



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v Mbuna & 2 others (Land Case E017 of 2024)  
[2024] KEELC 5769 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5769 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE E017 OF 2024  
SM KIBUNJA, J  
JULY 30, 2024**

**BETWEEN**

**WANJIRU NDEGWA NJUGUNA ..... PLAINTIFF**

**AND**

**CATHERINE KAGENDO MBUNA ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

[Notice of motion under certificate of urgency dated 27th June 2024]

1. The plaintiff filed the notice of motion dated the 27<sup>th</sup> June 2024, seeking for among others:
  - a. Leave to amend the plaint and to join the National Land Commission as the 4<sup>th</sup> defendant.
  - b. Prayer 2 of the application dated 7<sup>th</sup> March 2024, which is for temporary injunction, restraining the 1<sup>st</sup> defendant from trespassing into, encroaching, selling, transferring, leasing Mombasa/Ziwa La Ngombe/1806, irregularly created by deduction/removing from 0.03hectares from the plaintiff's plot known as Mombasa/Ziwa La Ngombe/1532, originally comprising 0.033hectares and currently known as Mombasa/Ziwa La Ngombe/1807, measuring 0.03hectares and road reserve, be granted.



- c. The court to visit the locus to acquaint itself with what is on the ground, pending the hearing and determinations of the application dated the 7<sup>th</sup> March 2024.

The application is premised on the ten (10) grounds on its face, and is supported by the affidavit of Wanjiru Ndegwa Njuguna, the plaintiff, sworn on the 27<sup>th</sup> June 2024, inter alia deposing that she filed this suit on 8<sup>th</sup> March 2024, contemporaneously with the application dated the 7<sup>th</sup> March 2024, seeking for injunctive order, but the court did not grant the order in the interim; that the gazette notice of 7<sup>th</sup> June 2024, on lands to be acquired by the National Land Commission, has disclosed the size of her plot as 0.0020 acres, while that of 21<sup>st</sup> October 2020 had given the size of 0.0073 acres; that if she is compensated with the reduced acreage, she will suffer financial loss, and it is important that she be granted leave to amend the plaint, and for the National Land Commission be joined as the 4<sup>th</sup> defendant; that temporary injunction order should be granted to safeguard the subject matter, and the court should visit the suit property to acquaint itself with the truth on the ground before the application dated 7<sup>th</sup> March 2024 is heard.

2. The application is opposed by Catherine Kagendo Mbuna, the 1<sup>st</sup> defendant, through her replying affidavit sworn on the 15<sup>th</sup> July 2024, inter alia deposing that the plaintiff has been aware of the compulsory acquisition process since the gazette notice of October 2020; that the plaintiff did not attend the inquiry of 26<sup>th</sup> June 2024, that was specifically for hearing and determination of disputes; that the plaintiff has not exhausted the process provided through the Commission and Land Acquisition Tribunal before coming to the court; that she was offered plot 2192 as a squatter in January 2003, that was erroneously consolidated with that of the plaintiff's son, Christopher Nyoike, and registered as Mombasa/Ziwa La Ngombe/1532; that she lodged a complaint and the District Surveyor and Land Registrar heard all the concerned people, including the plaintiff, and rectified the error, by partitioning Mombasa/Ziwa La Ngombe/1532 into 1806 and 1807; she was registered with Mombasa/Ziwa La Ngombe/1806, which she had legally, validly, lawfully and procedurally acquired, while the plaintiff and her son were registered with Mombasa/Ziwa La Ngombe/1807; that she has fenced off and developed her plot with rental units, and it has not encroached onto the plaintiff's plot; that her land is private land and the 3<sup>rd</sup> defendant has no issue with it; that no injunction order should issue as monetary compensation would be adequate; that the plaintiff is through this application circumventing the orders issued on the 19<sup>th</sup> June 2024 that fixed the application dated the 7<sup>th</sup> March 2024 for hearing on the 3<sup>rd</sup> October 2024; that to grant prayer 2 of the application dated the 7<sup>th</sup> March 2024 would amount to evicting her from the suit property at the interlocutory stage; that the plaintiff's interest in the application is to maximize compensation from the compulsory acquisition process.
3. On the 1<sup>st</sup> July 2024, the court inter alia certified the application urgent, issued directions on filing and exchanging replies and fixed it for hearing on the 22<sup>nd</sup> July 2024. On that date, the court heard submissions from Mr. Otwere and M/s Katsiya, learned counsel for the plaintiff and 1<sup>st</sup> defendant respectively, which the court has considered. M/s Saru for 2<sup>nd</sup> defendant informed the court that her client was not participating in the application, and also in the one dated the 7<sup>th</sup> March 2024.



