



REPUBLIC OF KENYA



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**Home Africa Communities Ltd v Mwangi & 2 others (Environment & Land  
Case E056 of 2023) [2024] KEELC 4755 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4755 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E056 OF 2023**

**AA OMOLLO, J  
JUNE 13, 2024**

**BETWEEN**

**HOME AFRICA COMMUNITIES LTD ..... PLAINTIFF**

**AND**

**JOSPHAT NJOROGE MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**The Plaintiff's application:**

1. The Plaintiff filed a notice of motion dated 13<sup>th</sup> February 2023 supported by an affidavit sworn by Duncan Ngeno on the same date, seeking for the following orders;
  1. Spent
  2. Spent
  3. Spent
  4. Spent
  5. Spent
  6. Pending the hearing and determination of the underlying Suit this Honourable Court be pleased to issue the Applicant an Interim Measure of Protection by way of an injunction directed at the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants restraining them from:
    - c) Accepting, processing, approving or issuing any Deed Plans for the sub-division of L.R Number 98/7 (Original Number 98/6/2).



- d) Processing, approving or issuing any Certificate of Title for any parcels of land arising from the sub-division of L.R Number 98/7 (Original Number 98/6/2).
7. Pending the hearing and determination of the underlying suit, this Honourable Court be pleased to issue the Applicant an Interim Measure of Protection by way of:
  - c) An injunction to Stay the Execution of the Judgment from the Arbitral Award issued and published by Justus Munyithia Esq. on 27<sup>th</sup> February 2019 in the dispute between Home Afrika Communities Limited and, Josphat Njoroge Mwangi.
  - d) An order granting the Applicant leave to continue making payments towards the balance of the decretal sum arising from the Arbitral Award issued and published by Justus Munyithia Esq. on 27<sup>th</sup> February 2019 in the dispute between Home Afrika Communities Limited and Josphat Njoroge A,fwangi into Court or into an interest earning account in the joint names of the parties Advocates.
8. Pending the hearing and determination of the underlying suit this Honourable Court be pleased to issue the Applicant an Interim Measure of Protection by way of an injunction staying the Prohibition Order dated 28<sup>th</sup> September 2022 prohibiting it from transferring or charging in any way and all persons from taking benefit from all the properties to with Title L.R INO. 29059 (L.R 13364) all registered in the name of the Applicant.
9. Pending inter partes hearing and determination of the underlying suit this Honourable Court be pleased to issue the Applicant an Interim Measure of Protection restraining the 1<sup>st</sup> Defendant whether by himself or by his agents and/or employees or in any manner whatsoever from interfering with the Applicant's property comprised in Title L.R No. 29059 (L.R 13364) or its use of the easement granted to it pursuant to the Deed of Easement dated 26<sup>th</sup> January 2012 between the Applicant and the 1<sup>st</sup> Defendant.
10. Any Other Order this Court may deem mete and just in the circumstances of the Suit.
11. The Costs of this Suit
2. The application was based on the grounds that the Plaintiff/Applicant is the registered proprietor of the property comprised in title L.R No. 29059 (L.R 13364) herein after referred to as "Parcel B" on which it has developed the residential community christened "Migaa" while the 1<sup>st</sup> Defendant/ Respondent is the proprietor of all the land comprised in L.R Number 98/7 (Original Number 98/6/2) herein after referred to as "Parcel A". That pursuant to a Deed of Easement (DOE) dated 26<sup>th</sup> January 2012, executed between the Plaintiff and the 1<sup>st</sup> Defendant, the Plaintiff was granted an easement traversing Parcel A to access its property comprised in Parcel B.
3. The Plaintiff explained that it was a term of the DOE that in the event that the 1<sup>st</sup> Defendant would sub-divide its property Parcel A then it would transfer the easement area thereunder to its ownership. That the 1<sup>st</sup> Defendant is sub-dividing the said property and intends to part with possession and title of the ensuing sub-division and to grant the owners thereof access to the easement area under the DOE purporting the same to be public land.
4. It added that in an effort to grant access to a 3<sup>rd</sup> Party, an institution known as Ark Light International a beneficiary of the covert sub-divisions, the 1<sup>st</sup> Defendant unlawfully demolished a wall erected by the Plaintiff along the easement area. The Plaintiff stated that it paid the 1<sup>st</sup> Respondent Kshs. 22,585,375/= pursuant to the DOE and has invested colossal sums in developing the easement area for the benefit of its Migaa project. That following a dispute between the parties which was determined by Arbitration,



