



B.O.M Kisian Primary School & 10 others v Kenya Railways Corporation (Suing for Themselves and on Behalf of the Entire Korando Community that are Affected by the Unlawful Act of the Defendants in terms of Encroachment on Private Lands and Blocking of Mason-Ogendo, Kisian-AIC Church Road, Orongo-Orao Kisian River Road, Alai Road and Asindi Road); Kenya Rural Roads Authority & another (Interested Parties) (Environment & Land Case E031 of 2023) [2024] KEELC 3793 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3793 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E031 OF 2023

E ASATI, J

MAY 9, 2024

SUING FOR THEMSELVES AND ON BEHALF OF THE ENTIRE KORANDO COMMUNITY THAT ARE AFFECTED BY THE UNLAWFUL ACT OF THE DEFENDANTS IN TERMS OF ENCROACHMENT ON PRIVATE LANDS AND BLOCKING OF MASON-OGENDO, KISIAN-AIC CHURCH ROAD, ORONGO-ORAO KISIAN RIVER ROAD, ALAI ROAD AND ASINDI ROAD

BETWEEN

- THE B.O.M KISIAN PRIMARY SCHOOL 1ST PLAINTIFF**
- CHURCH OF AFRICA 2ND PLAINTIFF**
- MORRIS ADONGO 3RD PLAINTIFF**
- JARED OBIYA 4TH PLAINTIFF**
- OWUOND OWUONDO 5TH PLAINTIFF**
- ANN OLANG ATIENO 6TH PLAINTIFF**
- PHILIP OGALO OLANG 7TH PLAINTIFF**
- WILSON SEDA 8TH PLAINTIFF**
- LUCIA ALAI 9TH PLAINTIFF**
- CHARLES OTIENDE JUMA 10TH PLAINTIFF**
- THE REGISTERED OFFICIALS AND MEMBERS OF CENTRAL KISUMU CBO 11TH PLAINTIFF**

AND



KENYA RAILWAYS CORPORATION DEFENDANT
SUING FOR THEMSELVES AND ON BEHALF OF THE ENTIRE KORANDO
COMMUNITY THAT ARE AFFECTED BY THE UNLAWFUL ACT OF THE
DEFENDANTS IN TERMS OF ENCROACHMENT ON PRIVATE LANDS AND
BLOCKING OF MASON-OGENDO, KISIAN-AIC CHURCH ROAD, ORONGO-
ORAO KISIAN RIVER ROAD, ALAI ROAD AND ASINDI ROAD

AND

KENYA RURAL ROADS AUTHORITY INTERESTED PARTY
COUNTY GOVERNMENT OF KISUMU INTERESTED PARTY

RULING

Introduction

1. This ruling is in respect of the Plaintiff's Notice of Motion application dated 22nd December, 2023 brought pursuant to the provisions of Section 1A, 1B, 3, 3A, 63(e), 80 and 99 of the *Civil Procedure Act*, Order 40 Rule 1, 2 and 4 and Order 51 of the *Civil Procedure Rules* 2010. The ruling is also in respect of the Preliminary Objection raised by the Defendant vide the Notice of Preliminary Objection dated 31st January, 2024.
2. This suit is related to Kisumu ELC LC NO.30 OF 2024 and the submissions made in respect of the application and Preliminary Objection were adopted relied on herein.

The Preliminary Objection

3. Vide the Notice of Preliminary Objection dated 31st January, 2024 the Defendant sought to have the suit dismissed in its entirety with costs to the Defendant on the grounds that;
 - i. the Plaintiff did not serve upon the Defendant's Managing Director a written notice of intention to institute legal proceedings against it which omission contravenes section 87 of the *Kenya Railways Act*, Chapter 397 of Laws of Kenya (herein the Act).
 - ii. the suit contravenes section 83(1) of the *Act* which prohibits institution of a suit where any person suffers damages arising out of the Defendant's execution of its mandate under sections 13, 15, 16 and 17 of the *Act*.

That the Plaintiff's suit offends the exhaustion doctrine.

4. Section 87 of the *Act* provides for limitation as follows:

“where any action or other legal proceedings is commenced against the corporation for any act done in pursuance of any public duty or authority or in respect of any alleged neglect or default in execution of this Act or of any such duty or authority, the following provisions shall have effect;

- a. the action or legal proceedings shall not be commenced against the corporation until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings has been served upon the Managing Direction by the Plaintiff or his agents.



b. the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act neglect or default complained of or in the case of a continuing injury or damage within six months next after the cessation thereof.

