



**Ndirangu & 5 others (Suing on their own behalf and on behalf of  
IMPALA GARDEN ESTATE)) v Jiweze Development Limited & another  
(Petition 18 of 2021) [2022] KEELC 3362 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3362 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
PETITION 18 OF 2021  
LA OMOLLO, J  
MAY 5, 2022**

**BETWEEN**

**JANE NYAMBURA NDIRANGU ..... 1<sup>ST</sup> PETITIONER  
SUSAN VIRGINIAH WACHIRA ..... 2<sup>ND</sup> PETITIONER  
SUSAN MWIHAKI NDIRANGU ..... 3<sup>RD</sup> PETITIONER  
PETER MAINA WAIKIA ..... 4<sup>TH</sup> PETITIONER  
MAUREEN WANJIRU MWANIKI ..... 5<sup>TH</sup> PETITIONER  
ANN WAMBUI KARUGU ..... 6<sup>TH</sup> PETITIONER  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF IMPALA GARDEN  
ESTATE)**

**AND**

**JIWEZE DEVELOPMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT  
THE DISTRICT LAND REGISTRAR NAKURU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the applicants' notice of motion application dated November 30, 2021. The said application is expressed as being brought under order 40 rules 1(2), 2(1), 4(1), (2) and order 51 rule 1 of the *Civil Procedure Rules* 2010, section 3A of the *Civil Procedure Act*, section 26(1) and 80 of the *Land Registration Act* and article 159 of the *Constitution*.
2. The application is filed under certificate of urgency and seeks the following orders:
  - i. Spent.



- ii. Spent.
  - iii. That pending the hearing and determination of this petition against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, this honourable court be pleased to issue an order of temporary injunction restraining the respondents by themselves, their servants, their agents, their auctioneers and any other persons from entering onto, transferring, developing, constructing and or dealing in any manner and interference by whatever way with alienated public land and way leave (currently registered as Plot Nos Kiambogo/kiambogo Block 2/23549 and Kiambogo/Kiambogo Block 2/23558 respectively).
  - iv. That pending the hearing and determination of this petition this Honourable court be pleased to issue an order for rectification on the land register by cancellation of the Title Deed held by the 1<sup>st</sup> respondent (Jiweze Development Limited) in respect of all or any of those parcels of land known as Kiambogo/Kiambogo Block 2/23549 and Kiambogo/Kiambogo Block 2/23558 respectively so as to restore the said parcels of land as public land and way leave to be utilized by the residents of Impala Garden Estate.
  - v. That the costs of this application be borne by the respondents.
3. The application is based on the grounds on its face and supported by the affidavit sworn by one Jane Nyambura Ndirangu and with the authority of the applicants. The supporting affidavit is sworn on the 30<sup>th</sup> of November, 2021.

### **Factual Background**

4. This suit was commenced by way of petition dated November 30, 2021 and filed on December 2, 2021. In the petition, the petitioners/applicants are seeking among other orders: a declaration that the petitioners are the rightful and lawful allottees of all that parcel of land known as Kiambogo/Kiambogo Block 2/23549 and Kiambogo/Kiambogo Block 2/23558 the suit properties herein, a declaration that the issuance of the title deeds of the suit properties by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent was null and void, an order for rectification on the land register by cancellation of the title deed held by the 1<sup>st</sup> respondent in respect of the suit properties, an order compelling the respondents to deliver vacant possession of the suit properties, an order prohibiting the respondents from re-entering or taking possession of the suit properties and in the alternative an order compelling the 1<sup>st</sup> respondent to give the petitioners full unfettered physical access to the suit properties.

### **Plaintiff/Applicant's Contention**

5. The 1<sup>st</sup> applicant contends that the applicants/petitioners are bona fide purchasers of various plots of land in the suit properties sold to them by the 1<sup>st</sup> respondent and that they have all constructed permanent residential homes. They have since named the gated community, comprising of the suit parcels, as Impala Garden Estate.
6. It is the applicants' contention that they were all issued with their respective title deeds and they have all settled on their respective homes leaving some land aside meant for public utility and wayleave for power lines.
7. The 1<sup>st</sup> applicant further contends that public utility and a wayleave are not private properties as they are meant to be utilized and enjoyed by them, the bona fide purchasers of the suit parcels.



8. The applicant further contends that the 1<sup>st</sup> respondent are in the process of constructing a perimeter fence on the public utility land which land serves as a wayleave for electricity lines and that the applicants around November, 2021 had raised their concerns about the intended constructions with the 1<sup>st</sup> respondent but it fell on deaf ears.
9. The 1<sup>st</sup> applicant avers that the 1<sup>st</sup> respondent is now claiming to be the registered owner of the suit properties which are meant for public use and which serve as a wayleave for electricity lines.
10. It is her contention that the 1<sup>st</sup> respondent is claiming to be the registered owner of land title number Kiambogo/ Kiambogo Block 2/23549. It is her deposition that the purported title documents held by the 1<sup>st</sup> respondent are not authentic.
11. She ends by stating that the applicants' acquired the suit properties with the belief that the 1<sup>st</sup> respondent shall set aside the public utility land for their use and that the 1<sup>st</sup> respondent has since violated their rights.

### **Respondent's Response**

12. In response to the application, the 1<sup>st</sup> respondent filed a replying affidavit dated January 13, 2022 sworn by one Joyce Wanjiru Ndirangu a director to the 1<sup>st</sup> respondent company where she deposes that the application is misconceived without merit and an abuse of the court process.
13. She deposes that the applicants are seeking for final orders on an interlocutory application. It is her deposition that orders for rectification of the land register by cancellation of the title deed held by the 1<sup>st</sup> respondent in respect of the suit properties is a final order.
14. She avers that the 1<sup>st</sup> respondent is in the commercial real estate business, that prior to purchasing the suit properties they conducted a search and found no encumbrances. The subsequently purchased the parcels of land from which the suit parcels mutated.
15. She further deposes that having paid the various owners, the 1<sup>st</sup> respondent sought to have the transfer of ownership to itself in order to subdivide and the same culminated to the issuance of the title documents in its name after which subdivision was done and sold to the applicants save for the 5<sup>th</sup> applicant.
16. The 1<sup>st</sup> respondent deposes that upon sale of the said lands, the 1<sup>st</sup> respondent applied for change of user in order to be issued with development approvals and after being successful, it built off-plan 3-bedroom bungalows and title documents were then issued to the applicants save for the 5<sup>th</sup> applicant, whom she says is a stranger to it, while the 6<sup>th</sup> respondent is in breach of an agreement between them.
17. It is her deposition that the remainder of the said land still belongs to the 1<sup>st</sup> respondent. She has attached copies of the title documents to the suit land.
18. The 1<sup>st</sup> respondent further deposes that suit parcels are for use by it and do not feature in any register of public lands and that if any claim accrued on the said land the same should have been brought forth by Kenya Power or the National Land Commission. The 1<sup>st</sup> respondent avers that the applicants' have not provided any evidence to support their claim and that their application has not met the threshold in granting of the orders sought and should be disallowed.

### **1<sup>ST</sup> Applicant's Response To The Replying Affidavit**

19. The 1<sup>st</sup> applicant filed a further affidavit in response where it reiterated the contents of the supporting affidavit and added that even though the 1<sup>st</sup> respondent has rights over the suit property, the same



rights can be defeated by operation of the law which in the instant case is by creation of public right of wayleave under section 143(1) of the Land Act and by the fact that the grant is subject to easement and conditions contained in the grant.

20. She deposes that the 1<sup>st</sup> respondent is under a duty to protect them from harm's way due to the high risk and high-power voltage lines that pass through the utility and or public land and that the 1<sup>st</sup> respondent should note that its rights to the suit lands are subject to the overriding interests and the public right of wayleave.
21. The 1<sup>st</sup> applicant avers that the 5<sup>th</sup> applicant is a bona fide purchaser residing in the USA having left her mother in occupation of the house and that the claims by the 1<sup>st</sup> respondent against the 6<sup>th</sup> applicant on the alleged breach of agreement should be raised in another forum and not the instant suit.
22. She further deposes that this court is to determine is whether there exists a public utility land and/or wayleave on "illegally" acquired lands and not whether the 1<sup>st</sup> respondent is the legal owner.
23. She finally deposed that the 1<sup>st</sup> respondent has not demonstrated any loss it is likely to suffer in the event the court grants the orders for injunction.

### **Issues For Determination**

24. The applicants filed their submissions on February 4, 2022 while the 1<sup>st</sup> respondent filed its submissions on February 15, 2022.
25. The 2<sup>nd</sup> respondent neither filed a response nor submissions.
26. The applicants identified the following issue for determination:
  - a. Whether the conditions for issuance of the injunction have been met.
27. The 1<sup>st</sup> respondent on the other hand raises the following issues for determination:
  - a. Are the applicants entitled to the orders sought?
  - b. Have the applicants fulfilled the conditions set for granting of the injunction?
  - c. Can the order to cancel the 1<sup>st</sup> respondent's title deeds and have the same issued to the applicants be granted in an interlocutory application?
  - d. Costs of the application.
28. Upon perusal of the application, supporting affidavit, replying affidavit, annexures and rival submissions filed in respect of this application, my considered view is that the two issues for determination are:
  - a. Whether an injunction should issue against the 1<sup>st</sup> respondent.
  - b. Which party bears the cost of the application.
29. The first issue for determination is whether the plaintiff has met the criteria for the grant of an order of temporary injunction.
30. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from kenyan courts and more particularly in the case of *Nguruman Limited*



versus Jan Bonde Nielsen & 2 others CA No 77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

