



**Kimeu & 7 others v Harun & 5 others (Environment & Land Case
E021 of 2022) [2023] KEELC 18727 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E021 OF 2022**

**A NYUKURI, J
JULY 12, 2023**

BETWEEN

**GEORGE MULI KIMEU 1ST PLAINTIFF
STANLEY NYABUTI NYARANGO 2ND PLAINTIFF
SAMSON OKIOGA ONCHIRI 3RD PLAINTIFF
FRANCIS WAMBUA KIMEU 4TH PLAINTIFF
ANDREW NYAMAI MUTUNGA 5TH PLAINTIFF
BEATRICE NTHENYA MUSYIMI 6TH PLAINTIFF
PHILIP KIOKO WAMBUA 7TH PLAINTIFF
SUSAN WAYUA MUTHAMA 8TH PLAINTIFF**

AND

**ASHA HARUN 1ST DEFENDANT
LIBAN ALI 2ND DEFENDANT
DANIEL OBIRI ALIAS OMAR 3RD DEFENDANT
JOHN NZIOKA ALIAS KISITHE 4TH DEFENDANT
PAUL KINYAMAO ALIAS KASUNGWA 5TH DEFENDANT
AUSTIN OCHIENG 6TH DEFENDANT**

RULING

1. Before court is a Notice of Motion dated March 8, 2022 filed by the Plaintiffs seeking the following orders;



- a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, an injunction order do issue restraining and/or stopping the Respondents jointly and severally with their agents, servants or any other person claiming the land from doing any building, erecting any fence, trespassing, subdividing or alienating or transferring or doing and destruction on the land Parcels LR No 32833, 32834, 32835, 32836, 32838, 32839, 32840 and 32842.
 - d. That the Officer Commanding Mlolongo Police Station be and is hereby ordered to provide security and protection to the properties and the Applicants at Mulinge Scheme.
 - e. That costs of this application be provided.
2. The application was premised on the grounds on its face together with the affidavit sworn by George Muli Kimeu, the 1st Plaintiff on March 5, 2022. The Applicants' case is that they are the bona fide owners of LR No 32833, 32834, 32835, 32836, 32838, 32839, 32840 and 32842 at Mulinge Scheme, Machakos County (suit properties) and that the Respondents have hired goons to protect them as they grab the suit properties. The Applicants state that their efforts to stop the Respondents from constructing on the suit properties have not borne any fruit since 2021, the Respondent continue to forcefully occupying the suit properties, remove beacons, subdivide the land, dig trenches and are now constructing a permanent fence without having any consent of the Applicants or documents of ownership thereof. They further stated that the Respondents were violent and despite reporting them at Mlolongo Police Station, the latter has declined to assist demanding a court order for them to act upon. They were apprehensive that their properties were at risk of being permanently grabbed. Attached to the application were leasehold titles, photographs of ongoing construction, police OB of October 15, 2021 and OB for assault, Applicant's counsel's letter dated January 3, 2022 and a copy of searches.
 3. The application was opposed. Ali Liban the 2nd Defendant filed a replying affidavit sworn on November 11, 2022. The Respondents' case was that the Plaintiffs had concealed material facts to the effect that the suit property was a public road reserve and that the Plaintiffs sole purpose was to grab a public road reserve so as to deny the 2nd Respondent and other road users access to their properties.
 4. The 2nd Respondent stated that he was the legal proprietor of LR No 25701 which he acquired by purchase. He stated that he had no claim, or interest in the suit properties. He further asserted that the leases by the Plaintiffs were unlawfully obtained as the same is a road reserve and was not available for alienation in favour of the Plaintiffs.
 5. The 2nd Respondent also alleged that vide a letter of 3rd January 2022, the Mavoko Sub County Administration permitted him to have temporary use of the front side of his parcel being LR No 25701 and that therefore the Plaintiffs' claim is misplaced as the suit property falls on an 11KV 40 meter wide power way leave and the 40 meter road reserve. That parcel LR No 25701 was transferred to him on February 8, 2022 and that he instructed the firm of Shukri Osman Consulting and Associates to carry out investigation and identification and availed a report dated March 30, 2022. That the Director of Surveys stated in their letter of July 19, 2022 that the PDP for the aver indicate that the suit properties falls on an 11 KV 40 meter wide power way leave and the 40 meter road reserve and that the corrective action was to cancel survey records being conps No 76667, FR 497/2 and the resultant deed plans.



6. The 2nd Respondent stated that the Plaintiffs had not met the threshold for grant of injunctive orders as no prima facie case had been shown. He stated that if the orders sought are granted, he will be extremely prejudiced as he will be blocked from accessing his property.
7. The other Defendants did not file any response to the application.

Analysis and Determination

8. I have carefully considered the application and the response. The only issue that arise for determination is whether the Plaintiffs/Applicants have met the threshold for grant of temporary injunction.
9. Principles for grant of temporary injunction are now well settled. To obtain a temporary injunction, an applicant ought to demonstrate a prima facie case; that if the injunction is not granted, he stands to suffer irreparable injury; and where the court is in doubt, it ought to decide the application on a balance of convenience. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held as follows;

"In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour."

These are the three pillars on which vest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.

10. Therefore to succeed in an application for injunction, the beginning point is for the Applicant to establish a prima facie case which is a case that demonstrates that the Applicants' legal right has apparently been violated by the Respondent calling for an explanation of rebuttal from the Respondent. In the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, the Court of Appeal described a prima facie case as follows;

"In civil cases, it is a case in which, on the material presented to the court a tribunal property directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal."

11. The Plaintiffs/Applicants herein stated that they were the registered leasees from the Government of Kenya of the suit properties and that the Defendants have trespassed on the suit properties and began constructing thereon, thereby violating their rights. The Applicants attached titles for leases of the suit properties as well as photographs of ongoing construction by Defendants, searches, letters of counsel and OB reports to the Police. The certificates of title produced show that the Plaintiffs were each the first registered proprietors of their respective parcels on June 10, 2021 for a leasehold interest for a term of 99 years with effect from December 1, 1998.
12. In response to the application, the 2nd Respondent stated that the suit property was public land being a road reserve and way leave. He stated that the suit property is the access road abutting his parcel of land namely LR No 25701 and that he was permitted to use the same by the Mavoko Sub County Administrator. He produced a copy of title, transfer, letter from the Survey of Kenya and a letter from the Mavoko Sub County administrator dated 3rd January 2022 to use the front side of his parcel of land temporarily. No response was field in regard to the response of the 2nd Defendant.



13. Therefore the issue that ought to be addressed by this court is whether the Applicants have shown that the suit property is their private property and not public land which was unlawfully registered in their respective names.
14. Having considered the response the 2nd Respondent, it is clear that the root of the Applicants' title has challenged, and therefore they ought to have made a response demonstrating at a prima facie level that the root of their title was clean. This is in view of the fact that the 2nd Defendant has filed defence and counterclaim alleging that the suit properties are a road reserve and that the development thereof by the Plaintiffs will deny the public including the 2nd Defendant use of the road and for 11 KV meter wide proven way leave. He stated that issuance of the leases to the Plaintiffs was unlawful, while the Plaintiffs produced their titles, showing that the suit properties were on June 10, 2021 registered in their names granting them leasehold interest therein for a 99 year term from December 1, 1998 being a grant made by the Government of Kenya, the basis for the lease demonstrating the root of their titles was not produced. It is my view that where title is challenged at the prima facie level in an application for temporary injunction, it is incumbent upon the Applicant to place material before court to show the apparent root of their title and to show that the root of their title is clean.
15. Under Section 7 of the [Land Act](#), one of the methods of acquisition of title to public land is through allocation, and Section 9 (2) (a) of the [Land Act](#) provides that public land may be converted to private land by allocation. It is the National Land Commission that has the mandate to allocate public land as is provided for under Section 12 of the [Land Act](#) as read together with Regulation 3 of the [Land \(allocation of public land\) Regulations 2017](#). Under Regulation 17 of the said Regulations, any one who is allocated public land must pay stand premium within 90 days of receipt of the letter of allotment.
16. As the Applicants have not made an attempt at disclosing how they acquired a leasehold title, by failing to show letters of allotment as provided for in the [Land \(Allocation of Public Land\) Regulations 2017](#), it is my view that they have failed to demonstrate a prima facie case.
17. I would have stopped there and merely dismissed the Plaintiffs' application for failure to disclose a prima facie case. However, what has come to the fore is the 2nd Defendant's allegations and evidence that the suit property is public land. He however states that he obtained permission from Mavoko Sub County Administration to use the land temporarily. In view of the fact that it is the National Land Commission that administers unalienated public land on behalf of the National Government and County Government, it follows that a Sub County Administrator has no mandate in law to grant permission for use of public land by a private citizen.
18. The 2nd Defendant states that the suit property is a road reserve yet evidence produced shows that he is putting up permanent structures thereon. He concedes constructing on the suit property alleging that he is doing that pursuant to a letter from a Sub County Administrator. Essentially therefore, while the 2nd Defendant state that the suit property is public land meant for public use as a road reserve and that exclusive use by a private citizen will prejudice public interest, it is perturbing that what he points out as unlawful is what he is doing and while at it seeks to get legal protection. In the premises, therefore the dismissal of the Plaintiffs' application does not mean that the Defendants herein and more particularly the 2nd Defendant or any other person is allowed to develop or construct on the suit property. Therefore all the parties herein together with their servants, agents or assignees must keep off the suit property.
19. Under Order 1 Rule 10 of the [Civil Procedure Rules 2010](#), this court has power on its own motion to add a party to any proceedings whose presence is necessary to enable the court to effectually and completely settle all questions involved in the suit. In view of the issues raised in the pleadings filed



herein, including whether or not the suit property is public land and more specifically a road reserve and evidence filed by the 2nd Respondent, it is clear that this suit may have a bearing on public interest.

20. Section 11 (1) (k) of the *Ethics and Anti-Corruption Commission Act* No 22 of 2011 empowers the Ethics and Anti-Corruption Commission to conduct proceedings in court for purposes of recovery or protection of public property. In my view therefore in view of the issues raised in the pleadings on whether the suit property is public land or not, it is imperative that the Ethics and Anti-Corruption Commission is joined to this suit as an Interested Party to enable the court effectively determine the real issues in controversy.
21. The upshot is that I find no merit in the Plaintiff's' application dated March 8, 2022 and the same is hereby dismissed. I further make the following orders;
 - a. That the Ethics and Anti-Corruption Commission be and is hereby joined to these proceedings as an Interested Party to assist the court in determining whether or not the suit property is public or private land.
 - b. All the parties herein to serve their pleadings, witness statements and documents filed herein upon the Interested Party in 14 days of this ruling. The Plaintiff to serve this ruling in 14 days.
 - c. The Interested Party is granted leave to file and serve their pleadings in 30 days of service.
 - d. All the parties herein together with their agents, servants and assignees or anyone claiming through them are ordered to forthwith keep off the suit property until this suit is heard and determined.
 - e. The Officer Commanding Mlolongo Police Station be and is hereby directed to ensure the orders issued herein are complied with.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 12TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Somba holding brief for Lakicha for 2nd Defendant

Ms Amunga holding brief for Mr. Ababu for both Plaintiffs

Abdisalam – Court Assistant

