



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gakuru & another v Owiti & 6 others; Vuti & another (Third party) (Environment & Land Case 410 of 2016 & 121 of 2013 (Consolidated)) [2023] KEELC 20023 (KLR) (8 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20023 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 410 OF 2016 & 121 OF 2013 (CONSOLIDATED)**  
**MD MWANGI, J**  
**SEPTEMBER 8, 2023**

**BETWEEN**

**STEPHEN KIBE GAKURU ..... 1<sup>ST</sup> PLAINTIFF**

**NANCY WANJIKU KIBE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BONIFACE OWITI ..... 1<sup>ST</sup> DEFENDANT**

**PAUL OGUYA GAWA ..... 2<sup>ND</sup> DEFENDANT**

**ALEXANDER KIOKO MUSAU ..... 3<sup>RD</sup> DEFENDANT**

**WILSON O. MABWA ..... 4<sup>TH</sup> DEFENDANT**

**STEPHEN NGUGI ..... 5<sup>TH</sup> DEFENDANT**

**THOMAS ABKA OCHIENG ..... 6<sup>TH</sup> DEFENDANT**

**STANLEY WECHULI SIMIYU ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**JOHN NGEI VUTI ..... THIRD PARTY**

**ANNE MBERE NGANGA VUTI ..... THIRD PARTY**

*(In respect of the 7th Defendant/Applicant's Notice of Motion dated 26th July 2023 seeking for restraining orders against the 2nd Plaintiff from interfering with plots No. 6845/120/6 and 6845/120/13 pending hearing and determination of the suit)*



## RULING

### Background

1. The 7<sup>th</sup> defendant/applicant herein seeks orders to restrain the 2<sup>nd</sup> plaintiff from interfering with his plot No 6845/120/6 and 6845/120/13 Embakasi/Utawala/Mihango (hereinafter referred to as ‘the suit properties’) pending hearing and determination of this suit. In his affidavit in support of the application, the applicant alleges that the 2<sup>nd</sup> plaintiff, Nancy Wanjiku Kibe had on July 19, 2023, accompanied by other persons attempted to enter into the suit properties for an unknown mission. The applicant is apprehensive that the 2<sup>nd</sup> plaintiff may be planning to sell, subdivide or deal adversely with the suit properties to his detriment. He therefore seeks orders restraining the 2<sup>nd</sup> plaintiff from trespassing, demarcating, damaging, subdividing, selling, mortgaging or dealing in any manner whatsoever with the said properties pending hearing and determination of this suit. The applicant alleges that he has been in possession of the suit properties since the year 2008.

### Response by the 2<sup>nd</sup> Plaintiff/Respondent.

2. By way of a replying affidavit sworn on August 24, 2023, the 2<sup>nd</sup> plaintiff deposes that she is the sole registered proprietor of the parcel of land known as LR 6845/120 in Embakasi, Utawala (upon the death of the 1<sup>st</sup> plaintiff), where she does farming whereas one of her sons occupies a plot within the land.
3. The 2<sup>nd</sup> plaintiff/respondent denies the allegations by the 7<sup>th</sup> defendant/applicant and asserts that he has not attached any evidence of the alleged interference. She opines that the application has been brought to court with the sole purpose of harassing her in an attempt to force her to accept the applicant’s illegal occupation of her land.
4. When this matter came up for directions, Mr Kiluva advocate for the 3<sup>rd</sup> parties informed the court that his clients were not opposed to the application by the 7<sup>th</sup> defendant. None of the other defendants participated in the application.

### Court’s Directions.

5. The court directed parties to file written submissions. Both the 7<sup>th</sup> defendant/applicant and the 2<sup>nd</sup> plaintiff/respondent complied and filed their written submissions. The court has had occasion to read the submissions which now form part of the record of the court.

### Analysis and Determination.

6. This matter is already partially heard. I will therefore be deliberately economical with my words in order not to prejudice or embarrass the hearing of the case. The sole issue for determination is whether the 7<sup>th</sup> defendant’s application is merited.
7. Interlocutory applications are not meant to decide the rights of the parties but are, as Cotton L.J observed in the case of *Gilbert v Endean* (1878) 9 CH. D259,

“...made for the purpose of keeping things in status quo till the rights can be decided, or for purpose of obtaining some direction of the court as to how the cause is to be conducted



as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”

8. Ringera J (as he then was) in the case of *Airland Tours and Travels Ltd v National Industrial Credit Bank* Nairobi (Milimani) HCCC No 1234 of 2002 too stated that,

“.....in an interlocutory application the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.”

9. That is actually what the parties herein have invited the court to do. Their affidavits dwell on issues of who between them has the proprietary rights over the suit properties.

10. Ideally and under the common law doctrine of ‘*lis pendens*’, in land cases like this one, status quo should be maintained from the time a case is filed in court until its determination. *Black’s Law Dictionary*, 9<sup>th</sup> edition defines ‘*lis pendens*’ as the jurisdictional power or control acquired by a court over property while a legal action is pending.

11. The Court of Appeal in the case of *Ruth Kinyua v Patrick Thuita Gichure & another* (2015) eKLR cited with approval Turner L.J in *Bellany v Sabine* (1857) 1 De J 566 where he had held that:

“(lis pendens) is a doctrine common to the courts both of law and equity and rests as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The plaintiff would be liable in every case to be defeated, by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo subject again to defeat by the same course of proceedings.”

12. Madan J had in the case of *Mawji v US International University and another* (1976) KLR 185, stated that

“The doctrine *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice.”

13. Nambuye J (as she then was) too had in the case of *Bernadette Wangare Muriu v NSSF Board of Trustees & 2 others* (2012) eKLR also affirmed the necessity of the doctrine of *lis pendens* in adjudication of land matters in the following words;

“The necessity of the doctrine of *lis pendens* in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency as well as the orderly and efficacious disposal of justice.”

14. Though the doctrine of *lis pendens* is not now expressly provided for in the land statutes of this country after the repeal of the *Indian Transfer of Property Act* (ITPA), the Court of Appeal in the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* (2015) eKLR held that *lis pendens* being a common law principle was still applicable in Kenya by virtue of the provisions of section 3(1) of the *Judicature Act*, cap 8 Laws of Kenya which provides that: -

“The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with-

- a. The *Constitution*.



- b. Subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in part 1 of the schedule to this Act, modified in accordance with part II of that schedule.
- c. Subject thereto and so far as those written laws do not extend or apply, the substance of the Common Law, the doctrines of equity and the statutes of general application in force in England on the August 12, 1897 and the procedure and practice observed in Courts of Justice in England at that date;

Provided that the Common Law, Doctrines of Equity and Statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

15. The ELC Practice Directions of 2014 enjoin this court in exercising its authority and jurisdiction, to, at all stages of any trial be guided by article 159 of the constitution, sections 1A & 1B of the Civil Procedure Act and section 13 of the Environment and Land Court Act so as to facilitate: -
  - a. Fast;
  - b. Expeditious
  - c. Proportionate; and
  - d. Accessible resolution of disputes.
16. Clause 32 of the ELC Directions 2014 on the other hand encourages parties during the inter-partes hearing of any interlocutory application to agree to maintain the status quo. Where they cannot agree, the judge is mandated to, after considering the nature of the case or hearing both sides, exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.
17. In the instant case, having considered the arguments of the applicant and those of the 2<sup>nd</sup> plaintiff/respondent; and having in mind the nature of this case and the stage of trial at which the matter has reached so far; further applying the principle of *lis pendens*, and guided by the provisions of clause 32 of the ELC Directions 2014, I am of the considered view that it is in the interest of justice to order for status quo pending the hearing and final determination of this suit. The status quo which is discernible from the affidavits of the 7<sup>th</sup> defendant/applicant and the 2<sup>nd</sup> plaintiff is that the 7<sup>th</sup> defendant is in physical possession of the suit properties.
18. That is the prevailing status quo. It shall remain so pending the hearing and final determination of this suit.
19. The costs of this application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8<sup>TH</sup> OF SEPTEMBER 2023.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Wachakana for the 7<sup>th</sup> Defendant/Applicant,



Ms. Muigai for the Plaintiffs/Respondents

No Appearance for the 1<sup>st</sup> to 6<sup>th</sup> Defendants and the 3<sup>rd</sup> Parties

