



**Kayoyo Investment Limited v Nesclay Limited & 3 others; Nesclay Limited (Plaintiff to the Counterclaim); Kayoyo Investment Limited & 6 others (Defendant to the Counterclaim) (Environment & Land Case E006 of 2022) [2023] KEELC 701 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 701 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE E006 OF 2022**  
**LN MBUGUA, J**  
**FEBRUARY 9, 2023**

**BETWEEN**

**KAYOYO INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**NESCLAY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PRINCIPAL SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING ..... 2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEYS ..... 3<sup>RD</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**NESCLAY LIMITED ..... PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**KAYOYO INVESTMENT LIMITED .. DEFENDANT TO THE COUNTERCLAIM**

**CHIEF LAND REGISTRAR ..... DEFENDANT TO THE COUNTERCLAIM**

**DIRECTOR OF SURVEYS ..... DEFENDANT TO THE COUNTERCLAIM**

**COUNTY GOVERNMENT OF NAIROBI .... DEFENDANT TO THE COUNTERCLAIM**

**ATTORNEY GENERAL ..... DEFENDANT TO THE COUNTERCLAIM**

**GEE PEE GENERAL TRADING LIMITED .... DEFENDANT TO THE COUNTERCLAIM**

**SAINT BENJAMIN MEMORIAL CLINIC .... DEFENDANT TO THE COUNTERCLAIM**



## RULING

1. There are 2 applications for determination before this Court, one dated January 13, 2022 brought forth by the plaintiff and another dated April 19, 2022 filed by the 1<sup>st</sup> defendant. Both are seeking injunctive orders against each other alongside other prayers. The first salvo was thrown by the plaintiff (Kayoyo Investments Limited) who filed this suit contemporaneously with the application dated January 13, 2022 which application was presented to me in the digital platform under Certificate of Urgency on January 17, 2022. The court gave directions that the same be served for interpartes hearing on February 8, 2022. On February 8, 2022, the Attorney General and the County Government of Nairobi had not filed their responses, as such, the court gave time lines for the filing of the necessary documents including submissions and the hearing was then re-scheduled to April 25, 2022.
2. On April 19, 2022, I handled the 2<sup>nd</sup> application of the even date where the 1<sup>st</sup> defendant is equally seeking injunction orders against the plaintiff while framing their claim as a Counter Claim. I gave directions that the said application be served for further directions on April 25, 2022.

### Directions of April 25, 2022

3. Taking cognizance of the existence of the two applications, the court gave directions as follows;

“In view of the fact that there is an application dated January 13, 2022 for injunction and another one by the 1<sup>st</sup> defendant dated April 19, 2022 also for injunction, then I proceed to give the following orders:

  - i. That *status quo* be maintained on the ground; such that no beacons or survey is to be under taken on the land.
  - ii. There be a scene visit conducted by the Deputy Registrar in the presence of counsels for the parties or their appointed representatives. The Deputy Registrar to file a report capturing:
    - a. What is the physical state of the land including structures, trees if any, cultivation constructions etc.
    - b. Who is in possession of the developments or the physical state of the land, ie in respect of LR No 7716/16/2 and for LR 7716/16 IR 7990.
  - iii. The counsels for the parties to avail photographs of the suit properties during the scene visit and to attach to their respective affidavits.
  - iv. In the intervening period the 2<sup>nd</sup> – 4<sup>th</sup> defendants to avail their respective Replying Affidavits to the two applications
  - v. Mention before the Deputy Registrar on May 10, 2022 to arrange the scene visit.



## Scene Visit Report

4. The scene visit exercise was not a walk in the park, nevertheless, the Deputy Registrar did file the report whose contents are captured as follows;

“This is in reference to the court order issued on April 25, 2022 by Honourable Lady Justice L Mbugua that the Deputy Registrar visits the locus quo to ascertain:

- i. The physical state of the land including structures, trees if any, cultivation or construction etc.
- ii. Who is in possession of the development or the physical state of the land; in respect of LR No 7716/16/2 and LR No 7716 IR 7990.

The *locus quo* was visited on July 22, 2022 in the presence of

1. Mr Kamau for the Plaintiff
2. Mr Allen Gichuhi for the 1<sup>st</sup> Defendant
3. Ms Fatma for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants
4. Mr Modi for the 4<sup>th</sup> Defendant
5. Mr Mwongela for the 7<sup>th</sup> Defendant in the Counter-claim.

The court was shown the suit property which is directly opposite the Australian High Commission on Limuru Road. The same measures approximately 11.2 acres ie LR No 7716 IR 7990. The court later visited the locus in the absence of the parties to take pictures after the previous photos taken got lost. As evidenced by the pictures attached to this report, there is a house built on one part of the property while the rest of the area consists of trees. The other part of the property has been cultivated on and consists of a banana plantation, avocado trees, beans, chickpeas, mango trees, macadamia trees, a beehive, spinach and kales etc.

This court confirms that Ms Mary Nesbitt and her 2 sons, Nicholas and Eric Nesbitt are in actual possession of the suit property since 1986. They have about 5 employees who also reside on the property. Aside from the photos, a map of the area is attached to this report”.

## The Application Dated 13/1/2022

5. The Plaintiff seeks a temporary order of injunction restraining the Defendants whether by themselves/ proxies from cancelling Grant IR No 233251 and the attendant survey records, trespassing, engaging in construction and /or interfering in any other way with the Plaintiff's peaceful and quiet enjoyment of land Reference No 7716/16/2 pending hearing and determination of the suit and an order for the OCS Gigiri Police station to ensure compliance with the Orders for purposes of maintaining peace and order.
6. The application is based on grounds on its face and on the Plaintiff's supporting affidavit sworn on January 13, 2022 by its director George Mwangi Wakangu. In summary, the plaintiffs aver that they are the registered owners of the property known as Land Reference No 7716/16/2 (Grant No IR 233521) (suit land), having purchased the said land and a transfer effected on December 16, 2021. To this end, they have availed a certificate of title and a copy of official search dated January 6, 2022 to prove their claim of ownership.



7. The plaintiffs further contend that through the conduct of due diligence, they established that the suit property was registered pursuant to a survey conducted in 1988 and that the original owners of the said land and who sold it to the Plaintiff have held the same since December 1, 1997.
8. That during the re-establishment of the beacons exercise, the Plaintiff was obstructed by goons deployed by the 1<sup>st</sup> Defendant who claim that the suit property forms part of its land. Mr Wakangu then reported the 1<sup>st</sup> Defendant's actions to the DCIO Gigiri Police station who got no response despite summoning the 1<sup>st</sup> Defendant. He deposes that the Plaintiff is currently unable to access its land let alone commence its development plans owing to the 1<sup>st</sup> Defendant's interference.
9. The plaintiffs got wind of an illicit scheme to dispossess them of the suit property without following due procedure of the law through cancellation of their original deed, hence the prayers sought herein.
10. In opposition to the Application dated January 13, 2022, the 1<sup>st</sup> Defendant filed a Replying Affidavit sworn on February 7, 2022 by its director one Nicholas A Nesbitt. In summary, the 1<sup>st</sup> defendant avers that Plaintiff's suit is based on a fake title obtained from an illegal subdivision of the 1<sup>st</sup> Defendant's title known as LR 77/16/1R 7990 acquired by way of purchase from Neswa Limited on June 6, 1972. He further deposes that they (1<sup>st</sup> defendant) have been in possession of title and have been paying the requisite land rates.
11. Over the years, the property has been leased and charged at different times and from 1996, the Nesbitt family has occupied it uninterrupted as their family home and they have not subdivided any portion of it nor sold or leased any piece of the land to anyone else.
12. The 1<sup>st</sup> defendant contends that in 1987, they commissioned a licensed surveyor, Mr Walter Absalom to draw up a subdivision of the entire property. The proposed subdivision was then submitted to the Director of City Planning & Architecture in the Nairobi City Commission. It was then approved by the Ministry of Lands and Settlement vide its letter dated May 23, 1989 subject to fulfillment of 12 conditions, one of which was that a portion of the land would need "to be reserved for public purpose (a Clinic) and to be surrendered to the government for free".
13. However, the 1<sup>st</sup> Defendant did not proceed with the subdivision and it did not surrender its title due to the expensive conditions contained in the letter of approval of subdivision. The 1<sup>st</sup> defendant avers that the subdivision appears to have been irregularly registered on the basis of 16 deed plans Nos 425249-425264 as 8 years later, trouble with the land started with grabbers claiming the various subdivisions.
14. In a bid to protect its land, on June 8, 1988, AH Malik & Company, the 1st Defendant's lawyers published a caveat emptor on LR 7716/16 on the local newspapers, which caveat has never been withdrawn to date.
15. The other parties did not file responses to the application.

