



Mwatela & 2 others (Suing as Officials of the Isangwaishi Development Community Land Management Committee) v Mghazo & 2 others (Environment & Land Case E004 of 2023) [2024] KEELC 141 (KLR) (Environment and Land) (23 January 2024) (Ruling)

Neutral citation: [2024] KEELC 141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E004 OF 2023
NA MATHEKA, J
JANUARY 23, 2024**

BETWEEN

**HON. CALIST MWATELA 1ST PLAINTIFF
TOLE MWAKIDEDI 2ND PLAINTIFF
MARY WADERO 3RD PLAINTIFF
SUING AS OFFICIALS OF THE ISANGWAISHI DEVELOPMENT
COMMUNITY LAND MANAGEMENT COMMITTEE**

AND

**NANCY MGHAZO 1ST DEFENDANT
ERNEST MWAKIRETI KISOCHI 2ND DEFENDANT
ELIJAH MWAZUGHA 3RD DEFENDANT**

RULING

1. The application is dated 26th October 2023 and is brought under Order 40 Rule 2 and 4 & 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Section 152B & 152E of the *Land Act* No. 6 of 2012 and Article 159 of *the Constitution* of Kenya, 2010 seeking the following orders;
 - (1) That Isangwaishi Development Community is the Bonafide and Registered owner of all that property known as Bura/Isangaiwishi Scheme/19.



- (2) That the Honorable court be pleased to issue orders of eviction of the Respondents/Defendants from all that parcel of land known as Bura/Isangaiwishi Scheme/19 and for vacant possession of the property to be delivered to the Plaintiff/Applicant.
 - (3) That pending the hearing of this application, this Honourable Court be pleased to issue a Permanent Injunctive Order restraining the Respondents by themselves, servants, employees, agents or any Other persons acting under instructions of their Interests from entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as Bura/Isangaiwishi Scheme/19.
 - (4) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an injunctive order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests from entering, remaining, trespassing or in any other manner interfering with all that parcel of land as Bura/Isangaiwishi Scheme/19.
 - (5) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of status quo against the Defendants that they should not trespass nor benefit from the suit property.
 - (6) That the Plaintiff/Applicant be allowed to access the land for the purposes of surveying and demarcating the land in accordance with the community needs.
 - (7) That an order be issued directing the that the Taita Taveta County Commandant, The Officer Commanding Police Division Taita Taveta and the Officer Commanding Station Mwaktau Police Station to supervise, provide security and enforce the order (3,4,5,6&7) by compelling the Defendants to exit from the suit property.
 - (8) That the costs of the suit be provided for.
2. It is based on the grounds that the suit property Bura/Isangaiwishi Scheme/19 in this matter belongs to the Applicant/Respondent. That the land that the Defendants have trespassed, encroached and illegally personalized belongs to the community registered under the Plaintiff/Applicant details. That the Respondents/Defendants were served with a notice to vacate. The Plaintiff/Applicant has followed up with Mwaktau police station and also informed the OCS of the eviction notice that was issued to the Respondents/Defendants. The Respondents/Defendants have ignored all notices served upon them by the Plaintiff/Applicant that they should vacate the premises.
 3. This court has considered the application which is unopposed. The Applicant seeks orders of eviction of the Respondents/Defendants from all that parcel of land known as Bura/Isangaiwishi Scheme/19 and for vacant possession of the property to be delivered to the Plaintiff/Applicant.
 4. A mandatory/permanent injunction is ordinarily granted after a full hearing and when all the evidence has been adduced and all facts have been established. In the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* (2018) eKLR it was held inter alia as follows;

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction



since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."

5. When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR when it rendered itself thus;

"the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, Air 2003, Gupta, J. of the Delhi High Court observed as follows:

"While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things."

6. For the foregoing reasons, I find that it would be premature for me to grant final orders at this interim stage in favour of the Applicants. The Applicants state that the suit property Bura/Isangaiwishi Scheme/19 in this matter belongs to the Applicant/Plaintiff and the Defendants have trespassed and encroached. The court needs to consider all the evidence in this matter before making any mandatory orders. Parties are advised to comply with Order 11 and set the suit down for hearing on a priority basis and in any event within the next 30 (thirty) days. There will be no orders as to costs as the application was not defended.

7. It is so ordered.

DATED, SIGNED AND DELIVERED, ELECTRONICALLY VIA EMAIL THIS 23RD DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

