



Koimerek (Suing on Her Own Behalf and on Behalf of and Representing Plot Owners on Loitoktok/Mbirikani/733 Affected by the Ketraco Wayleave) & 2 others v Mbirikani Group Ranch & 6 others (Environment & Land Case E100 of 2022) [2024] KEELC 4207 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E100 OF 2022**

**MN GICHERU, J
MAY 22, 2024**

BETWEEN

BEATRICE TITOYIAN KOIMEREK (SUING ON HER OWN BEHALF AND ON BEHALF OF AND REPRESENTING PLOT OWNERS ON LOITOKTOK/ MBIRIKANI/733 AFFECTED BY THE KETRACO WAYLEAVE) . 1ST PLAINTIFF

MULU PETER MUTUKU (SUING ON HIS OWN BEHALF AND ON BEHALF OF AND REPRESENTING PLOT OWNERS ON LOITOKTOK/ MBILIKANI/733 AFFECTED BY THE KETRACO) 2ND PLAINTIFF

JUSTUS MUTUKU MUSEMBI SUING ON HIS OWN BEHALF AND ON BEHALF OF AND REPRESENTING PLOT OWNERS ON LOITOKTOK/ MBILIKANI/733 AFFECTED BY THE KETRACO) 3RD PLAINTIFF

AND

MBIRIKANI GROUP RANCH 1ST DEFENDANT

CHIEF IMBIRIKANI LOCATION 2ND DEFENDANT

DISTRICT COUNTY COMMISSIONER 3RD DEFENDANT

REGISTRAR OF LANDS KAJIADO COUNTY 4TH DEFENDANT

NATIONAL LAND COMMISSION 5TH DEFENDANT

COUNTY POLICE COMMISSIONER KAJIADO 6TH DEFENDANT

KENYA ELECTRICITY TRANSMISSION – COMPANY LIMITED 7TH DEFENDANT



RULING

1. This ruling is on the notice of motion dated 30/11/2022. The motion which is by the plaintiffs is brought under Sections 1A, 1B, and 3A of the Civil Procedure Act, Orders 40 Rule 1 and 51 rule 1 Civil Procedure Rules and all the enabling provisions of the law. It seeks the following residual prayers.
 3. That an order do issue restraining the 7th defendant either by himself or through his agents, servants and/or representatives or any other person or entity from entering, remaining, encroaching, trespassing intruding, selling, transferring and or interfering in any manner with L.R. No. Loitoktok/ Mbirikani/892 previously known as Loitoktok/Mbirikani/733 hereinafter referred to as the suit property pending the hearing and determination of this suit.
 4. An order requiring the 1st defendant to provide the maps of the suit property.
 5. That costs of this application be provided for.
2. The motion is supported by 15 grounds, four affidavits by the three plaintiffs dated 30/11/2022 and 20/4/2023 and many annexures. The gist of the above material is as follows.

Firstly, the plaintiffs own L.R. 733, suit land, located in Imbirikani location. They bought the land from one Joyce Lemenei and they took possession between October 2017 and 2021.

Secondly, each of the plaintiffs paid survey fees of Kshs. 12,000/-to the 1st defendant whereupon they were issued with beacon certificates.

Thirdly, the plaintiffs developed the suit land as follows. Beatrice Totoyian Koimarek build a permanent house, (plot No. 726 at Mukutan), the 2nd plaintiff also built a house which he occupies. The same applies to the third plaintiff.

Fourthly, the plaintiffs learnt, in March 2022, that the 7th defendant acquired wayleave rights over their land.

Fifthly, in the months of April to October 2022, a series of meetings took place to resolve the disputes that had emerged. The meetings involved the plaintiffs the chairman of the 1st defendant, the area chief and an official of the 7th defendant. These meetings all did not resolve the dispute.

Sixthly, the plaintiffs were on 8/11/2022 issued with eviction notices requiring them to demolish their houses on the suit land.

Finally, failure to resolve the dispute outside the court made the filing of this suit necessary.
3. The motion is opposed by the 1st defendant whose chairman Daniel Metoe has sworn a replying affidavit dated 12/5/2023 in which he deposes as follows.

Firstly, the plaintiffs have no privity to contract with the 1st defendant because they bought their land from people who did not represent the 1st defendant.

Secondly, the said sellers have not been made parties to this suit.

Thirdly, the suit land is community land and not private land.

Fourthly the plaintiffs did not carry out due diligence before buying the land.

Finally L.R. Loitoktok/Mbirikani /892 remains undivided and the title is whole. For the above and other reasons, the 1st defendant prays for the dismissal of the plaintiff's motion.



4. The 7th defendant has also opposed the motion and its project surveyor Dominic Kipkemboi has sworn a replying affidavit dated 22/12/2022 in which he replies as follows.

