Langat & another (Suing on Behalf of Talai Community Clan Organization) v National Housing Corporation (Environment & Land Petition 2 of 2023) [2024] KEELC 1515 (KLR) (21 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1515 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND PETITION 2 OF 2023

MC OUNDO, J

MARCH 21, 2024

IN THE MATTER OF THE PROPOSED CONSTRUCTION OF NHC KERICHO HOUSING SCHEMES IN KERICHO COUNTY.

AND

IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER (INTER ALIA) ARTICLES 10, 27, 28, 29, 41, 47, 227 AND 236 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF BREACH OF NATURAL JUSTICE

BETWEEN

DAVID KIPRONO LANGAT .... 1ST PETITIONER

NGENO K. KENET .... 2ND PETITIONER

SUING ON BEHALF OF TALAI COMMUNITY CLAN ORGANIZATION

AND

NATIONAL HOUSING CORPORATION .... RESPONDENT

RULING

1. By a Notice of Motion dated 9th October, 2023 which is brought under the provisions of Articles 2(2) and 23 of *the Constitution* of Kenya 2010, Rule 23 of *the Constitution* of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, and all other enabling provisions of the law, the Petitioners/Applicants herein sought for interim orders restraining the Respondent whether by themselves or agents from evicting the Applicants from, L.R. No. 631/1834-1883 and further restraining the Respondents from any dealings on the said parcels of land pending the hearing and

determination of the Petition and thereafter order for status quo be maintained in as far as occupation of the suit land was concerned. The Applicants further sought for orders that the court may deem just and expedient be issued as well as for costs of the application.

2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Ngeno K. Kenet, the 2nd Petitioner/Applicant who is also the Secretary of the Talai Community clan organization.

3. In summary the basis for seeking the above captioned orders was that on 9th October, 2023, the Respondent without an impute of the Petitioners herein, had entered onto the said parcel of land and had commenced clearing works with the intention to demolish their houses so as to construct housing units. That the land had been allocated to the Talai Community and had been occupied by over 200 families for over sixty (60) years.

4. That were the orders sought not granted, title would be issued in favour of the third parties to the detriment of the members of the Talai Community who had been internally displaced and resettled on the suit land.

5. In response and in opposition to the application, the Respondent through its Replying Affidavit sworn on 30th October, 2023 by Joshua Sanduk, its Land Surveyor deponed that the Petitioners/Applicants lacked the locus to file the Petition there being no evidence that they were officials of the Talai Clan Organization, not that they had authority to file the Petition on behalf of the said Talai Community Clan Organization.

6. That the purported letter of authority lacked a letterhead, was undated, was executed by undisclosed persons, and was devoid of any attached resolutions of the Committee.

7. That further, the supervisory power of the Court under Article 165(6) of *the Constitution* of Kenya had not arisen in the circumstances as the Respondent had not violated any of the Petitioners' rights or freedom.

8. That the suit land was not community land, owned by the Talai Community or allocated to the said community and no trust had been established by the County Government on their behalf as enumerated in Article 63 of *the Constitution* of Kenya.

9. That indeed the suit land had been illegally occupied by squatters made up of 5 families who had been allocated different parcels of land by Commissioner of Lands as depicted in annexures marked as 'JS 1 (a), (b), (c), (d) and (e). That as a state organ, the Respondent was the rightful proprietor of the suit land under Article 62 of *the Constitution* of Kenya, 2010.

10. That vide a letter Ref. No. 21350/XXIII/11 dated 26th June, 1991 by the Commissioner of Lands together with approved Part Development Plan (PDP), the Government of Kenya had reserved the suit land measuring 3.40 hectares in Kericho and had handed the same to the Respondent for housing development who now constituted the lawful owner of the suit land, formerly L.R No. 1834-1883 and now known as land parcel Number Kericho Municipality Block 4/420.

11. That public participation for the purposes of Environmental Impact Assessment (EIA) license had been conducted on 24th August, 2023, wherein the 1st Petitioner and the squatters had been in attendance as evidence from a copy of Minutes and the signature of the attendees dated 12th October, 2023 annexed and marked as JS 6(a) and (b).

12. That vide a lawful procurement process, the Respondent awarded M/S Venus (208) Engineering and Construction (the "Contractor") the tender to develop housing units, for a contract sum of

Kshs. 283,485,144.16/= and a scheduled completion period of 52 weeks wherein the contractor took possession of the suit land on 27th September, 2023, but the project initially set to commence on 11th October, 2023 had been halted by a status quo court order.

