



**Ikiao & another v Kamenchu (Environment & Land Case
E008 of 2022) [2023] KEELC 16191 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2022**

CK NZILI, J

MARCH 8, 2023

BETWEEN

JENNIFFER KANARIO IKIAO 1ST PLAINTIFF

DOUGLAS KINYUA IKAMATI 2ND PLAINTIFF

AND

ZAKAYO KAMENCHU DEFENDANT

RULING

1. Before this court is the application dated December 13, 2022 in which the defendant seeks for injunctive orders against the plaintiffs from intimidating, harassing and or interfering with the quiet enjoyment of his tenants in occupation of plot No 92 pending the hearing and determination of this suit. The application is based on the grounds set out on its face and in the supporting affidavit of Zakayo Kamenchu sworn on December 13, 2022. The applicant averred that at the time the court delivered its ruling on November 16, 2022 restraining him from continuing with the construction on the plaintiff's Plot No's 133 & 134, the construction had already been concluded and the tenants had taken up the rental houses. The applicant averred that the construction and tenancies followed after he obtained both business and occupation permits from the relevant government agencies as per the attached documents marked ZK "1" – "6", respectively. Further, the applicant averred that in its aforementioned ruling, the court did not pronounce the fate of the tenants already in occupation of the suit premises.
2. Additionally, the applicant averred that the respondents were harassing and or intimidating the tenants yet the official searches at the Tigania land's registry, for LR No's. Kianjai/133 & 134 and the sheet maps indicated that the land parcels did not belong to the respondents but to third parties or did not exist in the same locality as the defendant's property.



3. On top of the application, the defendant has also filed a preliminary objection dated December 13, 2022, on the basis that the 2nd plaintiff was a faceless and a non-existent individual; the suit was frivolous, vexatious, scandalous and an abuse of the court process for the 1st plaintiff was signing pleadings on behalf of a non-existent plaintiff and lastly, on the basis that the plaintiffs have no locus standing to file the suit since they were not the registered owners of the alleged plots.
4. The application was opposed by the plaintiffs through a replying affidavit sworn by Jenifer Kanario Ikiao on January 11, 2023. The grounds are that the application is superfluous, unmerited; an abuse of the court process; the court was functus officio; that it does not matter if the construction was over and taken up by tenants since two wrongs cannot make a right and that in view of the served orders, the alleged tenants have no right to remain in situ. Further, the respondents averred that the plots were in Kianjai market and hence could not be the land parcels alluded to in the supporting affidavit.
5. With leave of court parties opted to canvass both the preliminary objection and the application by way of written submissions dated January 25, 2023 and January 26, 2023 respectively.
6. On the application, the defendant/applicant submits that the application had satisfied the tests for grant of temporary injunction as set out in *Giella v Cassman Brown (1973) E.A 358* [*Mrao Ltd v First American Bank of Kenya Ltd \(2003\) KLR 125 pg 137*](#) on prima facie case since the two plots do not belong to the plaintiffs as per the attached official search certificates and a sheet map.
7. On irreparable loss, the applicant submitted that if the tenants were harassed and or intimidated, there will be irreparable loss as held in [*Samuel Karubi Njenga v Jeniffer Ngendo Waweru \(2020\) eKLR*](#) and [*Nguruman Ltd v Jan Bonde Neilsen & 2 others \(2014\) eKLR*](#). On the aspect of the balance of convenience, the applicant submitted that the balance tilts in favour of granting the orders sought to protect him against injury as held in [*Ann Kinyua v Nyayo Tea Zone Development Corporation & 3 others \(2012\) eKLR*](#).
8. Regarding the preliminary objection, the applicant submitted that the plaintiffs do not own the two parcels of land and since the 2nd plaintiff does not exist, he could not sue or maintain the cause of action. It was submitted that the defendant had through due diligence, noted that the 2nd plaintiff did not exist and only a mere name which has been included. Reliance was placed on [*Housing Finance Co Ltd v Embakasi Youth Development Project \(2004\) eKLR*](#), [*KPLC v Benzene Holdings Ltd t/a Wyco Paints \(2016\) eKLR*](#), [*Alfred Njau & others v City Council of Nairobi \(1982-1988\) 1 KAR 229*](#) and [*Sheila Nkatha Muthee v Alphonse Mwangemi Munga & others \(2016\) eKLR*](#).
9. The plaintiffs submitted that the issues raised in the application were considered and determined in the ruling dated November 16, 2022 and that it was immaterial that the building had been finalized at the time the ruling was delivered since the same was in flagrant disregard of the law and court orders. As to land Parcels No Meru/Kianjai/133 and 134, the plaintiffs submitted that paragraph 2 of the supporting affidavit to the application was a veiled attempt to distort the facts and litigation in piecemeal, otherwise what was before the court was neither an appeal nor an application for review. Reliance was placed on [*Peter Mungai v Joseph Ngaba Kuria & another \(2022\) eKLR*](#).
10. On the aspect of preliminary objection, the plaintiffs submitted that the preliminary objection dated December 13, 2022 did not amount to what was envisaged to be a preliminary objection in *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1979) E.A 696*.
11. Having carefully gone through the application, the response, the preliminary objection and written submissions, the issues calling for the court's determination are: -
 - i. If the application dated December 13, 2022 is res judicata.



- ii. If the court is functus officio.
 - iii. If the preliminary objection has merits.
12. The plaintiffs filed a notice of motion dated May 26, 2022 seeking a temporary injunction against the construction on their plots No 133 & 134 Kianjai market. The defendant opposed the same through a replying affidavit sworn on July 26, 2022 claiming to be a bonafide owner. He specifically stated that the building at the time was at the roofing stage and that he had received deposits from potential tenants to his building following approvals for developments by the relevant government agencies. The court considered the facts and pleading on record. Among the documents considered was a letter dated April 20, 2020, which the defendant subsequently listed as document No 13 in his list of documents dated November 29, 2022. This letter stopped all construction works on the disputed Plots No 133 and 134. Further, the court considered a report dated April 28, 2021 in which the defendant listed the same document as number 18 in his list of documents indicating that the County Government of Meru had no evidence regarding the alleged transfer of Plot No 92 to any party, least of all the defendant herein.
 13. The defendant in his replying affidavit to the notice of motion had attached annexure marked as ZK “1”, a document issued in 1990 & 1991 regarding ownership marked as ZK “2”, photographic evidence on the status of the development, receipts by potential tenants marked as ZK “3”, letters to the Director of Physical Planning Meru County marked as ZK “4”, report dated April 28, 2021 and letters to DCIO marked as ZK “5”, approvals marked as ZK “6” and lastly a renewal of development permits marked as ZK “7”.
 14. In this application, the defendant has annexed photographs, tenants’ agreements, business permits, receipts and occupation permit as annexures marked as ZK, 2, 3 & 4 respectively. The dates when the tenancy agreements were allegedly signed are missing. The business permits were issued on June 24, 2022. The Ministry of Health receipt is dated November 15, 2022 which was a day before the ruling was delivered. Annexures marked ZK 7 and ZK 8 are dated November 25, 2022 and November 30, 2022, respectively. They also relate to a totally different land, falling on a totally different land registration mechanism. There is no evidence attached to show that Parcels No’s LR No Meru/Kianjai/133 and 134 refer to one and the same land as the one described as Plot No’s 133 & 134, Kianjai Market in the suit.
 15. There is nothing attached from the Land Registrar Meru Central or the County Government of Meru authenticating that the applicant herein and following the ruling dated November 16, 2022, has acquired a letter of allotment, beacons certificate, approved deed plans, full council minutes of allocation of Plot No 92 and or part development plans. In the defence dated November 29, 2022, which was filed after the ruling, the defence in paragraph 4 thereof states that the defendant was allocated Plot No 92 Kianjai on 1.2.1992 by the defunct Meru County Council. In paragraph 7 thereof, he admitted the issuance of the stop-construction notice vide a letter dated April 20, 2020. In paragraph 12 thereof, the defendant admits there was a temporary injunction and a contempt order thereof where after he stopped the construction till his appeal succeeded.
 16. In paragraph 13 of the defence the defendant alluded that he restarted the construction after two years when there was no finding of an encroachment to the plaintiffs’ plots in accordance with the approvals that he had acquired.
 17. In this application, the order issued on November 18, 2022 was not only binding the defendant but also his agents, his assignees, successors in the title and any persons claiming under him, from entering into, remaining, constructing and in any way whatsoever interfering with the plaintiffs’ proprietary rights on Plots No’s 133 and 134 Kianjai market pending the hearing and determination of this suit.



