



REPUBLIC OF KENYA



KENYA LAW
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**Kitur v Misoi & 3 others (Environment & Land Case E005 of 2023)
[2023] KEELC 21350 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21350 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E005 OF 2023
MN MWANYALE, J
NOVEMBER 6, 2023**

BETWEEN

JOEL KIPCHOGE KITUR PLAINTIFF

AND

DORCAS MISOI 1ST DEFENDANT

LANDS REGISTRAR – NANDI COUNTY 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

THE KAPSABET LANS DISPUTE TRIBUNAL 4TH DEFENDANT

RULING

1. Before Court for determination is the chamber summons applications dated August 3, 2023, seeking orders;
 - i) spent
 - ii) spent
 - iii) spent
 - iv) this honourable court be pleased to issue temporary orders restraining the 1st defendant/respondent, her children, servants, agents, relatives and/or assigns from anyway subdividing partitioning, selling, leasing out land parcel No. Nandi/Kamobo/1682 pending hearing and determination of the main suit.
 - v) this honourable court be pleased to issue an order ordering the 1st respondent to remove the already installed barbed wire partitioning the suit land into two portions pending hearing and determination of the main suit herein.



2. The application was grounded on grounds in interalia;
 - a) The applicant was the absolute registered owner of the suit parcel known as Nandi/Kamobo/1682
 - b) That the 1st respondent is currently conducting survey where she has already subdivided and portion the suit land into portions with an intention to sell and/or lease a portion measuring approximately 0.6 acres of the suit land to a third party.
 - c) The Applicant is in actual possession control and use of the entire suit land exclusive of the 1st Respondent.
 - d) There is need to restrain the 1st Respondent either by herself, or through her children assigns, agents, servants and any other person claiming through her from the actions she is conducting on the suit land.
 - f) That in the interest of justice that his application be allowed.
3. The application is supported by the supporting affidavit of the Applicant who has annexed. A copy of an official search confirming his registration as owner of Nandi/kamobo/1682 in 1984.
4. That the 1st respondent had sued the applicant before Kapsabet Land Dispute Tribunal and was awarded a portion of land measuring 0.6 acres, which award was adopted at Kapsabet Magistrates Court *vide* LDT Case No. 51/2008.
5. That the Applicant challenged the award of Kapsabet Magistrates Court *vide* Civil/Suit Number 257/2015 which suit was dismissed and an appeal was preferred against the dismissal where the applicant was granted leave to file a fresh suit having substituted the dismissal with an order of striking out the same.
6. The 1st respondent has now moved to execute the sub-dividing the suit property, in execution of the decision of Kapsabet Lands Dispute Tribunal.
7. The Applicant depones of establishing a *prima – facie* case with probability of success and urges the Court to allow the application.
8. In opposition to the application, the 1st respondent filed a replying Affidavit and avers that the suit is *resjudicata* and that the Court ought not to entertain the suit and should be dismissed with costs.
9. The Respondent depones from the orders sought the same are eviction orders at an interlocutory staged yet she had several temporary structures on the portion of land measuring 0.60 acres occupied by tents and hence the same would be tenants would be inconvenienced and that she had claimed the portions measuring 0.6 acres which she had bought even before the LDT case.
The 1st respondent thus prayed for dismissal of the application.
10. At the *exparte* the Court did issue an order of maintenance of status quo which orders have been in force since then. The Court directed parties to file written submissions on the application.

Plaintiff's Submission: -

11. In his submission before Court, Mr. Tallam the Learned Counsel for the Plaintiff cited order 40 rule 1 of the *Civil Procedure Rules*, and submitted that the property in dispute is in danger of being wasted, damage or alienated by any party to the suit, a temporary injunction sought.



12. The Plaintiff submits that the suit property measuring 0.6 acres having been surveyed and demarcated by the Applicant is in danger of being wasted by the honourable court.
13. The Plaintiff submits as the registered owner and hence he would be entitled to protect his interests as the balance of probability as defined in *Kanyungi Njogu v Daniel Kimani Maingi* (2000) eKLR tilts in his favour.
14. The Applicant submission that he had established a prima facie for removal of the already erected barbed wire.
15. In her submission before Court the 1st respondent had equally cited Order 40 rule 1 of the *Civil Procedure Rules* as well as the celebrated case of *Giella v Cassman Brown and Company Limited* as well as the decision in *Mrao Limited v First American Bank of Kenya* on the definition of a prima facie case.
16. The 1st Respondent submits on the doctrine of exhaustion and submits that this matter is an Appeal against the LDT decision since an appeal ought to follow the procedures as provided for under section 90 of the *Fair Administrative Act*.
17. The 1st Respondent submitted that the injunction sought amounted to Mandatory injunction which could not be issued as there was no special circumstances to warrant issuance of the same. In support of this limb of submissions, the 1st Respondent cited the decision in the case of *Kenya Breweries Limited and another v Washington Okeyo* and urged the Court to dismiss the application.
18. I have considered the application; sub missions of the parties and authorities and the Court frames the following as issues for determination.
 - i) whether the prayers sought are temporary prohibitory injunctive orders or temporary mandatory injunctive orders?
 - iii) what reliefs ought to issue?
19. From the orders sought by the applicant as set out in paragraph 1 of this ruling, the applicant has sought both temporary prohibitory injunction in prayer (iv) of his application and temporary mandatory injunction at prayer (v).
20. Temporary mandatory injunction is ordinary issued in the clearest cases as was stated in the decision in the *Kenya Breweries Limited v Washington Okeyo* cited by Counsel for 1st Respondent.
21. It has been deponed that on the 0.6 acres in dispute, the 1st Respondent has constructed houses with tenants thereon, a temporary prohibitory injunction order would not in the Courts view be the best to issue in the circumstances of the prevailing tenancies.
22. The Applicant has sought for an order of maintenance of *status quo* in prayer 6 of his application.
23. It is the Court view that the interests of the parties herein would best be served with an order of maintenance of *status quo*, both on the ground as it currently and on the register, consequently the 1st Respondent having been in possession and occupation of 0.6 acres within Nandi/Kamobo/1682 to continue to be in possession of the same through herself or her tenants, but not to interfere with the register of Nandi/Kamobo/1682 which shall remain registered in the name of the applicant pending hearing and determination of this suit.
24. The costs shall in be in the cause.

RULING, DELIVERED AND DATED AT KAPSABET THIS 6TH DAY OF NOVEMBER, 2023.



**HON. M. N. MWANYALE,
JUDGE.**

