



**Ingosi & 87 others v Kenya Forestry Services & 2 others (Environment & Land Case 479 of 2012) [2023] KEELC 18869 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18869 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 479 OF 2012**

**JM ONYANGO, J**

**JULY 12, 2023**

**BETWEEN**

**TIMOTHY INGOSI & 87 OTHERS ..... PLAINTIFF**

**AND**

**KENYA FORESTRY SERVICES ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated May 16, 2022 and amended on October 17, 2022 the Plaintiffs filed an application seeking the following orders:
  - a. Spent
  - b. That leave be granted to the in-coming advocates Amasakha & Co Advocates to come on record in place of the out-going advocates Mwinamo Lugonzo & Co Advocates.
  - c. Pending the hearing of the instant application *inter partes*, a temporary order of injunction be issued restraining the defendants, their servants, and/or agents from entering, occupying, tilling, alienating and/or in any way interfering with the plaintiff's use and occupation of all that land known as parcel block No 7561/R.
  - d. Pending the hearing of the instant application, a temporary order of injunction be issued restraining the defendants, their servants, and/or agents from entering, occupying, tilling, alienating and/or in any way interfering with the plaintiff's use and occupation of the above parcel of land.



- e. This Honourable Court be pleased to extend the period of suspension of the judgment for a further period of five years from the date of the order to enable the parties to conclude the ongoing process of allocation of the said Land Parcel Block 7561 to the plaintiffs.
  - f. The costs of this application be provided for.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the supporting affidavit of Timothy Ingosi (1<sup>st</sup> Plaintiff/Applicant) sworn on May 16, 2022. The application is strenuously opposed by the that 1<sup>st</sup> Defendant through the Replying Affidavit of Maurice Wanyiri sworn on the July 20, 2022.
  3. A brief background of the case is necessary in order to put the application into perspective. The Plaintiffs/ Applicants who are residents of Likuyani Serekenya Scheme in Turbo filed suit against the defendants claiming that they were allocated parcels of Land Parcel Block 7561/R by Presidential decree but they have been unable to process titles to their parcels of land as the land is still gazetted as a forest. They prayed for a prohibitory order restraining the defendants from compelling the 1<sup>st</sup> Defendant to de-gazette the suit property as a forest and an order compelling the 3<sup>rd</sup> defendant to issue land titles to the plaintiffs.
  4. The 1<sup>st</sup> Defendant filed and Defence and Counterclaim denying the plaintiffs' claim and stated that the President only had authority to alienate unalienated government land in accordance with the [Government Lands Act](#).
  5. In the Counterclaim, the 1<sup>st</sup> Defendant stated that the suit property belongs to the 1<sup>st</sup> Defendant pursuant to Gazette Notice no 145 of 1715/64 and Legal Notice No 167 of August 12, 1971. They alleged that the allocation of the suit property to the plaintiffs by the 3<sup>rd</sup> Defendant was illegal and unlawful.
  6. The suit was heard and judgment was delivered on November 6, 2015 dismissing the Plaintiffs' claim and allowing the 1<sup>st</sup> Defendant's Counterclaim. The court suspended the judgment for two years and directed the National Land Commission, Ministry of Environment and Natural Resources and the Kenya Forest Services to consider the plight of the plaintiffs who had settled on the suit property with view to completing the due process of allocation of the land to them. The period of suspension of the judgment was extended by a further two years on October 23, 2018.
  7. In his supporting affidavit the 1<sup>st</sup> Plaintiff alleges that on May 12, 2022 the Forest Station Manager planted tree seedlings on 12.25 Hectares of the suit property. This is what prompted the plaintiffs to file the instant application. The court granted a temporary injunction on June 15, 2022.
  8. In his affidavit sworn on October 17, 2022 the 1<sup>st</sup> plaintiff averred that the extended period of suspension of the judgment has expired. However, in the intervening period, the parties had set in motion the process of completing the allocation of the suit property to the plaintiffs by conducting public participation and an environmental impact assessment and what is pending is the de-gazettement of the area.
  9. He deposed that the plaintiffs have developed homesteads on the suit property and they have been in occupation thereof for more than 40 years. He averred that by virtue of the processes undertaken so far, the defendants had made the plaintiffs believe that they would be settled on the land and they have a legitimate expectation that they deserve to be notified of any processes carried out on the land. He annexed a bundle of documents consisting of letters, reports, minutes and photographs.



