



Yako Supermarket (K) Limited v County Government of Busia & 3 others (Environment & Land Case E007 of 2023) [2023] KEELC 21181 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E007 OF 2023
BN OLAO, J
NOVEMBER 2, 2023**

BETWEEN

YAKO SUPERMARKET (K) LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF BUSIA 1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

RULING

1. The Plaintiff (Yako Supermarket (K) LTD) has by its Notice of Motion dated 8th March 2023 and premised under the provisions of Order 40 Rule 1, 2 and 3 of the *Civil Procedure Rules* sought the following orders against the County Government Of Busia, Kenya Highways Authority, The Attorney General And The National Land Commission (the 1st, 2nd, 3rd and 4th Defendants respectively) with regard to the land parcel No Bukhayo/Mundika/1648 (the suit land):
 1. Spent
 2. Spent
 3. Pending the hearing and final determination of this suit, the Defendant by themselves, their servants, agents and authorized persons be and are hereby restrained from any further acts of trespassing onto the Plaintiff's title No Bukhayo/Mundika/1648 and breaking the perimeter wall and or from interfering with the Plaintiff's quiet occupation, possession and enjoyment of the said title.
 4. Costs be borne by the Defendants.



2. The application is founded on the grounds set out therein and supported by the affidavit of Chetakumar Shambhulal Khetia the Plaintiff's director.
3. It is the Plaintiff's case that it is the registered absolute proprietor of the suit land on which stands a single storeyed building complex which houses, among others, Khetia Supermarket the leading supermarket in Busia. That on the night of 6th and 7th March 2023, without notice, the 1st and 2nd Defendants caused earth moving machines to trespass onto the Plaintiff's premises and brought down 20feet of the front wall causing damage estimated at Kshs.150,000. Efforts to get an explanation for this callous act by the Defendants have yielded no result. The Plaintiff is therefore apprehensive that the Defendants may extend their demolition exercise to the main business premises unless otherwise restrained. The demolition has occasioned fears and concerns and this might lead to flight by tenants which may then lead to unprecedented losses incapable of compensation by any award of damages. The action by the Defendants in demolishing business premises have predisposed the business housed therein to enhanced insurance costs and penalties.
4. Annexed to the application are the following documents:
 1. Title deed to the suit land.
 2. Copy of Green card.
 3. Photographs.Only the 1st, 2nd and 4th Defendants filed their responses to the application.
5. The 1st Defendant filed it's replying affidavit dated 16th May 2023 through it's acting Municipal Manager David Maende in which he deposed, inter alia, that it's mandate with regard to physical planning and development are derived from the *Physical and Land use Planning Act*, the *Urban Areas and Cities Act* and the *Public Health Act*. That following a multi-agency and stakeholders engagement, it embarked on a massive re-organization of the town including up-grading of the urban roads. However, the persistent failure by the Plaintiff and other like minded individuals to comply with development control requirement has resulted in encroachment on public land, multiplicity of illegal structures and congestion making the roads impassable and affecting hygiene standards thereby exposing members of the public to risk of ill health.
6. The 1st Defendant has therefore acted in good faith and the on-going re-organization of the town is in line with the law and prior notice was issued to the Plaintiff and others.
7. That the photographs produced by the Plaintiff have no probative value since they are not certified and the Plaintiff has failed to meet the threshold established in the case of *Giella -v- Cassman Brown* 1973 E.A. 358. The application should therefore be dismissed.
8. Annexed to the replying affidavit is an enforcement notice dated 15th December 2022 issued by the 1st Defendant.
9. The 2nd Defendant filed a replying affidavit dated 22nd March 2023 by Engineer Samson Murage it's Corridor Director in which he has explained the 2nd Defendant's mandate under the *Kenya Roads Act* 2007 particularly under Section 49(1) thereof. That the perimeter wall and developments on the suit land do not sit on the 2nd Defendant's road reserve. He denied that the 2nd Defendant demolished the Plaintiff's perimeter wall adding further that it does not intend to carry out any further demolition. He deposed, instead, that he is aware that the 1st Defendant has been undertaking the demolition of illegal developments on road reserves in order to reorganize the town. That the 1st Defendant has also



urged it to accelerate road maintenance activities along the Ugunja-busia road and the construction of footpaths and storm water outfall.

10. That this application is fatally defective and a nullity since it was filed without a Board resolution and the Plaintiff has not annexed any evidence to show that it is the 2nd Defendant's agents or servants who carried out the demolition. Further, the Plaintiff has not met the requirement set out in the case of *Giella -v- Cassman Brown* (supra) nor met the mandatory provisions of Section 67(a) of the [Kenya road Act](#) 2007 and therefore this Court has no jurisdiction. In any event, the damages suffered by the Plaintiff have been quantified at Kshs.150,000.
11. Annexed to the application is a letter dated 15th February 2023 addressed to it by the 1st Defendant urging it to accelerate the road maintenance works.
12. BRIAN IKOL the 4th Defendant's Deputy Director Legal Affairs swore a replying affidavit dated 22nd June 2023 in which he averred, inter alia, that the 4th Defendant does not undertake or direct acts of demolitions of any property and it is therefore perplexed for being dragged into this suit as there is no proof that it has trespassed onto the suit land. The Plaintiff is therefore on a fishing expedition and this application should be dismissed.
13. The application has been canvassed by way of written submissions. The same have been filed both by MR Wasilwa instructed by the firm of BS Advocates LL.P for the Plaintiff, Mr. Omboko County Attorney for the 1st Defendant, Mr Mudavadi for the 2nd Defendant and Nadi Mohamed for the 4th Defendant. The 3rd Defendant entered appearance through Stafford Nyauma Principal State Counsel but did not file any response to the application.
14. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
15. Before I delve into the application itself, there are two important legal issues which I must address. These are:
 1. Whether the Plaintiffs suit is defective for want of a resolution of its Board authorizing it's filing.
 2. Whether the Plaintiff's suit as against the 2nd Defendant offends the provision of Section 67(a) of the [Kenya Roads Act](#) 2007.
16. With regard to issue NO 1, it is true that the Plaintiff did not file the resolution of the Plaintiff's Board authorizing the filing of this suit together with the plaint on 9th March 2023. However, that resolution was subsequently filed on 22nd May 2023 vide the Plaintiff's additional list of documents dated 19th May 2023. A resolution of the Plaintiff's Board can be filed at any time before the suit proceeds to hearing. That, in my view, is an omission curable under Article 159(2)(d) of [the Constitution](#). What is crucial, is that such resolution is subsequently filed and available among the Court records by the time the plenary hearing commences. In the case of [East African Safari Air Ltd -v- Anthony Ambaka Kegode](#) C.a. Civil Appeal No 42 Of 2007 [2011 eKLR.] the High Court had struck out the Plaintiff's suit for want of the authority by the Plaintiff's Board to institute the same. In reversing that decision, the Court of Appeal held:

“It is our view that the proper thing for the High Court to have done was not to strike out the proceedings, but to stay the same pending ratification if it was of the view that the evidence of ratification was not clear.”



The Court further went on to affirm the text in *Palmer's Company Law* 24th Edition that:

“If an individual shareholder, without authority to do so, initiates litigation in the name of the Company, the normal practice upon a motion to strike out the Company’s name is for the Court to adjourn, whilst ordering that a meeting of the shareholders be held to see if the Company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the Company will be personally liable for the Defendant’s costs.”

Nothing really turns on issue NO 1 because the Plaintiff subsequently filed its Board resolution dated 7th March 2023 authorizing the filing of this suit and also for Chetakumar Shambhlal Khatia to swear affidavits on its behalf.

17. The second issue is with regard to non-compliance with Section 67(a) of the *Kenya Roads Act* 2007 by the Plaintiff.
18. It is the 2nd Defendant’s submission on this issue that these proceedings offend the provision of the said Section which reads:

“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-

- (a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the Plaintiff or his agent; and
- (b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof. Emphasis mine.

It is the 2nd respondent’s submissions, therefore, that this Court has no jurisdiction to determine this suit against it as it offends the provisions of Section 67(a) of the *Kenya Roads Act* 2007 and the suit should be dismissed.

19. Counsel for the Plaintiff however takes the view that Article 20(1) of *the Constitution* provides that the Bill of Rights applies to all persons and binds State organs including the 2nd Defendant. Therefore, the Plaintiff, under Article 22(1) of *the Constitution*, has the right to claim that any right or fundamental freedom has been denied, violated, infringed or is threatened. No authority was cited for that proposition. In any event, what is before me is an ordinary civil suit seeking damages of Kshs.150,000 for trespass to land and destruction of a perimeter wall. This is not a Constitutional Petition and even if it was, Section 67 of the Kenya Road Acts 2007 clearly refers to “any action or other legal proceedings.”
20. In light of the above, since the Plaintiff served no notice on the Director General I am persuaded that the suit against the 2nd Defendant offends the provision of Section 67(a) of the *Kenya Roads Act*. It is accordingly struck out with costs and with it, the Notice of Motion is so far as it seeks injunctive reliefs against it.



21. With regard to the 4th Defendant, the Plaintiff has pleaded in paragraph 7 of the plaint as follows:
- 7: “On the night of 6th, 7th March 2023, the first and second Defendants without any prior warning, notification and without any lawful justification or excuse moved bulldozers and trespassed onto the Plaintiff’s premises on the said title No Bukhayo/Mundika/1648 and violently knocked down the front perimeter wall thereby occasioning tremendous damages and exposing the Plaintiff’s premises to insecurity and imminent vandalism.”
- It is clear from the above that the Plaintiff’s suit is directed principally at the 1st and 2nd Defendants for the damage caused to its perimeter wall. Counsel for the 4th Defendant has submitted, and rightly so in my view, “that the orders sought herein in the application are unmaintainable as against the 4th Respondent.” It has not suggested that the 4th Defendant is in the process of compulsory acquiring the suit land. It’s mandate is set out in Section 6 and 7 of the [National Land Commission Act](#) as well as Article 67 of [the Constitution](#).
22. The Notice of Motion as against the 4th Defendant is for dismissal. However, in keeping with the decision in [D.T. Dobie & Company \(kenya\) Limited -v- Joseph Mburia MuchinA](#) 1980 eKLR, I will not go as far as striking out the suit against it.
23. I shall therefore determine the Notice of Motion only in relation to the 1st and 3rd Defendants.
24. An application for temporary injunction has to be determined in line with the principles set out in [Giella -v- Cassman Brown & Company Ltd](#) 1973 E.A. 358 as reiterated in the case of [Nguruman Ltd -v- Jan Bonde Nielsen & Others](#) 2014 eKLR [C.A. CIVIL APPEAL NO 77 OF 2012]. These are:
- a. the applicant must establish a prima facie case with a probability of success
 - b. demonstrate irreparable injury not compensable by way of damages
 - c. if in doubt, the Court will determine the application on a balance of convenience.
25. It is common ground that the Plaintiff is the registered proprietor of the suit land. A copy of the title deed and photographs of the damaged wall have been availed. A prima facie case has, in my view, been established taking into account the definition of prima facie case as set out in [Mrao Ltd -v- First American Bank Of Kenya Ltd & Others](#) 2003 KLR 125.
26. On the issue of irreparable injury that may not be compensated in damages, the Plaintiff has averred, inter alia, that there is fear that the demolition of the perimeter wall may extend to the main premises which houses several businesses including a supermarket. Then there is the fear of flight by tenants and also security risks and insurance claims. That, in my view is injury whose value may not be quantified. The second limb set out in the case of [GIELLA -V- CASSMAN BROWN](#)(supra) has been established.
27. If I was in doubt, which I am not, I would determine the application in favour of the Plaintiff.
28. Ultimately therefore, and having considered the Notice of Motion dated 8th March 2023, this Court makes the following disposal orders:
1. The suit as against the 2nd Defendant and with it, the Notice of Motion dated 8th March 2023 are struck out with costs.
 2. The Notice of Motion dated 8th March 2023 as against the 4th Defendant is dismissed with costs being in the cause.
 3. An order is issued restraining the 1st and 3rd Defendants by themselves, their agents, servants and or any other authorized person acting through them from trespassing onto the Plaintiff’s



land parcel No Bukhayo/Mundika/1648 and breaking the perimeter wall or interfering with the Plaintiff's quiet occupation possession and enjoyment of the said title.

4. The Plaintiff shall ensure that this suit is heard and determined within the next 12 months or the temporary injunction shall lapse unless otherwise extended by this Court.
5. Costs shall be in the cause.

BOAZ N. OLAO

JUDGE

2ND NOVEMBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 2ND DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

2ND NOVEMBER 2023

