



REPUBLIC OF KENYA



KENYA LAW
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**Ivati v Kitaka (Environment and Land Case Civil Suit 337 of 2022)
[2022] KEELC 15345 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15345 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 337 OF 2022**

**JO MBOYA, J
DECEMBER 7, 2022**

BETWEEN

ESTHER NZILANI IVATI PLAINTIFF

AND

DOMINIC MAINGI KITAKA DEFENDANT

RULING

1. Vide Notice of Motion dated the November 17, 2022, the Plaintiff/Applicant has sought the following Orders:
 - i.Spent.
 - ii. That pending the hearing and determination of this Application, this Honorable Court does hereby issue a Temporary Injunction restraining the Defendant/Respondent either by himself, his agents, servants and/or Personal Representatives from entering, trespassing, encroaching or in any other way interfering with the Plaintiff/Applicant's land Plot No 176(Gekoyo-Marigo Housing Co limited)New No31/25/58.
 - iii. That pending the hearing and determination of the main suit this Honorable Court does hereby issue a Temporary Injunction restraining the Defendant/Respondent either by himself, his agents, servants and/or personal representatives from entering, encroaching, trespassing or in any other way interfering with the Plaintiff/Applicant's land Plot No 176(Gekoyo-Marigo Housing Co limited)New No31/25/58.
 - iv. That a Permanent Injunction be issued restraining the Defendant/ Respondent from entering, encroaching, trespassing or in any other way



interfering with the Plaintiff/Applicant's land Plot No 176 (gekoyo-marigo Housing Co Limited)New No31/25/58.

- v. That this Honorable Court does issue an order directing the Defendant/ Respondent to at his own costs move from the Plaintiff/ Applicant's land Plot No 176 (Gekoyo-Marigo Housing Co limited)New No31/25/58.
 - vi. That an order be and is hereby issued upon the OCS Lucky Summer to ensure compliance.
 - vii. That costs of this Application be in the Cause.
 - Viii. That this Honorable Court be pleased to issue any other orders as it deems fit and fair.
2. The instant application is anchored and premised on the various grounds that have been enumerated in the body of the application herein. Besides, the instant application is supported by affidavit of Esther Nzilani sworn on the November 17, 2022.
 3. Though the subject application was duly served upon the Defendant/Respondent, no response, whether *vide* Replying Affidavit nor Ground of opposition was ever filed or at all.
 4. In the premises, the subject application was factually unopposed. Nevertheless, despite the fact that the application was not opposed, it was still incumbent upon the Plaintiff/Applicant to prove and establish her entitlement to the various orders/reliefs sought at the foot of the application.
 5. Other than the foregoing, it is appropriate to mention and state that the subject application came up for hearing on the December 6, 2022, whereupon same was canvassed and ventilated *vide* oral submissions.
 6. For clarity, the submissions that were rendered on behalf of the Plaintiff/Applicant shall form the next segment of this Ruling.

Submissions By The Parties:

Plaintiffs Submissions

7. Learned counsel for the Plaintiff/Applicant canvassed the subject application by way of oral submissions and same raised and ventilated three pertinent issues for consideration by the Honourable court.
8. Firstly, counsel submitted that the Plaintiff/Applicant bought and purchased the suit property in the year 2014. In this regard, counsel added that upon purchase and acquisition of the suit property, the Plaintiff/Applicant therefore became the lawful and legitimate proprietor thereof.
9. On the other hand, learned counsel added that by virtue of being the registered proprietor and owner of the suit property, the Plaintiff/Applicant was thus entitled to exclusive occupation, possession and use of the suit property to the exclusion of all and sundry, the Defendant/Respondent not excepted.
10. Secondly, counsel for the Plaintiff/Applicant further submitted that at the time when the Plaintiff bought and acquired the suit property, the Defendant/Respondent was in occupation of the suit property, albeit without any lawful rights and/or interests.
11. Nevertheless, it was submitted that upon the purchase of the suit property, the Plaintiff/Applicant and the Defendant/Respondent entered into an agreement, whereupon the Defendant/Respondent agreed to vacate the suit property within a mutual timeline.