### **The Application Dated April 19, 2022**

16. The 1st Defendant, now a plaintiff in the Counter Claim is similarly seeking orders of injunction restraining the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants whether by themselves, their agents, employees and/or servants from charging, selling, leasing, transferring, alienating, trespassing or dealing in any manner whatsoever with the Plaintiff's property LR 7716/16 IR 7990 and from asserting any ownership on the basis of the 16 deed plans Nos 425249-425264 and Certificates of Title over Land Reference Nos 7716/16/2 and 7716/19-33. The 1<sup>st</sup> defendant is also seeking an order of inhibition in respect of the suit properties. They also seek various prayers directing the Chief Land Registrar and the Director of



Survey to produce a myriad of documents including reports, and to reconstruct their (1<sup>st</sup> defendant's) file.

17. The application is premised on the grounds set out on its face and on the Supporting Affidavit of its director one Nicholas A Nesbitt sworn on April 19, 2022. He rehearses the averments in his earlier Replying Affidavit sworn on February 7, 2022 in opposition to the Plaintiff's Notice of Motion Application Dated January 13, 2022. The 1<sup>st</sup> defendant contends that on October 20, 2021, agents of the 1<sup>st</sup> (read the plaintiff), 6<sup>th</sup> and 7<sup>th</sup> Defendants sent hired laborers on to the Plaintiff's property to tear down the prominently displayed "Not for sale" signs, but the trespassers were repulsed. They returned on November 1, 2021 bringing surveyors from Nairobi Metropolitan Services on behalf of GeePee General Traders Limited but they were again repulsed.
18. No responses were filed in respect of the application dated April 19, 2022.

### **Determination**

19. I have considered all the issues raised herein including the rival submissions of the parties. For purposes of this ruling and in order to main good order, the plaintiff in the main suit will be identified as such; The plaintiff, while the plaintiff in the Counter claim shall be refereed to as the 1<sup>st</sup> defendant. The issues arising for determination are; Whether the Plaintiff and /or the 1<sup>st</sup> Defendant has met the threshold for grant of interlocutory injunctions, whether an order of inhibition should be issued and whether there is a basis to order production of documents by the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, the Chief Land Registrar and Director of Surveys and to reconstruct 1<sup>st</sup> defendant's file at this stage.
20. The Plaintiff is apprehensive that it will be dispossessed of the land known as Land Reference No 7716/16/2 through cancellation of its original deed plan by 3<sup>rd</sup> Defendant under the 2<sup>nd</sup> Defendant's instructions. It seeks an order to restrain them from doing so and an interlocutory injunction to restrain the 1<sup>st</sup> Defendant from dealing with the suit land in any manner.
21. On the other hand, the 1<sup>st</sup> Defendant also seeks an interlocutory injunction to restrain the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants from dealing with the property known as Land Reference No 7716/16 IR No 7990.
22. In the case of *Giella v Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”
23. The Plaintiff presented in evidence a certificate of title and a copy of official search dated January 6, 2022 indicating that it is the proprietor of Land Reference No 7716/16/2 (Grant No IR 233521). The 1<sup>st</sup> Defendant argues that the certificate of title issued to the Plaintiff is a forgery arising from the illegal subdivision of its property known as LR 77/16/1R 7990. The 1<sup>st</sup> defendant has similarly annexed its certificate of title to the suit properties. From the material so far presented before me, it appears that both the Plaintiff and the 1<sup>st</sup> Defendant have established an arguable case.
24. There is hence a need to interrogate the other criterias; Who stands to suffer irreparable injury which would not adequately be compensated by an award of damages?, The balance of convenience tilts in



whose favour? The plaintiff submitted extensively that land is unique and no one parcel of land can be equated in value to another; Averring that it has mobilized resources with a view to setting up a medical facility in line with the suit property's conditions of use. However, no evidence was tabled in proof of the averments that it has made considerable investments on the suit land that cannot be compensated by way of damages. The plaintiffs have not demonstrated that they ever had physical possession or control of the suit premises.