4. The issues for the court's determinations in respect of the application dated the 27<sup>th</sup> June 2024 are as follows:
  - a. Whether the plaintiff has met the threshold for the order of temporary injunction to issue at this interlocutory stage.
  - b. Whether the National Land Commission is a necessary party to be joined in the suit for the effectual and complete adjudication of the issues arising for determinations.
  - c. Whether the plaintiff has made a reasonable case for the court to visit the locus pending the hearing and determination of the application dated 7<sup>th</sup> March 2024
  - d. Who pays the costs?
5. The court has carefully considered the grounds on the application, the affidavit evidence by the two parties, oral submissions by the learned counsel, and come to the following determinations:
  - a. That from the affidavit evidence available, the plaintiff was aware, even at the time this suit was filed, of the ongoing inquiries by the National Land Commission, relating to the compulsory acquisition of land where the suit property in dispute is situated. However, for reasons not disclosed, the plaintiff did not find it prudent to include the National Land Commission as a party then, but has now, through the instant application sought for leave. The joinder of the National Land Commission as a party has not been objected to by any of the parties herein, and considering the pivotal role the Commission prays in compulsory acquisition matters, I find it is a necessary party to be added as the 4<sup>th</sup> defendant for the effectual and complete determinations of the issues herein. To enable the plaintiff join the Commission as a party, there is need to grant the plaintiff leave to amend her plaint accordingly.
  - b. The threshold the plaintiff has to establish to show the court that she is deserving of a temporary injunction as sought in her application is as was set in the celebrated case of *Giella v Cassman Brown* (1973) EA 358, which position was adopted in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where 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.

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”.

The foregoing shows that the plaintiff need to establish the existence of first, a prima facie with a probability of success, secondly, demonstrate the likely irreparable injury she is to suffer if the temporary injunctive orders are not granted, and thirdly, allay any doubts by showing that the balance of convenience tilts towards the issuing the said orders in her favour.

- c. A prima facie case was discussed in the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR in which the Court of Appeal court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Though plaintiff herein has shown she has the title to the portion of land described in her pleadings, she has not established a prima facie case with a probability of success over the land now registered in the name of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has disputed the plaintiff's claim through her depositions, and the court would need to wait for the parties to present their evidence and be cross examined before making a determination as to whether the plaintiff has succeeded in having the 1<sup>st</sup> defendant's title impugned. I therefore find the plaintiff has failed the prima facie case test.

- d. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR the court expressed itself on what is meant by irreparable injury as follows;

“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.”

I have considered the facts presented by the plaintiff and I have not seen any evidence of particularized irreparable injury or loss that she is likely to sustain if the injunctive order sought was not granted. Indeed the 1<sup>st</sup> defendant has deposed, and her counsel has submitted that whatever loss the plaintiff may suffer, it is one that is capable of being determined and compensated through monetary award. The plaintiff again fails in the irreparable loss test and I find in the circumstances of this suit, the balance of convenience tilts against issuing the order at this stage.



- e. On the application for the court to visit the suit property at this stage, no reasonable basis has been laid before the court for its consideration. In our nature and processes of litigation, it is the responsibility of each party, who wishes the court to make a finding of fact in their favour in respect of their pleadings, to procure and tender the relevant evidence to the court. That duty is placed on parties under section 107 of the *Evidence Act* chapter 80 of Laws of Kenya. That duty cannot be transferred or sifted by one party to the court, as the plaintiff appear to do through that prayer. The status on the land in dispute can be captured and presented to the court for example, through relevant experts reports, like by surveyors, engineers, agricultural economists etc. I find no reasons to consider visiting the locus at this stage.
  - f. That as the plaintiff has only succeeded in one prayer of joinder of the National Land Commission, and considering she had no excuse why she had not included the Commission as a party from the start, she will pay the 1<sup>st</sup> defendant the costs of the application, the provision of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.
6. Flowing from the foregoing, the court finds and orders as follows in respect of the application dated 27<sup>th</sup> June 2024:
- a. That the plaintiff is granted leave to file and serve an amended plaint within the next fifteen (15) days incorporating the National Land Commission as the 4<sup>th</sup> Defendant.
  - b. That all the other prayers in the said application are rejected.
  - c. The plaintiff to meet the 1<sup>st</sup> defendant's costs in the application.

It is so ordered.

**DATED, SIGNED AND VITUALLY DELIVERED ON THIS 30<sup>TH</sup> DAY OF JULY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

Plaintiff : Mr. Ontere

Defendants : M/s Katsya for 1<sup>st</sup> Defendant

M/s Saru for 2<sup>nd</sup> Defendant

Mr Mudavadi for 3<sup>rd</sup> Defendant

Leakey – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

