agricultural, and recently changed to residential multi-dwelling units.
  54. The Plaintiff has indeed annexed business permits, food licenses and fire prevention certificates issued to businesses resident on the suit land by the Nairobi City County. Such licenses do not however override the mandatory provisions of the *Physical and Land Use Planning Act*. The Plaintiff also annexed to its Affidavit a letter from the National Environment and Management Authority (NEMA), acknowledging receipt of Environmental Initial/ Self-Audit Report. The Plaintiff has however failed to attach the actual reports for this court's consideration. He has also failed to adduce evidence that the area is in fact zoned as a commercial area.
  55. On the basis of the foregoing, this court must find that the Plaintiff has failed to demonstrate prima facie that it has a right to conduct its commercial businesses in his property which is zoned as a residential area, and that such right has been infringed by the Defendants in this matter as to call for a rebuttal.
  56. Having found that the Plaintiff has not established a prima facie case with a likelihood of success, this court is guided by the Court of Appeal decision in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR (quoted above) where the court held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. This court thereby disallows the Plaintiff's application dated 27<sup>th</sup> August 2021 through which it sought an injunction to restrain the Defendants from trespassing and interfering his businesses.
  57. In any event, the only injury the Plaintiff is likely to suffer is business losses. This injury can be adequately compensated in damages. This court is not persuaded by the Plaintiff by his assertion that he will suffer irreparable harm. The Plaintiff's prayer for injunction against the Defendant thus fails.
  58. With respect to the Defendants' application, the law on the issuance of conservatory orders is well settled. Conservatory orders were defined in the case of *Judicial Service Commission vs Speaker of the National Assembly & Another* (2013) eKLR where the court held that;

“Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under *the Constitution*, the supreme law of the land. They are not remedies between one individuals against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other



words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

59. The principles in regard to granting of interim conservatory orders were outlined by the Supreme court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* (2014) eKLR where the court stated as follows:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

60. In the case of *Wilson Kaberia Nkunja vs Magistrates and Judges Vetting Board and Another* Nairobi High Court Constitutional Petition No. 154 of 2016, the court summarized the principles in granting conservatory orders as follows: -

- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the constitution*.
- b. Whether if a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory.
- c. The public interest must be considered before grant of a conservatory order.”

61. In the matter herein, the Defendants’ case is that through commercializing the suit property, the Plaintiff has interfered with the peaceful enjoyment of the neighborhood by members of the association and residents of Thome One, through increased insecurity due to high movements of unknown personnel, goods and motor vehicles, noise, air and environment pollution and destruction of the newly repaired private cabro road by the heavy commercial trucks.

62. The Defendants have urged that they will suffer prejudice if the conservatory orders sought are not granted, due to the high levels of pollution, destruction of the road and hazardous environment for their families.

63. According to the Defendants, it is in the interest of the public to protect the environment from pollution during the pendency of this suit. However, the Defendant has neither filed a Petition nor a counter claim as against the Plaintiff. Indeed, in the absence of a counter claim challenging the Plaintiff’s title, and the change of user, this court is unable to grant to the Defendants a conservatory order as prayed.

64. However, having dismissed the Plaintiff’s application for injunction, the Defendants are at liberty to move the court appropriately for an injunction, but only upon filing a counter claim.

65. For those reasons, the court dismisses the applications dated 27<sup>th</sup> August 2021, 25<sup>th</sup> October 2021 and 22<sup>nd</sup> November 2021 with no order as to costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Etemasi for Respondent

No appearance for Applicant

Court Assistant - June

