Mavoko Muundani Residents Association & 5 others v East African Portland Cement Company PLC & 5 others (Environment & Land Case E037 of 2024) [2025] KEELC 806 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEELC 806 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E037 OF 2024

NA MATHEKA, J

FEBRUARY 25, 2025

BETWEEN

MAVOKO MUUNDANI RESIDENTS ASSOCIATION ..... 1ST PLAINTIFF

DAVID MUSAU ..... 2ND PLAINTIFF

JAMES KIGERA ..... 3RD PLAINTIFF

MICHAEL WAMBUA ..... 4TH PLAINTIFF

DANIEL KIMWELI ..... 5TH PLAINTIFF

BONIFACE MUTINDA ..... 6TH PLAINTIFF

AND

EAST AFRICAN PORTLAND CEMENT COMPANY PLC ..... 1ST DEFENDANT

GEONER SYSTEMS LIMITED ..... 2ND DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS ..... 3RD DEFENDANT

FRANCISCO NGEI MUTUA ..... 4TH DEFENDANT

NICODEMUS MULEI MUEKE ..... 5TH DEFENDANT

ANTONY MUTHAMA ..... 6TH DEFENDANT

RULING

1. The application is dated May 22, 2024 and is brought pursuant to Sections 1,3,12 of the *Civil Procedure Act*, Order 3 Rule 4, Order 5 Rules 1 and 4, Order 5 Rules 7, 8, 9, 10, 22B, 22C, Order 6 Rule 6, Order 9 Rule 1, and Order 15 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this application be certified as urgent and service be dispensed with in the first instance.

2. That pending the hearing and determination to this application, an order of interim injunction do issue restraining the 1st Defendant/Respondent and their agent from engaging in demolitions, evictions, or any other actions that would deprive the occupants of occupation of the suit property or alter the current status of the suit property.

3. That pending the hearing and determination of this application, there be an unconditional stay of the regularization process commenced on the 17th October, 2023 and/or any conveyance of the suit property by the 1st Respondent and its agents.

4. That pending the hearing and determination of this application, the Honourable Court be pleased to issue a mandatory injunction compelling the 1st Defendant to engage the Plaintiffs on a regularization model based on reasonable terms pursuant to the public participation exercise previously conducted or to be conducted thereafter.

5. That pending the hearing and determination of this suit, an order of interim injunction do issue restraining the 1st Defendant/Respondent and their agents from engaging in demolitions, evictions, or any other actions that would deprive the occupants of occupation of the suit property or alter the current status of the suit property.

6. That pending the hearing and determination of this suit, there be an unconditional stay of the regularization process commenced on the 17th October, 2023 and/or any conveyance of the suit property by the 1st Respondents and its agents.

7. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue a mandatory injunction compelling the 1st Defendant to engage the Plaintiffs on a regularization model based on reasonable terms pursuant to the public participation exercise previously conducted or to be conducted thereafter.

8. That pending the hearing and determination of this application, this Honourable Court be pleased to order the OCS Athi River to aid in the execution and enforcement of the orders.

9. That the costs of the application be provided for.

2. It is premised on the following grounds that the Applicants are residents of Machakos County and occupants in the suit properties L.R. No. 8784/144, L.R. No. 8784/145 and L.R. No. 8784/653. The 1st Respondent is the registered owner of the suit properties. By its own admission, the 1st Respondent through its EAPC-ANNUAL REPORT AND FINANCIAL STATEMENTS FOR FY 2021-22 (ref. page 51), published plans to raise capital through the sale of the suit properties. The 1st Defendant/ Respondent acknowledged that the Plaintiffs are the occupants of the suit property and to this end resolved to sell the property to them on a first priority basis. Consequently, the Plaintiffs and other occupants of the suit property engaged with the 1st Defendant/Respondent in a public participation exercise to identify the most sustainable way through which land would be sold to members presently living on the parcels of land through a regularization model. There were discussions on the pricing with the unit size being 40x80 with proposal for the same being the same to go for Kshs. 200,000/- in light of the harsh economic times. The presented price by the 1st Defendant/Respondent during the publication participation exercise was Kshs. 600,000/= but the Applicants through their local leaders requested for a reduction of the same to Kshs. 400,000 payable over a period of 5 to 10 years. Following the said discussions, the 1st Defendant/Respondent proceeded to report in the dailies and in their aforementioned Annual Report that they had unilaterally resolved to sell the properties to

occupants as first priority at Kshs. 600,000 with Kshs. 100,000 being deposit payable in three months and the balance payable in three (3) years. In a turn of events, the 1st Defendant/Respondent vide a Public Notice published in the dailies on the 17th October, 2023, informed the occupants to begin the regularization process and pay the Kshs. 100,000/= deposit within fourteen (14) days failure to which the occupants would lose their properties and the same be sold to the public; this actions was so unconscionable and coercive as the directives were given at a time when the 1st Defendant/Respondent was carrying out demolitions on adjacent piece of land that they had reclaimed from its occupants. It is peculiar and noteworthy that the public notice for regularization did not set out the purchase price and completion period. The occupants only proceeded to attempt to comply with the public notice out of fear of being evicted from their properties. After the first stage of the regularization process which was marred by corruption and extortion from the agents of the 1st Defendant/Respondent, the 3rd Defendant/Respondent proceeded to issue a caveat-emptor on the 1st November, 2023 warning the occupants and the public from engaging in any transaction relating to the suit property as the 1st Defendant/Respondent had failed to acquire the necessary approvals for the regularization process.

