



Republic & another v National Land Commission & 3 others; Acres and Homes Limited (Exparte) (Environment and Land Judicial Review Case 73 of 2015 & Environment & Land Case 830 of 2013 (Consolidated)) [2024] KEELC 4541 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4541 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 73 OF 2015
& ENVIRONMENT & LAND CASE 830 OF 2013 (CONSOLIDATED)**

J OMANGE, J

MAY 30, 2024

**IN THE MATTER OF AN APPLICATION BY ACRES AND HOMES LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION –
AND IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010,**

THE CIVIL PROCEDURE ACT, CAP 21 OF THE LAWS OF KENYA,

**THE ENVIRONMENT AND LAND COURT ACT NO 19
OF 2011, THE LAND REGISTRATION ACT NO 3 OF 2012,**

THE NATIONAL LAND COMMISSION ACT NO 5 OF 2012

AND

THE LAND ACT NO 6 OF 2012 –

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

**THE REGISTRAR OF TITLES, LAND TITLES REGISTRY,
NAIROBI 2ND RESPONDENT**

THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE ... 3RD RESPONDENT

AND

ACRES AND HOMES LIMITED EXPARTE

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 830 OF 2013



BETWEEN

ACRES AND HOMES LIMITED PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

RULING

1. This case before this court relates to land LR No 209/14030, Grant No IR 83237 hereinafter referred to as the suit property. The *ex parte* applicant on the 1st of July, 2013 filed a Suit 830 of 2013 against the Attorney General on the basis that Department of Defence had trespassed on the suit property in respect of which it has a title. The Plaintiff sought orders that the Departments entry into the suit property is illegal and amounted to trespass. The court was requested to issue an order of vacant possession, mesne profits and general damages.
2. The Attorney General strenuously opposed the Plaintiffs case and counterclaimed for the suit property on the grounds that the suit property is public property which was fraudulently allocated to the 2nd Defendant.
3. In the meantime, the Exparte Applicant filed a Judicial Review which sought various orders against the National Land Commission, the Registrar of Titles, and the Principal Secretary, Ministry of Defence. On the 24th February, 2015, the High Court transferred the Judicial Review matter to the Environment and Land Court for hearing together with ELC 803 of 2013. On the 30th July, 2015 the court adopted a consent which was in respect of the Judicial Review case.

From a perusal of the consent it is clear that the consent restricted itself to the issues in the Judicial Review. The issues in ELC 803 of 2013 remain unresolved.

4. The *ex parte* applicant has filed the present application dated 3rd May, 2023, seeking the following orders:
 - a. Spent
 - b. Pending the inter-partes hearing and determination of the application filed herewith, an Order of interim injunction be issued restraining the Department of Defence represented by the Ministry of Defence in this suit, from continuing with the construction project currently ongoing on Property Land Reference Number 209/14030, Grant No IR 83237.
 - c. Pending the hearing and determination of ELC Suit No 830 of 2013, an Order be and is hereby issued restraining the Department of Defence represented by the Ministry of Defence in this suit, from continuing with the construction project currently ongoing on Property Land Reference Number 209/14030, Grant No IR 83237.
 - d. This Honourable Court do order for a site visit of Property Land Reference Number 209/14030, Grant No IR 83237, in order to ascertain the property's current status



- e. That ELC Suit No 830 of 2013 be fixed for mention in order that directions may be taken for the hearing and determination of the suit
- f. Costs of the application

5. The application was supported by the affidavit sworn by Esther Njeri Gitau the director of the *ex parte* applicant in which she deposes that the *ex parte* applicant are the duly registered owners of the suit property having bought it from Impulse Developers Limited, for valuable consideration of Kshs 140,000,000.00/=.

She deponed that in the year 2013 officers drawn from the Department of Defence forcefully ejected Acres and Homes Limited from the suit property which necessitated the filing of ELC Suit No 830 of 2013 to establish ownership.

That the Department of defence the 3rd Respondent herein, has trespassed on the suit property, erected a parking sign, a fence and a gate restricting entry into the property and further commenced construction activities thereby restraining the *ex parte* Applicant from enjoying access to and use of the suit property.

