



REPUBLIC OF KENYA



KENYA LAW
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Musa & 4 others v Baringo County & 2 others (Environment & Land Case E24 of 2022) [2022] KEELC 15200 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E24 OF 2022
FM NJOROGE, J
DECEMBER 7, 2022**

BETWEEN

**LOICE TERIKI MUSA 1ST PLAINTIFF
SUSANA TOYOI MEIYWO 2ND PLAINTIFF
JEFFERSON KIBET NGENO 3RD PLAINTIFF
ELIJAH KOECKIMEIYWA 4TH PLAINTIFF
HARON KIMEIYWA 5TH PLAINTIFF**

AND

**BARINGO COUNTY 1ST DEFENDANT
LAND REGISTRAR 2ND DEFENDANT
COUNTY SURVEYOR 3RD DEFENDANT**

RULING

1. This is a ruling in respect of the Plaintiffs' Notice of Motion dated 2/05/2022 which seeks the following orders:
 - a. ...Spent
 - b. ...Spent
 - c. That pending the hearing and determination of this suit, the Honourable court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents whether by themselves, their agents, servants, employees, proxies and/or any person acting on their authority or instructions from entering, trespassing on, taking possession of, constructing on, selling, transferring, charging, leasing or otherwise howsoever interfering or dealing



with the property known and described Koibatek/Aram Kindonin/140, Koibatek/Aram Kindonin/141, Koibatek/Aram Kindonin/142, Koibatek/Aram Kindonin/143, Koibatek/Aram Kindonin/144, Koibatek/Aram Kindonin/145, Koibatek/Aram Kindonin/146 and the unsurveyed and/or unallocated portion of land on the suit property.

- d. THAT costs of this application be provided.
2. The application is supported by the affidavit sworn by Haron Kimeiywa the 5th Plaintiff/Applicant herein where he deposed that he is the son of the late Kimusar Arap Kogo Kimeiywa (deceased) while the other Plaintiffs/Applicants are members of the deceased's family; that they have been in actual possession and occupation of the suit properties since 1948; that in 2009 the Ministry of Lands and Physical Planning carried out adjudication and registration of titles on the suit properties under the *Land Adjudication Act* where the land was surveyed and each portion surveyed allocated its respective parcel number and later titles processed; that the Kimeiywa's family donated 1.3 acres to the 1st Defendant/Respondent for the construction of a water pan; that they conducted a search and learnt that the ownership of the suit property was not as agreed upon among the Plaintiffs and Defendants; that they further purchased survey maps and discovered that there exists unsurveyed and unallocated portions; that the 1st Defendant/Respondent connived with the 2nd and 3rd Defendant to allocate itself 10 acres of the suit property instead of the 1.3 acres; that they are not privy to allocation of any other land to the 1st Defendant and hence the said adjudication process was tainted with fraud; that on 27/05/2009 they lodged a complaint with the Adjudication Officer Koibatek District on allocation of Land Reference No. Koibatek/Aram Kindonini/140 and Koibatek/Aram Kindonini/142; that the Adjudication Committee ruled that Koibatek/Aram Kindonini/140 should revert back to Land Reference Koibatek/Aram Kindonini/141; that the Land Reference No Koibatek/Aram Kindonini/140 still appears on the map as allocated to unknown individuals; that the suit property ought to be divided among the wives and children of Kimusar Arap Kogo Kimeiywa (deceased) under customary tenure allocated to the family; that the then District Land Officer utilized his power unlawfully, conniving with the District Surveyor then while surveying and allocating titles over the suit properties.

Response

3. The 1st Defendant in response to the application filed its Replying Affidavit dated 18/10/2022 sworn by Julius Tarus the County Attorney with the 1st Defendant. He averred that the purpose of granting injunction orders is to maintain the subject matter pending the hearing and determination of a petition.
4. He averred that the Applicants have not placed sufficient material before the court to establish prima facie case to warrant grant of the injunction orders sought. He further averred that the 1st Respondent is the legal owner of Koibatek/Aram/Kindonin 140, 141 and 144 set aside for public utilities. He deposed that the Applicants have always been aware that they had settled on public land which position was confirmed after the adjudication where the 1st Defendant was issued with title deeds. In conclusion, the 2nd Defendant urged the court to dismiss the Plaintiff's application.
5. He averred that the Applicants have not presented any evidence, agreement or understanding that showed any agreement to donate 1.3 acres to the County Government. He added that the Adjudication Committee ruled that plot no. 140 be reserved as a water pan under the County Council of Koibatek. In conclusion, he urged the court to dismiss the Plaintiffs' application with costs.



Analysis And Determination

6. This court has considered the application and Replying Affidavit and the main issue for determination is whether the Applicants are entitled to the orders as sought in their application.
7. What is before this court is an application for injunction and I stand guided by the holding in the cases of *Giella vs Cassman Brown* (1973) EA 358 and *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR. It was held that to succeed in an application for injunction, an Applicant needs to demonstrate a prima facie case with a probability of success, show that he stands to suffer irreparable harm unless the injunction is granted, and where the court is in doubt, it will decide the application on a balance of convenience.
8. On the issue of a prima facie case, the case of *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 is instructive. A prima facie case was defined as follows:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
9. In the instant case, both the Applicants and the 1st Respondent claim ownership to the suit land. The Applicants contend that they have been in actual possession and occupation of the suit properties since 1948 which they occupied under customary tenure from Kimusar Arap Kogo Kimeiywa (deceased).
10. The 1st Defendant on the other hand contends that it is the legal owner of Koibatek/Aram/Kindonin 140, 141 and 144 set aside for public utilities. It further contends that the Applicants have always been aware that they had settled in public land which position was confirmed after the adjudication. The 2nd and 3rd Defendant did not file a response to the application.
11. I note that none of the parties have annexed any title documentation to the suit property despite them claiming ownership. Neither does the 1st Defendant/Respondent dispute that the suit land is occupied by the Applicants. Given that both parties are alleging ownership of the said land yet none has availed documents that can be said to be cpersuasive in terms of their having actual title to the land, this court is left in a situation of doubt, and it is best that this application be decided on a balance of convenience. The balance of convenience tilts in favour of the Applicant who are in possession of the suit property and not to the 1st Respondent.
12. In view of the foregoing discourse, this court makes the following orders:
 - a. The current *status quo* be maintained until the case is heard and finalized. The *status quo* is that it is the Applicants who are in possession of the suit land may retain possession and utilize the land for cultivation but they ought not to erect any additional structures until this suit is heard and determined.
 - b. In addition, no party should sell, charge, lease, or in any other way enter into dealings over the disputed land until this case is finalized.
 - c. Parties shall comply with Order 11 of the civil procedure rules and the suit shall be mentioned on 8/2/2023 for directions.



d. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 7TH DAY
OF DECEMBER, 2022.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU

