



Rono & 9 others v Kenya Forest Service & 4 others (Environment and Land Miscellaneous Application E049 of 2021) [2023] KEELC 535 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E049 OF 2021
LA OMOLLO, J
FEBRUARY 2, 2023**

BETWEEN

**ELASCO RONO 1ST APPLICANT
STEPHEN PANDUMUNYE 2ND APPLICANT
WILLIAM KIPLAGAT KALEGU 3RD APPLICANT
JOSEPH K. SANG 4TH APPLICANT
ZAKAYO LESINGA 5TH APPLICANT
JAMES RANA 6TH APPLICANT
JULIAS SITONIM 7TH APPLICANT
ISAAH SANET 8TH APPLICANT
SAMSON MURENO 9TH APPLICANT
WILLIAM SERONEY TIWAS 10TH APPLICANT**

AND

**KENYA FOREST SERVICE 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
REGIONAL COORDINATOR RIFT VALLEY REGION 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
NAKURU COUNTY COMMISSIONER 5TH RESPONDENT**



RULING

1. This ruling is in respect of the Applicants' Notice of Motion application dated 22nd November, 2021 which is expressed to be brought under section 1A and 3A of the Civil Procedure Act and order 51 of the Civil Procedure Rules 2010.
2. The application seeks the following orders:
 1. ...spent
 2. ...spent
 3. That this honorable court be pleased to issue an order of permanent injunction restraining the 1st Respondent by themselves, their agents, servants and/or anybody claiming under them from evicting persons, tearing down structures, selling, transferring, leasing, allocating land tampering with boundaries, engaging in any construction thereupon and/or in any other way dealing with the property belonging to the Applicants herein located Mariashioni Location, Elburgon Division, Nessuit Location and Njoro Division within Nakuru County within or at the outskirts of Mau Forest and/or interfering with the Applicant's occupation and possession of their property in line with judgement issued on 17th March 2021 pending resettlement.
 4. That costs of this application be borne by the respondents.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 22nd November, 2021 by Stephen Kipkemoi Pandumunye the (2nd Applicant) with the authority of the other applicants.

FACTUAL BACKGROUND.

4. The Application first came up for hearing on 18th January, 2022 and the court was informed that the Respondents had not been served. The court directed that the Respondents be served with the application and another date given for hearing.
5. After several mentions to confirm service, on 19th May, 2022 counsel for the 1st, 3rd, 4th and 5th Respondents appeared in court and directions were issued that the Respondents file and serve their Replying Affidavit and submissions and the Applicants were granted leave to file a Supplementary Affidavit if need be.
6. Subsequently, the matter was again mentioned severally to confirm filing of submissions and it was not until 28th September, 2022 when the 1st, 3rd, 4th and 5th Respondents informed the court that they would be relying on their replying affidavit.
7. The 2nd Respondent did not file a response to the application.
8. The application was then reserved for ruling.

THE APPLICANTS' CONTENTION.

9. The 2nd Applicant' contends that the Applicants are the beneficial owners of the parcels of lands located in Mariashioni Location, Elburgon Division, Nessuit Location and Njoro Division within Nakuru County on the outskirts of Mau Forest.



10. He also contends that they are members of the Ogiek Community and reside within Mau Complex, having been in occupation since time immemorial adding that the said parcels of land are ancestral land and the land supports their lifestyle as hunters and gatherers.
11. He further contends that their relatives and ancestors have been interred therein and that the land holds sacred trees and shrines of utmost importance to the Applicants and their community.
12. It is his contention that the Applicants were the Plaintiffs in Nairobi ELC Suit No. 821 of 2012 as against the Attorney General, Provincial Commissioner Rift Valley Province, Rift Valley Provincial Forests Officer, District Commissioner Nakuru, Wilson Chepkwony and the Director of Forestry being the 1st to 6th Respondents respectively.
13. It is his further contention that they were successful in the said suit and the court pronounced itself in their favor as follows:
 - a. The Court hereby declares that the right to life protected by Section 71 of the Previous Constitution and Article 26 of the 2010 Constitution the right to dignity under Article 28 of the 2010 Constitution and the Economic and Social rights under Article 43 of *the Constitution* of the affected members of the Ogiek Community in Mariashioni Location, Elburgon Division, Nessuit Location and Njoro Division within Nakuru in the Mau Forest Complex including the Applicants has been contravened and is being contravened by their forcible eviction from said locations without resettlement and that said members of the Ogiek Community have been deprived of their means of livelihood.
 - b. This Court hereby declares the eviction of the Applicants and other members of the Ogiek Community from Mariashioni Location, Elburgon Division, Nessuit Location and Njoro Division, Nakuru in the Mau Complex is a contravention of their right not to be discriminated against under section 82 of the previous constitution and Article 27 and 56 of the 2010 Constitution as it has resulted in the Applicants being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the Forests.
 - c. The National Land Commission is hereby directed to within one year of the date of judgment identify and open a register of members of the Ogiek Community in consultations with the Ogiek Council of Elders, and identify land for the settlement of the said Ogiek members and the Applicants who were to be settled in the excised area Mariashioni Location, Elburgon Division, Nessuit Location and Njoro Division in Nakuru and have not yet been given land in line with the recommendations in the Report of the Government Task Force on the conservation of the Mau Forest Complex published in March, 2009.
 - d. The Applicants shall serve a copy of the Judgement and orders herein to the Chairman of the National Land Commission within 30 days of the date of this Judgment.
 - e. The 1st 2nd 3rd 4th and 6th respondents shall meet the costs of this suit.
14. It is his contention that the 2nd Respondent partially adhered to the decision of the court in so far as making a register of the members of the Ogiek Community adding that the process has been marred



