



**Wandera v County Government of Busia (Environment & Land Case E011 of 2022) [2023] KEELC 480 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 480 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E011 OF 2022**

**BN OLAO, J**

**FEBRUARY 1, 2023**

**BETWEEN**

**NICOLAS BWIRE WANDERA ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF BUSIA ..... DEFENDANT**

**RULING**

1. What calls for my determination is the Notice of Motion by Nicolas Bwire Wandera (the Applicant) dated June 24, 2022 and predicated under the provisions of Article 40 of the Constitution, Section 63 of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules seeking the following orders:
  1. Spent
  2. Spent
  3. Pending the hearing and determination of this suit, the Honourable Court be pleased to issue an injunction order against the defendant, it's agents, proxies allottees and/or any other person acting for and under the authority of the defendant from dealing, constructing, building or in any way making any structures or conducting business on the sub-divided plots on the suit property that is LR NO BUNYALA/BULEMIA/3470 situated on both ends of the road adjacent to Bulemia Market.
  4. Spent
  5. Pending the hearing and determination of this suit, the Honourable Court be pleased to order that all those structures erected, built, raised or in any way developed on the suit property and in particular those built on the pathway to the plaintiff and the interested party's property be and are hereby demolished.



6. The Officer Commanding Port Victoria Police Station be directed to supervise the compliance of the orders of the Court.
7. Costs be provided for.

The application is based on the grounds set out therein and is also supported by the affidavit of the plaintiff of even date.

2. The gist of the application is that the plaintiff is the only surviving co-owner of the land parcel NO BUNYALA/BULEMIA/3470 (the suit property) which was previously known as BUNYALA/BULEMIA/200. That the suit property was handed down from the plaintiff's late father Antony Wandera Ogalo and is adjacent to Bulemia Market. That on or about January 2022 persons purporting to be from The County Government Of Busia (the defendant) visited the suit property and purported to make demarcations for purposes of expanding Bulemia Market. Then in March 2022, the defendant purported to demarcate, sub-divide and allocate part of the suit property to persons believed to be its agents who have proceeded to commence the construction of kiosks, toilets and an informal church structure. That some of those structures have been built in the middle of the road leading to the plaintiff's home thus blocking his movement in and outside the property. Despite having been served with letters, the defendant has refused to make good the violations to the plaintiff rights under both the Constitution and other laws hence this application.
3. Annexed to the application are the following documents:
  1. Green Card to the land parcel BUNYALA/BULEMIA/200.
  2. Certificate of Search for the land parcel NO BUNYALA/BULEMIA/3470.
  3. Photographs.
  4. Letter from Plaintiff's Counsel.
  5. Diagram.
4. The application is opposed and Everline Teresia Mbingi the defendant's chief officer in charge of the Department of Land, Housing and Urban Development filed a replying affidavit dated July 25, 2022 in which she deposed, inter alia, that the suit property is in fact public land reserved for public utility and held in trust for members of the public. Further, that the photographs annexed to the supporting affidavit are blurred and do not set out the alleged encroachment and in any event, the application is in contravention of Section 16(1) of the Government Proceedings Act and Order 29 Rule 2(2) of the Civil Procedure Rules which provides that no orders of injunction can be issued against the Government. That the prayer for temporary injunction is in itself a departure from the pleadings herein and finally, the application is not only defective and an abuse of the process of this Court but it also does not meet the threshold set out in the case of *Giella -v- Cassman Brown & Co Ltd 1973 EA 358*. It should therefore be dismissed with costs.
5. The application has been canvassed by way of written submissions. These have been filed by Mr Mola instructed by the firm of Mola, Kimosop & Njeru Advocates for the plaintiff and by Mr Rodgers Sekwe the defendant's solicitor.
6. I have considered the application, the rival affidavits and the submissions by counsel.
7. Before I delve into the merits or otherwise of the application, there are two issues raised in the submissions by the defendant's counsel which I must first address.



8. The first issue is the submission that no injunction can be issued against the Government. Reliance has been placed on the provisions of Section 16 of the *Government Proceedings Act* that no order of injunction can be issued against the Government. Counsel has also cited Order 29 Rule 2 of the Civil Procedures Rules. The short answer to those submissions, and as aptly captured by counsel for the plaintiff, is that the County Government Act 2012 has no provision prohibiting this Court from granting any injunctive reliefs against the County Government. In that respect, I agree with the decisions in the cases of *Lawrence Onyiego & Another -v- Samuel Minika & Another 2017 eKLR* and also *James Muigai Thungu -v- County Government Of Trans Nzozi 2017 eKLR* cited by Counsel for the plaintiff.

9. On the second issue that the prayer for a temporary injunction is a departure from the plaintiff's pleadings and is therefore not available to him, it is clear from paragraph 18(c) of the plaint herein that among the remedies sought by the plaintiff is that:

' A permanent injunction be and is hereby issued against the defendant, its agents, proxies, allottees and all persons acting under the authority of the defendant from making any development on the suit property.'

It is therefore not correct for counsel for the defendant to submit, as he has done, that:

' It is evident that the plaintiff's application for an order of temporary injunction amounts to a departure from pleadings and therefore inconsistent and in contravention of the law cited herein considering that no temporary orders were even pleaded by the plaintiff in his plaint.'

Temporary orders could only be pleaded in the application and not in the plaint. The plaint can only plead permanent final orders which the plaintiff has pleaded.

10. Having dispensed with the above, this application must be determined within the parameters set out in the case of *Giela -v- Cassman Brown & Co Ltd (supra)*. These are:

1. The plaintiff must demonstrate that he has a prima facie case with a probability of success.
2. Secondly, a temporary injunction will not normally be granted unless the plaintiff shows that he might otherwise suffer irreparable loss which may not adequately be compensated in damages.
3. If in doubt, the Court will determine the application on a balance of convenience.

A prima facie case, as defined in the case of *Mrao -v- First American Bank Of Kenya Ltd & Others 2003 KLR 125*:

' Is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'

And in *Nguruman Ltd -v- Jan Bonde Nielsen & Others Ca Civil Appeal No 77 Of 2012* the Court of Appeal stated thus:

' We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.



The Applicant need not establish title. It is enough if he can show that he has a bona fide question to raise as to the existence of the right which he alleges.'

11. Finally, as was held in *Films Rover International -v- Cannon Film Sale Ltd 1986 3 ALL ER 772*, a court considering such an application must take the course that appears to carry the lower risk of injustice.
12. Guided by the above, the fact that the suit property is the property of the plaintiff is not really in dispute. The search certificate shows that among the proprietors of the suit property is Nicholas Wandera whom this court presumes to be the plaintiff herein. Perhaps that will be made clearer during the main trial. Suffice it to state that there is no evidence placed before this Court by the defendant to suggest that the suit property is public land. The certificate herein shows that it is private property registered in the names of several persons. The defendant has not denied that it is constructing structures on the suit property. It's only complaint is that the photographs of the structures availed 'are blurred.' That is true and hopefully more legible photographs will be availed as this matter progresses. But again, all that the plaintiff was required to prove is a prima facie case which I am satisfied he has demonstrated.
13. On the issue of damages, the defendant's officer Everline Teresia Mbingi has deposed in paragraph 11 of her replying affidavit as follows:

' That the Applicant has completely failed to place any material before the Honourable Court to disapprove the fact and law that an award of damages would constitute adequate compensation for the purported loss of the suit property in the event an interlocutory order is not granted.'

To begin with, no facts have been placed before me nor any law cited to show that damages would be adequate compensation for the loss of property. Therefore, the plaintiff was under no obligation to disapprove what had not been provided by the defendant. Most importantly, however, it is not an inexorable rule that where damages may be an appropriate remedy, a temporary injunction will not be granted – *Waithaka -v- Icdc 2001 KLR 374*. In any event, the plaintiff having provided evidence that it is the proprietor of the suit property, and in the absence of any other contradictory evidence other than a mere un-substantiated assertion that the suit property is public land, this court must be guided by the decision in *Thomas Smith Aikman & Another -v- Muchoki & Others 1982 eKLR [CA CIVIL APPEAL NO 9 of 1982]* where MADAN JA (as he then was) stated that those who brazenly infringe on the title of others must be restrained by injunctions. The continued construction of structures on the suit property is, in my view, an activity that will change it's nature and I do not consider such injury to be one that can adequately be compensated with damages.

14. And if I was in any doubt, which I am not, I would determine the application in favour of the plaintiff with respect to the prayer for temporary injunction pending hearing as sought in paragraph 3 of the Notice of Motion.
15. With regard to prayers NO 4, 5 and 6 which seek orders that the structures on the suit property be demolished and also that the Officer Commanding Port Victoria Police Station be directed to supervise compliance of those orders, those prayers are not available at an interlocutory stage. To grant them would amount to making final orders in a matter that is still pending. Those prayers are declined.
16. The up-shot of the above is that having considered the Notice of Motion dated June 24, 2022, I allow it in the following terms:
  1. Pending the hearing and determination of this suit, an order of temporary injunction is issued restraining the defendant through it's agents, proxies, allottees and any other persons acting



under its' authority from constructing, building, dealing with or in any way conducting business on the sub-divided plots on the land parcel No Bunyala/bulemia/3470 situated on both ends of the road adjacent to Bulemia Market.

2. Prayers NO 4, 5 and 6 are declined.
3. Costs shall be in the cause.
4. The plaintiff shall ensure that this suit is heard and determined within the next 12 months or this order shall lapse unless extended by this Court for sufficient reasons.

**BOAZ N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY 2023**

**RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 7<sup>TH</sup> NOVEMBER 2022.**

**BOAZ N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY 2023**

