



**Absaloms v County Government of Kisumu (Environment & Land Case
E009 of 2023) [2024] KEELC 1408 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E009 OF 2023**

E ASATI, J

MARCH 7, 2024

BETWEEN

WALTER JUMA ABSALOMS PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated 23rd August, 2023. The application seeks for orders that: -
 - a. A mandatory injunction be and is hereby issued to compel the Defendant to reconstruct and replace to the same condition as before and at its cost, the fence, concrete columns, markers and/or beacons placed on the perimeter of the property known as Kisumu/Nyamasaria Market/ 24 that have been damaged, destroyed and/or removed within a period of sixty days from the date of the order.
 - b. A prohibitory temporary injunction be and is hereby issued to restrain the Defendant, its agents, servants and/or employees from entering, occupying, remaining on, accessing, damaging or in any manner howsoever interfering with the Plaintiff's quiet and peaceful possession of the whole of the parcel of land known as Kisumu/Nyamasaria Market/ 24 pending the hearing and determination of this suit.
 - c. Costs of the application be borne by the Defendant.
2. The grounds upon which the application was brought are that the applicant is the registered owner of a lease hold interest in all that parcel of land known as Kisumu/Nyamasaria Market/ 24 (the suit property herein). That without any notice whatsoever or consent from the applicant, the Defendant through its agents and/or employees descended onto the Applicant's suit property and razed the mabati fence and all temporary structures thereon to the ground, removed, damaged and/or destroyed



concrete columns, markers and/or beacons that were placed by the Applicant on the perimeter of the suit property. That the unlawful actions of the Defendant are causing great distress and uncertainty as people unknown to the applicant and on the instruction of the Defendant have taken full possession and control thereof and that the Defendant's agents are likely to repeat their actions and remove, damage and destroy other parts of the perimeter markers of the suit property. That unless restrained by an order of the court, there is real danger that the defendant is likely to continue with its actions. That further, unless compelled by an order of this court to reconstruct and/or replace the damaged and/or destroyed concrete columns, marks and beacons, the applicant shall be prejudiced by the destruction of the physical evidence of the position and placement of the perimeter of the suit property before trial of the suit by the unlawful actions of the Defendant. That granting of the orders sought will ensure that the substratum of the suit remains unchanged and that both parties approach the hearing of the suit with all evidence intact and no one party has an unfair advantage over the other.

3. The application was supported by the averments in the Affidavit-in-Support sworn by Walter Juma Absalom on 22nd August, 2023 and the annexures thereto.
4. The application was opposed vide the grounds of opposition dated 18th September, 2023 filed on behalf of the Defendant. The Defendant's case is that the application is misconceived, lacks in merit and ought to be dismissed with costs. That the application does not meet the legal threshold for the grant of the orders sought. That the injunctive order sought, by its very nature, is in law incapable of being granted against the Government. That the applicant has come to court with unclean hands hence not entitled to the relief sought. That the applicant is in breach of the law regulating planning and development of land within the jurisdiction of the County Government of Kisumu hence is not entitled to the protection of the law. That the applicant's case as presented is not born out by the record before the court. That the suit property is part of public land reserved for use of the public as a market hence was not available for alienation for private use with the result that the legality of the title held by the applicant is under challenge.
5. In addition, the Defendant filed a Replying Affidavit sworn by Michael Abala Wanga on 23rd October, 2023 in opposition to the application.
6. The application was canvassed by way of written submissions.
7. It was submitted for the applicant that there are two issues for determination in the application, namely; whether the Replying Affidavit sworn on 23rd October, 2023 in response to the Notice of Motion offends the provisions of section 4(1) of the [Oaths and Statutory Declarations Act](#) and secondly, whether the prayers sought should be granted.
8. On the first issue, Counsel for the Applicant submitted that for all intents and purposes, an affidavit sworn before an unauthorized Commissioner is not capable of being received under Order 19 Rule 7 of the Civil Procedure Rules as it offends a provision of an Act of Parliament and does not represent a mere irregularity. Counsel relied on the case of [Caltex Oil Kenya Limited -vs- New Stadium Services Station Limited & Another](#) (2002)eKLR .
9. That the Replying Affidavit was sworn before Ms. Awuor Mariella on 23rd October, 2023 yet she is the Advocate acting for the Defendant on behalf of whom the Replying Affidavit was sworn. That the Affidavit offends the provisions of Section 4(1) of the [Oaths and Statutory Declarations Act](#). That this



is an incurable irregularity. Counsel further relied on the case of *Stephen Mogaka –vs- IEBC & Others* (2017)eKLR where the court held that;

“ All the Affidavits in the petition having been commissioned by an unauthorized person or contrary to the law are in my view defective. I accordingly strike out and expunge from the court records the Affidavit

10. On whether or not prohibitory injunction should issue, Counsel relied on the case of *Giella –vs- Cassman Brown & Co. Ltd.* (1973)EA 358 on the considerations that the court ought to take into account in deciding whether or not to grant an interlocutory injunction. Counsel submitted that the applicant has demonstrated a prima facie case with a probability of success. That the applicant being the holder of a lease in respect of the suit property has a right which has been threatened with violation. That as a proprietor of the suit land, the applicant enjoys protection of the law under article 40 (2)(a) and (b) of *the Constitution* and Section 26(1) of the *Land Registration Act*.
11. Relying on paragraphs 9 and 10 of the Supporting Affidavit, Counsel submitted that the applicant has demonstrated that he will suffer irreparable injury if the orders sought are not granted and that the balance of convenience tilts in favour of the applicant.
12. On whether or not a mandatory injunction should issue, Counsel submitted that the special circumstances of the case are that the absence of the suit property’s fence and ground marks and/or beacons revealing the true perimeter of the suit property will serve to adversely affect the applicant’s attempts at evidence and proving the limits and reach of the suit property thereby exposing the suit property to trespass and damage. Counsel prayed that the application be allowed.
13. On behalf of the Respondent, written submissions dated 23rd October, 2023 were filed by the Office of the County Attorney, County Government of Kisumu. Counsel submitted that while article 40 of *the Constitution* protects property rights, the said protection does not extend to property acquired unprocedurally. That the applicant acquired the land un-procedurally as he never complied with the conditions of the Letter of Allotment.
14. That the Plaintiff has failed to prove an arguable case as the suit property is public land. counsel relied on the case of *Dina Management Limited –vs- County Government of Mombasa & 5 Others* (2923)eKLR to support the submission that failure to comply with the terms of allotment letter within the stipulated period disentitles one to claim interest in the land. That the Plaintiff did not exhibit the lease agreement signed creating the lease between himself and the Commissioner for Lands hence his acquisition of the Certificate of Lease was illegal from the beginning. Counsel relied on the case of *Funzi Development Ltd & Others –vs- County Council of Kwale*, Mombasa Civil Appeal No.252 of 2005 [2014]eKLR where it was held that;

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title”.

15. Counsel further submitted that the Plaintiff’s construction was not certified or inspected by the County Municipal Building Inspector contrary to conditions in section 41(3) of the *Physical Planning Act* (repealed). Counsel urged the court to disallow the application.
16. I have considered the application, the grounds advanced in opposition thereof and the rival submissions made. I have also perused the jurat of the Replying Affidavit sworn on behalf of the Respondent. It indicates that the Replying Affidavit was sworn by Michael Abala Wanga at Kisumu



on 23rd October, 2023 before Awuor Mariella Advocate & Commissioner for Oath. Awuor Mariella Advocate is Counsel representing the Respondent in this matter.

17. Section 4 (1) of the *Oaths and Statutory Declarations Act*, provides: -

“ A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any Court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

18. In *David Wamatsi Omusotsi v Returning Officer Mumias - East Constituency & 2 others* [2017] eKLR it was held that

“ it is the commissioning of an affidavit that distinguishes it from other documents. It would be an abuse of the process of the court to allow these kinds of documents to remain in record to form the basis of the case for the petitioner. The documents are thereby struck out and expunged from the record.”