with lethargy and indifference as they are yet to be resettled in the terms of the Judgement in Nairobi ELC No. 821 of 2012.

15. He contends that the 1st Respondent has illegally and unprocedurally moved into the Applicants ancestral land and with the help of the armed service forcefully evicted them by tearing down their premises without notice and in contempt to the judgement delivered in Nairobi ELC Suit No. 821 of 2012 on 17th march, 2014.
16. He also contends that the Respondents have blatantly discriminated and victimized the Applicants and that the said events are perennial and consecutively recurring.
17. He further contends that their rights to life and socio-economic rights are consequently defined and dependent on their continued access to the Mau Forest and to this extent the same should be protected by this court.
18. It is his contention that if indeed the persecution persists then the Applicants and their families will suffer untold misery.
19. He ends his deposition by stating that it is in the interest of justice that the application be heard on priority basis and be allowed.

THE 1ST, 3RD, 4TH AND 5TH RESPONDENTS RESPONSE.

20. The 1st, 3rd, 4th and 5th Respondents filed a Replying Affidavit sworn by Peter Mukira on 15th June 2022 and filed on 17th June, 2022.
21. He contends that he is an officer of Mau Forest Conservancy in Nakuru and is well versed with the facts of this case hence competent to swear the affidavit.
22. It is his contention that contends that the Mau Ogiek Community of Eastern Mau Forest Block and other Interested Parties sued the Kenya Forest Service, Hon. Attorney General, CS Ministry of Environment & Forestry and the Regional Commander, Rift Valley Region from conducting audits and boundary surveys among other activities.
23. He further contends that there are two court orders that are still active and the cases have not yet been heard and determined.
24. It is his contention that the recent court order issued by the Environment and Land Court on 18th December, 2020 alongside political incitements are believed to be the genesis of the mass re-invasion into the gazetted forest.
25. He contends that only the multi-agency team was restrained from entering the gazette forest area and the community was left at will to carry out illegal activities within the gazetted forest block.
26. He also contends that the Kenya Forest Service is part of the Multi-Agency team that has been restrained from entering the gazetted forest and therefore the community must also be restrained from the gazette forest land until the case is heard and determined.
27. He further contends that by restraining the Kenya Forest Service from entering the gazetted forest, it implies that that the Kenya Forest service is restrained from carrying out its mandate as per the [*Forest Conservation and Management Act* 2016](#).
28. He ends his deposition by stating that the Kenya Forest Service has not been served with the court order to date and that it would be expected that the Kenya Forest Service be allowed to carry out



its conservation and management activities within this gazette forest area as guided by the [Forest Conservation and Management Act 2016](#).

ISSUES FOR DETERMINATION.