12. Be that as it may, counsel proceeded and submitted that despite having previously agreed to vacate and hand over vacant possession of the suit property, the Defendant/Respondent has since failed to move out and vacate the suit property.
13. Owing to the failure and refusal by the Defendant to vacate and move out of the suit property, counsel has submitted that the Plaintiff's/Applicant's lawful rights to and in respect of the suit property have therefore been breached, infringed upon and violated.
14. Thirdly, counsel submitted that the Plaintiff/Applicant was therefore entitled to obtain vacant possession over and in respect of the suit property. In this regard, counsel contended that it was therefore appropriate for the Honourable court to proceed and grant the numerous orders sought in the body of the application, inter alia, an order of Permanent Injunction, as well as an Eviction against the Defendant/Respondent.
15. Notwithstanding the foregoing, when the honourable court sought to understand whether an order of Permanent Injunction and Eviction could be issued against the Defendant/Respondent, albeit at an interlocutory stage, counsel for the Defendant/Respondent responded by conceding that the court was not seized of such Jurisdiction.
16. Be that as it may, counsel still contended that it was imperative that the Honourable court be pleased to entertain and grant the application in the manner sought.
17. Suffice it to point out that learned counsel for the Plaintiff/Applicant neither cited nor quoted any case law to vindicate her submissions as to whether a Permanent Injunction and Eviction orders could issue at the interlocutory stage.

Defendant's/respondent's Submissions:

18. It was pointed out elsewhere herein before that though served with the instant application, the Defendant/Respondent neither filed any Grounds of opposition nor Replying affidavit.
19. Additionally, though learned counsel Mr Mambiri appeared for and on behalf of the Defendant/Respondent, same did not make or render any submissions in respect of the instant submissions. For clarity, no such submissions could be made, taking into account the provisions of Order 51 Rule 14 of the *Civil Procedure Rules*, 2010.
20. In the premises, the only submissions that are on record over and in respect of the subject matter are the submissions that were rendered on behalf of the Plaintiff/Applicant, which shall be duly considered and taken into account in the course of crafting the instant Ruling.

Issues For Determination:

21. Having reviewed the Application dated the November 17, 2022, the supporting affidavit thereto and the oral submissions made by and on behalf of the Plaintiff/Applicant, the following issues are pertinent and thus worthy of determination;
 - i. Whether the Honourable Court can grant an order of Permanent Injunction, either in the manner sought or at all, albeit at an Interlocutory stage.
 - ii. Whether the Honourable Court can direct the Defendant/Respondent to vacate and move out on the suit property and essentially, grant an Eviction order in the manner sought.



- iii. Whether the grant of the orders sought will have the net effect of determining the entire suit, albeit on the basis of an Application.

Analysis And Determination

Whether the honourable court can grant an order of Permanent Injunction, either in the manner sought or at all, albeit at an Interlocutory stage.

22. The Plaintiff/Applicant herein has contended that same is the registered owner and proprietor of the suit property. However, despite being the registered owner and proprietor, the Plaintiff/Applicant has contended that the Defendant/Respondent has without lawful cause or basis remained in occupation of the suit property, albeit without any color of rights or at all.
23. As a result of the offensive occupation and possession of the suit property by the Defendant/Respondent, the Plaintiff/Applicant has thus been constrained to file and mount the subject suit.
24. Contemporaneously with the filing of the suit, the Plaintiff/Applicant has also filed and lodged the instant application, wherein same has sought for inter-alia, orders of Permanent Injunction.
25. In this regard, the question that deserves interrogation and appropriate answer is whether the Honourable Court can issue and grant an order of Permanent Injunction at an interlocutory stage in the manner sought by the Plaintiff/Applicant.
26. To my mind, an order of Permanent Injunction is an order of a final nature, which can only issue and be granted after a plenary hearing, that is, upon hearing the evidence of the Parties and after due evaluation of the merits or otherwise of the evidence tendered by the respective Parties.
27. Consequently and in the premises, it is my considered view that an order of Permanent injunction can never be sought for nor obtained on the basis of an interlocutory application, either in the manner sought by the Plaintiff/Applicant herein or at all.
28. In any event, the provisions of Order 40 rule 1 of the [Civil Procedure Rules](#) 2010, which the Plaintiff/Applicant has cited and relied upon, do not envisage the issuance and grant of an order of Permanent injunction.
29. On the other hand, the courts of law are called upon to exercise due caution and circumspection, whilst entertaining applications for injunction which are couched in such a manner that are bound to attract or culminate into the issuance of Final orders, albeit at an interlocutory stage.
30. Quite clearly, what the Plaintiff/Applicant herein is keen to achieve is a final determination of the entire suit, albeit through an interlocutory application. For clarity, such an endeavor must not only be avoided and eschewed, but must be frowned upon.
31. Be that as it may, it is appropriate to recall and underscore that the issue as to whether or not a Permanent injunction can issue at an interlocutory stage, is a subject that has hitherto been deliberated upon by various courts and hence case law abound.
32. In this respect, it suffices to take cognizance of the holding in the case of [Kenya Power & Lighting Co Limited ... Versus... Sheriff Molana Habib](#) [2018] eKLR the Court held that;