3. That the 1st Defendant notwithstanding the caveat-emptor proceeded to issue the occupants with Letters of Offer that contained unconscionable payment and completion terms materially different from the initially proposed and reported terms. More importantly, the prices indicated on the offer letters were a total departure from what had been discussed and reported following the public participation exercise. The offer letters now quoted obscene amounts ranging from Kshs.775,000/= to as much as Kshs. 1,650,00/=. Furthermore, upon accepting the terms, which was mandatory in nature, the occupants were required to remit 20% of the purchase price within ten days of acceptance and the balance would be payable within three(3) months as opposed to the minimum three (3) years that the 1st Defendant/Respondent had initially reported. The Applicants attempted to engage the 1st Respondent in a bid to streamline all outstanding issues, however, all communication made to the 1st Respondent elicited no response to date. The Applicants have since been issued with eviction threats on account of non-compliance with the irregular and oppressive terms of engagement, this despite the presence of a caveat-emptor from the 3rd Defendant/Respondent and further communication from the 1st Defendant/Respondent's agents informing the occupants not to proceed with the regularization until the process is streamlined. That unless the orders sought herein are issued, the entire application will be rendered nugatory and the Applicant's stand to suffer irreparable harm and damage which cannot be compensated with any award of damages.

4. This court has considered the application, affidavits, annexures and submissions therein. The prayer for temporary injunction is well discussed in the celebrated case of Giella vs Cassman Brown (1973) EA 358. In Nguruman Limited vs Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR the Court of Appeal held that;

> in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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.
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> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

5. On the first pillar, the plaintiffs state that they are the occupants of the L.R NO. 8784/144, L.R NO. 8784/145 and L.R NO. 8784/653 in total comprising 907 acres or thereabout and have been

occupying the said property for more than twelve (12) years. That sometime in 2021, the 1st respondent became the registered owner of the suit property. That the 1st respondent being the registered owners of the suit property undertook efforts at liquidation of the said property through sale to the public with the aim of raising Kshs. 5 billion. That the 1st respondent however acknowledged that the applicants are occupants of the suit property and to this end carried out a public participation exercise with the occupants with an aim of addressing their interests.

6. Section 26 of the *Land Registration Act* states as follows;

   (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

      a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

      b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

   (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

7. On the 2nd pillar of temporary injunctions, the plaintiffs are required to show irreparable injury and I am guided by Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR where court held;

> Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

8. The 3rd pillar which is the balance of convenience. In Pius Kipchirchir Kogo case (Supra) the court held;

> The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
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> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

9. The applicants stated that the public participation exercise was carried out in August of 2022 wherein the members discussed various issues ranging from regularization of their occupation and ownership and the terms thereof such as the purchase price and the payment timelines. The 1st respondent proposed Kshs. 600,000/- at the time which was too high for the occupants and was therefore rejected. That subject to the said public participation exercise, the 1st Defendant/Respondent went ahead to report and publish the same in their Annual Financial Report wherein they stated that they had

resolved to sell the suit property to the occupants as first buyers with the selling price being payable within three (3) years.

10. Later the 1st respondent published a notice that was circulated to the occupants informing them that the properties for those who had not complied with the regularization had been declared vacant and consequently had been put up for auction and as such the 1st respondent was inviting the public to bid for the properties by the 2nd May, 2024. The price had drastically changed upwards and the 4th, 5th, and 6th Defendants/Respondents through their agents are still going around marking undeveloped properties and selling them to the public notwithstanding whether the land is owned by the occupants and is subject to regularization.

11. The 1st respondent submitted that this was a case of willing seller willing buyer and the 1st respondent had requested the applicants to either purchase the same at the current market price or vacate. The 5th respondent stated that he is the current Chairman of the Kathama Welfare Association which was registered inter alia to negotiate with the 1st respondent on the acquisition. That this was done and that the 1st applicant was registered on 15th November 2023 by the 2nd to 6th applicants to derail the ongoing process. It is not disputed that the suit property is registered in the name of the 1st defendant. It is also not disputed that some public participation was carried out in order to sell to the local community parcels of the said land. It appears the process of regularizing the same is ongoing for some despite some members objecting to the price. From the foregoing, I find that the applicants have failed to established a prima facie case at this stage. I find this application is not merited and is dismissed. Costs of this application to be in the cause. Parties are advised to comply with order 11 and fix the matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE