



REPUBLIC OF KENYA



Waska Company Limited & another v Nairobi City County & 13 others (Environment & Land Case E355 of 2021) [2022] KEELC 14730 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14730 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E355 OF 2021
EK WABWOTO, J
NOVEMBER 10, 2022

BETWEEN

WASKA COMPANY LIMITED 1ST PLAINTIFF

TEPHEN KAMUNGE WAINANA 2ND PLAINTIFF

AND

NAIROBI CITY COUNTY 1ST DEFENDANT

NAIROBI METROPOLITAN SERVICES 2ND DEFENDANT

KENYA URBAN ROADS AUTHORITY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

**MINISTRY OF INTERIOR AND CORDINATION OF NATIONAL
GOVERNMENT 5TH DEFENDANT**

**MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN
DEVELOPMENT AND PUBLIC WORKS 6TH DEFENDANT**

MINISTRY OF DEVOLUTION AND PLANNING 7TH DEFENDANT

KENYA RURAL ROADS AUTHORITY 8TH DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 9TH DEFENDANT

NATIONAL LAND COMMISSION 10TH DEFENDANT

MINISTRY OF LAND AND PHYSICAL PLANNING 11TH DEFENDANT

NATIONAL YOUTH SERVICE 12TH DEFENDANT

GOVERNOR NAIROBI COUNTY GOVERNMENT 13TH DEFENDANT

COUNTY ASSEMBLY OF NAIROBI 14TH DEFENDANT



RULING

1. The 1st applicant claims to be the registered owner of all the parcels of land known as title number Nairobi/Block 263/967 and Nairobi/Block263/968 all situated within Mukuru kwa Njenga along Catherine Ndereba Road, Nairobi. The applicants had developed the suit premises into a commercial building.
2. Following the earmarking of the suit premises for demolition, the applicants filed a notice of motion application dated October 22, 2021 which was accompanied by a supporting affidavit sworn by Stephen Kamunge Wainana. The plaintiffs/applicants sought the following orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this application this honourable court do and is hereby pleased to issue a temporary injunction restraining the defendants/respondents either by themselves, their agents, servants, employees, nominees, assignees and agents from trespassing onto, evicting tenants on the suit property, constructing any road therefrom and/or demolishing any building or structure on the plaintiffs/applicants parcels of land known as title number Nairobi/Block263/967 and Nairobi/Block263/968 all situated within Mukuru kwa Njenga along Catherine Ndereba Road Nairobi.
 - iii. That pending the hearing and determination of this suit this honourable court do and is hereby pleased to issue a temporary injunction restraining the defendants/respondents either by themselves, their agents, servants, employees, nominees, assignees and agents from trespassing onto, evicting tenants on the suit property, constructing any road therefrom and/or demolishing any building or structure on the plaintiffs/applicants parcels of land known as title number Nairobi/Block263/967 and Nairobi/Block 263/968 all situated within Mauro kwa Njenga along Catherine Ndereba Road Nairobi.
 - iv. That this honourable court be and is hereby pleased to order the Chief Government Surveyor and the applicants independent Surveyor to authenticate the size and place of subject property known as Nairobi/Block263/967 and Nairobi/Block264/967 all situated within Mukuru kwa Njenga along Catherine Ndereba Road Nairobi.
 - v. That this court be and is hereby pleased to direct the OCS nearest police station to ensure compliance with orders of this honourable court.
 - vi. That the honourable court be and is hereby pleased to visit the subject property and make its own independent findings.
 - vii. Costs of this application be provided for.
 - viii. Any other and further orders that this honourable court may deem fit and just to grant in the circumstance
3. The application was made on the grounds that:
 - i. The 1st applicant is the registered owner of all the parcels of land known as title number Nairobi/Block263/967 and Nairobi/Block263/968 all situated within Mukuru kwa Njenga along Catherine Ndereba Road Nairobi, while the 2nd applicant has a beneficial interest over the subject property by virtue of being the Director of the 1st applicant.