a Judgment was entered against the Plaintiff in favour of the 1<sup>st</sup> Defendant of an amount exceeding Kshs. 34,000,000/= of which the Plaintiff has settled substantially and continues to make lumpsum payments towards the balance thereof which now stands at Kshs. 7,000,000/= or thereabouts.

5. That for the 1<sup>st</sup> Defendant to benefit from the judgement entered, he obtained a Prohibitory Order on 22<sup>nd</sup> September 2022 in Misc. Applic No. E742 and E812 of 2020 HomeAfrica Communities Limited Vs Josphat Njoroge Mwangi, prohibiting the Applicant from transferring or charging in any way and all persons from taking any benefit from all the properties in Parcel B and keeps threatening to register against the property every time the Plaintiff insists on its rights under the DOE.
6. The Plaintiff deponed that the 1<sup>st</sup> Defendant breached the terms of the DOE and moved to obliterate the substratum of the DOE and the Judgment which he has enjoyed all to the detriment of the Applicant. That unless the court intervenes, the 1<sup>st</sup> Defendant shall proceed with the sub-division of Parcel A in a manner that completely defeats the DOE and renders it unviable to the detriment of the Plaintiff and all the investors in Migaa.
7. That the dispute between the Plaintiff and the 1<sup>st</sup> Defendant must be referred to Arbitration as per Clause 6 of the DOE and this Court has the mandate to issue the Orders sought herein pending the outcome of the Arbitral proceedings in order to preserve the subject matter of the dispute.

### **1<sup>st</sup> Defendant's application**

8. The 1<sup>st</sup> Defendant filed a notice of motion dated 8<sup>th</sup> March 2023 supported by an affidavit sworn by Josphat Njoroge Mwangi on the same date seeking for the following orders;
  1. That there be stay of proceedings in this matter pending the hearing and final determination of the dispute by way of arbitration proceedings between the Plaintiff and the 1<sup>st</sup> Defendant.
  2. That this matter be referred to arbitration in the manner provided for under clause 6 of the Deed of Easement dated 26.1.2012 and the Sale Agreement of similar date signed by the parties.
  3. That costs of this application be provided for.
9. The motion was on grounds that under clause 6 of the said Deed of Easement signed on 26.1.2011, registered on 17.7.2012 and clause 5 of the Easement Agreement, it was agreed by the parties that all disputes arising between them should be resolved through Arbitration. That the said clauses provided for the mechanism to be employed during the appointment of arbitrators to resolve any dispute but the Plaintiff has not engaged the mechanism set out.

### **1<sup>st</sup> Defendant's response:**

10. The 1<sup>st</sup> Defendant opposed the Plaintiff's motion vide replying affidavit and two supplementary affidavits all sworn by Josephat Njoroge Mwangi on 8<sup>th</sup> March 2023, 17<sup>th</sup> April 2023 and 14<sup>th</sup> December 2023 respectively. He contended that application is irregular for attempting to stay proceedings of HCCC E742 of 2020 (consolidated with E812 of 2020) whose judgment has not been challenged by the plaintiff.
11. The 1<sup>st</sup> Defendant stated that his Parcel A is situate adjacent to Parcel B, and that in order to access Parcel B, you have to pass right across Parcel A. That initially, the colonial government had created a road, nine (9) meters wide across Parcel A into Parcel B but the Plaintiff required a wider access road to its land since it intended to develop a dual carriage road for its own purposes.



12. That to prove that there existed a road before creation of the DOE, the 1<sup>st</sup> Defendant attached the following documents; letters dated 26/4/2001, 5/7/2001, 17/10/2001, 25/10/2001, 30/10/2001, Deed plan and map of LR 98/7 as after mutation dated 8/11/2001, Deed plan for LR 98/7 as at 21/12/2001, Deed plan for 98/7 as at 10/12/2021 and photographs of the easement road. He deposed that Parcel A came was a subdivision of L.R No. 98/6 which was subdivided to create a half acre for his brother Alex Gitata Mwangi. After the subdivision, it became LR. No. 98/7 and Alex's half acre was registered as L.R. No.98/8.
13. Subsequent to this subdivision, a road running from the main tarmac road was created to grant access to his brother's parcel and extended to his Parcel A. He posited that he had plans of doing further developments on his parcel using the road created at the time for future subdivisions and that the said road was surrendered to the government and became a public road. The 1<sup>st</sup> Defendant stated that the Plaintiff approached him to sell part of Parcel A in order to expand the existing access road to its Parcel B. On 26.1.2012, he signed an Easement Agreement and a Deed of Easement with the Plaintiff which was registered on 17.7.2012.
14. The 1<sup>st</sup> Defendant contended that under clause 6 of the Deed of Easement and clause 5 of the Easement Agreement, it was agreed that all disputes arising from the sale should be resolved through Arbitration with the mechanism to be employed during the appointment of arbitrators being provided. That the Plaintiff has not engaged the mechanism set out before filing this suit.
15. He stated that the Plaintiff has failed to adduce any adequate evidence to show that he has commenced subdivision exercise on Parcel A that may affect the easement area sold out to it and objected the subdivision plan presented by the Plaintiff. The 1<sup>st</sup> Defendant argues that other than the easement areas, there is a public right of way running alongside the easement area in the form of a public road with Parcel A holding the easement area on both sides. That under clause 2 of the DOE the Plaintiff was not to interfere with his right of way and access on the easement area in whatsoever manner. Thus, it was wrong for the Plaintiff to develop a stone wall on the easement area without allowing him access on any part of the road.
16. The 1<sup>st</sup> Defendant avers that an Easement Area is non-possessory thus the Plaintiff cannot claim the same and as per the DOE the same was supposed to be held in trust by him. He continued to state that he has no immediate plans to subdivide Parcel A in a manner that can affect the easement road. That since the easement area overlaps a public road, when the deed plan was presented to land offices for registration, the same was noted to be part of a public road and therefore registered in favour of the Ministry of Roads by the Government.
17. He also denied damaging any property owned by the Plaintiff stating that he only opened up a section of the easement wall on the public road side in order to gain access to Parcel A during the development of a school and which part he has repaired. He added that during the formation of easement agreement, he did not anticipate construction of stone walls on both sides of parcel A.
18. The 1<sup>st</sup> Defendant objected to the court's jurisdiction stating that other orders sought in the Plaintiff's application are made in the wrong court since this honourable court cannot supervise another court of equal jurisdiction and that no reasons have been advanced as to why the arbitration mechanisms has not been engaged prior to the filing of this suit.

**Plaintiff's response:**

19. In opposition to the 1<sup>st</sup> Defendant's application and in response to the 1<sup>st</sup> Defendant's response to its motion, the Plaintiff filed a further affidavit and 2<sup>nd</sup> further affidavit both sworn by Duncan Ngeno



on 30/3/2023 and 29/10/2023 respectively. It stated that the 1<sup>st</sup> Defendant's actions have put into jeopardy the substratum of the award in the Home Africa Communities Limited and Josphat Njoroge Mwangi proceedings thus a whole new cause of action has arisen and the subject matter being an interest in land this court can consider and offer reprieve to it.