31. Consequently, the applicants ought to, first, establish a prima facie case. The applicants submitted that the 1<sup>st</sup> respondent has caused itself to be the registered owner of the suit parcels of land and that the said title can be defeated by operation of law. Particularly, the applicants submit that section 26 (1) of the Land Registration Act provides that once a certificate of title is issue to a proprietor, it vests the land to such proprietor as the absolute and indefeasible owner subject to encumbrances, easments, restrictions and other conditions.
32. The applicants submit that the 1<sup>st</sup> respondent’s grant issued to it is subject to easement and conditions such as wayleave and public right of way, as provided for under section 143(1) pf the Land Act.
33. It is their submission that the 1<sup>st</sup> respondent’s right over the suit land is subject to the overriding interest and the public right of wayleave.
34. In support of this first requirement, the applicants have relied on the decisions in Kenya Power and Lighting Co Ltd Vs Kipevu Inland Container EPZ LTD [2018] eKLR, Kenya Power and Co Ltd Vs Mosiara Trading Company Ltd, Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLR
35. In Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLR the Court of Appeal explained what comprises of a prima facie case as follows:

“...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
36. The applicants have made certain allegations on infringement of their right by the 1<sup>st</sup> respondent. The right allegedly infringed by the 1<sup>st</sup> respondent is that the 1<sup>st</sup> respondent is in the process of undertaking construction on the suit parcels of land and that this goes against their easmentary rights. They further contend that the titles obtained by the 1<sup>st</sup> respondent are fraudulent as the suit parcels are public land and subject to wayleave for the benefit of all of them.
37. The 1<sup>st</sup> respondent has denied these allegations and have attached title documents to the suit property, stating that the suit parcels are for their use as they please and that the parcels do not feature in any register of public lands held by the National Land commission.
38. The 1<sup>st</sup> respondent also submits that no evidence has been attached by the applicants to show that the suit parcels are public land or subject to easmentary rights as they allege.
39. The 1<sup>st</sup> respondent has relied on the decisions in Alex Wainanina t/a John Commercial Agencies Vs Jonnson Wanjibia [2015] eKLR and Magnate Ventures Limited Vs Eng Kenya Limited (2009) eKLR



538. These decisions speak to the test whether to grant an injunction or not and that there is need for existence of special circumstances.

40. From the material placed before me, I am unable to conclude that there exists a legal right which has been infringed by the 1<sup>st</sup> respondent. I also note that the National Land commission, Kenya Power and Co Ltd are not parties to this petition. If indeed, the suit parcels are public land and that the 1<sup>st</sup> respondent's actions are causing interference with supply of electricity, they are invariably a necessary party to this petition.
41. In my opinion, therefore, the applicants have failed to meet the first requirement for grant of orders of temporary injunction.
42. Secondly, the applicants have to demonstrate that irreparable injury will be occasioned to them if the order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
43. The applicants have pointed me to the decision in *Pius Kipchirchir Kogo* to explain what is meant by irreparable harm but have failed to submit on the question of irreparable harm being caused to them or explain what injury they are bound to suffer if the orders of temporary injunction are not granted or that the said injury is one that cannot be compensated for in damages.
44. In my view, therefore, the applicants have failed to demonstrate that irreparable loss will be occasioned to them if orders of temporary injunction pending the hearing and determination of the suit are not granted.
45. Thirdly, the applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) EKLR which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the defendants. Inconvenience be equal, it is the plaintiff who will suffer.

In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”

46. In the case of *Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should



be granted, 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 the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies”

47. In the decision of *Amir Suleiman Vs Amboseli Resort Limited* [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated:

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

48. From the affidavits and responses filed, I note that the 1<sup>st</sup> respondent is in occupation of the suit parcels, it has documents of title and the encumbrance section of the documents of title has no entry. The National Land Commission is not a party to this suit and has not lent their voice on the question of the suit parcels being public land, Kenya power and Co Ltd which supplies electricity is not a party to the suit and have also not spoken to the question of the 1<sup>st</sup> respondent causing any inconvenience to them in fulfilling their mandate to supply electricity to the applicants and/or the public in general.

49. Bearing these in mind, I am unable to make a finding that the balance of convenience tilts in favour of the applicants. I am convinced that there is a lower risk in not granting orders of temporary injunction than in granting them, as I wait to hear the petition on its merits.

50. In view of the foregoing, I find that the applicants have failed to meet the requirements for grant of orders of temporary injunction.

51. On the issue on costs, section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The successful party shall ordinarily have costs.

#### **Deposition.**

52. Consequently, the notice of motion application dated November 30, 2021 is dismissed with costs to the 1<sup>st</sup> respondent.

53. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5<sup>TH</sup> DAY OF MAY, 2022.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Miss Karuga for the Petitioners/applicants.**

**No appearance or the 1<sup>st</sup> Respondent**

**No appearance for the 2<sup>nd</sup> Respondent**

**Court Assistant; Jeniffer.**

