



Yukos Kitengela Residents Association v County Government of Kajiado; Nyoike & another (Interested Parties) (Environment and Land Judicial Review Case E011 of 2021 & Environment & Land Case 083 of 2021 (Consolidated)) [2023] KEELC 534 (KLR) (6 February 2023) (Ruling)

Neutral citation: [2023] KEELC 534 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E011 OF 2021
& ENVIRONMENT & LAND CASE 083 OF 2021 (CONSOLIDATED)**

MN GICHERU, J

FEBRUARY 6, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL
REVIEW ORDERS FOR CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF ARTICLES 60, 61, 66 OF THE CONSTITUTION AND SECTION 6(1)
OF THE FIRST SCHEDULE OF THE CONSTITUTION;**

**IN THE MATTER OF LAND USE PLANNING UNDER SECTIONS 102 AND 103 OF THE
NATIONAL LAND POLICY; IN THE MATTER OF THE PHYSICAL PLANNING ACT CAP
286 (REPEALED); THE PHYSICAL AND LAND USE PLANNING ACT 2019 AND THE
URBAN AREAS AND CITIES ACT 2011**

AND

**IN THE MATTER OF YUKOS GATED COMMUNITY (CONTROLLED DEVELOPMENT –
ZONING PLANNING) KIGENGELA**

BETWEEN

YUKOS KITENGELA RESIDENTS ASSOCIATION APPLICANT

AND

COUNTY GOVERNMENT OF KAJIADO RESPONDENT

AND

JOSEPH NYOIKE INTERESTED PARTY

OROK INVESTMENT BUSINESS CENTERE LIMITED ... INTERESTED PARTY



RULING

1. This ruling is on the Notice of Motion dated 3/12/2021. The said motion which is brought under Sections 3, 13 and 19 of the *Environment and Land Court Act*, Order 40, Rule 2, Order 50, Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B, 3A, 63(C) and (e) of the *Civil Procedure Act* and all enabling provisions of the law seeks the following prayers.
 - (a) Pending the hearing and final determination of this suit the court issues a temporary injunction restraining the Defendants, its agents and or servants from obstructing, harassing, threatening or otherwise adversely interfering with the Applicant's fundamental proprietary right to property and right of way by restricting the development on and the common access to L.R. Kajiado/Kaputiei North/13985, 13986 and 113996 and the public access road abutting them.
 - (b) A mandatory injunction to compel the Respondent to remove the debris deposited at the rear entrance of the mall at the public access road abutting the three suit parcels mentioned above.
 - (c) That an interlocutory injunction do issue restraining the Respondent from trespassing on the suit land pending the hearing and determination of the suit.
 - (d) That the officer commanding Kitengela Police Station be directed to enforce the orders herein.
2. The motion is supported by fourteen grounds, two affidavits dated 3/12/2021 and 7/2/2022 and eleven (11) annexures.

In a nutshell the Applicants are saying that they own the three land parcels. The first two are adjacent to each other. They abut the Kitengela-Namanga road from which they are accessible at the front. The third Defendants have illegally erected a gate at the public access road and illegally vetoes those who can go through the gate or use the public access road.
3. Before this, the Defendants had complained against the Plaintiffs to the County Government of Kajiado to the effect that a mall under construction by the Plaintiff on the suit parcels was being undertaken without the necessary approvals. This complaint was dismissed by the County Government of Kajiado after a site visit that confirmed everything was in order.
4. The Defendants have also been accused of purporting that the suit parcels are within a zoned area when this is not the case.
5. The notice of motion is opposed by the Respondents and one Steve Sumbi Kamuya has sworn a replying affidavit dated 14/12/2021. He is the chairman of Yukos Kitengela Residents Association. The affidavit which has nine (9) annexures narrows the dispute to access to, and, from the mall. According to the deponent, the Plaintiffs can only develop their property by observing the zoning regulations.
6. Counsel for the parties filed written submissions on 7/2/22 and 15/2/2022 respectively.
7. I have carefully considered the Notice of Motion in its entirety including the three affidavits, the annexures, the grounds, the submissions and the case law cited therein.
8. I find that the application dated 3/12/2021 has merit for the following reasons.



9. Firstly, the Applicants have made a prima facie case with a probability of success. They have proved that they own the suit parcels and that they have all the requisite approvals from the County Government of Kajiado.
10. The Respondents have not come out strongly on the issue of zoning because it is contradictory to say that the area is zoned yet the Applicants have the necessary approvals to undertake the project that Respondents seem to be complaining about. At this stage, the Respondents have not proved zoning.
11. Secondly, the Applicants have shown that if the application is not allowed, they stand to suffer loss that cannot adequately be compensated by an award of damages. The Respondents have not in their replying affidavit proved that they can afford to compensate the Applicants in case they are eventually successful in the suit.
12. Finally the balance of convenience tilts in favour of the Applicants who have not only the title documents to the suit parcels but also the necessary approvals from the relevant authority to carry out the project that they are undertaking.
13. In short, the motion meets the test set out in the case of Giella –versus- Cassman Brown and Co. Ltd. The Notice of Motion dated 3/12/2021 is therefore allowed on terms of the prayers set out in paragraphs 2, 3, 4 and 5 of this ruling. Costs in the cause.
14. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6TH DAY OF FEBRUARY, 2023.

M.N. GICHERU

JUDGE