- 6. She argues that the actions of the 3rd Respondent defeats her Constitutional rights under Article 40 of *the Constitution* of Kenya, 2010. That the actions amount to impunity and disregard of court process, as the 3rd Respondent is aware that the dispute over ownership is yet to be determined in ELC Suit No 830 of 2013.
- 7. The Respondent opposed the application vide a replying affidavit dated 1st December 2023 sworn by Major Julius Meso in which he deposes that the alleged acquisition of the suit property was carried out in an irregular, illegal and unprocedural manner as the land is public land which was not available for allocation.
- 8. He further argued that the *ex parte* applicant cannot seek civil remedies in form of injunctions against the government in the Judicial Review matter. As such it his contention that the application is an abuse of the court process.
- 9. The 3rd Respondents counsel filed submissions dated 19th March 2024 in which it submitted that injunctions are not applicable to government institutions and relied on the provision of Order 29 (2) (d) which exempts government from Order 40 of the *Civil Procedure Rules*. Counsel also relied on the provision in Section 16 of the *Government Proceedings Act* that does not allow issuance of injunctions as against a government.
- 10. The other limb of the submissions is that this court does not have jurisdiction to grant injunctive orders in a Judicial Review application.

To advance this argument counsel relied on the provision of Sections 8(1)(2) (3)(4) and 5 of the *Law Reform Act* and the decision in *Cortec Miningh Kenya Limited v Cabinet Secretary Attorney General & 8 others* (2015) eKLR
- 11. On the question of the site visit, counsel submitted that there is no need for a site visit as the issue at hand should be determined based on facts and evidence. Counsel referred the court to the case of Beatrice Nyong'o Ndungu and others v Samuel K Kangoro the attorney General and the county government of Nakuru.
- 12. The court directed that the application be canvassed by way of written submissions. As at the time of writing this Ruling, the applicant had not complied. The 3rd Respondent filed submissions which



have been summarized above. Having considered the application, the affidavits and 3rd Respondents submissions the following issues emerge for determination.

13. Whether injunctive orders can be issued as against the 3rd respondent in a Judicial Review application Order 29 Rule 2 of the [Civil Procedure Rules](#) read as follows;

- 1) Except as provided by the [Government Proceedings Act](#) (Cap. 40) or by these Rules—
 - a. these Rules shall apply to all civil proceedings by or against the Government;
 - b. and civil proceedings by or against the Government shall take the same form as civil proceedings between subjects and shall, if no special form is applicable, take the form of a suit instituted by a plaintiff.
- (2) No order against the Government may be made under—
 - a. Order 14, r. 4 (Impounding of documents);
 - b. Order 22 (Execution of decrees and orders);
 - c. Order 23 (Attachment of debts);
 - d. Order 40 (Injunctions);
 - e. Order 41 (Appointment of receiver).

While Section (16) (2) of the [Government Proceedings Act](#) (Cap. 40) reads

“16(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”

14. The objection by the 3rd Respondent is on two fronts namely that Order 29 (2); (d) outlaws’ issuance of an injunction against the government. And secondly that an application for injunction should not be filed in a Judicial Review claim. On the first limb it is my view that the court can in deserving cases issue conservatory orders which have the effect of addressing this obstacle. However, the issues raised by the 3rd Respondent on the filing of this application in the Judicial Review application are valid.

15. In the first place the Judicial Review was finalized and formally marked as settled. Indeed, after adoption of the consent by Justice Mutungi on 30th July, 2015, Lady Justice Githumbi on 22nd October, 2015 confirmed the matter was settled.

An injunction order can only be issued on the basis that there is a matter that is awaiting determination. The applicant cannot resuscitate a concluded matter so as to seek injunctive orders in respect of a different matter.

16. Whether the *ex parte* applicant is entitled to the injunctive orders sought for in the application.

The law on grant of interlocutory injunctions is set out under Order 40 Rule “1 (a) and (b) of the [Civil Procedure Rules](#) as follows: -

“Where in any suit it is proved by affidavit or otherwise –

- a. 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; or



- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit;

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

17. The principles for grant of injunction are well settled by the locus classicus of *Giella v Cassman Brown & Company Limited* [1973] E.A. 358., in which the court stated thus:

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury,

which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

18. On the question of prima facie case, the *ex parte* applicant contend that they are the legally registered owners of the suit property having bought it from a third party. On the other hand, the 3rd Respondent contends that the land is public land which if at all it was transferred to private owners was irregularly transferred. The applicant apart from declaring that they bought the suit property and have title do not go further to address the pertinent issues raised by the 3rd Respondent. In view of this, the long history of this convoluted matter in the court corridors, I find that there is need to hear the parties substantively in the pending suit before the court makes any determination or issues any orders. The parties are therefore advised to expeditiously prepare for hearing of ELC 830 of 2013.

19. The upshot of the foregoing is that I find that the application has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN COURT THIS 30TH DAY OF MAY, 2024.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Ajireh for the 3rd Respondent

Steve - Court Assistant