13. That the contractor had furnished the Respondent with performance bond of 10% of the contract sum and provided insurance for the work and the workers hence in the event of suspension of the project, the contractor may file a contractual claim against the Respondent at the expense of the taxpayers.

14. No eviction orders had been to 5 families currently squatting on the suit land and the implementation of phase one of the project would not affect any household, who shall be accorded 52 weeks to relocate or pending determination of the suit.

15. That the Petitioners/Applicants were undeserving of the orders sought in the Notice of Motion application as conditions under Order 40 of the Civil Procedure Rules and the guiding principles in the Giella v Cassman Brown case had not been met.

16. In response and vide a Supplementary Affidavit dated 14th November, 2023 and filed on 23rd November, 2023, sworn by David Kiprono Langat, the 1st Petitioner/Applicant herein, deponed that he was the Chairman of the Talai Community, and that the instant Petition was a public interest petition wherein he and the Secretary of the organization had been duly authorized to lodge the present petition as evidenced from the Authority Letter marked as DKL 1.

17. That whereas the Respondent had relied on a letter of Reservation dated 26th June, 1991 as proof of ownership, it was trite that such letter could not apportion ownership rights to land. That Laibon Removal Ordinance of 1934 had set aside Kericho Township Area, which comprised the suit land, for the Talai Community to reside on. Further, that a community land could not be encroached by developers without following due process and if at all the Respondent had been allocated the suit land, then the said allocation had been fraudulent and/or irregular.

18. He reiterated that the occupants of the suit land were members of the Talai Community who had been in occupation of the same from the time of allocation. That the Respondent had never been in occupation of the suit property and could not purport to displace the rightful occupants without following due process. That the court had jurisdiction to grant the orders sought to preserve the subject matter.

19. Directions were given that the application be canvassed by way of written submissions to which the parties complied and filed their respective submissions to which I shall herein summarize as follows:

Petitioners/Applicants Submissions.

20. The Petitioners/Applicants vide their written submissions dated 14th November, 2023 and filed on 23rd November, 2023 submitted that they had duly met the principles of granting the interim/conservatory orders as they had demonstrated a legal and equitable interest over the suit land. Reliance was placed in the decided case of Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR where the court had enumerated the principles for the grant of conservatory/interim orders.

21. On an arguable prima-facie case, the Applicants submitted that it was not in dispute that they were currently in occupation of the suit land pursuant to the Laibon Removal Ordinance of the year 1934. That a letter of Reservation relied upon by the Respondents could not confer any legal interest on the suit land. Reliance was hinged on the decision in the case of *Shiva Mombasa Limited v Kenya Revenue Authority* [2005] eKLR. Reliance was also placed on the Provisions of Article 40 (1) of *the Constitution*

to submit that the Respondent was not an exception to the constitutional provision on protection of property rights in its pursuit of Affordable Housing Scheme on the Applicants' property.

22. That were the orders sought not granted, the Respondent would proceed to evict the Applicants and erect illegal structures on the Applicants' property leading to a state of homelessness which was a nugatory aspect.

23. The Applicants further submitted that the public interest was in favour of allowing the orders sought because Kenya was a democratic society that believed in the rule of law and due process. That had the Respondent complied with the law, the instant dispute over the ownership of the suit land would not have resulted. But The Applicants concluded that they were at the mercies of the court hence they prayed that the interim/conservatory orders sought be granted as they had undertaken to fast track the hearing of the Petition.

Respondent's Submissions.

24. The Respondent vide its undated Written Submissions filed on 27th November, 2023 framed its issues for determination as follows:

    i. Whether the court should grant restraining orders against the Respondent in relation to the Suit Property.

    ii. Whether the orders of status quo previously granted on 12th October, 2023, ought to be vacated.

    iii. Costs of the Application.

25. On the first issue for determination as to whether the court should grant restraining orders against the Respondent in relation to the suit property, the Respondent submitted that the Applicants lacked locus standi to obtain the reliefs sought as they had failed to submit any valid authority, minutes or resolution to act on behalf of the squatters or the Talai Community Clan Organization. That it was trite that lack of the requisite capacity to bring a suit went to the root cause of a case, and without locus standi, the suit could not stand. Reliance was placed in the decided case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No. 464 of 2000.