10. They are therefore of the view that the actions of the Forest guards who stormed the suit property and planted trees thereon were in total negation of the spirit of the on-going Alternative Dispute Resolution process and was arbitrary, illegal and a travesty of justice. They fear that the defendants' agents are not restrained from their actions, the Plaintiffs shall suffer irreparable loss and damage
11. In opposing the application, the Mr Maurice Wanyiri the County Forest Conservator deposed that the application is fatally defective, bad in law and an abuse of the process of the court. He denies that the 1<sup>st</sup> defendant has interfered with the plaintiffs' continued occupation of the suit property. He admitted that the Forest Station Manager had planted tree seedlings on 12.5 Hectares of the suit land. He deposed that the Plaintiffs had not advanced any good reasons to warrant the orders sought and that the application is only aimed at delaying the matter. He deposed that the Plaintiffs had not met the threshold for an injunction as the only party that was suffering loss is the 1<sup>st</sup> Defendant which has not been able to enjoy the fruits of its judgment.

### **Analysis and Determination**

12. The application was disposed of by way of written submissions and the parties filed their submissions which I have considered.
13. There are two main issues for determination: -
  - i. Whether an injunction ought to be granted against the defendants.
  - ii. Whether the period for suspension of the judgment ought to be extended for five more years.
14. With regard to the first issue, the jurisdiction of this court to grant a temporary injunction when exercising its jurisdiction as a trial court is donated by Order 40 of the [Civil Procedure Rules](#). Order 40 of the [Civil Procedure Rules](#) provides as follows:

Order 40 rule 1 provides thus:

- "1. Cases in which temporary injunction may be granted Where in any suit it is proved by affidavit or otherwise-
    - a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
    - b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders"
- “[Order 40, rule 2.] Injunction to restrain breach of contract or other injury.
- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury



complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."

15. The court's jurisdiction under Order 40 rule 1 of the *Civil Procedure Rules* is exercised by the court pending the hearing and determination of a suit; not after a final judgment has been rendered. Although Order 40 Rule 2 contemplates the issuance of an injunction after delivery of judgment, such an injunction cannot take away the rights of a party who has a judgment in his favour
16. In the case at hand, judgment was rendered on November 6, 2015. That Judgment determined the rights of the parties to this suit and stated that the suit property belongs to the 1st Defendant. This court cannot, at this stage, exercise jurisdiction to grant a temporary injunction under Order 40 (2) as sought by the Plaintiffs as this would limit or take away the rights accrued to the 1<sup>st</sup> Defendant. I therefore decline to grant the injunction.
17. I will now proceed to determine whether the period for suspension of the judgment should be extended. After delivery of the judgment, the court directed the National Land Commission, Ministry of Environment and Natural Resources and Kenya Forest Services to consider the plight of the Plaintiffs who have settled on the suit land with a view to completing the due process of allocation. In this regard, the court suspended the judgment for a period of two years upto 2018. The period was extended by another two years upto 2020. The Plaintiffs are now seeking an extension of 5 years. Learned counsel for the plaintiffs submitted that the plaintiffs have so far moved the National Land Commission and the Ministry of Environment and Natural Resources and they have had an Environmental Impact Assessment and Social Impact Assessment conducted after public participation. The said reports need to be tabled in Parliament for approval. It is Counsel's submission that the remaining process is purely political and it is within the mandate of the executive arm government. It is for this reason that the extension is sought. Reliance has been placed on the case of *Gogardhan v Barsai* AIR 1972 All 246 and Indian case where the court held as follows:

"Even in cases where an order is made by the court for doing a thing within a particular time and the order further provides that the application, suit or appeal shall stand dismissed if the thing is not done within the time fixed, the court has jurisdiction, if sufficient cause is made out, to extend the time even when the application for extension of time is made after the expiry of the time fixed. It is no the application for grant of further time, whether made before or after the expiry of the time granted which confers jurisdiction on the court".

18. Closer home, in the case of *Charo v Mwashetani & 3 Others* (2014) KLR –SCK the Supreme Court observed that:

"In emerging jurisprudence, the concept of timelines and timeliness is generally upheld as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the court's eternal mandate of responding appropriately to individual claims as dictated by compelling considerations of justice".

19. On the other hand, learned counsel for the 1<sup>st</sup> Defendant submitted that the plaintiffs had not demonstrated that they had a legitimate expectation to be allocated land by the defendants. He contended that there was no evidence that the 1<sup>st</sup> Defendant had made any representations to the



plaintiffs that it would allocate them the suit land nor had they placed any material before the court to show that they had involved the 1<sup>st</sup> Defendant in conducting the Environmental Impact Assessment. He relied on the case of *Alex Mrefu v rural Electrification & 3 Others* (2022) eKLR where the court cited the Supreme Court decision of *Communication Commission of Kenya & 4 Others v Royal Media Services Ltd & 4 Others* (2014) eKLR in which the court held as follows:

“Legitimate expectation applies the principles of fairness and reasonableness to the situation in which a person has an expectation, or interest in a public body retaining a long standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice has aroused an expectation that is within its power to fulfill”

20. It is counsel’s submission that since the 1<sup>st</sup> Defendant did not promise the plaintiffs that it would allocate them land, the question of legitimate expectation does not arise and since the period of suspension of the judgment has lapsed the 1<sup>st</sup> defendant can carry out activities on the suit land without issuing prior notice to the plaintiffs.
21. Counsel submitted that the judgment had been suspended for 8 years yet no meaningful negotiations had taken place and blamed the plaintiffs for deliberately delaying or obstructing the course of justice and thereby preventing the 1<sup>st</sup> Defendant from enjoying the fruits of their judgment.
22. It is not in dispute that the court suspended the judgement to allow the 1<sup>st</sup> Defendant, National Land Commission and Ministry of Environment and Natural Resources to consider the plight of the plaintiffs who have settled on the suit property for many years with a view to allocating them the land. The Plaintiffs have demonstrated that they have so far engaged the National Land Commission and the Ministry of Environment and Natural Resources and an Environmental Impact assessment and Social Impact Assessment have been conducted. Although it is not clear why they did not engage the 1<sup>st</sup> Defendant in the said assessments, I am persuaded that some progress has been made.
23. It must be appreciated that it was not entirely upto the plaintiffs to move the process forward as there is a limit as to what they can achieve. As submitted by counsel for the plaintiffs, some of the processes are purely political and therefore out of the plaintiffs’ control. This includes Parliamentary approval and de-gazettment of a portion of the forest.
24. In the case of *Equity Bank v West Link MBO Limited* (Civil Application No 78 of 2011) ,[2013] eKLR, Musinga JA observed that Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met.
25. The court has a wide discretion to enlarge time. Section 95 of the *Civil Procedure Act* provides as follows:

“Where any period is fixed or granted for doing any act prescribed or allowed by this Act, the court may in its discretion from time to time, enlarge such period even though the period originally fixed or granted may have expired.”
26. In *Mukenya Ndunda v Crater Automobiles Limited* (2015) eKLR, the Court observed that “Rules of the Court, have conferred on the Court unfettered discretionary power to extend time set by the Rules. The *Constitution* (in Article 159 (3)(d)) enjoins Courts to do justice to the parties and to avoid undue regard to procedural technicalities where such technicalities stand in the way of justice, and for



that reason, courts in paying obedience to the Constitution have inherent jurisdiction to waive the strict application of such rule or rules as may be a hindrance to dispensation of justice.”

27. Furthermore, in *Charo v Mwasbetani* (supra) the Supreme Court recognized the Court’s eternal mandate of responding appropriately to individual claims dictated by compelling considerations of justice.
28. In exercising its discretion, the court has to act judiciously and balance the interests of the parties. Granted that the 1<sup>st</sup> Respondent is entitled to enjoy the fruits of its judgment I am persuaded that the plaintiffs have made out a case for extension of the period of suspension of the judgment albeit for a short time, to enable the relevant Government agencies complete the process of allocating land to the Plaintiffs.
29. In the interest of justice, I exercise my discretion in favour of the Plaintiffs and extend the period of suspension of the judgment for the last time for a period of 18 months.
30. I make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 12<sup>TH</sup> DAY OF JULY 2023.**

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**J.M ONYANGO**

**JUDGE**

In the presence of;

Miss Munji for Mr. Angu for the Plaintiffs

Ms. Kesi for the 1<sup>st</sup> Defendant

Mr. Odongo for the 2<sup>nd</sup> Defendant

Court Assistant: A. Oniala

