



M'Laaru (Suing by his next friend Jerusha Kanario Mwenda) v Mioro & another (Environment & Land Case E005 of 2023) [2023] KEELC 21211 (KLR) (1 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E005 OF 2023
CK NZILI, J
NOVEMBER 1, 2023**

BETWEEN

SAMUEL M'MAINGI M'LAARU (SUIING BY HIS NEXT FRIEND JERUSHA KANARIO MWENDA) PLAINTIFF

AND

ABEDNEGO MATATA MIORO 1ST DEFENDANT

INSPECTOR GENERAL OF POLICE 2ND DEFENDANT

RULING

1. The court is asked to grant a temporary injunction barring and restraining the 1st respondent from entering, trespassing into, harvesting miraa or in any way whatsoever, interfering with the applicant's quiet enjoyment, occupation, possession and execution of her management duties over the properties namely LR No's. Njia/Cia Mwenda/3460 and 3090 and for an order for the 2nd respondent to discharge its constitutional and statutory duties regarding the 1st respondent who has trespassed to the suit lands.
2. The grounds are contained on the face of the application and in the detailed affidavit in support of Jerusha Kanario Mwenda.
3. Briefly, the applicant says that she was appointed as a manager or next friend of her father Samuel M'Imalongi M'Laaru to manage his properties and collect all the farm proceeds for his use but the 1st respondent has blocked her from accessing the properties. She avers that the 1st respondent trespassed into and has taken possession of the suit properties, denied her access, use and collection of the miraa proceeds or produce and or entry into the suit lands.
4. The applicant avers that her efforts to seek intervention of the 2nd respondent through the local police station have been unsuccessful and the 2nd respondent appears to have been compromised by the 1st respondent.



5. The applicant, therefore, avers that there has been total breakdown of law and order since the 1st respondent has and continues to act with impunity, and in total disregard of the applicants proprietary rights as the registered owner(s) of the itemized properties.
6. The applicant avers that unless the reliefs sought are granted the subject stands to suffer irreparable loss and damage which may not be compensated by way of damages.
7. The 1st respondent by an affidavit sworn on 18.10.2023 denies the alleged interference with the suit properties. On the contrary, he says that he is neither a family member of the applicant nor has he trespassed into and or evicted the applicant, who resides in Nairobi with the subject.
8. Further the 1st respondent says that he was being dragged into family disputes, which have nothing to do with him. He terms the application and the affidavit as based on lies, falsehoods, malice or misrepresentation and containing misleading statements since he is neither a registered or a beneficial owner of the two properties or their farm proceeds. He states that his properties are distinct and has never sought to be joined or claimed the plaintiff's property. The 1st respondent denies committing any criminal offence(s) or having sought to be transferred any of the plaintiff's land alongside one Martin Murithi or ever interfered with the duties of the 2nd respondent.
9. The 1st respondent admits that the applicant's late mother or wife was buried on the suit land. He says she had been sued in Civil Suit No. 325 of 2017 and denied ever evicting the plaintiff from the lands as alleged.
10. The 1st respondent avers, that if at all there was any sale of the plaintiff's property, he was never a party to it or a beneficiary from it. He denies the allegations of arson or the cutting down of trees from the suit lands.
11. By written submissions dated 17.10.2023 the applicant urges the court to be guided by Standard Resource Ltd Grays vs AG and another (2016) eKLR, on uncontroverted facts, if no response has been filed by the respondents.
12. The applicant submitted that this application was peculiar in the sense that the plaintiff was a person who cannot perform for himself the most elementary functions of his life other than through the next friend, hence raising important moral and legal issues as to Kenya's legal protection of such persons in general and in particular on how the police service should protect the lives and properties of citizens with or without disabilities.
13. The applicant submitted that the third peculiarity was that despite the state being founded on the rule of law and being a common law country with known stand on the protection of private property against invasion, the police in Kenya have abdicated their constitutional duty to do so. Reliance was placed on Methodist Church in Kenya Registered Trustees vs Attorney General and others (2016) eKLR, that the law ought to be the king and that there was no other king above the law. The applicant submitted that the nullification of the election of President Uhuru Kenyatta in Odinga & another vs IEBC (2017) KESC 42 (KLR) (20th September (2017) (Judgment) reaffirmed the greatness of a nation lies on its fidelity to *the Constitution* and adherence to the rule of law, which provide a framework for orderly and objective relationships between citizens in a country.
14. The applicant relying on Eutick vs Carrington (1785) EWHC KBJ 98 and Boyd vs US 116 US 616 (1886) submitted that the law holds the property of every man sacred such that no man can set foot upon his neighbours close without his leave except as justified by law and that men entered into the society to secure their property which right cannot be taken away or abridged by some public law except in instances of distress, execution, forfeiture or taxes, upon common consent of the owner giving up the



