



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jusan Limited v Land Registrar, Mombasa & 3 others (Environment & Land Case E024 of 2024) [2024] KEELC 6769 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6769 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE E024 OF 2024**  
**SM KIBUNJA, J**  
**OCTOBER 16, 2024**

**BETWEEN**

**JUSAN LIMITED ..... PLAINTIFF**

**AND**

**THE LAND REGISTRAR, MOMBASA ..... 1<sup>ST</sup> DEFENDANT**

**HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**GLORIA WAMBUI MWAI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH KARANI MWAI ALIAS MWAI KARANI ALIAS MWANIKI MUNENE) ..... 3<sup>RD</sup> DEFENDANT**

**JAMES KINYUA MWAI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Notice Of Motion Dated 25th March 2024**

1. The plaintiff filed the notice of motion dated 25<sup>th</sup> March 2024, seeking for inter alia temporary injunction restraining the 1st defendant from revoking the plaintiff's title to L.R No. 311/Section V/Mainland North and 402/Section V/Mainland North (Original No. 200/V/MN), suit properties, and reverting it back to the estate of the late Joseph Karani Mwai alias Mwai Karani alias Mwaniki Munene; and temporary injunction restraining the 3rd and 4th defendants from interfering with the suit properties, pending the hearing and determination of this suit. The application is premised on the 35 grounds on its face and supported by the affidavit of Mohamedraza S. Rashid, director, sworn on 25th March 2024, in which he among others deposed that the 1st defendant informed the plaintiff vide a letter dated 24th August 2023, that they would expunge the plaintiff's name from the register of the suit properties on the basis of an order issued in Nairobi Succession Cause 948 of 1997, and that the deceased had bequeathed the properties to 4th defendant; that the suit properties were once owned by the deceased but vide an application dated 27<sup>th</sup> October 1987 by the Commissioner of Income Tax,



a security for income tax he owed was registered over the said properties; that after the death of the deceased a grant was issued to four named persons in Mombasa Succession Cause No. 78 of 1988 on 31<sup>st</sup> January 1989, but was on 18<sup>th</sup> April 1989 revoked and the grant issued to the Public Trustee; that the public trustee advertised the suit properties for sale, and the plaintiff bought the same at a consideration of Kshs. 4,200,000; that the properties were transferred to its name on 11th April 1990, and the suit properties could not have been listed in the certificate of confirmation of grant in 1993 in the said Mombasa High Court Succession Cause 788 of 1988 because title had already passed to the plaintiff; that the widow of the deceased, Mary Njeri Mwai Karani, despite being aware of cause 788 of 1988 filed the second petition Nairobi Succession Cause No. 948 of 1997 where she obtained a certificate of confirmation of grant dated 21st August 1998, that was unlawful; that the 3rd defendant sought an annulment in the said grant and lodged her own cross-petition which led to the court issuing another grant to the 3rd defendant on 22nd February 2000, while the previous grant was annulled on 13th October 1999 after an application by the 3rd defendant; that the 3rd defendant's grant was confirmed on 28th March 2000 while the very first grant of 1993 in cause 788 of 1988 still existed; that the 3rd defendant's grant is what was used to bequeath the 4<sup>th</sup> defendant with L.R No. 402/Section V/Mainland North; that L.R No. 311/Section V/Mainland North, which were never listed in the grants of cause 788 of 1988 or 948 of 1997 and hence did not form part of the estate of the deceased; that the afore mentioned grant of 28th March 2000 cannot confer any rights to the 4th defendant as there was another grant already existing in 1993; that despite receiving demand from the plaintiff's advocates, the 1st defendant has refused to withdraw its letter dated 24th August 2023, and hence this application.

2. In response, the 1st and 2nd defendants filed joint grounds of opposition dated 9th April 2024, inter alia stating that the plaintiff has not met the threshold for injunctive reliefs; that the plaintiff has willingly refused to exhaust the alternative dispute resolution mechanism provided in the office of the 1st defendant under section 76 (2) of the [Land Registration Act](#) and section 91 (1) of the Land Registration (General) Regulations, 2017; that this application is premature before this court by dint of section 9 (2) of the [Fair Administrative Action Act](#) as the plaintiff has not exhausted the alternative dispute resolution mechanisms available.
3. The learned counsel for the plaintiff and 1<sup>st</sup> & 2<sup>nd</sup> defendants filed their submissions dated the 1<sup>st</sup> July 2024 and 28<sup>th</sup> May 2024 respectively, which the court has considered.
4. The issues for determination by the court are as follows:
  - a. Whether the court has jurisdiction to hear and determine this suit and application.
  - b. Whether the plaintiff has met the threshold for the temporary injunction orders sought to issue.
  - c. Who bears the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by the two learned counsel, superior courts decisions relied on, and come to the following determinations:
  - a. The locus classicus case of Owners of the Motor Vessel "Lilian S" v Caltex (Kenya) Ltd [1989] e KLR 1 the court stated that jurisdiction is everything and where a Court has no jurisdiction, it must down its tools and cannot take one more step. The learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that this court does not have jurisdiction for reasons that the plaintiff has not exhausted all the alternative dispute resolution mechanism, such as rectification proceedings under section 87 of the [Land Registration Act](#) and regulation 91 (1) and 93 (1) of the Land Registration (General) Regulations 2017. However, the learned



counsel for the plaintiff submitted that the point of law raised by the 1st and 2nd respondent is fatally defective as they did not file a defence where they could have raised this principle of exhaustion, and more specifically the rectification proceedings under the afore mentioned provisions. Counsel relied on the case of Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 Others (2020) eKLR which the court has perused and found that, in that suit the defendants had not filed a defence and yet had raised a notice of preliminary objection. The 1st and 2nd respondents in this case have raised a pure point of law which in this case is lack of jurisdiction and are submitting that the plaintiff failed to adhere to other forms of alternative dispute resolutions first, before commencing this suit. However, this pure point of law should have properly been raised through a notice of preliminary objection, as is practice which could also have been preceded by a defence. However, this court still needs jurisdiction despite the failure by the respondents to properly move the court. It is the court's finding that the sections on rectification proceedings have not been coached in as mandatory terms like the court annexed mediation under Order 11 of Civil Procedure Rules and thus the court has jurisdiction to determine this suit and application.

- b. The test for temporary injunctions was discussed in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR) where the court held as follows:

“The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1) whether the applicant has demonstrated a prima facie case with a probability of success.
- 2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.
- 3) Where the balance of convenience tilts if the court is in doubt.”

The court proceeded to discuss each of the above points and held as follows;

“The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. Prima Facie case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a Prima Facie case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed.”

The plaintiff has through the deposition of Mohamedraza narrated that the plaintiff bought the suit properties through public auction conducted by the Assistant Public Trustee, pursuant to the grant issued Succession Cause No.788 of 1988 delivered on 18th April 1989. That however, Mary Njeri Mwai, widow to the deceased obtained another grant nine years later on 21<sup>st</sup> August 1998 which was revoked through court order of 13th October 1999. After the said revocation another grant was issued to one Gloria Wambui Mwai on 28th March 2000. The searches dated 6th February 2024 show the order above was registered as an encumbrance on both suit properties. However, the copies of certificates of title marked “MR 2” do not show



any encumbrance of the order above stated. If it was not for the letter by the 1st defendant, the plaintiff would not have been aware of the other two grants. The court has also noted that in the subsequent grant dated 28th March 2000, parcel L.R 311/V/MN has not been listed as one of the assets. This then is one of the issues which will come up during hearing, and I find the plaintiff has established a prima facie case.

- c. In the case of Pius Kipchirchir Kogo [supra] case the court described irreparable injury as follows: -

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury....”

The learned counsel do not appear to have addressed the court on the issue of whether or not irreparable injury would be occasioned.

- d. On the last principle the court in the Pius Kipchirchir Koga [supra] case stated:

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

Once again, the learned counsel did not submit on this issue, and no photographs were attached to assist the court get the status of the suit properties. In the case of Joel Mugambi Mukira & 2 others (for and on behalf of Kimathi tenants welfare group) versus County Government of Nyeri [2019]eKLR the court held that;

“In land matters the maintenance of status quo order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of Mugah -v- Kunga [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”

The court finds that the plaintiff has made a reasonable case for injunction order directed towards the 1<sup>st</sup> defendant to be issued to safeguard the legal status of the suit property, as the suit is heard and determined. This will ensure the 1<sup>st</sup> defendant does not proceed to rectify the register and or expunge the titles of the plaintiff, while this suit is pending in court. However,



no reasonable cause has been made for injunction order to be issued against the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

- i. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where otherwise ordered for good reasons. In this instance, I find it just to order that the costs abide the outcome of the suit.

6. From the foregoing, the court finds the plaintiff has partially succeeded in its application and orders as follows;

- a. That temporary injunction order against the 1<sup>st</sup> defendant in terms of prayer (4) is hereby granted.
- b. That the costs to abide the outcome of the suit.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 16<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff ...: Mr Kilonzo for Olunga

Defendants : M/s Mwanazumbah for 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Leakey – Court Assistant.