29. The Applicants filed their submissions dated 11th March, 2022 on 15th March, 2022. They give a summary of their case and identify the following issues for determination:
 - a. Whether the application is uncontroverted.
 - b. Whether the Applicant has fulfilled the conditions set for granting an injunction sought in the Chamber Summons.
 - c. Costs
30. On the first issue the Applicants submit that the standard of proof in claims such as the instant one is on a balance of probabilities. The Applicants rely on the Judicial decisions in Palace Investments LTD Vs Geoffrey Kariuki Mwenda & Another NRB CA Civil Appeal No. 127 of 2007 [2007] eKLR, Janet Kaphiphe Ouma & Another vs Marie Stopes International Kenya Kisumu HCC No. 68 of 2007, Interchemie EA Limited Vs Nakuru Veterinary Center Limited Nairobi (Milimani) HCC No. 165 B of 2000 and submit that their application is uncontroverted as the Respondents did not file any response to their application.
31. On the second issue, the Applicants rely on the decision in Giella Vs Cassman Brown which sets out the principles of granting an injunction. They also rely on the Judicial decisions in Alex Wainaina t/ a John Commercial Agencies Vs Johnson Wanjihia [2015] eKLR, Mrao Vs First American Bank of Kenya Limited & 2 Others and submit that they have demonstrated that they have a right which is being threatened by the Respondents and they are seeking the protection of the court.
32. They also submit that they have demonstrated that they have a prima facie case and they therefore seek that the injunctive order sought be granted as prayed. They further submit that they are likely to suffer grave injury and that the same cannot be adequately compensated by an award of damages. The Applicants rely on the decisions in Films Rover International Ltd & Others Vs Common Film Sales Ltd [1986] EAER 772 among other cases in support of their arguments.
33. The Applicants submit that the conditions set out in the Giella case (Supra) require that in the event that the court is in doubt as to the existence of the two previous conditions already addressed, the court should determine the application on a balance of convenience. They further submit that the balance of convenience tilts in their favour. They rely on Nandan Pictures Ltd Vs Art Pictures Ltd & others among other decisions in support of their arguments.
34. On the question of costs, they rely on the decision in Joseph Oduor Anode vs Kenya Red Cross society [2012] and pray that their application be allowed with costs.
35. The 1st, 3rd, 4th and 5th Respondents intimated that they would not be filing submissions and asked the court to rely entirely on their replying affidavit.



ANALYSIS AND DETERMINATION.

36. I have considered the Application, Replying Affidavit and the submissions filed in this matter. The two issues that arises for determination are:
- a. Whether an order of permanent injunction can issue is a miscellaneous application
 - b. Whether an order of permanent injunction should issue against the 1st Respondent.
 - c. Who shall bear the cost of the application.

Whether an order of permanent injunction can issue in a miscellaneous application.

37. In answer to this questioning I will interrogate meaning and scope of a miscellaneous application.
38. The Applicants have filed the instant miscellaneous application seeking orders of permanent injunction against the Respondents.
39. The basis for seeking this order is that judgement was delivered Nairobi ELC Suit No. 821 of 2012 and the Respondents continue to engage in certain activities and /or have failed to perform certain duties which according to the applicants, are in violation of the orders of the court as set out in the said judgment. A copy of the said judgment is annexed to the miscellaneous application.
40. The general rule is that suits are instituted by way of a Plaint unless the rules prescribe any other form. Section 19 of the *Civil Procedure Act* provides as follows:
- “Every suit shall be instituted in such manner as may be prescribed by the rules.”
41. Order 3 Rule 1 of the Civil Procedure Rules stipulates that:
- “Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed.”
42. The Learned Judge in Rajab Kosgei Magut Vs Nuru Jepleting Choge [2020] eKLR cited with approval the decision in Joseph Kibowen Chemor Vs William C Kasera (2013) eKLR wherein the court defined the filing of suits as follows;
6. The word "suit" has several meanings. Black's Law Dictionary defines "suit" as any proceedings by a party or parties against another in a court of law .
 7. "suit of a civil nature" is defined to be a civil action.
 8. "A civil action" is an action brought to enforce, redress, or protect a private or civil right.
 6. Section 2 of the *Civil Procedure Act*, defines "suit" as all civil proceedings commenced in any manner "prescribed"
 7. "prescribed" under Section 2 means prescribed by rules.
 8. "Rules" means rules and forms made by the Rules Committee to regulate the procedure of courts.



9. "pleadings" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.
 10. Section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example, the Probate & Administration Rules under the Succession Act, prescribe how matters touching on succession of estates of deceased persons need to be instituted.
 11. It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules.
43. Permanent Injunctions are perpetual in nature and are generally issued after a suit has been heard and finally determined.
 44. The Concise Oxford English Dictionary 12th Edition at Page 913 defines the word miscellaneous thus;

Of various types. Composed of members of elements of different kinds. The word has its origin in the Latin word *miscellaneus* meaning mixed.
 45. My understanding is that when a person wishes to move the court seeking an order (s) that the civil procedure rules or any other statutes do not expressly provide a procedure for, then that person would have to approach the court by way of a miscellaneous application. In most instances, such applications are not intended to enforce rights as against other parties.
 46. In the case of *Joseph Kibowen Chemjor Vs William C Kisera (Supra)*, the Learned Judge observed as follows;

There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no "action" being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no "action". In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. (emphasis is mine). This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings.
 47. In *Tatecoh Housing and Co-op Sacco Ltd Vs Qwetu Sacco Ltd (2021) eKLR* the Learned Judge held as follows;

"Without much ado, I will agree with the position of the respondentthat the appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of



eviction. one will ordinarily only obtain an order of eviction after a full hearing of the case. What the appellant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit and If successful, that an order of eviction would issue.”