1. It was submitted on behalf of the Defendant that it's a mandatory provision that Notice of at least one month be served upon the Managing Director of the Defendant before the suit is filed. That the effect of non-compliance is that the suit is rendered a non-starter. Counsel relied on the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* (1969) EA 696 on what amounts to a Preliminary Objection and the case of *Joseph Nyaramba & 4 Others v Kenya Railways Corporation* (2015)eKLR wherein the court set out the effect of section 87 of the *Kenya Railway Corporation Act* and article 48 of the *Constitution* of Kenya. That under Section 5 of the Act, any damages must be agreed upon first. That the Chief Justice is to appoint a single arbitrator to handle the dispute. That this provides for the exhaustion doctrine which mandates the use of internally laid procedures for dispute resolution before seeking recourse to the court.

Counsel also relied on the case of *Anthony Ngure v Kenya Railways Corporation* (2022)eKLR and submitted that the applicants had an option to ensure compliance.

2. On behalf of the applicants, it was submitted that courts in this country have, pursuant to the provisions of the *Constitution* of Kenya 2010, held that access to justice ought to be given pre-dominance. That the actions by the Defendant in suddenly moving to fence off the Applicants' homes and public roads did not give time for compliance with Section 87 of the Act. That the only available recourse to secure the Applicants' interest was to come to court and get temporary orders. That the Applicants came to court because of the urgency of the matter. Counsel relied on the case of *Anthony Ngure Murugu v Kenya Railways Corporation* where similar Preliminary Objection was disallowed on the premises of the principle of access to justice.

3. Counsel submitted further that the Preliminary Objection was also based on section 83 of the Act. That the section is not applicable in this matter because the subject matter is private land. Counsel prayed that the Preliminary Objection be dismissed.

4. In the case of *Joseph Nyamamba & 4 Others v Kenya Railways Corporation* (2015)eKLR the court of Appeal stated that;

“the scope of access to justice as so enshrined is very wide – it includes ability of a party to file suit in court, ability to access the police with legitimate expectation of fair, expeditious and prompt investigations of one's complaint, prosecution of suspects, enforcement of decrees and orders issued by a court and prompt and fair compensation by government upon compulsory acquisition of one's property for public use – (see exposition of those principles in *Dry Associates v Capital Markets Authority & Another*, Petition 328 of 2011 (unreported)”

5. In *Catherine Njeri Majana v Kenya Railways Corporation & Another* [2021]eKLR the court held that;

“Considering the provisions of article 48 of Constitution which requires the state to ensure access to justice for all persons, the pronouncement of the



Superior Courts on the applicability of Section 87(a) of the *Kenya Railways Corporation Act*, it is my finding that failure by the Plaintiff to issue to the Defendant a 30 days' notice, if at all is not fatal to the suit”.

6. The facts of the present case as pleaded in the Supporting and Further Affidavits, is that the Defendant suddenly and without any notice to the Applicants arbitrarily initiated the process of fencing off privately registered land belonging to the Applicants as well as public roads of access on the erroneous assumption that the same fell within the railway reserve. The photographs attached to the application show that the fencing had already begun. The justice of the case requires that urgent intervention be sought so as to preserve the status quo of the suit land and the public roads of access prevailing before the Defendant's actions complained of herein.
7. Article 48 of the Constitution of Kenya 2010 places an obligation on the state to ensure access to justice for all persons. Given the facts of the case, a 30 days' notice to a Defendant who had already begun the actions complained of in my view would be an impediment to access to justice.
8. On the basis of the provisions of article 48 of the *Constitution*, the decided cases cited and the facts of the case, I find that failure by the Applicant to comply with section 87 of the *Kenya Railways Corporation Act* did not render the suit a non-starter. I find that the Preliminary Objection has no merit and hereby dismiss it.

The Application

9. The substantive prayer sought in the application is for an order of temporary injunction restraining the Defendant from blocking and/or otherwise fencing off public roads to wit; Mason – Ogendo, Kisian-AIC Church Road, Alai road and Asindi road that serve the Kisumu Korando community from fencing and/or hiving of portion of the 1st – 10th Plaintiffs' parcels, specifically; Kisumu/Korando/109, Kisumu/Korando/294, Kisumu/Korando/293, Kisumu/Korando/2380, Kisumu/Korando/1270, Kisumu/Korando/295, Kisumu/Korando/287, Kisumu/Korando/4509, Kisumu/Korando/5862, and from fencing off and/or hiving off portions of all those registered parcels of land that fall within the Kisumu/Korando Registration Section and abutting the railway reserve.
10. The grounds upon which the application was brought are that the Respondent on 14th December, 2023 arbitrarily initiated the process of extending beacons and fencing off privately registered land belonging to members of Korando community as well as the public roads. That the public roads have been in use since time immemorial. That the actions of the Respondent are contrary to the provisions of sections 2 and 14 of the *Public Road and Road Access Act*, sections 24 and Rules 31, 34 and 91(2) of the *Survey Regulations* 1994 in the *Survey Act* Cap 299. That the Respondent has purported to fence off and therefore compulsorily acquire portions of the Plaintiffs' parcels of land contrary to sections 3, 4, 6, 8 and 9 of the repealed *Land Acquisition Act*. That unless the actions of the Respondent are stopped, the applicants' community of about two hundred thousand people shall be rendered inaccessible and their socio-economic well being compromised contrary to Article 43 of the *Constitution*. That the Respondent's actions compromise the applicants' right to Fair Administrative Action under Article 47 of the *Constitution* and the right to education of the children of and students within Korando community attending Kisian Primary and Secondary Schools contrary to Article 53(1)(b) of the *Constitution* of Kenya 2010.



11. The application was supported by the averments in the Supporting Affidavit sworn by Jared Obiya, the 4th plaintiff on behalf of the other Plaintiffs and the annexures thereto and the Further Affidavit.
12. The application was opposed vide the contents of the Replying Affidavit sworn by Geoffrey Wekesa on behalf of the Defendant. The Defendant's case as set out in the Replying Affidavit is inter alia that it is the registered proprietor of the leasehold interest in property previously known as LR No 1184/7 reserved as 'Railway Station Lela' on 8th January 1929. That to implement the East African Railway Master Plan, the Defendant commenced the exercise of securing its lawfully acquired and registered parcels of land by fencing off its land countrywide. That the purported roads of access traverse the Lela station which is a tortious act of trespass. Further that the owners of the lands listed in the Supporting Affidavit were unaffected by the fencing exercise.
13. The 1st Interested Party's response to the application was vide the Replying affidavit by Eng. K. A. Ochieng on the 22nd January 2024. He deposed that the 1st Interested Party is a national government agency with its mandate provided for in the [Kenya Roads Act](#), 2007, to deliver, rehabilitate, maintain and manage roads in the country which fall within its mandate. That the 1st Interested Party is not responsible for the suit roads as they do not fall under its mandate.
14. It was submitted on behalf of the Applicants that the suit lands are private lands which are so registered and which are protected by the provisions of Article 40 of the [Constitution](#) of Kenya 2010. That there are public roads that the Defendant intended to fence off. That the lands in question were registered under the [Registered Land Act](#) after closure of Adjudication in the late 60's and only 70's.

That the root of the lease that the Defendant is relying on is questionable. Counsel relied on the case of [Dina Management Ltd v County Government of Mombasa & 5 Others](#) (Petition 8(E10) of 2021[2023]KESC 30 KLR (21 April 2023) (Judgement) and submitted that a prima facie case had been demonstrated. That unless the orders sought are granted the Applicants' shall suffer irreparable injury.
15. It was submitted on behalf of the Defendant that the Defendant is the registered proprietor of the land referred to as Lela Railway Station. That the Defendant's rights are protected under Article 40 of the [Constitution](#). Counsel relied on Section 26 of the [Land Registration Act](#) and the case of Andrew Kiptich Langat v Joseph Kipruto Maina (2021)eKLR. Counsel submitted that no evidence of irreparable injury had been tendered.
16. I have considered the application and Supporting Affidavits. I have also considered the contents of the Replying Affidavit, the submissions made and the authorities cited. The grounds for grant of interlocutory injunction were set out in the case of [Giella v Cassman Brown Co. Ltd](#) (1973) 358 that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience.
17. It is not denied that the Plaintiffs have title to the land which they believe is the land the Defendant is fencing off. It is also not denied that the fencing by the Defendant blocks certain roads of access which have been in use for a long time. The photographs annexed to the application confirm this. The defendant does not deny undertaking the acts complained of but its case is that it was justified to do so. The Plaintiffs' on the other hand claim ownership of the suit lands and question the leasehold interest claimed by the Defendant. Each of parties claims to have relied on a surveyor's report to support their respective contentions. It is important, in the circumstances of the case, to preserve the status quo ante



pending hearing and determination of the suit. I find that the application has merit and grant it in terms of prayers 5, 6 and 7 thereof. Costs to the applicants.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 9TH DAY OF MAY 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Nyambeki for the Plaintiffs/Applicants.

Mwesigwa for the Defendant/Respondent.

Chesoro h/b for Rapando for the 1st Interested Party.

Opondo for the 2nd Interested Party.