20. That what the 1<sup>st</sup> Defendant calls a road was parcel of land comprised in LR.No.98/6/1 which belonged to him and was part of the easement area. Further that his intention to sub-divide Parcel A was written to the Plaintiff as evidenced by bundle of letters at Pages 2-6 of annexure DN-1. The information was also shared by his son through the telephone calls together with images of the intended development as shown in pages 7-12 of annexure DN-1.
21. The Plaintiff stated that it obtained a detailed professional opinion of a firm of Licensed Surveyors who confirmed the subdivision of parcel A. That at the time of entering into the DOE, the aforesaid L.R 98/6/1 formed part of the easement area for which the Plaintiff paid to the 1<sup>st</sup> Defendant the sum of Kshs. 22, 585,375/=. Further, without its knowledge, the 1<sup>st</sup> Defendant subdivided Parcel A in the year 2021 to create L.R No. 98/9 (98/7/1), L.R No. 98/10 (98/7/2), L.R 98/11 (98/7/3) and L.R 98/7/4 which he purported to surrender the same to the Government of Kenya as a road.
22. That the area of land which the 1<sup>st</sup> Defendant has purported to surrender is in excess of 25 acres all of which is part of the land forming the Easement Area and which should have been transferred to the Plaintiff for its exclusive use in accordance with Clause 4 of the DoE. The deponent stated that the 1<sup>st</sup> Defendant was aware of his obligation to transfer the easement area to the Plaintiff and even wrote to it seeking the waiver of the said obligations in his letter dated 7<sup>th</sup> June 2021 at pages 13-14 of Annexure DN-1.
23. He added that the Arbitration clause does not limit the power of this court to grant an interim measure of protection pending the reference to arbitration. That as suggested by the 1<sup>st</sup> Defendant, there are other parties affected by the unravelling dispute who are not parties to the arbitration agreement. The Plaintiff contended that it is doubtful that the 1<sup>st</sup> Defendant was ever entitled to the sum of Kshs. 22, 585,375/- which was paid to him or the sum of KShs. 25,595,000/= together with interest thereon which he earned following an arbitration based on the DoE as none of these newly established facts were known to the parties.

### Submissions

24. The 1<sup>st</sup> Defendant filed submissions dated 1<sup>st</sup> April 2024. I have not seen any submissions filed by the Plaintiff. The 1<sup>st</sup> Defendant cited the guiding principles to grant interlocutory injunction set out in *Giella Versus Cassman Brown* (1973) EA 358 and reiterated in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 "2012 (2014) eKLR to submit in opposition of the Plaintiff's motion.
25. He stated that the Plaintiff has not established a prima facie case because it acknowledges that at the time of the Easement Agreement of year 2012, there was an existing access way running across parcel A that was created in year 1914 and it only sought to increase the size of the already existing road for their own purpose.
26. The 1<sup>st</sup> Defendant submitted that the injunction sought by the Applicant will create a private road out of a public road with the danger of blocking the access road to members of the society including the 1<sup>st</sup> Defendant and from utilizing his own land against the provisions of article 40 of the *Constitution*. He also argue that the Plaintiff will gain unfair advantage should the orders sought be granted to the



detriment of the public as the Plaintiff may take advantage of the orders sought in the application to close the road.

27. The 1<sup>st</sup> Defendant stated that the Plaintiff's case has no high probability of success at the hearing of the main suit since its claim is only for a right of way for a property of 1.8 acres as compared to his parcel that is 220 acres or so. That the Plaintiff has not demonstrated what irreparable damages it will suffer should the orders of injunction fail to be granted and also balance of convenience tilts towards the 1<sup>st</sup> Defendant. Inally, the 1<sup>st</sup> Defendant submit that the dispute should be referred to arbitration being the only dispute resolution mechanism available to the parties chose.

**Determination:**

28. I have considered the issues raised in the pleadings and the submissions filed by the 1<sup>st</sup> Defendant. I hold that this court lacks jurisdiction to grant the orders sought under paragraphs 7 and 8 of the motion for the following reasons. The orders sought to be stayed were issued by a court of concurrent jurisdiction other than this court. This is discernable from the plaint at paragraph 16 and 18 where it is pleaded thus;

“ 16. The aforesaid arbitral award was recognized by the High Court of Kenya in Misc App E742 and E 812 of 2020; Home Africa communities Limited vs Josephat Njoroge Mwangi.

18. In order to realize the award, the 1<sup>st</sup> Defendant sought and obtained a prohibitory order on 28<sup>th</sup> September 2022 in Misc App E742 and E 812 of 2020; Home Africa communities Limited vs Josephat Njoroge Mwangi directed at the Plaintiff prohibiting it from transferring or charging in any way and all persons from taking benefit from all the properties to wit L.R. No 29059.”