48. In *Norah Ndunge Henry & another v Abednego Mutisya & another* [2022] eKLR. The learned Judge while answering the question on whether a party can enforce a right through a miscellaneous application commenced by way of a motion observed as follows;

A Notice of Motion is not legally recognised as an originating process. A Notice of Motion can only be within a properly instituted suit.”

49. Another decision that is insightful on the question of miscellaneous applications commenced by way of a motion is *Kalyonge Vs Karanja* (Miscellaneous Application E070 of 2021) [2022] KEHC 16174 (KLR) (Commercial and Tax). The learned Judge observed as follows;

15. In view of the foregoing, the suit before the court is not competent. The Applicant came by way of notice of motion which is not prescribed by any law or rule as an originating process. (Emphasis is mine) In any event, an interlocutory injunction can only be granted in the interim pending the resolution of the suit. In a miscellaneous cause commenced by way of a motion, once the application is determined, the proceedings are terminated. The matter is concluded and there would be no further hearing of the dispute. (Emphasis is mine)

50. I find that an order of permanent injunction cannot issue on a miscellaneous application and/or a miscellaneous application commenced by way of a motion. A party seeking and desirous of such order must file a suit.

b. Whether an order of permanent injunction should issue against the 1st Respondent.

51. The nature of an order of permanent injunction is settled and has been discussed in numerous judicial decisions.

52. In *Kenya Power & Lighting Co. Limited Vs Sheriff Molana Habib* [2018] eKLR the learned Judge held as follows:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. (emphasis is mine). It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/ interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”



53. In *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR it was held as follows:

“Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just sit, wait and watch under these given circumstances...”

54. In the present matter, the Applicants are seeking orders of permanent injunction to be issued against the 1st Respondent restraining it from dealing in any way with the property that is alleged to belong to the Applicants located at Mariashioni Location, Elburgon Division, Nessir location and Njoro Division in Nakuru County within the Mau Forest.

55. The Applicants allege that the said property is their ancestral land and that the Respondents have evicted them. Subsequent to the said eviction, the Applicants state that they filed Nairobi ELC suit No. 821 of 2012 which was determined in their favour and the court declared that their right to life and dignity as provided for under *the Constitution* had been infringed because of their forcible eviction from the Mau Forest Complex.

56. They contend that court also ordered the National land Commission to identify and open a register of the members of the Ogiek Community and in consultation with the Ogiek Council Elders identify land for their settlement.

57. The Applicants further contend that despite the said judgement by the court in Nairobi ELC Suit No. 821 of 2012, the 1st Respondent has forcefully evicted the Applicants.

58. The 1st, 3rd, 4th and 5th Respondents in response admit that the Applicants have instituted suits against them seeking orders on injunction to prevent them from conducting audits and boundary surveys adding that these suits are pending determination.

59. I reiterate and as was held in the decisions in *Kenya Power & Lighting Co. Limited Vs Sheriff Molana Habib* (supra) and *Bandari Investments & Co. Ltd Vs Martin Chiponda & 139 others* (supra), a permanent injunction can only be granted upon hearing a suit on merit of the suit.

60. The Applicants have moved this court through a Miscellaneous Application seeking for substantive orders which cannot be issued in a Miscellaneous Application. The Learned Judge in *Nairobi West Hospital Limited Vs Joseph Kariha & Another* [2018] eKLR, shed more Light on the scope of a miscellaneous application and stated thus;

“...In my view this substantive order which for all intents and purposes cannot be issued through a application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that a suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard.”

61. It would seem that the Applicants seek to enforce the orders issued in Nairobi ELC Suit No. 821 of 2012 and/or engage this court in some sort of post judgment proceedings. The forum for filing such application would be the court that issued them.



Who shall bear the cost of this application ?

62. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

DISPOSITION.

63. In conclusion, therefore, I find that the Applicants application dated 22nd November, 2021 lacks merit and is hereby dismissed with costs to the Respondents.

64. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF FEBRUARY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Applicants.

No appearance for the 1st Respondent.

No appearance for the 2nd Respondent.

No appearance for the 3rd, 4th and 5th Respondents.

Court Assistant; Monica Wanjohi.