26. On the reliefs sought in the instant application, the Respondent placed reliance on the celebrated case of *Giella v Cassman Brown* (1973) EA 358 on the conditions needed for grant of an interlocutory injunction. Reliance was placed on a combination of decisions in the case of *Mrao vs. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 on the definition of a prima facie case and Board of Management of *Uhuru Secondary School v City County Director of Education & 2 others* (sic) on parameters of what constituted a prima facie case in a Constitutional Petition, to submit that the material presented by the Applicants did not establish their right of ownership over the suit land or any allocation thereof of the Talai Community. Further reliance was placed on the provisions of Article 63 (3) of *the Constitution* to submit that the Applicants had fallen short of the legal definition of the community land contained therein.

27. The Respondents submitted that the Applicants had not demonstrated that the suit land had been registered in the name of the Talai Community Clan Organization or held in trust by the County Government of Kericho hence they had failed to establish a right which had allegedly been infringed by the Respondent. That conversely, the Respondent had articulated its lawful ownership over the suit land. Reliance was placed on the provisions of Article 62 (1) (b) of *the Constitution* on the definition of a public land to submit that the suit land was a public land, allocated by the Commissioner of Lands in the year 1991 for housing development programs. That following the resurvey and titling process as

had been detailed in its Replying Affidavit, the Respondent was the legal and indefeasible proprietor of the suit land now known as Kericho Municipality Block 6/420.

28. The Respondent further placed reliance on a combination of decisions in the case of *Ekaterra Tea Kenya PLC vs. Mokal Investment Limited & Another* ELC No. E014 of 2022 and *Esther Nugari Gachomo v Equity Bank Limited* [2019] eKLR to submit that the Applicants had deceitfully claimed that 200 families were currently occupying the suit land but had failed to disclose the squatters on the suit land some of whom possessed allotment letters to different parcels of land as had been detailed in the their Replying Affidavit. They thus submitted that the Applicants had failed the first test of establishing a prima facie case with a probability of success.

29. Regarding whether the Applicants stood to suffer irreparable harm which could not be compensated in damages, reliance was placed in the decided case of DR. Simon Waiharo Chege v Paramount Bank of Kenya Ltd, Nairobi (Milimani) HCCC No. 360 of 2001 to submit that the current occupants of the suit land were illegal squatters residing on public land. Further reliance was placed on the provisions of Section 134 (2) of the *Land Act* on the role of the National Government in settling squatters to submit that the National Government facilitates settlement programs for persons displaced by development projects. Further, that the Applicants had admitted that the National Land Commission had proposed recommendations for settlement of Talai Community under the advisory of the County Government. They thus submitted that were the interlocutory injunction not granted, adequate remedies were available to the squatters.

30. The Respondent placed its reliance in the decided case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR on the concept of balance of convenience to submit that the same weighed heavily in its favour. It reiterated that in addition to the process of obtaining the title documentations over the suit land, it had awarded a tender to M/S Venus (208) Engineering and Construction (the "Contractor") to develop affordable housing units, for a contract sum of Kshs. 283,485,144.16/=. That if the contractor was prohibited from undertaking the project, it would seek contractual claims against the Respondent and compensation for the machinery employed.

31. It was thus its submission that the inconvenience caused by the orders would not only prejudice it, but the contractor and the taxpayers as well, who shall cater for the contractual claims of the contractor. Further, that the Petitioners had not demonstrated any greater inconvenience.

32. On the second issue for determination as to whether the orders of status quo that had previously been granted on 12th October, 2023 ought to be varied, reliance was placed in a combination of decisions in the case of Nairobi Civil Appeal No. 33 of 2012, *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR and *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR, ELC Appeal No. 31 of 2020 to submit that the contractor had been in occupation of the suit land as of 27th September, 2023, prior to the order herein hence if the said order was not vacated, the Respondent would be prejudiced and exposed to hefty contractual claims by the contractor, payable at the taxpayers' expense.

33. The Respondent's further reliance was placed on the decided case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 93 others* [2015] eKLR, ELC Case No. 525 of 2013 to submit that the first phase of the development had been scheduled for completion over a period of 52 weeks and none of the squatters would be evicted as corroborated by the Report of the Site Visit dated 23rd November, 2023 thus creating ample time for their relocation.

34. On the costs of the Application, the Respondent's reliance was placed on the provisions of Section 27 of the *Civil Procedure Act* and the decided case of R*epublic v Rosemary Wairimu Munene, Ex-Parte*

Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2014 to submit that the Respondent was the successful party in the instant Application, having proved that the Applicants were not entitled to the reliefs sought hence it ought to be compensated for the trouble taken in defending the present case.

Determination.

