



**Wilson & 20 others v Kenya National Highway Authority (Civil Case E011 of 2024) [2024] KEHC 12598 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12598 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL CASE E011 OF 2024  
SM GITHINJI, J  
OCTOBER 17, 2024**

**BETWEEN**

**JOHN KIURA WILSON ..... 1<sup>ST</sup> APPLICANT  
IBRAHIM HASSANO ..... 2<sup>ND</sup> APPLICANT  
NDUNDA KAESA & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS  
& 18 OTHERS & 18 OTHERS ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... RESPONDENT**

**RULING**

1. The Applicants instituted this suit against the Respondent vide a plaint dated 4/6/2024 seeking to restrain the latter from interfering with their business premises without adequate compensation and ample time to relocate. The Applicants were apprehensive that the Respondent having issued gazette notice numbers 6237 and 6238, they will commence construction of a road on their properties identified as MN/III/10914, 10932, 10950, 10951, 10952 and 3917.
2. Alongside the plaint, the Applicants filed a notice of motion dated 4/6/2024, which is the subject of this ruling. The motion is expressed to be brought under Articles 40 and 159 of the Constitution; Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act; and Order 40, Order 51 rules 1, 3 and 4 of the Civil Procedure Rules. The orders sought therein are framed as follows: -
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of this suit, this court be pleased to issue an order of permanent injunction restraining the Respondent by himself, employees, agents and/



or anyone claiming under him from interfering in any way by digging, excavating and so disrupting in any way the Applicants' business places.

4. The costs be provided for.
2. The application is founded on the grounds set out at the foot of the motion and supported by the affidavit sworn on an even date by the 1<sup>st</sup> applicant, John Kiura Wilson, wherein he stated that he is a tenant having rented a shop at Majengo Kanamai area. That the Respondent is constructing the Mombasa-Malindi highway which passes through his and some other shops. He deposed that despite having consultative meetings with the Respondent regarding compensation of their businesses, the latter has been evading the issue. The Applicant stated that no valuation of their businesses or assessment has been done as is expected, thus they stand to suffer loss. He indicated that the Applicants are not in objection to the construction, however the same should not disadvantage them.
3. There is an affidavit of service on record. It was sworn on 24/7/2024 by Mr. Birir, counsel for the Applicants. The same establishes that the Respondent was served via email on 19/7/2024. However, as at the time of writing this ruling, the Respondent had neither entered appearance nor filed a response to the application.
4. The application was heard by way of written submissions. I have keenly considered the submissions presented to me by the Applicants. I find that the only issue for determination is whether this court should issue a permanent injunction restraining the Respondent by himself, employees, agents and/or anyone claiming under him from interfering in any way by digging, excavating and so disrupting in any way the Applicants' business places.
5. I must first state that as much as the application is not opposed, it does not mean that it will automatically succeed. The Applicants have a duty to substantiate their claim. (See the Supreme Court in *Gideon Sitelu Konbellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR)
6. As already established, the Applicants instituted this suit against the Respondent for inter alia order of permanent injunction restraining the Respondent from interfering with their business places without adequate compensation. It is also clear that the motion is seeking a similar permanent injunction pending the hearing and determination of the suit.
6. In respect to the substantive order (3), upon my consideration, I note that the same is essentially a prayer for a temporary injunction pending the determination of the suit.
7. This court is therefore charged with the mandate to consider whether the applicants have established a case for the grant of injunction at this interim/interlocutory stage.
8. In *Giella v Cassman Brown* [1973] EA 358 the guiding principles on such applications were set out as follows: -
  - i. The applicant must show a prima facie case with a probability of success.
  - ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
  - iii. When the court is in doubt it will decide the application on a balance of convenience.
9. These principles were restated by the court in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR. The court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it is not enough that the Appellants establish a prima facie case, they must further successfully establish irreparable injury, that is, injury for



which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. On the contrary, where no prima facie case is established, the court need not consider irreparable injury or balance of convenience.

10. The same court adopted the definition of a prima facie case established in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 as follows: -

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

11. The court added that: -

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Appellants need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant’s case is more likely than not to ultimately succeed.”

12. Have the Applicants in this case therefore, established a prima facie case? I think not. This is because, no document in form of a lease or whatsoever was exhibited to demonstrate that the Applicants are indeed in occupation as tenants in the premises alleged to be interfered with by the Respondent. There is also no supporting document to show that the named Applicants are entitled to compensation as claimed. In the given circumstances, I am hesitant to grant the injunction sought at this stage.

13. The outcome is that the application dated 4/6/2024 is unmerited, it is dismissed with no orders to costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Mr Amarati for the Respondent
2. Mr Birir for the Applicants

