



Kelly & 4 others v County Government of Kajiado & 4 others; National Land Commission & 3 others (Interested Parties) (Environment and Land Petition E006 of 2023) [2025] KEELC 5677 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND PETITION E006 OF 2023**

LC KOMINGOI, J

JULY 31, 2025

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 31, 40 AND 47 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015 AND IN THE MATTER OF THE LAND ACT AND IN THE MATTER OF THE WATER ACT

BETWEEN

**KENNETH SENTEU OLE KELLY 1ST PETITIONER
SALOME NASERIAN SULULU 2ND PETITIONER
MICHAEL MBUGUA NJOGU 3RD PETITIONER
JOSEPH KINYANJUI KIMONDO 4TH PETITIONER
ROBERT MWENDA GERALD 5TH PETITIONER**

AND

**COUNTY GOVERNMENT OF KAJIADO 1ST RESPONDENT
SUB COUNTY ADMINISTRATOR, LOITOKTOK SUBCOUNTY 2ND
RESPONDENT
LERRA SURUPE 3RD RESPONDENT
KOYAN SURUPE 4TH RESPONDENT
CHIEF LEJESU 5TH RESPONDENT**

AND

**NATIONAL LAND COMMISSION INTERESTED PARTY
WATER RESOURCES AUTHORITY INTERESTED PARTY
COUNTY LAND REGISTRAR, KAJIADO INTERESTED PARTY**



NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

RULING

1. This Ruling is in respect of the Notice of Motion dated 11th March 2024. It is brought pursuant to Rule 3 (1) & (2) of the High Court (Practice & Procedure) Rules, Rules 13, 19 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and all other enabling provisions of the law. It seeks Orders that;
 - i. This Honourable Court be pleased to grant a temporary injunction restraining the Respondents, their agents, servants or assignees from evicting the 5th Applicant, accessing, dealing with, trespassing or howsoever interfering with parcel of land number Loitokitok/Emperon/4011 pending the hearing and determination of this Application.
 - ii. This Honourable Court be pleased to grant a temporary injunction restraining the Respondents, their agents, servants or assignees from evicting the 5th Applicant, accessing, dealing with, trespassing or howsoever interfering with parcel of land number Loitokitok/Emperon/4011 pending the hearing and determination of this Application.
 - iii. This Honourable Court be pleased to grant a temporary injunction restraining the Respondents, its agents, servants or assignees from further accessing, dealing with, trespassing or howsoever interfering with parcels of land numbers Loitokitok/Emperon/4016, Loitokitok/Emperon/2919 and Loitokitok/Emperon/4013 pending the hearing and determination of this suit.
 - iv. The costs of this Application be borne by the Respondents.
2. The grounds are on face of the application. The same is supported by the sworn Affidavit of Robert Mwanda Gerald. He states that the Petitioners/Applicants own the following pieces of land: Loitokitok/Emperon/4011 registered to the 5th Petitioner Robert Mwanda Gerald; Loitokitok/Emperon/4016 registered to the 1st Petitioner Kenneth Sentu Ole Kelly; Loitokitok/Emperon/2919 registered to the 2nd Petitioner Salome Naserian Sululu and Loitokitok/Emperon/4013 registered to the 3rd Petitioner Michael Mbugua Njogu situated in Shurie in Kuku ward of Kajiado South constituency.
3. He states that they had been peacefully residing and farming on their respective parcels until sometime in February 2023 when the Governor Kajiado County visited the area, held a public forum and ordered all persons living along and around Nolturesh Water Catchment area to vacate their land or be evicted. A few days later, the 1st -4th Petitioners' fences and houses were demolished and the crops and tress thereon cut down. It is their case that the land has now converted to grazing fields. Officers of the 1st Respondent also entered the 5th Petitioner's parcel and erected beacons thereon.
4. The Petitioners claim that Nolturesh region has never been gazetted as a water catchment area or riparian land and if the Respondents wanted to acquire the property, then due procedure for compulsory acquisition ought to be followed. He added that he had planted exotic trees and plants on the suit property and he would suffer damage if the reliefs sought were not granted.
5. The 1st and 2nd Respondents in their Replying Affidavit sworn by James Ngugi contested the application on grounds that the Court was being called to condone an illegality by allowing the



Petitioners to continue their encroachment on riparian land, the Petitioners had not demonstrated how their rights had been violated and the Petition had not met the threshold for a Constitutional Petition.