- ii. The 1st applicant has been in occupation of the subject property since the year 2017 and has erected a commercial building in the property which properties have tenants in occupation
 - iii. On or around the September 24, 2021 the defendants/respondents without any colour of right marked the plaintiffs properties erected on the suit property to pave way for the purported construction of a road.
 - iv. That the subject properties have been earmarked for demolition without affording him a written or oral notice to that effect and since the adjacent properties have been demolished the subject properties stands to be demolished anytime from now.
4. On May 17, 2022, the court directed that the application be canvassed by way of written submissions. In the applicants' submissions dated July 7, 2022, it was averred that the applicants were reasonably apprehensive following the demolition of their neighbouring premises. Moreover, any further action would amount to illegal demolitions which would cause a substantial loss. It was submitted that the rent raised on the premise was to clear an outstanding loan of Kes 1,600,000 which had been affected by the threat of demolition and consequent vacation of tenants.
 5. It was further contended that the compulsory acquisition of the suit properties was contrary to section 107 of the National Land Act and article 40 of the Kenyan Constitution which requires that once the National Land Commission is satisfied that the conditions for compulsory acquisition are met it publishes a notice in the Kenya Gazette, the Land Registry and all interested parties.
 6. The 2nd, 4th, 5th, 6th, 7th, 11th and 12th respondents filed grounds of opposition dated February 7, 2022 in which they averred that the building was illegal and premised upon a road reserve and therefore ought to be removed.
 7. The 2nd, 4th, 5th, 6th and 7th respondents filed a replying affidavit dated 9th February sworn by Geoffrey Cheruiyot in which the intention of compulsory acquisition was explicitly denied. It was reiterated that the plaintiffs had not acquitted the necessary construction approvals and as such the structure was illegal. On a balance of convenience, it was argued that the inconvenience caused by the plaintiffs would not be greater than that of the defendants.
 8. I have considered the application, parties' submissions and respective responses that were filed. In my view, the issues that arise for determination is whether the plaintiffs/applicants have met the threshold to be granted the temporary injunctive orders sought.
 9. Article 23 of the Constitution specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person's right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. This court is further guided by section 63 of the Civil Procedure Act and order 40(1) of the Civil Procedure Rules, 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 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." [Emphasis mine]

10. The principles to determine the threshold for temporary injunction are well enunciated in *Giella v Cassman Brown* (1973) EA 358 to the effect that a party seeking a temporary injunction has to establish a *prima facie* case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
11. This position was also reiterated in [Nguruman Limited v Jan Bonde Nielsen & 2 others](#), CA No 77 of 2012, where the court stated that:
 - “In an interlocutory injunction application, the applicant has to satisfy the three 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) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour”
12. I share in the sentiments of the Court of Appeal in [Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others](#) [2016] eKLR where it was held that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court. I take note that the building has existed for several years and should demolition occur, several parties including the tenants would suffer a great inconvenience.
13. The court is in the circumstances satisfied that the criteria upon which our courts exercise jurisdiction to grant injunctive orders pending hearing and determination of suits has been satisfied. The court finds that there is a proper basis for preserving property, the developments thereon and the occupancy thereof, pending the hearing and determination of the suit. The court will give further directions on quick disposal of the suit at the time of rendering this ruling. I believe the question of lawful construction and development processes and approvals is at the heart of the suit and will still be ripe for determination in the main suit.
14. In the foregoing, this court finds that the applicants have established a *prima facie* case and therefore the notice of motion application dated October 22, 2021 is merited and is allowed in the following terms:
 - i. That pending the hearing and determination of the main suit the court hereby issues a temporary injunction restraining the defendants/respondents either by themselves, their agents, servants, employees, nominees, assignees and agents from trespassing onto, evicting tenants on the suit property, constructing any road therefrom and/or demolishing any building or structure on the plaintiffs/applicants parcels of land known as title number Nairobi/Block263/967 and Nairobi/Block263/968 all situated within Mukuru kwa Njenga along Catherine Ndereba Road Nairobi.
 - ii. The applicants are at liberty to contract the services of an independent Surveyor to authenticate the size and place of subject property known as Nairobi/Block263/967 and Nairobi/Block264/967 all situated within Mukuru kwa Njenga along Catherine Ndereba Road Nairobi.



iii. Costs will abide the determination of the main suit.

14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF NOVEMBER 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Paul Muchiri h/b for Ms. Mwae for the Plaintiffs/Applicants.

Aluku for 1st Defendant/Respondent.

Motari for the 2nd, 4th, 5th, 6th, 7th, 11th and 12th Defendants/Respondents.

Ngugi for 14th Defendant/Respondent.

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE

