Barasa & 2 others (Suing as the Officials of Vumilia Tree Nursery) v Ng'apesur & 58 others & another (Environment & Land Case E021 of 2024) [2025] KEELC 3846 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3846 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE E021 OF 2024

CK YANO, J

MAY 8, 2025

BETWEEN

RICHARD NYONGESA BARASA ..... 1ST PLAINTIFF

JAMIN WEKESA MASINDE ..... 2ND PLAINTIFF

PAUL KORIR KERICH ..... 3RD PLAINTIFF

SUING AS THE OFFICIALS OF VUMILIA TREE NURSERY

AND

MOSES NG'APESUR & 58 OTHERS ..... 1ST DEFENDANT

SIMION KIPTOO ROTICH ..... 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 17th April, 2024 and filed under certificate of urgency, the Plaintiffs/ Applicants sought the following orders: -

   a. Spent.

   b. Spent.

   c. That an interlocutory order of injunction do issue against the defendants restraining them, whether by themselves, their servants, agents and/or employees from ploughing, planting, constructing, leasing, charging, selling, offering for sale, registration of any such subdivision and/or in any other way dealing with the whole of that parcel of land known as Soy/Soy/ Block 10 (Navillus)/ 258 measuring 81 acres pending the hearing and determination of the main suit.

d. That an order do issue directing Uasin Gishu County Surveyor to visit that parcel of land known as Soy/Soy/ Block 10 (Navillus)/ 258 and mark its boundaries and prepare a report on the same.

e. Costs of this Application be provided for.

2. The application is based on 4 grounds on the body of the application and on the 1st Applicant's Supporting Affidavit sworn on even date.

3. The 1st Applicant avers that they are the registered trustees of Vumilia Tree Nursery, and who is the registered owner of the suit land and holder of the title deed issued on 16.2.2012.

4. He deponed that Vumilia Tree Nursery has a total of 456 members, who were the former employees of Lonrho Agri Business East Africa Ltd, and which was the previous registered owner of the suit land. The said land was gifted to the applicant and its members, who were to share the same equally upon removing public utilities.

5. It is the applicants' claim that the previous owner of the suit parcel, Lonrho Agri Business East Africa Ltd, signed the relevant documents to enable the applicant's members be registered as the owners thereof. They obtained the requisite consent to transfer the suit land to their names, paid stamp duty and subsequently became the registered owners thereof.

6. It is their contention that the respondents have since converted the suit land into their use in exclusion of other members who are entitled to an equal share thereof, hence the orders sought to avoid breach of peace.

7. They maintained that they have established a prima facie case with a probability of success and contend that damages will not be an adequate remedy. It is their position that the balance of convenience tilts in favor of granting the orders of injunction. They therefore urged the court to allow the application.

8. The application was opposed. The Respondents filed a Replying Affidavits dated 7th June, 2024 and a Further Affidavit dated 16th July, 2024 (erroneously titled Supplementary Affidavit); both sworn by the 1st respondent, Moses Ng'apesur, the chairman of environment conservation Vumilia Team.

9. The 1st Respondent in his Replying Affidavit averred that the suit land falls under Public Land as shown in the original RIM of the suit land. It is therefore his claim that suit land is a swampy and water catchment area qualifying to be a public land pursuant to the provisions of Article 62(1) (g) of *the constitution* and hence should be subjected for environment conservation.

10. Consequently, he avers that the suit parcel should be managed by the National Land Commission, on behalf of the National and County governments. Further, that there is a 'restriction' registered against the title of the suit land by the Lands Registrar.

11. It is their contention that the defendant being environment conservation team are entitled to the law of Restrictive covenant and are hence the immediate beneficiaries of the suit land. They further contend that the previous owner of the suit land already subdivided the same as per the RIM. They therefore urged the court to dismiss the application with costs.

12. In their further affidavit, the respondents accused the applicants of fraudulently selling a portion of the suit land. It was also their claim that the letter of consent dated 21.3.1997 outlined the mode of subdivision by capturing the format of land use and measurements.

13. The Application was canvassed by way of written submissions, both parties filed their rival submissions. The applicants filed their submissions dated 20th February, 2025 while the respondents filed their submissions dated 20th March, 2025, which I have read and considered.

Analysis and Determination:

14. I have carefully considered the pleadings filed herein and it is my considered view that the issues arising for determination is whether the Applicants have met the requirements for the grant of a temporary order of injunction as sought and whether this court can direct the county surveyor to visit the suit land and mark its boundaries.

15. The law governing injunctions is found under Order 40 (1) (2) of the Civil Procedure Rules which provides as follows: -

    1. "Where in any suit it is proved by affidavit or otherwise: -

        (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

        (b) .....,

        the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

16. Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 further empowers this court to grant interim preservation orders, including an interim order of injunction in the nature sought herein.

17. The principles governing the grant of injunctions are well settled. An applicant seeking orders of injunction is under a duty to satisfy the 3- hurdle test set out in Giella vs Cassman Brown and Co. Ltd [1973] EA. 358 at 360 where the court held as follows: -

    a). where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt;

    b). He will suffer irreparable harm/injury which cannot be adequately compensated by damages;

    c). Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.

18. These 3 principles must to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. The existence of one element alone does not automatically entitle an applicant to an order of injunction without considering the other elements. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86.

19. The first element to be demonstrated is whether the applicants have established a Prima Facie case which raises arguable and triable issues with a probability of success. The Court of Appeal in Mrao

Ltd vs. First American Bank of Kenya and 2 Others (2003) KLR 125 explained what amounts to a prima facie case and stated as follows:

> "a prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

20. The basis of the applicants' claim is that they are the registered Trustees of Vumilia Tree Nursery, with a membership of 456 members and which is the registered owner of the suit parcel, measuring 81 Acres. The 1st applicant explained in details how the Trust (Vumilia Tree Nursery) became registered owner of the suit land and maintained that all the members are entitled to an equal share thereof.

21. It is their claim that the respondents have converted the suit land into their use in exclusion of the other members who are entitled to a portion thereof.

22. The respondents on their part averred that the suit land is a public land pursuant to the provisions of Article 62(1) (g) of *the constitution* and hence should be subjected for environment conservation. Further, that the management thereof should be vested with the National Land Commission.

23. Before delving into the merits of whether the applicants have established a prima facie case, I wish to address the averments made by the respondents that the suit parcel is a public land falling in the category of a wetland pursuant to the provisions of Article 62(1) (g) of *the constitution*.

24. It is well settled that process of conversion of a private land to a public land is through compulsory acquisition, undertaken by the government, through the National Land Commission and upon satisfaction of the criteria therein and the payment of the requisite compensation.

25. This process is however different where subject land is within a protected area like a swampy area as alleged by the respondents. The applicants maintain that the suit land is a private land and they are therefore entitled to use and protection as enshrined under sections 24, 25 and 26 of the *Land Registration Act*, while the respondents aver that the suit parcel is a public land by virtue of it being within a swampy area and thus falls in the category of a wetland.

26. The procedure of declaring a parcel of land as wetland is governed by Regulations 8 and 9 of The Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009 and which provides as follows: -

> "8.
>
> (1) The Minister may, by notice in the Gazette, declare an area to be a protected wetland where such area has national and international significance due to its-
>
> (a) biological diversity;
>
> (b) ecological importance;
>
> (c) landscape;
>
> (d) natural heritage, or
>
> (e) aesthetic value.

(2) Upon declaration of an area to be a wetland, the following shall be the only activities be permitted to be carried out in the area-

(a) research;

(b) eco-tourism;

(c) restoration or enhancement of the wetland; or (d) any other activities identified in the Management plan

9.

(1) The declaration of a protected wetland under regulations 8 may be done by the Minister –

(a) in consultation with the relevant lead agency; or

(b) On the recommendation of the Authority on its own motion or in consultation with the lead agency, a registered civil society organization or an individual person.

(2) Where the Authority of its own motion or in consultation with the relevant lead agency initiates the process of declaring an area to be a protected wetland under sub-regulation (1), the Authority shall –

(a) by notice in the Gazette and in at least one newspaper circulating in the local area. notify the public of its intention to declare the area to be a protected wetland, which notice shall identify and assign terms of reference to a task force which shall be mandated to prepare the wetland management plan;

(b) set up a task to prepare a wetland management plan by, incorporating the views of the people inhabiting the areas contiguous to the wetland;

(c) cause a Strategic Environmental Assessment of the management plan to be undertaken in accordance with the Act;

(d) review the report containing the findings under paragraphs (b) and (c) of this sub-regulation.

(3) Where the Authority is satisfied with the findings under sub-regulation (2) (d), it shall submit its recommendations to the Minister for the gazettement of the wetland.

(4) Where a lead agency, a member of the public or a registered civil society organization petitions the Authority to initiate the process for declaration of an area as a protected wetland, the

Authority shall consider the petition and may initiate the process as set out in sub-regulation (2).

(5) .....

(6) ....."

27. From the above Regulations, it is clear that the procedure of declaring a parcel of land as a wetland commences by a Notice in the Gazette by the Minister or a notice in a local newspaper. Regulation 9 goes further to mandate the preparation of a Wetland Management Plan by incorporating the views of the people inhabiting the said area and thereafter cause a Strategic Environmental Assessment of the management plan to be undertaken.

28. The question that follows is whether this clear and elaborate procedure was complied with in the instant case. No evidence has been adduced by the respondents, either in the form of a Gazette Notice, a Notice in the local newspaper, a wetland management plan, minutes of the meeting held by the area residents stating their views or a Strategic Environmental Assessment from the relevant authorities, to support their allegations.

29. Section 107 of the *Evidence Act* on the burden of proof is clear in this regard. The respondents cannot merely state that the suit land is a wetland and hence a public land without any proof. That since the swampy area is indicated in the RIM, then that is enough proof of the land being a wetland without following the outlined procedure.

30. Consequently, it is the finding of this court that the allegations by the respondents are unsubstantiated and have not been proved to the required standard. Therefore, the allegations by the respondents that the suit parcel is a wetland and hence a public land are hereby dismissed.

31. On whether the applicants have established a prima facie case, I have critically considered the rival positions by all parties. Both parties are in agreement that the suit parcel is registered in the name of the applicants as trustees to be held in trust for the members of the Vumilia Tree Nursery.

32. The applicants contend that all the 456 members of the Trust are entitled to an equal share of the suit land and the actions by the respondents of conversion of use to the exclusion of others who are entitled to a portion thereof, is a breach of their rights.

33. The respondents have admitted using the suit parcel on the basis that the same is a public land, despite the applicants' title thereto. The issue of wetland and/or the suit land being a public land has extensively been dealt with hereinabove and I therefore find no lawful basis or sufficient justification of the respondents' use of the suit parcel to the exclusion of the applicants.

34. Based on the material presented before this court, it is my considered opinion that the applicants have sufficiently demonstrated the existence of a prima facie case to the required standard.

35. The second element is that an applicant must demonstrate the irreparable loss and injury that he is likely to suffer that cannot be adequately compensated by an award of damages unless an order of injunction is granted. The applicants are duty bound to demonstrate the nature and extent of the irreparable loss and harm they are likely to suffer.

36. An injury is irreparable where there is no standard by which an amount can be measured with reasonable precision and accuracy or is in such a nature that monetary compensation, of whatever amount, will never be an adequate remedy. It has been held that speculative injury or unfounded fear does not amount to an irreparable injury.

37. The Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, while defining what amounts to an irreparable injury held as follows;

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

38. In explaining the irreparable loss and injury that will be occasioned unless the orders sought are granted, the applicants maintained that being the holders of a valid title deed and hence entitled to exclusive use and the rights appurtenant thereto, the acts by the respondents of conversion of their rightful land without lawful basis is a violation of their rights and may amount to a breach of peace.

39. I find this explanation as a sufficient demonstration of the irreparable loss that they are likely to suffer that cannot be compensated by an award of damages.

40. The final element that must be established is on the balance of convenience. The court needs to be satisfied that the inconvenience likely to be caused to the Applicants by declining the injunction is greater than that which is likely to be caused to the Respondents. The court is called upon to balance the inconveniences of both parties and possible injuries to them and their properties.

    (See Charter House Investment Limited vs Simon K. Sang and 3 Others [2010] eKLR.

41. In the totality of the foregoing, it is my finding that the balance of convenience tilts in favor of the applicants in granting the orders of temporary injunction as sought.

42. From the rival positions by both parties, it is my considered opinion that the prejudice and inconvenience that is likely to be caused to the applicants, who are the registered owners and members who are entitled to a portion of the suit land is greater than that which is likely to be caused to the respondent by granting the orders sought.

43. On the second issue of whether this court can direct the County Surveyor to visit the suit parcel for purposes of marking its boundaries and prepare a report, it is my considered view that section 18 of the *Land Registration Act* vests the Land Registrar with the jurisdiction and mandate of fixing boundaries of a land and therefore this court need not usurp the said role or mandate which is statutorily vested in the Land Registrar.

Costs:

44. The general rule is that costs follow the event.

45. Having held that the applicants have proved their claim to the required standard, I find that they are entitled to the costs of the application.

Conclusion:

46. In view of the foregoing, I find that the Notice of Motion Application dated 17th April, 2024 is merited and is hereby partially allowed on the following terms: -

    i. An Order of temporary injunction be and is hereby issued, restraining the defendants, whether by themselves, their servants, agents and/or employees from ploughing, planting, constructing, leasing, charging, selling, offering for sale, registration of any such subdivision and/or in any other way dealing with the whole of that parcel of land known as Soy/Soy/ Block 10 (Navillus)/ 258 measuring 81 acres pending the hearing and determination of the main suit.

    ii. Costs of the Application to be borne by the respondents.

47. It is so ordered.

COCLUSIONS

DATED, SIGNED AND **DELIVERED** IN **ELDORET** THIS **8TH DAY OF MAY, 2025.**

HON. C. K. YANO

JUDGE

Ruling delivered in the presence of: -

Mr. Mathai for the Plaintiffs/Applicants.

Defendants present in person.

Court Assistant – Laban