25. On the other hand, the Deputy Registrar's site visit report dated October 24, 2022 confirmed that LR7716/16-IR is in possession of Ms Mary Nesbitt and her sons. The photographs clearly show that there is a residential house on the land, as well as staff quarters where employees reside while the rest is covered in vegetation and crops.
26. I therefore find that it is the 1<sup>st</sup> Defendant who has established that it would suffer irreparable injury that would not adequately be compensated by an award of damages. Thus even the balance of convenience tilts in their favour.
27. Another point for consideration on the issue of injunctive orders relates to the pleadings of the plaintiff where in the final prayers no (c) and (d), they seek the following orders;
  - i. "An order be issued ordering the Defendants to remove all structures and offending materials they have placed on the suit property.
  - ii. In the alternative, an order of eviction be granted against the Defendants, their servants or agents from the suit property".
28. In essence, the issuance of injunctive orders as prayed in the application dated January 13, 2022 would amount to granting a major relief at the interlocutory stage of the suit. In the case of *Daniel Atibu Jasimba v Ainea Sandanyi Magana* [2013] eKLR, the court had this to say in respect of a prayer relating to a major relief;

"Since the Plaintiff's suit is for eviction of the defendant from the said residence, such an injunction will amount to granting a major relief in the suit without the benefit of a hearing".
29. Similarly in the Court of Appeal case of *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR, the court cited the Indian case of *Ashok Kumar Bajpai - v- Dr (Smt) Ranjama Baipai*, AIR 2004, All 107, 2004 (1) AWC 88, where the court had expressed itself as follows:

"...It is evident that the Court should not grant interim relief which amounts to final relief..."
30. Likewise, this court cannot grant a major relief at the interlocutory stage before the suit is heard on its merits.
31. I find that in so far as the prayers for injunction orders are concerned, the most efficacious orders to give are the maintenance of status quo both in terms of registration status as well as ground status. The Court of Appeal defined what 'status quo' means in the case of *Shimmers Plaza Limited vs National Bank of Kenya Limited* [2015] eKLR as follows:

"Status quo" in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things."



32. On the issue of production of documents, there is no basis to warrant the issuance of such orders at this stage of the trial. Such issues should be dealt with during the pretrial stage through the various methods like notice to produce and summons to the relevant personnel to produce documents or reports. The other prayer sought by the 1<sup>st</sup> defendant for reconstruction of their Deed File in respect of its property Land Reference 7716/16-IR 7990 is equally unmerited as it amounts to an order of mandamus, which order cannot be issued at the interlocutory stage as no special circumstances warranting the issuance of such orders have been proffered; See *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, *Lucy Wangui Gachara V Minudi Okemba Lore* [2015] e KLR and *Kenya Breweries Ltd & Another vs Washington O Okeya* [2002] eKLR.

**Final orders:**

1. The application dated January 13, 2022 is hereby dismissed.
2. The application dated April 19, 2022 is hereby partially allowed in terms of the following;
  - a) An order of status quo is hereby issued in respect of the entire suit properties; For avoidance of doubts, a) the ground status entails that the 1<sup>st</sup> defendant shall be in possession and control of the suit premises. The plaintiff is restrained from interfering with the suit premises.
  - b) An order of inhibition is hereby issued in respect of the suit premises such that the same shall not be alienated in any manner.
  - c) The prayers sought in number 4, 5 and 7 in the application dated April 19, 2022 are hereby dismissed.
3. The costs of the two applications shall abide the out come of the main suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

**K. Kamau for Plaintiff**

**Allen Gichuhi for 1<sup>st</sup> Defendant**

**Kubai for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants (in the counter claim)**

**Madi for 4<sup>th</sup> Defendant**

**Ochieng for 7<sup>th</sup> Defendant in the counter claim**

**Court assistant: Eddel**