19. In the case of *James Francis Kariuki & Another V United Insurance Co. Ltd* Civil Appeal No. 1450 of 2000, Hon. Justice Onyango Otieno, as he then was; held that

“That the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory provisions of Section 4(1) of the *Oaths and Statutory Declarations Act*.” “The simple facts of this case are that the Plaintiffs are, according to the Plaint represented by Njenga Mwaura and Company, Advocates. Mr. Njenga Mwaura is a Partner in the firm of Njenga Mwaura and Company, Advocates, who are the Advocates representing the Plaintiffs. The Verifying affidavit has been sworn before Njenga Mwaura as Commissioner for Oaths.” “It will be clear from the above that Mr. Njenga Mwaura, being an Advocate in the firm that is acting for the plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party.” 52. In *Kenya Federation of Labour & Another V. Attorney General & 2 Others* Industrial Court of Kenya at Nairobi, Case No. 735 of 2012, Hon. Justice Nzioki wa Makau held: “The short answer to that is that it would be against the provisions of the *Oaths and Statutory Declarations Act*. A lawyer cannot commission a document drawn by his/her firm. Indeed, the further affidavit by the claimants was defective in form as the jurat was not in conformity with the *Oaths and Statutory Declaration Act*.”

20. Although under section 4 (1) a Commissioner for Oaths is generally empowered to administer oaths and commission documents, the proviso thereto places a restriction in that a Commissioner for Oaths cannot administer oaths in respect of an affidavit to be used in a case where the commissioner acts as advocate for any of the parties in the matter.

21. It is clear that the Commissioner for Oaths who commissioned the Replying Affidavit is Counsel for the Respondent in this matter. This renders the affidavit irregular and inadmissible as a pleading or



evidence in the matter. The Replying Affidavit is therefore hereby struck out and expunged from the record.

22. Under Order 40 Rule 1 of the Civil Procedure Rules 2010 cases in which temporary injunctions may be granted include where it is proved by Affidavit or otherwise 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. In such cases, the court may by order grant a temporary injunction to restrain such act.
23. In this case, it is not denied that the applicant holds a lease in respect of the suit property. It is also not denied that the Defendant has engaged in the acts complained of in the application. The Respondent's contention is that although the applicant holds the lease, the suit property is public land as the applicant did not follow the proper procedure of acquisition of the land. In my view, this will be an issue to be determined at the full trial. For now, and for the purposes of the application before court, on the basis of the certificate of lease exhibited and the contents of the Affidavit-in-Support, the Applicant as the registered owner of the suit property has prima facie demonstrated that the property is in danger of being wasted, damaged and/or alienated. Already parts of the property have been damaged. The applicant's right to property as protected under article 40 of the Constitution and sections 25 and 26 of the Land Registration Act has been violated and is threatened with further violation.
24. The court finds that the applicant has satisfied the conditions for grant of a prohibitory injunction as prayed for in prayer 3 of the application.
25. As regards the prayer for mandatory injunction, as correctly submitted on behalf of the applicant, it is the position in law that mandatory injunction will not normally issue at an interlocutory stage unless there are special conditions. The Court of appeal of Kenya in the cases of Joseph Kaloki t/a Royal Family Assembly Vs Nancy Atieno Ouma [2020] eKLR and Kenya Breweries Limited & another Vs Washington O. Okeyo [2002] eKLR held that

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”
26. The court finds that special circumstances for grant of mandatory injunction have not have not been demonstrated. The case cannot in my view be said to be a clear case that ought to be decided at once as there are issues raised for trial in the hearing of the main suit.
27. In conclusion the court finds that the application has merit and allows it as follows: -
 - i. A prohibitory temporary injunction is hereby issued to restrain the Defendant, its agents, servants and/or employees from entering, occupying, remaining on, accessing, damaging or in any manner howsoever interfering with the Plaintiff's quiet and peaceful possession of the whole of the parcel of land known as Kisumu/Nyamasaria Market/ 24 pending the hearing and determination of this suit.
 - ii. Costs of the application are awarded to the applicant.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 7TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI



JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Applicant.

No appearance for the Respondent.