right for the sale of justice and the general good. The applicant submitted that the application before the court relates to the protection of both the life and property of an individual which is at stake. The fourth peculiarity according to the applicant was the callousness of the defendants yet the applicant has a permanent house, agricultural land and a miraa plantation all of which have been invaded by the 1st respondent who knows the applicant can only be assisted by a guardian strangely the applicant submitted that the 1st defendant was pickpocketing a dead person instead of assisting in securing a dignified burial.

15. The applicant submitted that there was no dispute that:
 - a. The 1st defendant assisted the son of the plaintiff one Martin Muriithi to fraudulently register as the owner of the two suit properties and other subjects in Meru ELC No. 325 of 2017.
 - b. The plaintiff is looked after by the next friend in Nairobi though his home was in Maua sub-county Meru County.
 - c. The 1st defendant has been selling miraa since May 2023, thereby denying the applicant his source of livelihood.
 - d. The 1st respondent was occupying the stone house next to where the plaintiff's late wife was buried.
 - e. The 1st respondent is neither a tenant nor a licensee of the plaintiff.
 - f. It was sheer greed and impunity for the 1st respondent to occupy the house while embarking on cutting and selling the trees and depriving him of income, robbing him off his dignity, treating him as dead and behaving like a colonial governor in charge of his investments and members of his family.
 - g. The 2nd respondent has allowed him to terrorize members of his family yet it is supposed to uphold the rule of law as a national value.
 - h. He will suffer irreparable injury including early death if the orders are not granted.
16. Given the foregoing, the applicant submitted that the application meets the requirements for the grant of prohibitory and mandatory injunction as laid in *Giella vs Cassman Brown* (1973) E.A 358 and in *Ripples vs Muchuha* (1992) KLR 504, since none of the respondents could explain the invasion of private land or the failure to offer protection, yet the suit borders on a tort of trespass on land and contravention of his rights to the protection of life law and property unheard, Article 10, 26 & 40 of [*the Constitution*](#).
17. Moreover, the applicant submitted that the 2nd respondent's refusal to enforce the law against the 1st respondent amounted to a breach of statutory duties described by Section 24 of the [*National Police Service Act*](#) calling for the issuance of conservatory orders as held in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & others* S.C Application No. 5 of 2014.
18. The applicant submitted that under Article 23 of [*the Constitution*](#), the court has powers to grant an injunction as well as such public law remedies against public officers as the 2nd respondent as held in *Kenya National Examination Council vs Republic* C.A (NRB) No. 266 of 1996, such as an order of mandamus to compel the performance of a public duty as imposed by a statute, if there was a failure by the detriment of a party with a legal right to expect the duty to be performed.



19. The applicant submitted that the 2nd respondent has allowed anarchy to prevail. Reliance was placed on *Olmstead vs US 277 United States 438*, that decency security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commanded to the citizens and that if the government becomes a lawbreaker, it would breed contempt, for the law invites every man to become a law unto himself and invite anarchy.
20. Therefore, the applicant submitted that the respondents have disgraced the Republic of Kenya depicting it as heartless and that where the law has been banished what Thomas Hobbes's statute of nature described as brutish would emerge and like wildfire, if not put out now would spread to the rest of Meru County. The applicant urged the court to put out the fire by granting the orders sought.
21. A party seeking for temporary orders of injunction has to meet the threshold set in *Giella vs Cassman Brown (supra)* namely establish a prima facie case with a possibility of success; show that he is likely to suffer irreparable injury which would not be compensated by way of damages and lastly, if in doubt, the balance of convenience tilts in favour of granting the applicant.
22. In *Mrao Ltd vs First American Bank of Kenya Ltd and 2 others (2003) KLR 123*, the court defined a prima facie case as including but not limited to a genuine and arguable case which based on the material before the court it was likely to conclude that here exists a right which has been infringed by the opposite party as to call for rebuttal from the latter.
23. In *Nguruman Ltd vs Jan Bonde Nielsen & 2 others (2014) eKLR*, the court set the test of establishing a prima facie case. The court said that a court need not hold a minitrial must not examine the merits of the case closely and all what is necessary is for it to see that on the face of it the person applying for an injunction has been threatened with the violation. Additionally, the court said that the applicant need not establish title since it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right, which he alleges, the standard of prove of that prima facie case being on a balance or preponderance of probabilities. As to irreparable damages, the court said an injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be an adequate remedy.
24. In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & 7 another*, the court said that to succeed in an application for injunction an applicant has to make full and frank disclosure of all the relevant facts to the just determination of the application in the right he claims to have legal or equitable which requires the protection by injunction.
25. In *John Ngumo Murere vs Muriuki Karue & others (2006) eKLR* the court said that the three conditions were sequential so that the second condition can only be addressed if the first one is satisfied.
26. Further, in *Paul Gitonga Wanjau vs Gathuthi Tea Factory Ltd & 2 others (2016) eKLR*, the court said that where any doubts exist as to the applicants or if the right is not disputed but its violation is denied, the court in determining whether or not to grant the injunctions takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent. On the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction refused and he should not ultimately turn out to be right. So, the court makes a determination as to which party will suffer greater harm with the outcome of the motion.
27. Applying the foregoing guiding principles and caselaw to this matter, by a plaint dated 3.10.2023 the plaintiff suing through the next friend says he is 90 years old and resides in Nairobi. She avers an order



- to manage and be his guardian was made in Nairobi Family Division Misc Appl No. 106 of 2017, including to collect all income from his properties.
28. The plaintiff avers that the 1st defendant/respondent is a nephew of his young brother who together with the 2nd defendant/respondent a constitutional office holder established under Article 245(1) of [the constitution](#) have contravened his right to life, protection of law and property under Article 26, 40 & 57 of [the constitution](#) by not apprehending and prosecuting the 1st defendant/respondent despite reports made.
 29. The plaintiff avers that the 1st defendant/respondent was a former police officer and a purported legal advisor of his last born and the 1st defendant in Meru ELC No.325 of 2017, who had purported to defeat it by transferring LR No. Njia Cia Mwenda/2317 Njia/Cia Kiegoi/176 to himself by forging transfer documents while the plaintiff was in Nairobi around 7.9.2017.
 30. The plaintiff avers his wife Tabitha Kanuu died on 6.5.2023 and was buried on 9.6.2023, in Njia/Cia Mwenda/3460 following which the 1st defendant conceived and executed a plan to evict him from LR No. Njia/Cia Mwenda/3460 where his stone houses stand and 3090, where tis miraa plantation is and his source of livelihood.
 31. The plaintiff avers that the 1st defendant was a violent man with much influence over OCS Kangeta OCPD Maua and local IPOA Office and since 19.5.2023 efforts to seek intervention by police to stop the takeover by the 1st defendant of the suit land has been in vain including a letter written to the 2nd defendant/defendant dated 30.7.2023.
 32. The plaintiff averred that since 19.6.2023 the 1st defendant has excluded the plaintiff's members of the family from entering the said properties yet he was an absolute owner entitled to exclusive possession.
 33. The plaintiff prays for declaration of contempt, tort of trespass permanent injunction vacant possession, mesne profits, general damages and an account of the income derived from the sale of miraa and trees growing from the sale parcels against the 1st defendant/respondent and as against the 2nd defendant/respondent a declaration of breach of statutory duties under Article 244 (c) of [the Constitution](#) and Section 24 of the [National Police Service Act](#); breach of national values; mandamus to compel him to discharge his duties arrest and charge the 1st defendant/respondent general and exemplary damages.
 34. The respondents are yet to file any defences into the plaint herein. As regards the application, the 1st respondent/respondent as indicated above has refuted the allegations by way of a replying affidavit dated 18.10.2023. He does not however specifically deny that he has moved into and assumed the rights of the plaintiff and the family within the specified suit lands. The plaintiff has made specific complaints against the defendants as regards his legal and equitable rights as per the court order dated 7.8.2017 which gave her powers over the subject properties, LR No's. 3460 and 3090. The applicant has also attached an order in Meru ELC No.325 of 2017 restraining among others Martin Murithi from dealing with the suit parcels of land.
 35. Additionally, the applicant has attached an annexure marked JKM "6" dated 30.7.2023 where he made serious allegations against the 1st respondent over threats to Justus Mwinji on 11.5.2023 and 22.7.2023 and injuries to the guard by the name M'Birithia Gitonga M'Karau. Further, the applicant made complaints that the 1st respondent entered the land on 22.7.2023 and caused some destruction. The said letter was received by the officers of the 2nd respondent on 31.7.2023 going by the acknowledgement stamps.



36. The letter was a follow-up to another letter dated 14.5.2023 written to the 1st defendant/respondent and copied to the area assistant chief and Martin Murithi Maingi where the 1st respondent alongside the 1st defendant in Meru ELC No. 325 of 2017, were accused of interfering with the burial arrangements of the plaintiff's late wife.
37. To my mind, the applicant has disclosed a right to the suit lands not only as a next friend or guardian, but also as a daughter of Mr. Samuel M'Laaru who has unlimited access to and duties to perform her roles as directed by the court with respect to the subject and his properties to the exclusion of the other members of the family. The 1st respondent is not a member of the said family nor has he demonstrated any protectable right, legal or equitable, which is superior to those of the plaintiff or the subject.
38. The applicant has annexed documents showing that the 1st respondent has interfered with the legal and equitable rights of the subject and the next friend, manager and guardian which this court is obligated in law to protect.
39. Similarly, the applicant has demonstrated the efforts which have been made for the 2nd respondent to take action.
40. In Bernard Gathiaka Mbugua and 4 others vs Republic (2016) eKLR the court cited with approval Terekali & another vs Republic (1952) E.A 259 on the significance of evidence of the first report by the complainant to a person in authority since it provides a good test by which the truth and accuracy of subsequent statements may be gauged.
41. The applicant has not stated whether or not she made a report to the police stations other than the letters written and followed it up with the making of a police statement and provision of exhibits against the 1st respondent.
42. In Mutuku Mwanza vs Inspector General of the National Police Service & 3 others & others (2021) eKLR the court said that under Article 245 (a) & (b) of *the Constitution* evidence must be shown that the inspector general had overstepped its mandate or acted ultra vires, irrationally or maliciously since under Article 245 (1) 4 & 5 thereof he is an independent office.
43. The court cited with Republic vs Commissioners of Police and another ex parte Michael Monari & another (2012) eKLR that the Director of the Public Prosecution under Article 157 (4) of *the Constitution* may direct the police to investigate any information or allegations of criminal conduct. The court said that it was the Office of the Director of Public Prosecution that checks the excess of the executive arm, in respect of prosecution of criminal cases.
44. On conservatory orders the court cited with approval Law Society Kenya vs Attorney General and another Judicial Service Commission (Interested Party) (2020) eKLR that an application for conservatory orders must show to the satisfaction of the court that his or her rights are under a threat unless the orders were issued to preserve the subject matter.
45. The applicant has to demonstrate that he followed the procedure under the *National Police Service Act*, especially in making a report so that if there is any cognizable offence and reasonable grounds for an arrest or apprehension to be effected.
46. In Keroche Industries vs Kenya Revenue Authority (2007) 2 KLR, the court held that enforcing the law and maintaining public order must always be compatible with respect for the human person and that under Article 73 (a) & (b) of *the Constitution*, authority given to a state officer was on public trust to be exercised in a manner consistent with the purposes and objects of *the Constitution*. This is to avoid what Mumbi J as she then was, said as conduct by enforcement officers of profiling subjects on



- mere suspicion without evidence should be abhorred in *Anthony Njenga Mbuli & 5 others vs AG & 3 others*. See also *Stephen Gachau Githaiga & another vs AG (2015) eKLR*.
47. The applicant has averred that the 2nd respondent has abdicated its responsibility and this court should grant orders directing it to apprehend and prosecute the 1st respondent. In *Florence Amunga Omukanda and another vs AG & others (2016) eKLR* the court said the state protects its citizens through the police service whose duty is among others to maintain law and order, protect life and property and apprehend offenders under Section 24 of the *National Police Service Act*. The court further said this mandate flows from Article (1) of *the Constitution* where the people's sovereign power is delegated to state organs including the power to protect their property and lives which the police in this case exercise according to the wishes of the people to avoid the people taking up arms and defending themselves. The court cited with approval *Charles Murigu Murithi & 2 others vs Attorney General (2015) eKLR* that the state has a legal duty and a positive obligation to protect the citizens, lives and their properties.
 48. The duty of care has to be activated citizens in making reports by way of an occurrence book with the police. To accuse the police of inaction without demonstrating the making of a first information report (OB) and showing that they knew or ought to have known the risk of the threat to the lives of the plaintiff and her property would be spurious.
 49. There is no evidence that the brother of the plaintiff and his guard and the plaintiff herself have recorded an OB report with any police station in Kenya.
 50. It is not enough to write letters. In *Osman vs UK* the court observed that where there is an allegation that the authorities had violated their positive obligation to protect the right to life and property of its citizen evidence must be there that the authorities knew or ought to have known the real existence of the risk to life of the identified individuals from criminal acts.
 51. There must be due diligence on the part of the citizens. The applicant did not approach the office of the ODPP for intervention before coming to court under Section 5 (2) (b) of the ODPP Act and Article 157 (4) of *the Constitution*.
 52. In *Republic vs Inspector General of Police & another exparte Edmund Polit James & another (2019) eKLR* the court held that mandamus is employed to compel action or performance when refused and may be refused by the court when the requisite grounds do not exist. The court said it has to respect the constitutional independence of the Inspector General of Police and the ODPP and could only intervene where there was clear evidence of a breach of their constitutional duties or abuse of discretion.
 53. This court cannot direct the 2nd respondent to take action where an alternative remedy exists as held in the *Speaker of National Assembly vs Karume (1992) eKLR* and *Reuben Mwangi vs Director of Public Prosecution (2021) eKLR*, further the court cannot issue such an order unless there is sufficient evidence of a contravention of the law or Constitution. See *Paul Nganga Nyaga vs AG & 3 others (2013) eKLR* *Hon. James Ondicho Gesami vs AG & others, Petition No. 376 of 2011*, *Bernard Mwkya Mulinge vs ODPP (2019) eKLR*.
 54. Turning to the complaint made against the 1st respondent, the court finds that there is irreparable injury if the applicant and his family, are kept out of the rural home and the miraa plantation where they draw their comfort income due to its sentimental value. Further, the convenience or loss that the applicant is likely to be subjected to if the application is not allowed is more than what the 1st respondent was likely to suffer especially in this case where he had no perceivable interest or rights or stake in the subject matter.



55. The upshot is I confirm prayers numbers 1, 2, 3 & 4 of the application dated 3.10.2023. The 2nd defendant is directed to enforce compliance of the said orders.

Orders accordingly.

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

HON. CK NZILI

ELC JUDGE

