Wainaina v National Land Commission & another (Environment and Land Case E172 of 2024) [2025] KEELC 5893 (KLR) (6 August 2025) (Ruling)

Neutral citation: [2025] KEELC 5893 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE E172 OF 2024

JG KEMEI, J

AUGUST 6, 2025

BETWEEN

CHEGE WAINAINA ..... PLAINTIFF

AND

THE NATIONAL LAND COMMISSION ..... 1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2ND DEFENDANT

RULING

1. This Ruling is in respect of the Plaintiff's application dated 29/4/2024. The application is anchored on the provisions of Articles 27 (1) (2) (4) & 40 (3) (b) (i) of *the Constitution*, Section 111 & 115 (1) of the *Land Act* and Section 1A, 1B & 3A of the *Civil Procedure Act* as well as Order 40 Rule 2 of the Civil Procedure Rules, 2010. Substantively, the Applicant seeks the following orders;

    a. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order restraining the Respondents, their officers, servants, agent or anyone acting on the Respondent's behalf from taking possession or entering, encroaching, trespassing, working on, constructing, using, acquiring or in any manner interfering with part or whole parcel of land known as Dagoretti/Kinoo/4732 belonging to the Applicant without clearing the balance of the award for the said land and the developments thereon all totaling to a sum of Kshs. 34, 453,665/= together with interest at commercial rates from the date of award until payment in full.

    b. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue an order restraining the Respondents, their officers, servants, agents, or anyone acting on the Respondents' behalf from taking possession or entering , encroaching, trespassing, working on, constructing, using, acquiring or in any manner interfering with part or whole parcel of land known as Dagoretti/ Kinoo/4732 belonging to the Applicant without clearing

the payment for the lost earnings in the sum of Kshs. 35,389,000/= together with such other lost earnings in full.

c. That pending the hearing and determination of this suit, the 1st Respondent be restrained from acquiring the suit property on behalf of the 2nd Respondent.

d. That Costs of the application be awarded.

2. The application is premised on the grounds on the face of it and the further supported by the Affidavit of Chege Wainaina, the Plaintiff herein, sworn on the 29/4/2024. The Plaintiff avers that he is the registered proprietor of the suit property known as Dagoretti/Kinoo/4732 and has developed shops and residential flats that are rented out. The deponent states that the suit property was earmarked for demolition to pave way for the construction (expansion) of A104 James Gichuru Junction-Rironi Junction. Subsequently, a Gazette Notice, Number 810, was published for the acquisition of an area measuring 0.0205 of the suit property.

3. He deposes that vide the letter of Award dated 23/7/2020 by the Directorate of Valuation and Taxation he was awarded Kshs. 128,492,580/= as compensation for the section of the property the Respondents intended to acquire. That on 21/10/2020, the 1st Respondent thereafter paid him a sum of Kshs. 94,038,915/= in partial settlement of the award leaving a balance of Kshs. 34, 453,665/=. That despite numerous requests, the Respondents have failed and/or refused to pay the outstanding sum despite acknowledging the debt vide their letter dated 18/08/2022.

4. He avers that he has suffered and continues to suffer damage for loss of income as the tenants vacated the units developed thereon after the earmarking of the building on the suit property. That at the time of gazettement, he was earning a rental income of Kshs. 948,000/=. He asserts that from October 2020 and the time of swearing the Affidavit therein, he had suffered a loss of Kshs. 35,389,000/=.

5. The Plaintiff/Applicant argues that owing to the Respondents actions, he is apprehensive that the Respondents are likely to take possession of the suit property without making the full payments as agreed and as provided in law. He urges the Court to grant the orders sought.

1st Defendant/Respondent's Replying Affidavit

6. The 1st Respondent opposed the application vide the Replying Affidavit of Brian Ikol, its Director Legal Affairs sworn on 2/12/2024. The deponent avers that the 1st Defendant, pursuant to Article 40 of *the Constitution* and Chapter VIII of the *Land Act*, received a request from the 2nd Respondent, being the acquiring authority, instructed the 1st Defendant to compulsorily acquire the suit property for the construction on the James Gichuru Junction- Rironi Junction Project. In compliance with Chapter VIII of the *Land Act*, the 1st Defendant published a Notice of Inquiry and that upon completion of the inquiry, the Plaintiff was issued with an award of Kshs. 128, 492,590/=.

7. The deponent avers that in accordance with the procedure provided under Section 111 (1) (A) of the *Land Act*, they requested for funds from the 2nd Respondent being the acquiring authority. That the 2nd Respondent only forwarded a sum of Kshs. 94,038, 915/= which was paid to the Plaintiff. That the 2nd Respondent is however yet to avail the outstanding sum of Kshs. 34,453,665/= hence the 1st Respondent's "hands are tied." The Deponent therefore urges the Court not to issue any orders against the 1st Defendant.

8. The 1st Defendant filed a Further Affidavit dated 9/5/2025 sworn by Isabel Njeru, its Chief Valuation and Taxation Officer. The deponent avers that the 1st Defendant never carried out any activities at the project site neither is it in actual possession of the suit parcel to warrant the issuance of the orders

sought against it. That in any event, the 1st Defendant is yet to issue a notice of taking possession as required under Section 120 of the *Land Act*.

9. The deponent further avers that since compensation deposit has already been paid, the Court to consider an alternative remedy to enforcing the payment of the outstanding sums as opposed to halting the process of acquiring the subject property.

The 2nd Respondent's Replying Affidavit

10. On its part, the 2nd Respondent opposed the application vide the Replying Affidavit of Dr. Athony Kusima sworn on 14/07/2025. The deponent confirms that indeed the suit property was compulsorily acquired for the stated project. That the suit property was duly valued and the Plaintiff awarded a sum of Kshs.128, 492,580/=. He acknowledges that although the Plaintiff was paid, there is an outstanding balance of Kshs. 34, 453,655.50/=.

11. The deponent deposes that the Plaintiff's assertion that he is likely to suffer irreparable harm is unsubstantiated as he can be compensated by way of damages. He contends that the Applicant has not demonstrated how delayed payment warrants the extraordinary remedy of injunctive relief. He further avers that the balance of convenience favors the 2nd Respondent, a public entity mandated to oversee critical infrastructure projects, hence granting the injunctive relief would paralyze the 2nd Defendant's operations and impede public interest projects.

12. The deponent avers that the 2nd Respondent's budgetary allocations are dependent on the disbursement of funds by the National Treasury. That unfortunately, due to financial constraints, funds are not being remitted hence the 2nd Respondent is unable to pay the outstanding sums. He argues that the application is not merited hence should be dismissed with costs.

The written Submissions

13. The Court directed that the application be canvassed by way of written submissions. Parties complied. The Plaintiff/Applicant's submissions are dated 1/4/2025 whereas the 1st and 2nd Defendant/ Respondent's submissions are dated 14/5/2025 and 15/7/2025 respectively. The Court has had the opportunity to read through and considered the said submissions.

Analysis and Determination

14. I have considered the pleadings, evidence, the Notice of Motion, the affidavit in support and response thereto, the rival submissions and the authorities cited. The issues for determination are:

    a. Whether Applicants' is entitled to the orders sought.

    b. Who should bear the costs of this application?

Whether Applicant's is entitled to the orders sought.

15. Article 23 of *the Constitution* specifically identifies an order of injunction as one of the reliefs that a Court can grant if it is satisfied that a person's right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened.

16. This Court is further guided by Section 63 of the *Civil Procedure Act* and order 40(1) of the Civil Procedure Rules, 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) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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."

17. The principles to determine the threshold for temporary injunction are well enunciated in Giella –vs- Cassman Brown (1973) EA 358 to the effect that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.

18. This position was also reiterated in Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others CA No 77 of 2012, where the Court stated that:

> "In an interlocutory injunction application, the Applicant has to satisfy the three requirements to;
>
> a. Establish his case only at a prima facie level,
>
> b. Demonstrate 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"

19. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86.

20. If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the Applicant to injunction directly without crossing the other hurdles in between.

21. Has the Applicant made out a prima facie case with probability of success? In the case of Mrao Ltd-v-First American Bank of Kenya Limited & 2 Others (2003) KLR 125, a prima facie case was described 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."

22. In the present case there is no dispute that the Applicant is the proprietor of the suit properties. It is also a common ground that the Respondents have expressed their intention to compulsorily acquire a section of the suit property for public use, namely road expansion. Indeed, it is not in dispute that awards have been made by the Respondents to the Applicant and partial compensation made to that effect of the said parcels of land. The Respondents have in fact acknowledged that a sum of Kshs. 34, 453,655.50/= is still outstanding and owed to the Plaintiff/Applicant. It is clear to me therefore, that the Applicant's claim is one of the delayed payment of the balance of the compensation sums.

23. Having regard to all the material presented by the Applicant and the Respondents, I am satisfied that the Applicant has established a prima facie case with a probability of success. Article 40 of *the Constitution* of Kenya protects rights to property and the state can only deprive an individual of that right under circumstances specifically provided in law. A registered proprietor whose property by way of compulsory acquisition is entitled to a just and prompt compensation at the fair market price.

24. The Applicant avers that unless the orders sought are allowed, it stands to suffer irreparable injury. He avers that he has suffered and continues to suffer damage for loss of income as the tenants vacated the units developed thereon after the earmarking of the building on the suit property. The 1st Respondent submits that it is yet to issue any notice of intention to take possession of the suit property in accordance with Section 120 of the *Land Act*, which provides:

> "After an award has been made, the Commission may take possession of the respective land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county government as the case may be, provided that such taking of possession will not result in persons being rendered homeless".

25. I agree with the 1st Respondent's argument that in the absence of such a notice, the Respondents are yet to take any steps to physically occupy, develop, or otherwise interfere with the suit land. The Plaintiff/Applicant is therefore not at risk or imminent threat of being unlawfully disposed of his property.

26. Irreparable harm or injury must be one that cannot be adequately compensated in damages. The 2nd Respondent has stated that it remains willing to pay the debt once the funds are available. In my considered view, the Plaintiff/Applicant has not demonstrated that he is likely to suffer irreparable harm or injury.

27. As for the balance of convenience, if I had doubt, would be against hindering the construction of the road; a project that is for the benefit of the wider public. In any event, the Plaintiff/Applicant has already received a significant partial payment as compensation. With the Respondents' undertaking that they shall clear the balance and the greater public interest, the balance of convenience tilts in not granting the injunction. In my view the Plaintiff/ Applicant has therefore failed to meet the threshold for the grant of the orders sought.

28. Final Orders for Disposal

    a. The upshot is that the Notice of Motion dated 29/4/2024 lacks merit.

    b. It is hereby dismissed with costs to the Respondents.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF AUGUST, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

Mr. Dennis Maina for the Applicant

NA for the 1st Respondent

Mr. Muhoro HB for Mr Ogembo for the 2nd Respondent

CA- Ms. Yvette Njoroge