29. In the event the Plaintiff is unhappy with the existence of these orders, the proper forum to apply to stay or vary would be the court that issued them or challenge the same before the Court of appeal. The manner in which the Plaintiff has approached the court in so far as prayers 7 and 8 of its motion is concerned amounts to abuse of the court process.
30. In regard to prayer 9 that sought an order of interim measure restraining the 1<sup>st</sup> Defendant or his agents from interfering with the Plaintiff's property L.R. No 29059 or its use of the easement pending determination of the suit required of the Plaintiff to demonstrate the three headings of prima facie case, irreparable loss and balance of convenience.
31. In persuading the court that it has shown a prima facie case, the Plaintiff pointed this court to the annexure DN-1 and a report dated 19<sup>th</sup> September 2023 prepared on their behalf contained in the 2<sup>nd</sup> further affidavit sworn by Duncan Ng'eno on 29<sup>th</sup> October, 2023. The surveyor who prepared that report said in the findings inter alia that “c). in 2021, L.R. no 98/7 was subdivided to create 3 parcels of land and to expand the existing 9-meter road reserve as shown in FR No 507/92 in annex 3. The 3 parcels created are indicated as 98/9-11 and the expanded road registered as 98/7/4. That the expanded road was surrendered to the government in December 2021 as shown in the deed plan shown in annex 4.
32. The report by the Plaintiff thus state that the subdivision already took place and the expanded road surrendered to the government in December 2021. This is confirmed by the pleadings in paragraph 23 and 27 of the Plaint. This application was filed almost two years after the actions complained of and



so issuing an order of temporary injunction in terms of prayer 9 without evidence how the impugned documents interferes with the easement area in the DOE would serve no purpose. The Plaintiff still has remedy in prosecuting the main suit or having matters resolved by way of arbitration.

33. The Plaintiff also urged the court to grant orders as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from accepting the documents for registration. The 1<sup>st</sup> Defendant has denied undertaking any such subdivision processes. It is not clear from the application which subdivisions the Applicant is unhappy with, whether it is the subdivision that started in the year 2021 or there was a subsequent one. As earlier stated, this application was filed 2 years after the activities of 2021 which appears to have been acted on by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. This deductible from annex DN-1 page 7 at paragraph 4(d) thus;

“upon subdivision of L.R. No 98/7, the 9-meter road was registered as L.R. No 98/6/1 with an area of 7.518ha was expanded and registered on its own as I.R. No. 98/7/4 as shown in figure 2”

34. The orders sought were not of a mandatory nature and the purpose of temporary injunction is to preserve the suit property in its state so that it is not wasted before determination of the dispute. Hence, premised on the documents provided by the Applicant itself, this court is unable to issue the orders sought under paragraph 6 of the motion where the action sought to be stopped seemed to have taken place. Prayers 1-5 of the motion had already been overtaken by events by virtue that the application is not pending inter parties hearing. In essence, I find none of the prayers sought in the motion dated 13<sup>th</sup> February 2023 to be unavailable to the Plaintiff.

35. The Defendant urged this court to send the parties for arbitration on account that the DOE provided so at clauses 5 and 6. Indeed, the deed of easement required parties to go for arbitration in case of a dispute and they had previously attended to arbitration going by the proceedings mentioned by the Applicant vide HCC E742 and 812 of 2020. I have perused the further affidavits filed by the Plaintiff and there is no paragraph denying the provision for arbitration. The Plaintiff only moved this court to obtain interim protection pending the parties going for arbitration.

36. In light of the foregoing, I make the following orders;

- a. The Plaintiff's application dated 13<sup>th</sup> February, 2023 is dismissed with costs to the 1<sup>st</sup> Defendant.
- b. These proceedings are stayed by virtue of allowing the 1<sup>st</sup> Defendant's motion dated 8<sup>th</sup> March 2023.
- c. The case is referred to arbitration with liberty to the parties to appoint an arbitrator of their choice
- d. Costs of the 1<sup>st</sup> Defendant's motion ordered in the cause

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE, 2024**

**A. OMOLLO**

**JUDGE**