6. The said Respondents claim that the suit properties border Nolturesh River which is among the largest fresh water source in Kajiado County. Further that due to human activity, the river had been heavily contaminated and depleted following encroachment of riparian reserve. They acknowledged that on 2nd February 2023, during a public forum, those who had encroached on the water sources were ordered to remove their offending structures and stop the farming activities. The Respondents then undertook inspection and discovered that there were twelve (12) illegal homesteads along the riparian reserve. They were asked to demolish their structures. The Respondents further claim that eleven (11) of the twelve homesteads complied, save for the 5th Petitioner/Applicant who refused to comply.
7. It is their case that compulsory acquisition applies to private land, but the Petitioners had encroached on public land. That the issue of compulsory acquisition could not arise in this case. They further stated that the 5th Petitioner had acknowledged that he had structures and plants on the suit property which was contrary to Section 42 of the Environmental Management and Coordination Act and Rule 6(c) of the Environmental Management and Coordination (Water Quality) Regulations, 2006 for being on riparian land. They also acknowledged having erected beacons on the riparian reserve to prohibit and control its use as authorised under Section 56(a) *Physical and Land Use Planning Act*.
8. It was also contested that the Petitioners had not set out with a reasonable degree of precision the infringement of their Constitutional rights claimed pointing that the right to property was not absolute and could be limited in instances where it was prejudicial to the public or the environment.
9. It is their case that, the Petitioners had come to Court with unclean hands and were undeserving of the orders sought.
10. The other Parties did not file their responses.
11. The Application was canvassed by way of written submissions.

The Petitioners/Applicants Submissions

12. On whether the Petitioners/Applicants were entitled to the injunctive relief sought, counsel submitted that the Applicants had established a prima facie case for grant of orders of interim injunction because they had established a prima facie case. Counsel argued that the contention between the Applicants and the Respondents on the ownership of the suit properties, meant that there was a prima facie case that needed to be determined and the suit properties should be protected. Reference was made to the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) which held that it was not necessary to establish title in order to meet the threshold of a prima facie case. That the Applicant need only demonstrate a clear and unmistakable right that is threatened by material acts of the respondent...
13. On whether the Applicants stand to suffer irreparable loss, Counsel argued that the 1st Respondent acknowledged that they had entered into the Applicants suit properties as well as the 5th Applicant's property and erected beacons thereon. Counsel submitted that even if the Applicants were illegally occupying public land, Section 152B, C, G, I of the *Land Act*, 2012 (Revised edition, 2019) provided statutory mechanisms for eviction. Therefore, the 1st Respondent's admissions were blatant disregard of the Petitioners' constitutional and statutory property rights and no damages could adequately compensate the deliberate violation of mandatory statutory obligations.



14. On whether the Applicants had demonstrated that the balance of convenience was in their favour, counsel submitted that the Applicants had established they had a prima facie case and that they were at risk of suffering irreparable damage. As such, their inconvenience would be greater than the Respondents' inconvenience citing Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR).

The 1st and 2nd Respondents' submissions

15. Counsel for the 1st and 2nd Respondents submitted on the following:
16. On whether this suit was competent as held by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, counsel submitted that the jurisdiction of this Court was being misrepresented and the doctrine of Constitutional avoidance should be invoked, because this was an ordinary dispute which was being raised as a Constitution Petition. Reference was also made to these other cases to support this argument: Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others [2021] eKLR and Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR.
17. Counsel also added that the issue of trespass should not resort to a Constitution Petition as held in Gathara v Athi Water Works Development Agency & 2 others [2022] KEELC 12633 (KLR).
18. If the Court was inclined not to strike out the suit, were the Applicants entitled to the injunctive relief sought? Counsel submitted that they were not because they did not establish the grounds established under Giella vs. Cassman Brown. This is because, the Applicants had not established a prima facie case because they had not shown any infringement if a right because they were on riparian land and activities on riparian land were prohibited by Section 42 of Environmental Management and Coordination Act and Article 62(2) of *the Constitution*. It was further submitted that the 1st Respondent had the right to prohibit and control the use and development of buildings in its area as per Section 56 of the Physical Land Use and Planning Act and the 1st Respondent was thus discharging its mandate in prohibiting encroachment on Nolturesh reserve. The application should thus be declined citing Aloys Mataya Moseti vs National Environment Management Authority & Another [2020] eKLR, Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR and Naftali Ruth Kinyua v. Patrick Thuita Gachure & Another (2015) eKLR.
19. On whether the Applicants would suffer irreparable loss and damage, counsel submitted that this had not been demonstrated and the 1st Respondent could adequately compensate the Applicants should the suit succeed. Reference was made to Gehlot & Another v. African Banking Corporation Limited [2022] KEHC 96 (KLR) and Hassan Huri & another v Japhet Mwakala [2015] KECA 637 (KLR).
20. On the issue of balance of convenience, counsel submitted that as per Kipchirchir Kogo v. Frank Kimeli Tenai [2018] eKLR, the Applicants must demonstrate that the inconvenience caused to them would be greater than that caused to the Respondents if the injunction is not granted. But in the circumstances at hand, there is no harm or any inconvenience that will be suffered by the Applicants if the injunction is not granted.
21. Therefore, the application should be dismissed with costs.

Analysis and Determination.

22. I have considered the Notice of Motion, the Affidavit in support, the responses thereto, the written submissions and the authorities cited. The issues for determination are;



- i. Whether the Petitioners/Applicants application meets the threshold for grant of temporary injunction.
 - ii. Who should bear costs of the Application?
23. The principles guiding the grant of temporary injunction were laid down in the case of *Giella Vs. Cassman Brown & Co. Ltd* (1973) EA 358.
- The Court of Appeal reaffirmed these principles in *Nguruman Limited Vs. Jan Bonde Nielsen & Others* (2014) KECA 606 KLR where it emphasized that the three conditions for the grant of interlocutory injunction are sequential. The Applicant must demonstrate;
- i. the existence of a prima facie case with a probability of success;
 - ii. that he stands to suffer irreparable harm that cannot be adequately compensated by an award of damages; and
 - iii. if the court is in doubt, the application should be decided on a balance of convenience.
24. It is the Petitioners/Applicants case that they are registered owners of the parcels of land; Loitokitok/Emperon/4011, 4016, 2919 and 4013 respectively.
- That the 1st Respondent has intention of evicting them from the said parcels on the ground that they have encroached on Nolturesh water catchment area.
25. The 1st/2nd Respondents on the other hand claim that the Petitioners/Applicants have encroached on riparian land as their parcels border Nolturesh River which is the largest fresh water source in Kajiado County.
26. I have considered the rival positions and I find that there is need to establish how the Titles held by the Petitioners/Applicants were acquired. This can only be established by tendering evidence. Until this is done the titles held by the Petitioners/Applicants are indefeasible.
27. There is also need to establish whether Nolturesh Water Catchment area is gazetted. This again can be established by way of evidence. The fact of encroachment on riparian land would also have to be proved.
28. The Petitioners/Applicants case is pegged on the Right to property and the Rights for Administration Action.
29. However, I am not convinced that they stand to suffer irreparably if they are asked to stay away from riparian land.
- The Petitioners will have to prove that they have not interfered with riparian land.
- The 1st and 2nd Respondents are however directed to allow the 5th Petitioner to harvest his crops if any.
30. In conclusion I find no merit in this application and the same is dismissed. The costs will abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31ST DAY OF JULY 2025.

L. KOMINGOI

JUDGE.

In The Presence Of:



Mr. Kirimi for the Petitioners.

Mr. Otieno for the 1st, 2nd Respondents.

Ms. Nekesa for Ms. Majune for the 4th Interested Party.

Court Assistant – Mutisya.

