



**Baitalakua v Deputy County Commissioner Igembe Central Sub-County & another; Kabilia (Interested Party) (Petition E003 of 2023)
[2023] KEELC 21386 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E003 OF 2023
CK NZILI, J
NOVEMBER 1, 2023**

BETWEEN

BENSON MUTUMA BAITALAKUA APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER IGEMBE CENTRAL SUB-COUNTY 2ND RESPONDENT

AND

VINIAS KABERIA KABILIA INTERESTED PARTY

RULING

1. By an application dated 28.7.2023, the applicant asks the court to stay further proceedings or the execution of the decision of the 1st respondent made over Case No. 1 of 2012 regarding Parcel No. 7294 Athiru Ruujine Adjudication section, pending the hearing and determination of this petition.
2. The 2nd prayer is for a temporary injunction barring and restraining the interested party, his agents, servants, or employees from dealing with Parcel No.7294 Athiru Ruujine Adjudication Section, be it adjudication or subdivision pending the hearing and determination of this petition.
3. The grounds are set on the face of the application and a supporting affidavit of Benson Mutuma sworn on 28.7.2023. The applicant avers that the suit land is approximately 4 acres, which he bought in 2007 from Henry Miriti M'Aruchu, took vacant possession and developed. The applicant also avers that the interested party filed a committee case against him in 2009, which was determined in his favor but led to a Minister's appeal. Further, the applicant avers that the 1st respondent heard the appeal and rendered the decision without notifying him.



4. Similarly, the applicant avers that the interested party attempted to forcibly enter the suit land only for him to establish that the minister's decision was rendered over a year ago, which was a clear indication of collusion with the interested party and the 1st respondent, to make it impossible for him to challenge the decision by way of judicial review.
5. In his supporting affidavit, the applicant attached copies of the sale agreement, transfer letters, the adjudication records, the land committee objection proceedings and decisions, and the Minister's decision as annexures marked BMB 1-8, respectively.
6. In the affidavit, the applicant reiterates that though the decision was to be delivered on notice, he only learned that it was delivered on 7.1.2022, when he visited the Director of the Land Adjudication in May 2023. He says the decision lacks proceedings, departs from the findings by both the committee and the objection stages, and avoids the issues, history, and evidence he gave, especially on how he acquired the land as a bona fide purchaser. The applicant avers his right to a fair hearing, application of the law, and right to property have been infringed by the respondents.
7. When this matter came up for hearing on 25.9.2023, counsel for the 1st and 2nd respondents told the court that they were not opposed to prayer Number. 5 of the application so that the petition could be heard on merits. Counsel appearing for the interested party objected to any grant of interim orders. The court directed the interested party and the respondents to file any responses to the petition and the application by 25.10.2023. By written submissions dated 24.10.2023, the petitioner relies on *Giella v Cassman Brown & Co. Ltd* (1973) EA 358, Order 40 [Civil Procedure Rules](#), [Joel Kipkurui Arap Koech v Alice Wambui Magandu and others](#) (2018) eKLR, [Gatirau Peter Munya v Dickson Mwenda Kitbinji](#) (2014) eKLR and [BOM Uhuru Secondary School v City County Director of Education and others](#) (2015) eKLR. He urges the court to grant the orders sought.
8. The applicant is seeking a stay of the implementation of the decision made on 7.1.2022 and for the interested party to be restrained from subdividing or dealing in any way or adjudication in any way whatsoever with the suit land, pending the hearing and determination of the petition. The decision implies that the suit land was decreed to the interested party. The court has not been told if the decision was implemented and to what extent. The nature of the applicant's developments on the suit land has also not been demonstrated.
9. To grant a temporary injunction, a party has to establish a prima facie case with a probability of success, show that there will be irreparable damage that cannot be not compensated by way of damages, should the order not be issued, and lastly, that a balance of convenience tilts in favor of granting the orders sought. In the case of [Mrao Ltd v First American Bank](#) (2003) KLR 123, the court said a prima facie case is established if, based on the material before the court, a right has been infringed to call for the rebuttal from the opposite side. As to irreparable damage in [Kitbo Civil & Engineering Co. Ltd v National Bank of Kenya](#) Civil Appeal (Application) E706 of 2021 (2023) (Ruling), the court cited with approval [Esso \(K\) Ltd v](#) KECA 387 (KLR) (31st March 2023) [Mark Makwata Okiya](#) (1992) eKLR, that where the remedy sought could be compensated by an award of damages, then the equitable relief of injunction would not be available.
10. In [Nguruman Ltd v Jan Bonde Nielsen & others](#) (2014) eKLR, the court observed that in considering whether or not a prima facie case has been established, a court does not hold a mini-trial must not examine the merits of the case closely but must see that on the face of it, the person applying for an injunction has a right which has been threatened violation. Further, the court said that the parties' positions are not to be proved in such a manner as to give a final decision; the applicant need not establish title but a fair and bonafide question to raise as to the existence of the right on a balance of probability.



11. In this application, the applicant is not seeking conservatory orders but a temporary injunction and stay of proceedings or the implementation of a decision made on 7.1.2022. The delay in moving to court since May 2023, when he came to learn about the decision, has not been explained. It is not enough to state that there is a threatened right. The nature of the danger, other than mere fear or apprehension, has not been explained. How accurate the threat is has not been established for this court to make a finding that the substratum of the petition, the livelihood or occupation of the petitioner, is in danger.
12. In *Gatirau Peter Munya v Dickson Mwenda Githinji and two others* (2014) eKLR, the court said conservatory orders bear a public law connotation, aimed at facilitating ordered functions within the public agencies as well to uphold the adjudicatory authority of the court in the public interest. Conservatory orders are, therefore, unlike interlocutory injunctions linked to such public-private issues. The court said a conservatory order should be granted on a case's inherent merits, considering the public interest, the institutional values, the proportionate magnitudes, and the priority levels attributable to the relevant cases.
13. The 1st prayer in this application is to stop the execution of the decision made on 7.1.2022. In *Judicial Service Commission v Speaker National Assembly* (2013) eKLR, the court observed that conservatory orders were not ordinary civil law remedies but were aimed at keeping the subject matter of the dispute in situ and were remedies in rem as opposed to in personam.
14. Articles 22 and 23 (3) (c) of the *Constitution* require a petitioner to show that the petition would be rendered nugatory and that the public interest weighs in his favor in granting conservatory orders. In *Kevin K. Mwiti and others v Kenya School of Law* (2015) eKLR, the court held that a petitioner has to show a petition discloses arguable issues.
15. In this application, I think the applicant has shown that his right to a fair hearing has been violated, which is why the respondents have conceded to prayer number 5. Consequently, I grant the application in terms of prayer number 5 to last for one year only. The respondents and the interested party are directed to file any responses to the petition within 30 days from the date hereof. Mention on 7.12.2023 for directions.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 1ST DAY OF NOVEMBER, 2023**

In presence of

C.A Kananu/Mukami

Interested party

Asuma for Mutembei for petitioners

Miss Mina for Mbaikyatta for respondents

HON. CK NZILI

ELC JUDGE

