



REPUBLIC OF KENYA



**Gikunga & 2 others (Suing as the Chairman, Secretary, and Treasurer  
of Enosupikia Displaced People Group) v Mbogo (Civil Suit  
E031 of 2022) [2023] KEHC 23624 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23624 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT E031 OF 2022  
SM MOHOCHI, J  
OCTOBER 17, 2023**

**BETWEEN**

**JOHN NJUGUNA GIKUNGA ..... 1<sup>ST</sup> PLAINTIFF**

**JAMES NDUNG’U NG’ANG’A ..... 2<sup>ND</sup> PLAINTIFF**

**KIMANI KARANU ..... 3<sup>RD</sup> PLAINTIFF**

**SUING AS THE CHAIRMAN, SECRETARY, AND TREASURER OF  
ENOSUPIKIA DISPLACED PEOPLE GROUP**

**AND**

**STANLEY KIAMA MBOGO ..... DEFENDANT**

**RULING**

1. The applicant moved court vide Notice of Motion Application dated November 30, 2022 under Order 40 Rule 7 of the *Civil Procedure Rules* seeking:
  - i. That this Application be certified as urgent and be heard on priority basis and service be dispensed with within the first instance.
  - ii. That pending the hearing of this Application inter-parte, this honourable court be pleased to stay execution of orders issued on November 21, 2022.
  - iii. That pending the hearing and determination of this Application, this honourable court be pleased to stay execution of orders issued on November 21, 2022.
  - iv. That this honourable court be pleased to vary and or vacate the orders issued on November 21, 2022.



- v. That the plaintiff/respondent be ordered to produce and deposit in court the title deed allegedly acquired by the Group to warrant the plaintiffs to collect monies from the members for the purported survey fees and in the alternative, the plaintiffs/respondent be ordered to deposit the sum of Kshs. 14,000,000 collected by the plaintiff's as survey fees.
  - vi. That the costs of this Application be provided.
2. The Application is supported by the grounds on the face of it and sworn affidavit of Stanley Kiama Mbogo on even date. He averred that the Respondents filed this suit and a Notice of Motion Application whereby orders were issued on November 21, 2022 suspending the implementation of the annual general meeting held on October 21, 2022. The applicant deponed that the orders were issued ex-parte without the knowledge of either the applicant or his advocates.
  3. He also deponed that the respondents are not sincere in the management of affairs of the members of Enosupikia and their motive is to collect money. That the orders will affect the group in that the Respondents have never been registered as they were only running the group pending the Annual General Meeting.
  4. The Application was not opposed.
  5. Under Order 40 Rule 7 of *Civil Procedure Rules* it is provided:-
 

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
  6. I have considered the Application, the Affidavit in support thereto and I find several issues arise for determination namely; -
    - i. Whether the applicant has met the threshold for staying varying and or vacating of order of November 21, 2022.
    - ii. Whether the respondent should be compelled to deposit in court the title deed allegedly acquired by the Group or d to deposit the sum of Kshs. 14,000,000 collected by the plaintiff's as survey fees.
    - iii. Who will pay the costs of this Application?
  7. As regards the first issue, In the case of *St Patricks Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR, it was held: -
 

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”
  8. I have had the opportunity to peruse the court file and the proceedings on record and I find that, on the 27<sup>th</sup> of October, 2022 the respondents filed an Application under Certificate of Urgency dated October 26, 2023. The same was never prosecuted by the respondent and however overlooked due to the many emails and the court on November 2, 2022 directed that the Application be served and a mention date be fixed for directions as per the court's diary.



9. The matter came up for mention for directions before Justice Matheka on November 21, 2022 and the respondents advised court that they had served the Application and prayed that it be allowed in the absence of a response as it was unopposed. The respondents intimated to have served the applicant and filed two affidavits of service on the 17<sup>th</sup> of November, 2022 and on the date of mention.
10. The applicant alleges that he was not aware of the Application and that his advocates were never served with the Application or the mention notice.
11. On record there are two returns of service, dated November 9, 2022 and November 17, 2022. The Process Server avers that on both occasions he contacted the Applicant who advised him that he was out of town and the documents should be served on his brother Mr. Kiama in town. The process server stated to having known the Applicant's brother since he had served him on previous documents.
12. The firm of Naomi Muriithi & Co Advocates filed a Notice of Appointment of Advocates dated November 10, 2022 on behalf of the Applicant. The Notice was served and received by the Advocates of the respondents on November 29, 2022. At the time the applicant was being served in person his advocates had not communicated that he had legal representation and when he eventually communicated, the Order had already been issued.
13. *In Re MWO (Minor)* [2021] eKLR the court stated that:

“Ordinarily, an agent who is recognized in law as an agent authorized to accept service on behalf of a party in a suit would be the Advocate on record for said litigant. Where a party has not appointed counsel to act for him/her then the preferred mode of service is personal.”
14. In this case service was affected upon “the brother” in service of the mention notice and the Application as alleged. The Plaintiff was served together with the application and the Applicant entered Appearance immediately through his advocates. The applicant was thus aware of the existence of the Application.
15. The second time the matter was before court, the service of the court date is in doubt. Looking at the two affidavits there was a similar import from the first one. One would therefore question as to why the Applicant would advise the process server to serve his brother the mention date yet he had an advocate on record?
16. The court has discretion to set aside or vary an injunction order if the ends of justice demand so. When such orders are issued, the same are not meant to punish but to preserve the state of affairs pending the court's determination based on the evidence presented before it.
17. In weighing the circumstances that led to issuance of the order and the fact that the Respondents were served with the Application and even acknowledged receipt but never responded, I see no prejudice as to why the same should not be vacated.
18. On the second issued, the applicant has sought that the court to issue an order to the respondents to compel them to deposit the title over which survey fees were being collected or alternatively deposit Kshs. 14,000,000 collected as survey fees. It is the applicant's contention that the respondents have been collecting survey fees for land that is unknown.
19. I have looked at the pleadings and the evidence tendered in support of the Application. There seems to be leadership wrangles in the management of the group Enosupukia Displaced People Group and allegations of mismanagement of funds. There also seems that there were monies that were collected on behalf of its members, which have not been accounted for or are yet to be accounted for. The



Respondents have not filed any response as to why they should be compelled to avail a title that was subject to the alleged survey as per the attached receipts.

20. In the interests of the matter and that the members of Enosupukia Displaced People Group, there seems to be much more than meets the eye. The members deserve to have their interests protected as to who is to protect their interest is yet to be determined by this Court. There is therefore is good legal sense and an equitable need to grant the prayer sought until the suit is heard and determined on its merits.
21. I also note that the respondents have not moved court, to dispose of their Application and have been enjoying the order issued on November 21, 2022. It seems that the respondents have weaponized the order issued as against the Applicant since as long as the order is in force, the applicant cannot conduct business as a representative of the group.
22. There is no excuse for a party to obtain interim orders and enjoy the benefits for an extended period without taking the necessary steps to have the Application heard inter parties. The respondents' conduct is unfathomable and an abuse of the court's due process<sup>2022</sup> and this court should not condone such.
23. The respondents herein have a pending Application dated October 26, 2022 in which they are enjoying interim orders. It is also evident that the Applicant has another Application dated December 15, 2022 besides the instant Application dated November 30, 2022. It is my considered view that the parties should proceed and set down the matter for hearing so as to determine the suit expeditiously.
24. The duty of the court is to ensure that justice is done and also seen to have been done. Section 3A of the Civil Procedure Act enjoins the Court to make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.
25. In the premise, the Application is allowed as follows;
  - a. That the Orders issued on November 21, 2022 are hereby vacated;
  - b. The Respondents are ordered to produce and deposit in court the title deed acquired by the Group that was the subject of the collected survey fees;
  - c. The parties shall comply with Order 11 of the Civil Procedure Rules.
  - d. The status quo shall maintain until determination of the main suit;
  - e. The pending Application dated October 26, 2022 and the Application dated December 15, 2022 shall be jointly heard and determined.
  - f. Parties to file and exchange written submissions in support of their respective Applications and in response to their counterparts within the next thirty (30) Days.
  - g. Mention for further directions shall be on 21<sup>st</sup> November 2023.
  - h. That the Deputy Registrar is hereby directed not to accept any other Application to be filed in the matter, without reference to the Judge, pending the hearing and disposal of the main suit; and
  - i. The costs shall be in the cause.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023**

**MOHOCHI S.M**



**JUDGE OF THE HIGH COURT**