‘A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It 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.

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 from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”

33. Additionally, the issue as to whether a Permanent injunction can be granted at an interlocutory stage was also addressed vide the decision in the case of *Headmaster Kiembeni Baptist Primary School & Another V Pastor Of Kiembeni Baptist Church* [2005] eKLR, where the Honourable court observed and stated as hereunder;

“I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also *Shah v Shah* (1981) KLR 374.

34. Duly guided by the holdings in the foregoing decisions, it is my finding and holding that the order of Permanent Injunction that has been sought for at the foot of the instant Application, is clearly misconceived, Bad in law and/or otherwise legally untenable.

Whether The Honourable Court Can Direct The Defendant/respondent To Vacate And Move Out On The Suit Property And Essentially Grant An Eviction Order In The Manner Sought.

35. Other than the prayer for Permanent injunction, which has been discussed in the preceding paragraphs, the Plaintiff/Applicant has also sought for orders which are akin to Eviction of the Defendant/ Respondent from the suit property.
36. To be able to understand the import of the orders sought by the Plaintiff/Applicant, it is appropriate to reproduce prayer number five (5) in the subject Application.
37. For convenience, prayer five (5) in the application is reproduced as hereunder;

That this Honorable Court does issue and order directing the Defendant/Respondent to at his own costs move from the Plaintiff/ Applicant's land Plot No 176 (Gekoyo-Marigo Housing Co limited)New No 31/25/58.

38. Though the Plaintiff/Applicant has not expressly alluded to or used the word Eviction, it is evident that the bottom line of the orders sought is one which is calculated to remove and evacuate the Defendant/ Respondent from the suit property.
39. In my humble view, an order directing the Defendant/Respondent to move out and vacate the suit property would essentially constitute an Eviction.
40. Premised on the foregoing, it is therefore imperative to interrogate and discern whether an order of Eviction, whether expressly alluded to or by implication, can be issued at an interlocutory stage.
41. Just like an order of Permanent injunction, it is appropriate to state, reiterate and underscore that an order of Eviction can neither issue nor be granted at an Interlocutory stage.



42. Without belaboring the point, it is trite, hackneyed and established law that an Eviction order can only issue after the hearing of the Parties, production of evidence and ultimately evaluation of the merits of the evidence tendered before the honourable court.
43. Contrarily, if the Plaintiff/Applicant was keen to pursue the issue and aspect of Eviction, without prosecuting a substantive suit, then it behooved the Plaintiff/Applicant to comply with and adhere with the provisions of Section 152 E, F and G of the Land Act, 2012 (2016).
44. For coherence, the provisions of Section 152 E, F and G of the Land Act (*supra*) are reproduced as hereunder;

152E. Eviction Notice to unlawful occupiers of private land.

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
- (2) The notice under subsection (1) shall -
 - (a) be in writing and in a national and official language;
 - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

152F. Application to Court for relief.

- (1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.
- (2) The Court, after considering the matters set out in sections 152C, 152D and 152E may-
 - (a) confirm the notice and order the person to vacate;
 - (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - (c) suspend the operation of the notice for any period which the court shall determine; or
 - (d) order for compensation.

152G. Mandatory procedures during eviction.

