



REPUBLIC OF KENYA



**Kimani v Embakasi Ranching Company Limited & 2 others (Environment & Land
Petition E051 of 2022) [2023] KEELC 21304 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E051 OF 2022
EK WABWOTO, J
NOVEMBER 2, 2023**

BETWEEN

MARY STELLA WANJIRU KIMANI PETITIONER

AND

EMBAKASI RANCHING COMPANY LIMITED 1ST RESPONDENT

KEVIN KIIRU CHOMBA 2ND RESPONDENT

THE CHIEF LANDS REGISTRAR 3RD RESPONDENT

RULING

1. This ruling is in respect to the 2nd Respondents application dated 21st June 2023 and the Preliminary Objection of the same date. The Notice of Motion application dated 21st June 2023 was accompanied by a Supporting Affidavit sworn by Kevin Kiiru Chomba. The 2nd Respondent sought the following orders:
 - a. ...Spent.
 - b. That this Honourable Court be pleased to discharge, vary and/or set aside the ex parte order of injunction issued against the Applicant on 20th December 2022 restraining the Applicant from interfering with the Petitioner/Respondent's quiet possession and enjoyment of the property known as Plot No 136/807 situate in Embakasi pending hearing and determination of this suit.
 - c. That this Honourable Court do issue an order restraining the Petitioner/Respondent by herself, her agents, servants, employees and/or otherwise from further constructing, dealing and/or interfering with the property known as Plot No 136/807 pending hearing and determination of this application.
 - d. That this Honourable Court do issue an order restraining the Petitioner/Respondent by herself, her agents, servants, employees and/or otherwise from further constructing, dealing



and/or interfering with the property known as Plot No 136/807 pending hearing and determination of petition before court.

- e. That this Honourable Court be pleased to vacate the Hearing date scheduled on 26th June 2023 and consequently set down the Respondent's application herein for inter-partes hearing.
 - f. That the Petitioner/Respondent be condemned in costs.
2. The Application was premised on the following grounds:
- a. The Applicant learnt of existence of this petition on 26th May 2023 when served with a letter by Kahuthu & Kahuthu Advocates.
 - b. The Applicant states that they were never served with the Petition and were surprised to learn that the same was heard ex parte and injunction granted by the Court.
 - c. The Applicant states that the orders were issued illegally, unlawfully and unprocedurally since he is the legally registered owner of Nairobi Block 136/807 as evidenced in Certificate of Lease.
 - d. The first affidavit of service is dated 19th December 2022 where the said advocate depones that he visited the Applicant's offices in Ruai and that he was ushered in by the secretary, the Applicant does not have any office at Ruai at all.
 - e. It is not indicated anywhere that the 1st Respondent accepted service on behalf of the Applicant. In any case, the procedure would be for service to be done by way of substituted service which did not happen.
 - f. The court whilst granting the temporary injunction did not have all the information as the service was deliberately not done.
 - g. The Applicant states that the Respondent has no locus since it is the trespasser who has been previously evicted from the suit property.
3. The 2nd Respondent equally filed a notice of preliminary objection dated 21st June 2023 seeking the petition be dismissed with costs, on the following grounds:
- a. This Honourable Court has no jurisdiction to entertain a claim for prerogative orders for the grant of the remedy of mandamus as that is within the province of the judicial review division of the High Court.
 - b. In the absence of the mandatory leave having been granted to the Petitioner to commence this Petition and the Petition having been filed in breach of the mandatory provisions of Order 53.
 - c. To the extent that the petition raised disputed facts between the parties the mandatory procedure for the petitioner to ventilate her case is by filing an ordinary suit by way of Plaint as prescribed by Order 4 of the civil procedure rules
 - d. The Petitioner has no locus standi to institute the petition and/or the petition is bad for misjoinder of parties and should therefore be struck out.
 - e. The petition is an abuse of the court process and bad in law.
4. Pursuant to the directions issued by this court, it was directed that the both the 2nd Respondent's application and the preliminary objection be canvassed by way of written submissions.
5. The 2nd Respondent filed submissions dated 17th July 2023 and it was submitted that the orders of the Court were tantamount to a default judgement and since service of unduly effected, the orders should



be set aside in the interests of justice. It was further submitted that the Petitioner was in breach of the presumption of regularity as outlined in the case involving *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR. Referring to Order 53 of the *Civil Procedure Rules*, it was argued that the prayers for mandamus required leave of the Court which was within the jurisdiction of the Judicial Review High Court and not the Environment and Land Court.

6. The Petitioner filed a replying affidavit, submissions and grounds of opposition dated 23rd September 2023 and 25th September 2023 respectively. It was emphasized that the jurisdiction of the Court was attributed to Article 162 of *the Constitution* and Section 13 of the *ELC Act* and therefore, the Court was well within its jurisdiction to hear and determine the matter. It was reiterated that the averments in the affidavit of service were a true account of what transpired and the Court consequently granted the orders on merit.
7. The court has considered the respective submissions and rival affidavits and is of the view that the following issues arise for determination:
 - a. Whether the preliminary objection is merited?
 - b. Whether the application dated 21st June 2023 is merited?
 - c. Who should bear cost of the applications?
8. The Preliminary Objection calls upon the court to determine whether or not it has jurisdiction. The Supreme Court in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others*, Civil Appl. No. 2 of 2011, observed that:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

9. Article 162 of *the Constitution* as read with Section 13(1) and 13(2) of the *Environment and Land Court Act* (ELC Act) states:

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

- (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



(e) any other dispute relating to environment and land.

Additionally, Section 13(7) outlines the reliefs that may be granted by the Court as it deems fit and just, including— (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.”

10. It is undisputed that the suit relates to a dispute relating to land and in specific, the interests of each of the foregoing parties in Plot No. V 13296. The reliefs that can be granted by the Court are clear as they are outlined to include prerogative orders and, on that premise, the court finds that the preliminary objection is misplaced.
11. In determining the merit of the 2nd Respondent’s application, I have considered his argument that he was not duly served. It is a long-established practise that service should be in person, or to a known address such as at a place of business or via substituted means of and most recently virtually via electronic mediums. I have scrutinized the said affidavit of service relied upon by the Petitioner herein and particularly note that the process server made reliance on the fact that the 2nd Respondent “occasionally frequents the place” being the alleged offices of the 2nd Respondent. The word “occasionally” casts doubt as to when the 2nd Respondent would have actually received the said documents; would it be the same day? In a week’s time? Or when specifically. For this reason, the court is convinced that service was not duly effected.
12. Seeing that the injunctive orders enjoyed by the Petitioner are contested, I have considered that the essence of such orders in equity and that this Court must primarily uphold the parties’ constitutional right to a fair hearing.
13. Having arrived at the conclusion that this Court has jurisdiction and the Applicant has a right to fair hearing, this court hereby makes the following disposal orders:
 - a. The Preliminary objection dated 21st June 2023 is hereby dismissed.
 - b. The orders of the Court given on 20th December 2022 are hereby set aside.
 - c. Costs will abide the determination of the main Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF NOVEMBER 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Oyoo for the Petitioner.

N/A for the 1st Respondent.

Ms. Mbirwe for the 2nd Respondent/Applicant.

N/A for the 3rd Respondent.

Court Assistant; Caroline Nafuna.