18. The court made a finding that the defendant had trespassed on the plaintiffs' plots as per the [Trespass Act](#).
19. The defendant has not appealed against the said ruling or applied for any review. Therefore, that ruling injunctioning him and any of his agents or servants from trespassing into the two plots still stands. Instead of abiding by the ruling or the orders, the defendant now comes before the court claiming that the court did not pronounce itself on the fate of his complete building and the tenants therein.
20. Unfortunately, the said tenants were and are not a party to this suit. They are the agents of the defendant who are bound by the aforesaid orders. The defendant has not attached anything to show that he has the authority to plead and advance their cause. The court made findings that the plaintiffs had established the ingredients for the grant of temporary injunction.
21. In the statement of defence filed subsequent to the ruling, no new evidence was pleaded or attached on ownership of Plot No 92 Kianjai and or a determination by the allotting authority that plot No 92 allegedly belongs to the defendant, did not encroach on the plaintiffs' two plots. The paper trail which is consistent and traceable from the allotting authority is held by the plaintiffs, unlike the defendant whose ownership documents have not been authenticated by the allotting authority.
22. The defence filed by the defendant has no counterclaim seeking for any declaratory reliefs that the defendant is a bonafide owner on paper and on the ground of Plot No 92 Kianjai market, which is separate and different from Plots No's 133 and 134 Kianjai market.
23. As much as the applicant has attached approval plans, permits and occupation licenses, there is nothing new after the ruling dated November 16, 2022 to show that the defendant has any enforceable rights superior to those of the plaintiffs, protectable by way of a temporary injunction.
24. The sheet map attached to the application is not authenticated and therefore cannot amount to any proof of ownership.
25. In seeking for the court to injunct the plaintiffs from asserting ownership rights that have been given a stamp of approval through a valid court order, the applicant is simply asking this court to sit on appeal on its own ruling and or to issue rival injunctive orders in favour of the two parties but in contrast to each other.
26. In the case of [St. Patricks Hill School Ltd v Bank of Africa \(K\) Ltd \(2018\) eKLR](#), the court held that it had unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. The court held that the material and the relevant question was whether it was unjust to maintain the injunction in force or whether it was otherwise unjust and inequitable to let the order remain.
27. Suffice it to say that this application is not made to discharge the interim orders on the basis that the same is unjust, inequitable or has been misused by the plaintiffs to serve another purpose apart from the preservation of the substratum.
28. In [Eric v J. Makhokha & 4 others v Lawrence Sagini & 2 others](#) Civil Application No 20 of 1994, the court said that, equity-like nature will do nothing in vain and that a court cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes.
29. The applicant is not saying that circumstances have changed after the ruling was delivered or that the justice of the case shows otherwise. On the contrary, the applicant appears to be admitting that he has gone against the court orders by willingly and knowingly allowing third parties in the nature of tenants



- to interfere with a valid court order. That cannot be said to be undue hardship or prejudice if the orders continue to exist. The court was alive to the alleged deposits from the so-called potential tenants at the time the ruling was made. No occupation licenses or permits had been issued by November 16, 2022.
30. Similarly, after the orders were issued, the defendant waited for one month to come to this court not by way of review of the orders, but in the name of the alleged tenants whose tenancy agreements do not predate the ruling delivered on November 16, 2022. The defendant must have known the consequences of bringing in third parties onto the suit property during the pendency of the suit and by extension during the subsistence of valid injunctive orders. He cannot therefore, plead ignorance of the law and the pendency of the injunctive orders right from the lower court, during the subsistence of his appeal and after this suit was filed.
 31. By enforcing the court order, the plaintiffs cannot be said to be intimidating or oppressing non-parties to the suit who in any event are bound by the said court orders. An injunction as held in *Mobile Kitale Service Station v Mobil Oil (K) Ltd & another (2004) eKLR*, is a weapon only meant for a specific purpose to shield a party against the violation of the legal rights he is seeking. The injunctive orders issued on November 18, 2022 were specifically clear and aimed at preserving the property to the detriment of the plaintiffs.
 32. Coming to the preliminary objection dated December 13, 2021, based on capacity to sue, in Goodwill and Trust Investment Ltd and another v Witt & Bush Ltd as cited in *Apex Finance International v KACC NKU JR 64 of 2011 (2012) eKLR*, it was held that proper parties must be identified before an action could succeed.
 33. In this preliminary objection, the defendant has merely stated that he undertook due diligence and established that the 2nd plaintiff was non-existent and that the plaintiffs have no sufficiency of interest on the land to sustain the claim. The statement of defence in paragraph 2 admits the descriptive part of the plaint. Paragraphs 4 & 5 of the defence do not state that the two plots claimed by the plaintiffs do not exist either at the county registry or fall under a different land registration mechanism. The defendant did not plead the non-existence of any of the plaintiffs, legally or otherwise.
 34. In any event, the two grounds of preliminary objection as to the identity, non -existence and or the 2nd plaintiff being an imposter would require evidence to sustain them. In the case of *Oraro v Mbaja (2005) IKLR 141*, the court held that a preliminary objection must not deal with disputed facts and that it must not derive its foundation from factual information which stands to be tested by rules of evidence.
 35. Given the foregoing reasons, I find both the application and the preliminary objection dated December 13, 2022 lacking merits. The two are dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8TH DAY OF MARCH, 2023

In presence of:

C/A: Kananu

Mokua for the plaintiffs

Kariuki for defendant

HON CK NZILI

ELC JUDGE

