



Ethics and Anti – Corruption Commission v Mburugu & 4 others; Ministry of Land, Public Works, Housing and Urban Development (Interested Party) (Land Case E064 of 2024) [2024] KEELC 13671 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE E064 OF 2024
LL NAIKUNI, J
DECEMBER 4, 2024**

BETWEEN

ETHICS AND ANTI – CORRUPTION COMMISSION PLAINTIFF

AND

SILAS KIOGORA MBURUGU 1ST DEFENDANT

MOHAMED SALIM ALI MOHAMED JUMA 2ND DEFENDANT

JUMA ALI MOHAMED JUMA 3RD DEFENDANT

PEARLJAM ESTATES LIMITED 4TH DEFENDANT

WILSON GACANJA 5TH DEFENDANT

AND

**MINISTRY OF LAND, PUBLIC WORKS, HOUSING AND URBAN
DEVELOPMENT INTERESTED PARTY**

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated 6th September, 2024. The Court was moved under Certificate of urgency by Ethics and Anti – Corruption Commission, the Plaintiff/Applicant. The application was brought under the provisions of Sections 1A & 63(c) and (e) of the *Civil Procedure Act*; Order 40, rules 1 & 4 of the Civil Procedure Rules, 2010; Sections 68 & 69 of the *Land Registration Act*, 2012; Section 11(1)(i) of the Ethics & Anti-Corruption Commission Act, 2011; Section 51, 53 & 56C of the Anti – Corruption and Economic Crimes Act and all enabling provisions of the law.



II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.
 - b. That the Honourable Court be pleased to issue interlocutory orders of inhibition to restrain the 2nd Defendant/Respondent whether by itself or through his agents, servants or assigns from alienating, transferring, charging, leasing, sub-dividing, consolidating, disposing of, wasting, or undertaking any construction or development of any nature thereon or any part thereof of parcel of land described as Mombasa Municipality Block XXII/231 (hereinafter referred to as the suit property) or from howsoever dealing with the said property pending hearing and determination of the Plaintiff/Applicant's present application and suit.
 - c. That costs of the Application be provided for.
3. The application is premised on the grounds, testimonial facts and averments made on the face of the application and further supported by the 5 Paragraphed annexed affidavit of LYDIAH ONG'ERA, an investigator with the Ethics and Anti-Corruption Commission (EACC) with six (6) annexures marked as "LO1 to 6". The Deponent averred that:
 - a. The Plaintiff /Applicant was a body corporate mandated under the provision of Sections 3 and 11 (1)(i) of the Ethics & Anti-Corruption Commission [Act, No. 22 of 2011](#) to institute and conduct proceedings in Court for purposes of recovery or protection of public property, confiscation of proceeds of corruption and payment of compensation.
 - b. Pursuant to the Plaintiff/Applicant aforesaid mandate, investigation was undertaken regarding corrupt, fraudulent and illegal alienation of suit property situated in Mombasa County and the following primary facts established:
 - i. Vide a letter of allotment dated 5th October, 1993 referenced 31922/X the 5th Defendant acting in purported powers vested upon him under the Registered [Land Act](#), Cap 300, Government [Land Act](#) Cap 280, the Registration of Titles Act (Cap 281) (all-now repealed) and other written laws, caused to be demarcated, alienated and allocated in favour of the 1st Defendant an unsurveyed parcel of land described as "Unsu Commercial Plot- Mombasa Municipality" and measuring 0.085 hectares more particularly identified in a purported Part Development Plan No 12.2.CT.8.93 on a lease basis for a period of 99 years from 1.10.1993 (see annexure marked LO1).
 - ii. The suit property was wholly excised from a built-up portion of Mombasa Block XII/27 which comprised of government of Kenya houses namely;
MOM/HOU/LG/242A - H, MOMB/HOU/MG/1A - D, MOM/HOU/LG/243 A-H and MOM/HOU/LG/244 A - H built by the Government of Kenya and let out to civil servants/ government employees in different ministries through the Interested Party.
 - iii. The houses mentioned in Paragraph (b) above were constructed way back in the year 1928 and have all along and continue to be let out to civil servants who pay rent from their salaries through a check off system. As the houses were old and run down, the



estate, along with several other estates are due for redevelopment with modern high-rise development for rental and sale to civil servants.

- iv. That suit property which is part of Mombasa Block XII/27 identified, alienated, allocated in favor of Interested Party was an open space serving civil servants/government employees when the 4th Defendant illegally acquired and developed it.
 - v. The Plaintiff shall contend that the Part Development Plant No. 12.2.CT.8.93 dated 18th August, 1993 that was used to survey, alienate, and allocate the suit property to the 1st Defendant was irregular and the-process initiated through its use was and remains null and void and of no legal effect since the suit property had already been set aside for use by government (see annexure marked as “LO – 2”).
 - vi. That based on the above Letter of Allotment a survey was carried out on 17th October, 1993 vide survey plan FR 248/111 authenticated on 1st November, 1993 leading to the-creation-of the suit-parcel of land.
 - vii. Thatafter survey, the Registry Index Map(RIM) was amended to reflect creation of a new parcel of land and the amendment box on the RIM should reflect the changes. However, in the instant case even though the Registry Index Map shows the suit property, the amendment box did not indicate the changes (see annexure marked as “LO – 3”).
 - viii. On 26th April, 1994 the 5th Defendant issued the 2nd and 3rd Defendants with a lease for the suit property. Subsequently on 14th July, 1996 the 2nd and 3rd Defendants transferred to the 4th Defendant the sui property at a consideration of a sum of Kenya Shillings Three Thousand (Kshs 300,000/=). The suit property was currently registered in the name of the 4th Defendant having been issued with a certificate of lease on 17th July, 1996 (see annexures marked as “LO – 4”, “LO – 5”, “LO – 6”).
 - ix. The survey that led to the creation of the suit property was null, void ab initio as the suit parcel of land was not available for allocation and/or alienation.
 - x. That the Interested party has never surrendered or relinquished the suit property to the Government for alienation or allocation to the 1st Defendant or any other person, neither had the Minister responsible for Housing and Urban Development given consent to any allocation asrequired by the provisions of the Government Lands Act, Cap. 280 and the Government Financial Regulations and Procedures.
- c. The Plaintiff had a prima facie case against the Defendants with a high probability of success. Consequently, the intended civil-recovery proceedings will be rendered nugatory if the land reasonably suspected to have been illegally acquired is allowed to dissipate.
 - d. It was in the public interest to grant the orders sought which are a precursor to recovery of the suit property.
 - e. No prejudice will be caused to the 4th Defendant/Respondent as there can be no loss to be suffered in restraining dealings with the suit property. Nevertheless, if at all there was loss, the same can be compensated by way of damages.
 - f. The balance of convenience tilted in favour of the Plaintiff/Applicant since the matter is of great public interest as it involves illegal acquisition of public land thus denying the Authority, a public entity of its intended use.



- g. There was a real danger that unless this Honourable Court issues orders restraining the 4th Defendant/Respondent from dealing with the property herein, they may dispose of or transfer all or part of the property in order to frustrate any decree that may be passed against them and the Authority will suffer great loss which may not be recoverable from them to the detriment of its operations.
- h. It was therefore just, fair and reasonable that this Honorable Court prohibits the 2nd Defendant/Respondent, its agents, servants or any other persons from transferring or disposing of or otherwise dealing with the parcel of land known as Mombasa Municipality Block XXII/231 to until the suit is heard and determined.

III. Submissions

- 4. On 5th November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 6th September, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court was not able to access the written submissions. The Honourable Court proceeded to reserve a ruling date on 4th December, 2024 on its own merit accordingly.

IV. Analysis and Determination

- 5. I have carefully read and considered the pleadings herein and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
- 6. In order to arrive at an informed, fair and reasonable decision, the Honorable Court has two (2) framed the following issues for determination.
 - a. Whether the Notice of Motion dated 6th September, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - b. Who will bear the Costs of Notice of Motion application 26th October, 2023.

Issue No. a). Whether the Notice of Motion dated 6th September, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

- 7. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

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.



8. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358”, where it was stated:-

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR”,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

10. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case of:- MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125,

“So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

11. As the Court previously observed in this ruling, the Applicant in the affidavit supporting the Application avers that Vide a letter of allotment dated 5th October, 1993 referenced 31922/X the 5th Defendant acting in purported powers vested upon him under the Registered Land Act, Cap 300, Government Land Act Cap 280, the Registration of Titles Act (Cap 281) (all-now repealed) and other written laws, caused to be demarcated, alienated and allocated in favour of the 1st Defendant an unsurveyed parcel of land described as “Unsu Commercial Plot- Mombasa Municipality” and measuring 0.085hectares more particularly identified in a purported Part Development Plan No 12.2.CT.8.93 on a lease basis for a period of 99 years from 1.10.1993.

12. The suit property was wholly excised from a built-up portion of Mombasa Block XII/27 constructed-way back in 1928 and have all along and continue to be let out to civil servants who pay rent from their



salaries through a check off system. As the houses were old and run down, the estate, along with several other estates are due for redevelopment with modern high-rise development for rental and sale to civil servants. The suit property which is part of Mombasa Block XII/27 identified, alienated, allocated in favor of Interested Party was an open space serving civil servants/government employees when the 4th Defendant illegally acquired and developed it.

13. The Plaintiff contended that the Part Development Plant No. 12.2.CT.8.93 dated 18th August, 1993 that was used to survey, alienate, and allocate the suit property to the 1st Defendant was irregular and the-process initiated through its use was and remains null and void and of no legal effect since the suit property had already been set aside for use by government. That based on the above letter of allotment a survey was carried out on 17th October, 1993 vide survey plan FR 248/111 authenticated on 1st November,1993 leading to the-creation-of the suit-parcel of land.
14. After survey, the Registry Index Map(RIM) was amended to reflect creation of a new parcel of land and the amendment box on the RIM should reflect the changes. However, in the instant case even though the Registry Index Map shows the suit property, the amendment box did not indicate the changes. On 26th April, 1994 the 5th Defendant issued the 2nd and 3rd Defendants with a lease for the suit property. Subsequently on 14th July, 1996 the 2nd and 3rd Defendants transferred to the 4th Defendant the sui property at a consideration of a sum of Kenya Shillings Three Hundred Thousand (Kshs 300,000/=). The suit property was currently registered in the name of the 4th Defendant having been issued with a certificate of lease on 17th July, 1996. The Plaintiff had a prima facie case against the Defendants with a high probability of success. Consequently, the intended civil-recovery proceedings will be rendered nugatory if the land reasonably suspected to have been illegally acquired is allowed to dissipate.
15. In the case of “Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1”, the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”
16. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited” the court held that:-

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
17. In the present case, regarding this first condition though, the Plaintiff/ Applicant has demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.
18. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Plaintiff/ Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable



remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

19. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Plaintiff/ Applicant have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted as the suit is a matter of public interest. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

“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.”

20. Quite clearly, the Applicant would not be able to be compensated through damages as it has shown the court that its rights to the suit property as a legal proprietor and that the Respondents ought to be stopped until such a time the acquire the affected portion(s) in a procedural manner. The Applicants have therefore satisfied the second condition as laid down in “Giella’s case”.

21. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

22. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the



greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

23. The balance of convenience tilts in the favour of the Applicant since the matter is of great public interest as it involves illegal acquisition of public land thus denying the Authority, a public entity of its intended use. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated;-

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

24. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

25. In the case of:- “Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR” where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

26. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/ Applicant. In view of the foregoing, I strongly find that the Plaintiff/ Applicant have met the criteria for grant of orders of temporary injunction.

ISSUE No. b). Who will bear the Costs of Notice of motion application dated 6th September, 2024

27. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs in the cause.



V. Conclusion & Disposition

28. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Plaintiff/ Applicant has a case against the Defendants/ Respondents.
29. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 6th September, 2024 be and is hereby found to have merit and is hereby allowed as per the Court's discretion and the preservation of the suit property.
 - b. That the Honorable court be and is hereby pleased to issue interlocutory orders of inhibition to restrain the 2nd Defendant/Respondent whether by itself or through his agents, servants or assigns from alienating, transferring, charging, leasing, sub-dividing, consolidating, disposing of, wasting, or undertaking any construction or development of any nature thereon or any part thereof of parcel of land described as Mombasa Municipality Block XXII/231 (hereinafter referred to as the suit property) or from howsoever dealing with the said property pending hearing and determination of the Plaintiff/Applicant's present application and suit.
 - c. That for expediency sake, the matter be heard on 27th February, 2025 there be a mention on 4th February, 2025 for purposes of conducting a Pre – Trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
 - d. That the cost of these application will be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF DECEMBER 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a). M/s. Firdaus Mbula, the Court Assistant.
- a. M/s. Songole Advocates for the Plaintiff/Applicant.
- b. M/s. Ajiambo Advocate holding brief for Mr. Gitonga Advocate for the 1st Defendant/Respondent.
- c. Mr. Thuo Advocate for the 5th Defendant/Respondent.
- d. No appearance for the 2nd, 3rd & 4th Defendants/Respondents.