35. The issue for determination by this court is whether the Applicants have established a prima facie case to enable this court grant them the interlocutory injunctive orders sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the case of *Giella vs. Cassman Brown* [1973] EA 358 which sets out the conditions that the Applicants needs to satisfy for the grant of an interlocutory injunction which is firstly establishing and demonstrating that they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

36. The principles for grant of conservatory orders were further outlined in *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others* [2015] eKLR as follows:

    ‘’a. The need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.

    b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.

    c. The Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.

    d. Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”

37. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicants, to issue temporary injunction against the Respondents restraining them whether by themselves or agents from evicting the Applicants from, L.R. No. 631/1834-1883 and further restraining them (Respondents) from any dealings on the said parcels of land pending the hearing and determination of the Petition. At this stage, the Court is only required to determine whether the Applicants are deserving of the orders sought. The Court is not required to determine the merit of the case.

38. I have considered all the material facts placed before me and find that the Applicants’ main ground for seeking interim orders against the Respondents was that vide the Laibon Removal Ordinance of 1934, the suit land had been set aside for the Talai Community to reside on wherein over 200 families had been in occupation of the said suit land for over 60 years. That there was therefore danger of their houses being demolished and them being evicted and rendered homeless should the court not grant orders sought.

39. It should not be lost that an injunction being an equitable remedy, if it is shown that the Applicant’s conduct does not meet the approval of a court of equity, it is trite that such a court may decline to grant the same. On this ground alone, the court would be entitled to dismiss the application.

40. Pursuant to issuing ex-parte interim orders of status quo on the 11th October 2023, on the 31st October 2023, the court had directed its Deputy Registrar to visit the suit land and thereafter file a ground status report.

41. On the 6th November 2023, the suit land was visited by the Deputy Registrar in the company of security personnel, the Petitioners and the officials of the Respondent herein as well as the Respondents Surveyor wherein it had been noted that the despite the Applicants not being in possession of any registerable documents of ownership to the suit land there were only 14 "mabati" iron sheet structures which were 4 meters apart and which had been occupied by the Applicants only. There was neither power connected nor piped water. Further that the beacons placed by the Respondents for the phase one project would not affect these structures as they were outside the parameters. That what was likely to be affected were three temporary built houses on the lower part of the land next to the river. That the Applicants' relatives had also been buried outside the parameters of the proposed phase one project. With this report in mind and the disposition by the Applicant that that the housing project would displace more than 200 families living there in, the court is left to consider whether Applicants were deserving an equitable remedy in form of an injunction.

42. In Moses Ngenye Kahindo vs. Agricultural Finance Corporation: HCC No. 1044/01, Nairobi Ringera J (as he then was) observed as follows:

> " And of course it requires no stressing that an injunction is a discretionary equitable remedy. If the Applicant's conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been".

43. I now turn to the point of determination as to whether or not the Applicants have demonstrated a prima facie case. A prima facie case was described as follows in the case of *Mrao v First American Bank* (2003) KLR 125;

> " ..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard that is higher than an arguable case."

44. As to whether the Applicant herein has demonstrated that he has a genuine and arguable case, I shall consider the provisions of Section 26 of the *land Registration Act* which obliges me to take a certificate of lease as conclusive evidence of proprietorship. The Applicants have not exhibited any document in their application to prove that they are the proprietors of any of the suit lands known as L.R. No. 631/1834-1883.

45. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Respondents' claim that the suit land herein is public land but the mere fact that the Applicants hold no title to the suit land is sufficient to lead the court to hold that the Applicant has not established a prima facie case and cannot therefore benefit from an order of injunction them not having demonstrated ownership of the property.

46. Indeed having found that the Applicants herein have not established a Prima facie case, I need not consider the other two conditions for the grant of temporary injunction as established in the Giella –vs- cassman Brown Ltd case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society* (2001) IEA 86 cited by Gitumbi,

J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed as follows:-

> " The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".

47. I have however one observation to make, which is that since the Applicants are in occupation of part of the suit land, and further that since the Respondent herein as well as the report filed by the Deputy Registrar of this court are in agreement that the Applicants are in occupation of part of the suit land that will not be affected by phase one of construction of the housing units that will provide affordable housing to the citizen of the Republic of Kenya, I find that the overriding public interest should thus take precedence and direct as follows;

    i. The Application dated the 9th October, 2023 is dismissed.

    ii. That the interim orders of status quo issued on the 11th October 2023 is herein vacated but shall and is hereby substituted with the order that the Respondent and the contractor proceed with phase one of construction of the housing units (which construction did not affect temporary structures erected on the suit land by persons currently thereon), while the Applicants herein remain on the suit land, pending the determination of the instant suit.

    iii. Costs to be in cause

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 21ST DAY OF MARCH 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE