



Woche (Suing as the legal administrator of the Estate of Woche Imala - Deceased) v Senior Resident Magistrate’s Court Moyale; Sode (Interested Party) (Environment and Land Judicial Review Miscellaneous Application E001 of 2023) [2025] KEELC 760 (KLR) (10 February 2025) (Ruling)

Neutral citation: [2025] KEELC 760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E001 OF 2023**

JO MBOYA, J

FEBRUARY 10, 2025

BETWEEN

ABI WOCHÉ (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF WOCHÉ IMALA - DECEASED) APPELLANT

AND

THE SENIOR RESIDENT MAGISTRATE’S COURT MOYALE ... RESPONDENT

AND

ADAN CHULA SODE INTERESTED PARTY

RULING

1. The Application beforehand has approached the court vide the Notice of Motion Application dated the 18th day of March 2024; and wherein the applicant is seeking for inter-alia orders of temporary injunction to restrain and or prohibit the interested party from dealing with the suit property [whose details are well captured and/or highlighted at the foot of the application].
2. Following the filing of the application under reference, the interested party herein has filed and served a Replying affidavit and wherein the interested party has averred inter-alia that the suit property was the subject of civil proceedings and which were heard and determined vide the Judgment of the 1st Respondent. Furthermore, the judgment of the 1st Respondent under reference has been attached and/or annexed to the Replying affidavit.
3. Moreover, the existence of the said judgment is not contested. Further and in any event, the said judgment founds and or anchors the subject application for Judicial review.



4. To the extent that the judgment has not been set aside and or varied, questions do arise, as to whether this court can proceed to grant an order of temporary injunction to restrain and/or prohibit the interested party from dealing with the suit property either in the manner sought or otherwise.
5. The question as to whether the court can grant the orders of temporary injunction as sought is pertinent and deserves due interrogation and investigations by the court; and hence I propose to do so in the subsequent paragraphs
6. However, before the court can proceed to address the question of whether an order of temporary injunction can be granted, it is important to recall and reiterate that the proceedings herein have been commenced by way of Judicial review under the provisions of Sections 8 and 9 of the Law Reforms Act Chapter 26; as read together with Order 53 of the Civil Procedure Rules 2010.
7. Having been commenced vide Judicial review, this court is called upon to ascertain whether under the proceedings commenced by way of Judicial review and more particularly, under the provisions of Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya; an applicant can move the court to procure and obtain an order of temporary injunction.
8. Firstly, it is important to point out that under the provisions of Order 53 of the Civil Procedure Rules 2010 as read together with the provisions of Sections 8 and 9 of the Law Reform Act [Cap 26], the applicant can only partake of and or procure the traditional writs/remedies on certiorari, prohibition and mandamus. For good measure, an applicant pursuant to an application for Judicial review under Order 53 of the Civil Procedure Rules 2010, cannot be heard to seek for an order of temporary injunction, either in the manner sought or at all. [See the holding in the case of Republic vs Geoffrey Gathenji and Kenya National Examination Counsel [1996] eKLR.
9. Moreover, it is worthy to underscore that an applicant who files an application for Judicial review orders under Order 53 of the Civil Procedure Rules 2010 and Sections 8 and 9 of the Law Reform Act Chapter 26 Laws of Kenya cannot purport to expand the scope on the judicial review to procure orders under the provisions of Article 47 of the Constitution 2010 and the Fair Administrative Actions Act 2016.

[See the decision on the Supreme Court of Kenya in Edwin Harold Dande & others vs the Inspector General of Police and others (2023) KESC] [See also the holding in the Court of Appeal in the case of Suchan Investments Limited vs the Minister for National Heritage on Culture (2016) eKLR.
10. Notwithstanding the foregoing, it is also important to point out and underscore that parties, the applicant herein not excepted, are bound by their pleadings. In this regard, it is worth recalling that the primary pleadings that underpin the instant proceedings is the statement of facts and the affidavit in verification of the statement of facts. Suffice it to state, that the statement of facts in judicial review matters ordinarily captures the reliefs to be sought and canvassed by the applicant. [See Commissioner of Excise and Customs and Silvanus Onema Owaki t/a Marenga Petrol Station (2002) eKLR.
11. In this case it is imperative to state and observe that the primary relief captured on the foot of the statement of facts is the singular order/remedy of certiorari. For good measure, the statement of facts which underpins the instant proceedings does not seek for an order of injunction. [See the decisions on the Court of Appeal in the case of See Commissioner of Excise and Customs and Silvanus Onema Owaki t/a Marenga Petrol Station (2002) eKLR].
12. To my mind, having not sought for an order of temporary injunction or any other sort of injunction under the statement of facts, the applicant herein cannot be heard to seek to obtain an order of temporary injunction. Such an endeavor shall be tantamount to breaching the doctrine of departure.



- [See Order 2 (2) Rule 6 of the Civil Procedure Rules) [see also the decision of the Court of Appeal in *Dakianga Distributors Limited Vs Kenya Seed Company (K) Ltd* [20150 eKLR and *Independent Electoral and Boundaries Commission vs Stephen Mutinda Mule* (2013) eKLR.
13. Other than the question of the doctrine of departures which has been captured and highlighted in the preceding paragraphs, there is also the question of whether the orders of temporary injunction would issue in the obtaining circumstances. To start with, it is not lost on the court that there is a judgment of the 1st respondent the [Senior Resident Magistrates Court] which adjudged that the suit property belongs to the interested party.
 14. For coherence, the judgment under reference has neither been quashed nor set aside. In short, the judgment under reference remains in existence. In this regard, there is no gainsaying that the judgment has conferred and vested in the interested party some legal rights and interests. [See Section 44 of the *Evidence Act* Chapter 80 Laws of Kenya which underpin the doctrine of the judgment in rem.]
 15. Pertinently, for as long as the judgment under reference remains in situ, [in existence] all persons and the court are obliged to defer to the judgment in question. In this regard, this court cannot be heard to grant an order of temporary injunction whose net effect is to restrain the enjoyment of the legal rights and interests vested in the interested party vide the judgment of the First Respondent and which Judgment was never appealed against.
 16. Simply put, the grant of an order of temporary injunction either as sought or at all shall be tantamount to setting aside the judgment of the 1st Respondent, albeit through the back door and in the absence of an appeal in the conventional manner.
 17. In my humble view, the prayer for temporary injunction herein has been sought for albeit in a vacuum.
 18. Moreover, it is also important to point out that even if this court was to be inclined to look at the merits of the application beforehand, I am afraid that the applicant herein has neither demonstrated nor established a prima facie case with a probability of success. [See *Mrao Ltd vs First American Bank of Kenya* [2003] eKLR]. Firstly, for as long as the impugned judgment has not been set aside it suffices to state that the applicant has no demonstrable rights and/or interests over and in respect of the suit property.
 19. Suffice to state that in the absence of any demonstrable rights and interests, the question that arises is what claim does the applicant seek to vindicate vide the order[s] of temporary injunction.
 20. Furthermore, it is common knowledge that in the absence of a prima facie case, an order of temporary injunction cannot issue and or be granted [see the decision of *Kenya Commercial Finance Ltd vs Afraha Education Institute* (2001) E.A] [See also *Vivo Energy Ltd vs Maloba Petrol Station Ltd and others* (2015) eKLR].
 21. Additionally, it is important to observe that for as long as the judgment under reference remains in situ, the interested party herein is deemed to own the suit property and hence the question that arises is whether an order of temporary injunction can issue and or be granted to restrain the registered owner of the land/suit property of what is currently registered in his/her name.
 22. In my humble view, the order of temporary injunction cannot issue and or be granted against the registered owner of the land. [See the decision of the Court of Appeal in the case of *Nguruman Ltd vs Jan Bonde Nielsen and others* (2014) eKLR.[See also the holding of the Court of Appeal for Eastern Africa in the case of *Moya Drift Farm Limited versus Theuri* [1973] EA 173].



23. In the circumstances and taking into account the issues highlighted and canvassed in the body of the ruling herein, I am afraid that the entire application before the court is not only premature and misconceived, but the same is also legally untenable.

Final Disposition :

24. In the premises and taking into account the law as pertains to the Judicial review, it is my firm albeit considered view that the application beforehand is devoid of merits and the same [application] court's dismissal.

25. In a nutshell, the application dated the 18th March 2024 be and is hereby dismissed with costs to the Interested Party/2nd Respondent, only.

26. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 10TH DAY OF FEBRUARY, 2025

OGUTTU MBOYA

JUDGE.

In the presence of

Mr. Mutuma – Court Assistant

N/A for the Applicant

N/A for the Respondent

N/A for the Interested Party/2nd Respondent

