



**County Government of Meru & another v M'Mbijiwe (Acting as the legal representative of the Estate of the Late Hon Kabeere M'Mbijiwe) & 2 others; Tana Water Services Board (Interested Party) (Environment and Land Case E011 of 2023) [2024] KEELC 67 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 67 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND CASE E011 OF 2023**

**CK NZILI, J**

**JANUARY 17, 2024**

**BETWEEN**

**THE COUNTY GOVERNMENT OF MERU ..... 1<sup>ST</sup> PLAINTIFF  
MERU WATER AND SEWERAGE SERVICES REGISTERED  
TRUSTEES ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KINYUA M'MBIJIWE ((ACTING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF THE LATE HON KABEERE M'MBIJIWE) ..... 1<sup>ST</sup> RESPONDENT  
SOLUTION SACCO SOCIETY LTD ..... 2<sup>ND</sup> RESPONDENT  
KEYSIAN AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**TANA WATER SERVICES BOARD ..... INTERESTED PARTY**

**RULING**

1. By an application dated 30.11.2023, the court is asked to issue interim orders of injunction and inhibition barring and restraining the defendants/respondents from interfering with actual possession, occupation, disposal, or dealing by way of advertisement, making entries, transfers, disposition, or otherwise regarding LR No. Ntima/Igoki/2032/hereinafter the suit land pending hearing and determination of this suit.
2. The grounds are contained on the face of the application and supporting affidavit of Dr. Kiambi Atheru, the County Secretary of the 1<sup>st</sup> plaintiff, sworn on 30.11.2023. Briefly, the applicants aver that



the suit land was surrendered for public use by the 1<sup>st</sup> defendant's late father in the 1990s in exchange for Plot No. 51, known as Meru Municipality Block 11/99.

3. The plaintiffs/applicants aver the 2<sup>nd</sup> plaintiff/applicant is in actual possession of the suit Land as contracted by Tana Water Board to operate, maintain, and manage the water supply and sewerage services for Meru town residents and its environs.
4. The applicants aver the deceased failed to surrender the original title deed despite compensation as averred above and the extensive construction on the surrendered land as set out in the decree made in Meru ELC No. 28 of 2012, attached as annexures marked DKA "1" (a) & (b) respectively.
5. The plaintiffs/applicants aver that it has come to their knowledge that while the appeals were pending, the suit property was charged by the 1<sup>st</sup> defendant/respondent to the 2<sup>nd</sup> defendant/respondent as per a charge registered on 12.5.2020 according to the official search attached as DKA "2" yet the suit property was not available to the 1<sup>st</sup> defendant/respondent who has failed to repay the loan risking the suit property to be placed for auction sale.
6. The plaintiffs/applicants aver that they would suffer irreparable loss and damage if the suit premises were to be auctioned as per the annexure marked DKA ' 3".Further, the plaintiff/applicants' aver the application was brought with utmost faith and without unreasonable delay.
7. When the application came up before the court on 30.11.2023, the court directed that the matter be served for an inter-parties hearing on 4.12.2023 to address the court on jurisdiction. Counsel for the 1<sup>st</sup> respondent submitted that land was already inhibited by a decree issued by this court on 24.11.2023 and that the suit was res-judicata for the orders sought were already in place under the decree.
8. Counsel for the plaintiffs/applicants, on his part, told the court that the auction due on 30.11.2023, did not take place.
9. For a party to be entitled to a temporary order of injunction and inhibition, he has to establish a prima facie case with a probability of success show that there will be irreparable loss and damage that may not be compensated by way of damages and that the balance of convenience tilts in favor of granting the order sought.
10. In *Mrao Ltd v First American Bank* (2003) eKLR, the court observed that a prima facie case is established if, based on the material before the court, a right has been infringed to call for a rebuttal from the opposite party. The court said a prima facie case was more than an arguable case where it is not sufficient to raise issues but show an infringement of a right.
11. In *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR, the court said that in considering whether or not a prima facie case is established, the court does not hold a mini-trial and must not examine the merits of the case closely but only see whether the person applying has a right which has or is threatened with violation, the standard being on a balance of probability.
12. In *Pius Kipchirchir Kogo v Frank Kimeli* (2018) eKLR, the court said a prima facie case means that a serious question is to be tried in the suit. In *Banis Africa Ventures Ltd v National Land Commission* (2021) eKLR, the court defined irreparable injury as substantial, which may not be rendered or atoned for by damages. Further, in *Nguruman Ltd* (supra), the court said the three pillars of *Giella v Cassman Brown & Co Ltd* (1973) EA 358 must be surmounted sequentially, and if a prima facie case is not established, then irreparable damage and balance of convenience need not be considered.
13. In the application before the court, the interested party alleged to be the bonafide and legitimate owner of the suit land, which the 2<sup>nd</sup> plaintiff/applicant occupies as the managing agent.



- The 1<sup>st</sup> applicant/plaintiff says the 2<sup>nd</sup> plaintiff/applicant and the interested party have extensively developed the suit land though registered in the name of the 1<sup>st</sup> defendant/respondent with effect from 16.1.2020, who unlawfully and fraudulently took out a loan facility with the 2<sup>nd</sup> defendant.
14. The plaintiffs/applicants pray for a declaration that the land belongs to the interested party; hence, the loan was fraudulently obtained. The plaintiffs/applicants also pray for a permanent injunction against the defendants plus costs. Dr. Kiambi Atheru, who refers to Meru ELC Appeal No. 28 of 2012, has signed the verifying affidavit. He has not attached any authority to sue and plead from the 2<sup>nd</sup> plaintiff/applicant or the interested party. As part of the list of documents, the plaintiffs have attached a copy of the decree/judgment in Meru ELC Appeal No. 28 of 2012 issued on 24.11.2023 and 18.10.2023, respectively.
  15. The nexus between the 1<sup>st</sup> plaintiffs/applicants and the suit property has not been pleaded. The loss and damage the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs/applicant and the 2<sup>nd</sup> defendant are likely to suffer is defined. The copy of the official search attached shows that the 1<sup>st</sup> defendant became a registered owner on 8.6.2017 and charged the suit property to the 2<sup>nd</sup> defendant/respondent in 2020. If the plaintiffs were the owners of the land out of surrender in 1990, there is no evidence of what stopped them from effectuating the surrender between 1990 and 2017.
  16. This court on 15.3.2023 determined a similar application brought by the 2<sup>nd</sup> plaintiff/applicant in Meru ELC Appeal No. 28 of 2012. In paragraph 10 of the ruling, the court observed that the initial title for the suit land was issued on 13.7.2010, following which the 1<sup>st</sup> defendant's/respondent's late father obtained a loan with Barclays Bank Ltd and later on with Agricultural Finance Corporation up to 2006, when the title was discharged. Further, in paragraph 13 of the ruling, the court observed that after re-issuing the title deed on 10.1.2020, the 1<sup>st</sup> defendant obtained a loan from Resolution Savings and Credit Corporation Societies Ltd after a charge was registered on 2.5.2020 for Kshs.5,000,000/=.
  17. In the ruling, the 2<sup>nd</sup> plaintiff/applicant had sought to inhibit the title out of fear of an unserved loan. The court observed that there were stay orders since 13.3.2017.
  18. Moreover, the court noted that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, who had been parties in the appeals, were complacent yet knew there was such a crucial public investment in the suit Land. The plaintiffs/applicants knew that the original title deed had always been in the name of the 1<sup>st</sup> defendants/respondents since 2010 and so had used the title as security for the loan since 2012. In paragraph 15 of the ruling, the court noted that the plaintiffs knew the original proprietor passed on in 2017, but either ignored their rights or slept on them. The court nevertheless confirmed the existence of the stay orders.
  19. In the judgment delivered on 18.10.2023 the court dwelt on the issue of who owned the suit premises as per the [Land Act](#). The court observed that the status of the 1<sup>st</sup> plaintiff/applicant in the suit premises was ring-fenced by Sections 51, 53, and 55 of the [Water Act](#). The court pronounced itself on the title deed held by the 1<sup>st</sup> defendant/applicant as subject to the overriding domain rights held by the state under the [Land Act](#) and the [Constitution](#).
  20. The court also found that the issue of surrender of the suit land to the interested party following the change of governance structures in the water sector in 2006 and the coming into operation of the [Constitution](#) of Kenya 2010, had not been followed. The court, therefore, issued an inhibition order to last six months as the parties regularized the ownership process under Section 78 of the [Water Act](#).
  21. Aware of these orders and the decree, the applicants have filed this suit alleging fraud and dishonesty by the 1<sup>st</sup> defendant. In [Maina Kiai v IEBC](#) (2017) eKLR, the court observed *res judicata* as a public policy doctrine raised and upheld after the suit or issue was directly and substantially in issue in the



former suit, between the same parties or parties under which they or any of them claim the same title was heard and finally determined in the former suit by a competent court with finality. The court observed that res-judicata brings finality to litigation and prevents the wastage of court's time and resources in the endless road of litigation.

22. In this application, the plaintiffs/applicants were parties to the former suit alongside the 1<sup>st</sup> respondent. The issue of injunction and inhibition orders was heard and determined. There is already an inhibition order in favor of the plaintiffs/applicants, which they have extracted and registered against the title as per the official search attached as annexure DKA "2".
23. So, when this suit was filed on 30.11.2023, the plaintiffs knew there were subsisting court orders or decree in their favor, issued under Section 68 of the Land Registration Act. Again, the plaintiffs knew the issues raised in the plaint as to ownership of the suit premises had already been determined by this court.
24. The upshot is that I find the plaintiffs are re-litigating on similar issues in the application dated 30.11.2023 and in the plaint. This court finds that it lacks jurisdiction to revisit the issues guided by the caselaw of Accredo Ag & 3 others v Stefano Uccelli & another (2019) eKLR, which cited with approval John Florence Maritime Service Ltd & another v Cabinet Secretary for Transport & Infrastructure & 3 others (2015) eKLR, since res-judicata applies in equally measure to applications.
25. The court had already determined the parties' rights in the application dated 15.3.2023 and the judgment delivered on 18.10.2023. The 1<sup>st</sup> respondent/defendant knew of the existing orders of inhibition, and, by extension, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents/defendants. The orders have not been discharged, appealed against, or set aside.
26. The upshot is that I find the application incompetent, and so is the suit. The same is dismissed with no order as to costs.
27. File closed.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17<sup>TH</sup> DAY OF JANUARY 2024**

**HON. CK NZILI**

**JUDGE**

In presence of

Miss Muchomba for the Applicant

Mr. Mwanzia for the 1<sup>st</sup> Defendant