Firstly, on 28/7/2020 the National Land Commission issued a notice to the public *vide* gazette notice No. 5270 of the 7th Defendant's intention to acquire wayleave for the Construction of Sultan Hamud Loitoktok Transmission Line. This was after a social-economic survey and census study entailing inventory of the parcels of land, structures and trees that would be affected by the transmission line had been undertaken.

Secondly, the 7th defendant undertook public participation through sensitization within Imbirikani on 15/5/2019 and 22/5/2019 respectively.

Thirdly, upon identification of the transmission line route and during the meetings the 7th respondent advised the individuals whose parcels of land would be affected not to build any structures along the wayleave corridor. The public was also informed that structures constructed within the wayleave corridor after the participation and gazette notice would not be compensated.

Fourthly, the transmission line traverses L.R. No. Mbirikani/892 which is registered in the name of Mbirikani Group Ranch Cooperative Society Limited who were compensated to the tune of Kshs. 39,054, 15000 and in return the easement was effectively registered in favour of the 7th defendant.

Fifthly, when the 7th defendant was about to complete the project, it discovered that the plaintiffs had encroached the wayleave corridor and had constructed structures thereon. It immediately informed the plaintiffs to vacate before the commencement of the remaining phases of the project.

Finally and for the above and other reasons, the plaintiffs are not entitled to the orders sought and their motion should be dismissed with costs.

5. Counsel for the parties filed written submissions dated 20/4/2023, 12/5/2023, 20/11/2023, 21/8/2023 and 9th November. The issues identified for determination are as follows.

- a. Whether there is a reasonable cause of action.
- b. Whether the plaintiffs have met the threshold for grant of the orders sought.
- c. Whether the plaintiffs are entitled to damages as a result of negligence by the defendants.
- d. Whether the plaintiffs are entitled to costs.
- e. Whether the applicants have satisfied the principles of injunction as laid down in *Giella – versus-Cassman Brown Ltd* (1973) EA 258.
- f. Whether the court has jurisdiction to hear and determine the plaintiffs' case.

6. I have carefully considered the motion in its entirety including the grounds, the affidavits, the annexures, the written submissions by both sides and the issues raised in the submissions and the law cited therein. I make the following findings on the six issues noted above.

7. On the first issue, I find that though the plaintiffs have not yet adduced any document of title to the suit land, the suit discloses a cause of action in that they claim to have owned and occupied the suit land or part of it before it was taken over by the 7th defendant.

8. As for the second issue, I find that the plaintiffs have not met the threshold for the grant of an order for injunction. Firstly, they have not established a prima facie case with a probability of success because they do not, so far, have evidence of ownership of the suit land. The only thing they have is a disputed claim of actual possession of part of the suit land. This claim of occupation is not sufficient to establish



a prima facie case with a probability of success especially when it is not only disputed but when it is shown that a third party is in possession of the title deed. On the second limb of irreparable loss that cannot be adequately compensated by an award of damages, I find that the same is not proved. The plaintiffs, if eventually successful, can be adequately compensated by an award of damages. The value of the land and the development thereon can be quantified. It is the plaintiffs who cannot adequately compensate the 7th defendant if the project that they are undertaking which involves substantial sums of money is stopped and it turns out that the plaintiffs did not have a good case. The plaintiffs will be hard pressed to pay even a fraction of the loss likely to be occasioned to the 7th defendant. Closely related to the second ground is the third ground which tilts in favour of allowing the 1st defendant to continue with the project rather than restraining it when we are not sure of the plaintiffs' capacity to pay them for the loss that they will suffer.

In summary, the plaintiffs have not met the test in the case of *Giella –versus- Cassman Brown* (1973) EA 358.

9. Coming to the third issue of negligence, I find that the pleadings have not brought out the tort of negligence in any of the 36 paragraphs. The word “negligence” is not used anywhere in the entire plaint. It has abruptly come up in the issues for determination. The word negligence denotes a tort. This court has no jurisdiction in the province of torts. Its jurisdiction is limited to disputes relating to the environment, use of, title to and occupation of land. I will make no finding on this third issue. The finding on the second issues covers the fifth issue exhaustively. In fact the two issues are one and the same thing.
10. On the issue of jurisdiction, I find that this court has jurisdiction because the [energy Act](#) (Act No. 1 of 2019) has no application in this case. This suit has nothing to do with Section 3 of the [Energy Act](#). It does not relate to the importation, exportation, generation, transmission, distribution, supply or use of electrical energy. It has nothing to do with the exploration, production, transportation, distribution and supply of any form of energy.

Finally, it is not even remotely related to all works and apparatus for any or all the above purposes. It only deals with the occupation of the land in dispute. In short, I find that the preliminary objection said to be dated 19/5/2023 and which I have not seen on record has no merit for the above stated reasons.

In summary, I dismiss both the notice of motion dated 30/11/2022 and the preliminary objection. Costs in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 22ND DAY OF MAY 2024.

M.N. GICHERU

JUDGE