- (1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures-
 - (a) be preceded by the proper identification of those taking part in the eviction or demolitions;
 - (b) be preceded by the presentation of the formal authorizations for the action;



- (c) where groups of people are involved, government officials or their representatives to be present during an eviction;
- (d) be carried out in a manner that respects the dignity, right to life and security of those affected;
- (e) people who are vulnerable such as women, children, the elderly, and include special measures to ensure effective protection to groups and persons with disabilities;
include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction,
- (g) include mechanisms to protect property and possessions left behind involuntarily from destruction;
- (4) respect the principles of necessity and proportionality during the use of force; and give the affected persons the first priority to demolish and salvage their property.

The Cabinet Secretary shall prescribe regulations to give effect to this

45. However, I beg to observe that the Plaintiff/Applicant did not seek to appropriate or utilize the avenue provided for under the cited provisions of the Land Act, 2012. Consequently and having chosen to file the instant suit, the Plaintiff must therefore await the Formal and Plenary hearing of same.
46. In a nutshell, it is my finding and holding that the Plaintiff/Applicant herein cannot seek to and procure an order of Eviction against the Defendant/Respondent in the manner sought for or at all.

Whether The Grant Of The Orders Sought Will Have The Net Effect Of Determining The Entire Suit, Albeit On The Basis Of An Application.

47. Notwithstanding the foregoing observations, it is also important to recall that the Plaintiff/Applicant has also sought for orders of temporary injunction as against the Defendant/Respondent. However, it is not lost on this court that the Defendant/Respondent is admitted to be in occupation of the suit property.
48. To this end, what then becomes evident and apparent is whether an order of temporary injunction can issue to restrain or prohibit an act that has already transpired, accrued or occurred.
49. Nevertheless, my understanding of an order of temporary injunction is that same is calculated to prevent, pre-empt, restrain and prohibit the occurrence of an imminent act and not otherwise. Clearly, an order of Temporary injunction cannot issue *ex-post-facto*.
50. In view of the foregoing, I am afraid that an order of temporary injunction cannot issue or be granted, where as in this case, the Defendant/Respondent is already in occupation of the suit property. For clarity, to do so would be tantamount to acting in Vain, yet a Court of Law, does not act in vain/ futility.
51. For coherence, in situations where the act has already occurred or accrued, it then behoves the claimant to seek for an order of Mandatory Injunction, subject to satisfaction of the special and exception circumstances as established under the law.



52. For clarity, one would be obliged to meet the statutory threshold that was underscored vide the decision in the case of *Nation Media Group Ltd & 2 Others v John Harun Mwangi* (2014)eKLR, where the Honourable Court Of Appeal stated and observed as hereunder;

“A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases. See *Kenya Airports Authority Vs Paul Njogu Mungai & Others* Civil Application No 29 of 1997 (CA). As the court stated in the case of *Locabail International Finance Ltd Vs Agroexpert & Others* [1986] 1 ALL ER 901, the court has to have “a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.....”.

53. Be that as it may, no prayer for Mandatory Injunction was ever sought for. Consequently, it is my finding and holding that the order of Temporary injunction sought would not also issue in the circumstances of this matter.

54. Suffice it to point out that the issuance of the orders of Temporary Injunction, either in the manner sought or otherwise, would have the net effect of evicting the Defendant/Respondent from the suit property, albeit through the Backdoor.

55. In short, I am not persuaded that the Plaintiff/Applicant herein is entitled to the orders sought or at all.

Final Disposition:

56. Having duly analyzed the various perspectives and aspects, that were canvassed by the Plaintiff/Applicant, it must have become apparent that the subject application is not merited.

57. In any event, it is common ground that the subject application was calculated to attract and achieve precipitate and substantive reliefs, albeit at an interlocutory stage. Clearly, such kind of an application must be frowned upon and deprecated, by all and sundry.

58. Nevertheless, I come to the conclusion that the Application dated the November 17, 2022 is devoid and bereft of merits. Consequently, same be and is hereby Dismissed with no orders as to costs.

59. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER 2022.

HON OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson Court Assistant

Ms. Mwanzia for the Plaintiff/Applicant.

Mr Mambiri for the Defendant/Respondent.

